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June 2013, Wellington, New Zealand | REPORT 129

A NEW ACT FOR INCORPORATED SOCIETIES





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A NEW ACT FOR INCORPORATED SOCIETIES

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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28 June 2013

Hon Judith Collins
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

NZLC R129 - A NEW ACT FOR INCORPORATED SOCIETIES

I am pleased to submit to you Law Commission Report 129, *A New Act for Incorporated Societies*, which we submit under s 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink that reads "Grant Hammond". The signature is written in a cursive, flowing style.

Sir Grant Hammond
President

Enc.

Foreword

The Incorporated Societies Act 1908 has been a New Zealand success story. When it was enacted it was regarded as world leading and innovative. What it did was to enable the incorporation of community related organisations for a wide variety of purposes. These ranged all the way from local chess clubs through to the New Zealand Rugby Football Union. The Act has been so successful that there are presently over 23,000 incorporated societies in New Zealand.

The passage of over a century since the statute was enacted has inevitably thrown up the need for some revision of it. Particularly this is so as to the obligations of those running such societies.

It was in this context that the Law Commission was invited to bring forward a modern statute. The Commission has proceeded on the footing that this report represents the evolution of this beneficial vehicle, rather than revolution.

The model which we advance proceeds on three distinct principles.

- First, societies are organisations run by their own members.
- Secondly, societies should not distribute profits or financial benefits directly to members. People join societies to achieve a stated purpose and not to personally profit from the activities of the society.
- Thirdly, societies are private bodies that should be self-governing and largely free from inappropriate state interference.

Accordingly the statute we recommend:

- confirms societies are essentially private organisations;
- includes modern governance provisions;
- provides for modern rules that will apply to societies unless they adopt their own;
- sets out better procedures for resolving disputes and for members to control societies; and
- clarifies the legal capacity of an incorporated society and the limitations on liability of members.

I am grateful to those persons at the Commission who worked on this project. The lead Commissioner was Professor Geoff McLay. The Legal and Policy Advisers on this review were Claire Browning, Jo Dinsdale, Linda McIver, Peter McRae, and Nicola True.

At the time the Board considered and adopted these recommendations, the Commissioners included Sir Grant Hammond, Geoff McLay, Judge Peter Boshier, and Dr Wayne Mapp. However, I should acknowledge that the late George Tanner QC and former Commissioners Dr Warren Young and Professor John Burrows QC also contributed ideas and criticism in the early days of the work on this review.



Sir Grant Hammond
President

Acknowledgements

We are grateful to all the people and organisations that provided input during this review. This includes submitters to *Issues Paper 24* published in June 2011. A list of those submitters is included in this paper as an Appendix.

We particularly wish to acknowledge the contribution of members of our reference group. The project greatly benefitted from their generosity in giving their time and expertise to assist with the review, although the views and recommendations in this report remain those of the Law Commission.

Members of the reference group were:

- Rona Buckley, Community Waikato
- Maria Clarke, Maria Clarke Lawyers
- Nicola Drayton-Glesti, Wellington Community Law Centre
- Louise Hornabrook, Companies Office, Ministry of Business, Innovation and Employment
- Sheree McDonald, Companies Office, Ministry of Business, Innovation and Employment
- Tina Reid, Social Development Partners
- Jane Stevens, Community Waikato
- Mark von Dadelszen, Bannister & von Dadelszen Solicitors

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- Community Waitakere
- Dunedin Council of Social Services
- North Shore Community and Social Services (Inc)
- Te Mata Hautū Taketake (Māori and Indigenous Governance Centre), University of Waikato

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Introduction and Summary

The case for reform

New Zealand has over 23,000 incorporated societies spanning a diverse range of interests and purposes. Approximately 45 per cent of them are cultural, sporting and recreational bodies. The remaining 55 per cent comprise a broad range of community activities, including social service providers, religious groups, development and housing bodies, educational and environmental interest groups, and business and professional groups.

These community organisations play a very important role in New Zealand society. Together they are often referred to as the not-for-profit sector or as the “third sector”, existing alongside the private (for profit) sector and the public (or state) sector. The third sector has a direct impact on New Zealand’s social and economic development through the provision of services not provided by the other sectors and the development of strong communities.

The third sector faces numerous challenges including competing for adequate resourcing and attracting competent leaders (many of whom are volunteers). An important role for the government in supporting this sector is through legislation, which provides a mechanism for incorporation (thereby giving each society a legal personality) and minimum requirements for the governance structures of those organisations. The Incorporated Societies Act 1908 currently performs that role for many of those organisations.

While the 1908 Act was innovative and world leading when it was enacted, the passage of time and developments in the New Zealand community have left it significantly deficient in a number of respects. In particular, it lacks guidance about the obligations of those running societies and about how disputes within societies should be dealt with. There is a strong need to provide a more modern statute to guide this sector into the future. Such a statute will make societies more robust, will help them to govern themselves, and will provide more constructive options when things go wrong.

This project

The terms of reference for this project asked us to take a first principles look at the Act:

The Incorporated Societies Act 1908 is uncomfortably old and has been little amended since its enactment. Yet the rich tapestry of community organisations that use this legal form is extensive in New Zealand. Practising lawyers are often called upon for advice concerning incorporated societies. They are asked for advice on whether to set one up, how to set one up, how to register it and what to include in the documents. Difficult questions frequently arise around the governance and administration of such organisations and the resolution of their internal disputes. Many of the reported cases revolve around such disputes. This review will take a first principles look at the Act.

We began this project by publishing *Issues Paper 24* in June 2011.¹ We received over 200 submissions representing the full range of societies. In addition to reviewing the submissions, we formed a reference group to provide regular guidance. The group consisted of people who specialise in providing advice to incorporated societies, including lawyers and those involved in providing free advice to community organisations. We also met individually with many people

¹ Law Commission *Reforming the Incorporated Societies Act 1908* (NZLC IP24, 2011) [*Issues Paper 24*].

representing significant interests in the sector, such as iwi, unions, farmers, sports groups, philanthropic grant providers and clubs.

Most submissions we received and people we met said that a new statute for incorporated societies would significantly benefit the sector. We agree and recommend that the 1908 Act should be repealed and replaced by a more modern statute.

Principles guiding our recommendations

The following principles represent the overriding messages we received time and again in our consultation meetings and from submitters. They guided our recommendations:

- Societies are organisations run by their members. This means both that members have primary responsibility for holding societies to account, and that a group without members to hold it to account should consider an alternative form of incorporation.
- Societies should not distribute profits or financial benefits directly to members. This is one of the key features that sets incorporated societies apart from other forms of incorporation. People join societies to achieve a shared purpose, not to personally profit financially from the activities of the society.
- Societies are private bodies that should be self-governing and largely free from inappropriate state interference. Societies value the flexibility that the current regime gives them to adapt their operating environment to suit their purposes and their culture. That flexibility should be retained as much as possible.

Legal structures

A group of people operating for a common purpose can choose from a range of corporate structures in addition to incorporated societies (such as a company, an incorporated charitable trust board, or an industrial or provident society) or they can choose to remain unincorporated, which includes operating through an unincorporated charitable trust. It is important that they choose a legal structure that best suits their purpose, structure and operating methods.

Some confusion is currently created by the ability of societies to incorporate a board under either the Charitable Trusts Act 1957 as either a society or a board, or the Incorporated Societies Act. The confusion is compounded because any of these societies or boards may register as charities under the Charities Act 2005. We recommend that charitable trust boards under the 1957 Act should remain outside new incorporated societies legislation, but charitable societies should be brought under it.

“No pecuniary gain” to become “no monetary gain”

It was clear from our consultation that the principle that incorporated societies should not operate for the pecuniary gain of their members remains a fundamental pillar of the regime. It was however, equally clear that what does and does not constitute pecuniary gain is often misunderstood.

We recommend that the new statute should refer to “monetary gain” instead of “pecuniary gain”, and that the definition of “operating for the monetary gain of members” should make it clear that members can have no ownership interest in the society or its assets, and cannot receive any share in profits that the society may make. It also means that societies will not be able to distribute surplus assets to members upon termination.

Minimum membership requirements

Currently, there must be at least 15 members before a society can incorporate under the 1908 Act.² We recommend reducing that figure to 10 members, to strike a balance between retaining the inherent membership nature of societies, and providing flexibility for small societies. We also recommend that societies should be required to maintain a minimum membership base of 10 members at all times.

Branch societies

Currently, the Incorporated Societies Amendment Act 1920 allows parent societies to incorporate a number of branch societies, and the members of the branches are automatically members of the parent society.³ We consider that these provisions are confusing and unnecessary. Societies can establish a parent and branch structure utilising the normal society model of incorporation. They may use contracts and the provisions of their constitutions to control the relationship between them. We recommend therefore that the 1920 Amendment Act be repealed. However, we propose that existing branches should retain key features derived from the Amendment Act, including that members of branches are also members of the parent society, until they elect to change them.

Liability and indemnity

We consider that the current principle that membership of a society does not make members liable for the legal obligations of the society should continue, but should be drafted consistently with the equivalent provision in the Companies Act 1993.⁴

We also recommend that the statute should provide that a society may indemnify its members who act in good faith in pursuance of the purposes of the society, and a society may arrange insurance to cover that indemnity. We also recommend that a society ought to be able to indemnify its officers against liability to anyone other than the society, because exposing individuals to personal liability when they are acting for the society in good faith may make it difficult to attract quality candidates into those roles.

Ultra vires

Currently the common law doctrine of ultra vires applies to incorporated societies. This means that, because a society is bound by its constitution, any actions outside that constitution may be invalidated by disaffected members or third parties. The problem with the doctrine is that injustice can result to third parties dealing with a society if they are unaware of any restrictions imposed upon the society by its constitution.

We recommend that the new statute should provide that no act of a society is invalid merely because the society did not have the capacity, the right or the power, to do the act. We also recommend that the statute protects third parties who are unaware of any incapacity when they deal with a society.

² Incorporated Societies Act 1908, s 4(1).

³ Incorporated Societies Amendment Act 1920, ss 2 and 6.

⁴ Companies Act 1993, s 97.

Committees

Most societies currently have committees which perform management or governance roles; although some smaller societies do not. We consider it is desirable that the statute require a society to have a committee of officers to make decisions and run its affairs. What that committee looks like will in most part be determined by the society.

In addition, we think that there is a public interest in the society electing or appointing one person to be the society's statutory officer. The person in that role would have certain obligations under the statute and would be the Registrar of Incorporated Societies' main point of contact for the society.

Duties of officers and conflicts of interest

The current legislation lacks any guidance as to the obligations of those running societies, although case law provides some help. The new statute should contain both a list of officers' duties along the lines of directors' duties in the Companies Act,⁵ and a set of rules governing the disclosure and management of conflicts of interests.

The recommended duties of an officer of an incorporated society are:

- to act in good faith and in the best interests of the society, and use his or her powers for a proper purpose;
- to comply with the Incorporated Societies Act and with the society's constitution, except where the constitution contravenes the Act;
- to exercise the degree of care and diligence that a reasonable person with the same responsibilities within the society would exercise in the circumstances applying at the time;
- not to allow the activities of the society to be carried on recklessly or in a manner that is likely to create a substantial risk of serious loss to the society's creditors; and
- not to allow the society to incur obligations that the officer does not reasonably believe will be fulfilled.

Submitters supported the introduction of statutory rules for dealing with conflicts of interest. The recommended rules will require a committee member to disclose any financial interest the member has in a matter being considered or affecting the society, as soon as practicable after the committee member becomes aware of the interest. After disclosure, the committee member may not participate in any decision on that matter, and may be excluded by the rest of the committee from any discussion on it.

Financial reporting

The Financial Reporting Bill 2012 is currently before Parliament.⁶ It aims to reduce compliance costs for many types of organisations, by removing requirements on some organisations to produce and file general purpose financial reports (GPFs) that meet accrual accounting standards, or to have their reports audited. It also gives some organisations the ability to opt out of preparing GPFs if a substantial majority of shareholders, owners or members agree. Incorporated societies that are not registered charities have been left out of that Bill, with the intention that they will be brought under the scheme after this report and any related work is completed.

⁵ Companies Act 1993, ss 131-138.

⁶ Financial Reporting Bill 2012 (42-2) (select committee report).

We have concluded that incorporated societies should not be able to opt out of preparing and filing at least simple annual financial reports. The requirement to prepare annual financial reports ensures members receive financial information about their organisation each year, which they could not get from any other source. Further, the requirement to file allows the Registrar to identify societies that may have ceased operating. We also take into account that as a result of the proposed amendments to the Bill as reported back from the Select Committee, most societies whose annual payments fall below \$125,000 will only be required to produce relatively simple reports using cash accounting, but will have improved support and guidance on how to go about doing so.

Constitutions

We received substantial support in submissions for an expanded list of statutory requirements for the content of every constitution. Currently the list is very simple and does not reflect the full range of rules that are needed by every society. We therefore recommend that every constitution should contain rules covering the following:

- the name of the society;
- the purposes of the society;
- how the registered office of the society will be determined;
- how people become members of the society and cease to be members;
- arrangements for keeping the society's register of members up to date, and whether and how the society will provide access for members to the register of members;
- how committees function, including:
 - the election or appointment of committee members;
 - the terms of office of committee members;
 - qualifications for appointment of committee members;
 - the functions and powers of the committee;
 - grounds for removal from office of committee members; and
 - how the statutory officer will be elected or appointed;
- how the society will enter into legal obligations;
- how the society will control and manage its financial resources and other assets, including how it will keep financial records, how it will pay expenses and how authority to make decisions will be given;
- a procedure for resolving disputes, including the grievances of members and the conduct or discipline of members;
- how general meetings are run, including:
 - the intervals between general meetings;
 - the information that will be presented at general meetings;
 - when minutes are required to be kept;
 - the manner of calling meetings;
 - the time within which, and manner in which, notices of general meetings and notices of motion are to be notified;
 - the quorum and procedure for general meetings; and
 - voting procedures for general meetings;

- what information members can ask for from the society;
- the method by which the constitution may be altered;
- how the assets of the society should be distributed if the society is wound up or put into liquidation.

We also recommend that the statute enable a model constitution to be provided for in regulations. That model constitution would be a very basic constitution covering only the rules required by statute for every constitution. In most cases, societies would be well-advised to put time and effort into drafting their own constitution that better reflects their own purposes, culture and operating environment. The model will however, provide societies with a simple, cost-effective method of incorporating where required.

Complaints and grievances

There was strong support in our consultation for the statute to require every society to establish procedures for resolving disputes. While many societies already provide for this, the lack of established procedures (or procedures that fail to meet basic standards of natural justice) is a common cause of problems in societies.

We recommend therefore, that every society must have rules in its constitution to provide procedures for the resolution of complaints concerning misconduct or discipline of members, and of grievances brought by members concerning their rights or interests as members. We propose that the statute should set out some minimum natural justice standards for those procedures, covering a member's right to be heard, and the avoidance of bias. So long as they satisfy those minimum requirements, societies should be free to develop any procedures that suit their needs.

Civil enforcement

As mentioned, it is a fundamental principle of our recommendations that societies are run by their members. Whenever possible it is for members, rather than the state, to hold their society to account. We consider that there should be better ways for members to do that. In the first instance members should use the society's internal dispute resolution procedures. Where that fails to resolve the matter, we recommend that there should be statutory provisions under which a member may apply to a court to enforce the constitution. This will eliminate the need in most cases to rely on actions in judicial review, the law of contract or the Declaratory Judgments Act 1908, none of which are a good fit for disputes arising within societies.

To mitigate the risk that this more straightforward mechanism will increase litigation, we recommend that the court have powers to refuse to hear an application or not to make an order if the matter is unnecessary or inappropriate.

When a breach of a statutory duty by the officers is alleged, it would be for the society to take action against the officers concerned because the duty is owed to the society, rather than to the members. In line with derivative actions under the Companies Act,⁷ we acknowledge that there are times when societies are unwilling or unable to take such action. In such circumstances, members should be able to apply to the court for leave to enforce those duties themselves. The society would usually meet the costs of that enforcement action, and the courts should have powers of control over it.

⁷ Companies Act 1993, ss 165-168.

Criminal sanctions

Submissions on *Issues Paper 24* were generally strongly opposed to the use of criminal sanctions for conduct within societies, except for dishonest conduct. We agree that for the most part the use of criminal sanctions is unnecessary and can be a disincentive to people volunteering to run community groups. We have however, recommended a new offence of using a position of responsibility within a society to directly or indirectly obtain property, privilege, service, monetary advantage, benefit or valuable consideration, or to cause loss to any other person. This offence is specific to societies and so will send a necessarily strong message to some in the sector that positions of responsibility within societies cannot be used for one's own benefit.

We have also recommended that the new statute replicate certain offences within the Companies Act. The incorporated societies regime should not be able to be used as a method of avoiding criminal liability under that Act. Those offences are:

- providing false information;⁸
- fraudulent use or destruction of property;⁹
- falsification of records;¹⁰ and
- carrying on business fraudulently.¹¹

We also suggest that the court have a power to ban a person from holding a position of governance or management of an incorporated society, or from being the statutory officer of a society, upon conviction of one of these offences.¹²

Registrar's powers of enforcement

The Registrar of Incorporated Societies currently plays a very light-handed role in the sector. We consider this is appropriate. However, there will continue to be rare situations in which it is in the public interest that the Registrar takes action. Examples where this may arise are where a society or its members are unlikely to take action and where the behaviour of individuals within societies is particularly egregious; substantial amounts of public money have been sunk into the society; or where the society plays a significant role in the life of the community or the nation.

We have recommended a limited framework of investigative and intervention powers for the Registrar, similar to those in Parts 1 and 2 of the Corporations (Investigation and Management) Act 1989.¹³ It is important that in rare circumstances where the public interest demands it, the Registrar has powers to step in to protect the assets of a society and the interests of members.

Dissolution and liquidation

Our consultation revealed few problems with the current processes for dissolution and liquidation, but some minor problems with interpretation of the current legislative provisions. We recommend that the new statute adopt similar wording for removal and restoration of societies from the register as is provided in the Companies Act, to clarify the law and take advantage of the companies-based case law.

8 Companies Act 1993, s 377.

9 Companies Act 1993, s 378.

10 Companies Act 1993, s 379.

11 Companies Act 1993, s 380.

12 Crimes Act 1961, s 2.

13 Corporations (Investigation and Management) Act 1989, ss 9, 10, 13, 17, 19, 30, 32, 33 and 34.

We recommend that under a new statute, members may resolve to liquidate a society at a single meeting, rather than the current double meeting requirement, but 30 days notice of a motion to liquidate the society would be required. This strikes a balance between the need to inform members and allow them to attend and vote on the motion, and the need to deal promptly with a sometimes rapidly deteriorating situation.

We recommend that the Registrar's existing practice of accepting requests for dissolution from societies be replaced with a statutory provision to allow removal from the register by request. Societies requesting removal will still need to confirm they have resolved any creditor issues and disposed of any surplus assets. They will also need to pass a members' resolution to request removal at a meeting for which 30 days notice has been given to members.

Compromises with creditors and voluntary administration

The 1908 Act provides that the liquidation provisions in Part 16 of the Companies Act apply to societies.¹⁴ This provides societies with a modern set of procedures for liquidations and means that they benefit from amendments and improvements in the law as they are developed in the wider context. We recommend that the statute also provides that provisions of the Companies Act relating to compromises with creditors in Part 14, and to voluntary administration in Part 15A, apply to incorporated societies.

Distribution of assets on liquidation

Currently, the statute prohibits societies from incorporating for the pecuniary gain of members.¹⁵ This is a defining characteristic of both the existing and the proposed regime. However, the current statute also states that members will not be deemed to be associated for pecuniary gain merely because they are entitled to divide up society property on dissolution. There is an evident conflict between these two provisions, leaving it unclear whether or with what restrictions members could receive a distribution on termination of a society.

We recommend that a new statute should resolve this conflict by removing the deeming provision. The statute should not allow society property to be distributed to members on dissolution. Any remaining assets should instead be distributed to another incorporated society, a charitable trust or a not-for-profit entity that is prevented from distributing the surplus assets to an individual. The Act should further require each society to nominate in its constitution the entity or entities that are to receive such assets.

We recognise that there may be existing societies that currently have rules providing for distribution to members on dissolution. We recommend that where a society has such a rule, it may retain or make use of the rule during a transitional period. By the end of the transitional period the society would be required to have brought its distribution rule into compliance with the new Act, or to have transferred to another form of entity, for example by becoming a company or an unincorporated association.

¹⁴ Incorporated Societies Act 1908, s 24(3).

¹⁵ Incorporated Societies Act 1908, s 4(1).

What this means for current societies

When the recommendations in this report are implemented, every existing society will need to check that its constitution complies with the new requirements. Many societies will discover that they currently have constitutions complying with the new requirements, and they need do nothing more. Those societies with constitutions that lack a rule required by the new statute, or that do not comply with the new requirements for the content of those rules will need to amend their constitutions. We recommend that the statute recognises that constitutional amendments can be a lengthy process and provides an adequate transition period. That period is likely to be no less than four years.

Summary of Recommendations

CHAPTER 1 OUR REVIEW: ORIGINS, JUSTIFICATION AND PRINCIPLES

R1 The Incorporated Societies Act 1908 should be replaced by a new Incorporated Societies Act.

Chapter 2 The non-profit sector: legal structures and status

R2 Charitable societies should no longer be able to incorporate under the Charitable Trusts Act 1957. Those that are currently incorporated under that statute should transition to become societies incorporated under the new incorporated societies statute.

R3 The statute should provide an easy and efficient mechanism for agricultural and pastoral societies to transfer registration voluntarily from the Agricultural and Pastoral Societies Act 1908 to incorporation under the new Incorporated Societies Act.

Chapter 3 What kinds of society can be registered under the Act

R4 The statute should prohibit societies from operating for the monetary gain of members. Societies must not operate for the purpose of, or with the effect of, returning all or part of the surplus generated by their operations to their members, in money or in kind, or conferring any kind of ownership in the society's assets on its members. However, a society is not operating for the monetary gain of members in breach of the statute simply because:

- it trades on its own behalf;
- it provides a member with payments that are incidental to the purposes of the society, and that member is a body corporate or trust that is prevented by its constitutional documents or deed from acting for the monetary gain of its members;
- it reimburses a member for reasonable expenses legitimately incurred on behalf of the society or while pursuing the society's purposes;
- it provides benefits to the public some of whom may be members or their families;
- it provides a member with salary, wages or other payment for services to the society, so long as such payment is at arms length and in accordance with normal commercial terms and does not include any profit share, percentage of revenue or other reward linked to gains made by the society; or
- it provides a member with incidental benefits such as prizes or discounts on products or services, provided that the purpose of the provision is in accordance with the purposes of the society.

Chapter 4 Establishment and registration of societies

Membership requirements

- R5 The minimum membership requirement for incorporation of a society under the new statute should be 10 members, with 10 applicant members to be named on any application for incorporation. Corporate members should continue to count as three members.
- R6 The statute should provide that:
- a. the minimum membership requirement continues after incorporation;
 - b. a society that falls below the 10 member requirement is not automatically deemed de-registered, nor are its actions invalidated only because it has insufficient members;
 - c. the Registrar may give not less than six months notice to any society that has insufficient members that it must bring its membership up to the required level or it will be removed from the register and its assets distributed in accordance with the society's constitution and the Act.

Names of societies

- R7 The provisions for the names of societies under s 11 of the current Act should be replaced by a provision mirroring company name rules in s 22 of the Companies Act 1993, but without the requirement to first reserve a name. A suitable provision should set out that:
1. An application to approve the name of a society must be sent or delivered to the Registrar with the relevant application to incorporate the society, and must be in the prescribed form.
 2. The Registrar must not approve a name:
 - a. the use of which would contravene an enactment; or
 - b. that is identical or almost identical to the name of another society or a company registered under the Companies Act 1993 or any other body corporate that is registered under a New Zealand Act; or
 - c. that, in the opinion of the Registrar, is offensive; or
 - d. if the name does not include either the word "Incorporated" or the word "Manotōpu", or both words, as the last word or words of the name.
 3. The Registrar must advise the applicant by notice in writing whether or not the Registrar has approved the name and if the proposed name has been rejected the reason for rejection.

Branch societies and federal structures

- R8 The Incorporated Societies Amendment Act 1920 should be repealed when the new statute comes into force.
- R9 The statute should make no separate provision for incorporation of branches, but any branch to be incorporated may be incorporated as a society in the normal way.

R10 Any new branch incorporated as a society and its parent society may make constitutional amendments, enter into contracts to define their relationship or both, which should be registrable, but the Act should not place any restrictions or additional requirements on these other than those applying to all societies.

R11 A grandparenting provision should be included in the statute and provide that branches incorporated under the Incorporated Societies Amendment Act 1920 will be described as societies from the commencement of the new Act, but ss 6 and 7 of the Incorporated Societies Amendment Act 1920 will continue to apply to each former branch and its parent society as if the Amendment Act had not been repealed.

R12 The statute should provide that any former branch and parent society may at any time after commencement of the new Act choose to remove the application of the repealed provisions to their societies by providing appropriate notice to the Registrar.

Chapter 5 The legal dealings of an incorporated society

Limitation of Liability

R13 The statute should provide that a member is not liable for an obligation of the society by reason only of being a member. The provision should be aligned to that in s 97 of the Companies Act 1993, with the necessary changes.

R14 The statute should expressly allow societies to indemnify members and employees who act in good faith in pursuance of a society's activities, and allow societies to take insurance, if they so wish, for the purposes of that indemnity.

Corporate Capacity

R15 The statute should provide that a society has full capacity to carry on or undertake any business or activity, do any act or enter any transaction. The provision should be aligned to that in s 16 of the Companies Act 1993, but it should also state, for avoidance of doubt, that a society has the following powers (unless expressly negated in the society's constitution):

- to buy, sell, exchange, develop and mortgage property;
- to borrow money and give security for it;
- to issue negotiable instruments;
- to receive and make gifts;
- to enter contracts and leases;
- to employ persons; and
- to belong to other societies or associations, whether or not incorporated, with similar purposes or purposes beneficial to the society.

Ultra Vires

- R16 The statute should provide that no act of a society and no transfer of property to or by a society is invalid merely because the society did not have the capacity, the right, or the power to do the act or to transfer or take a transfer of the property.
- R17 The statute should protect third parties who are unaware of any incapacity when they deal with a society.
- R18 The new statute should not include a provision relating to security for costs.

Chapter 6 Committees, officers, duties and arrangements for running societies

Committees

- R19 The statute should provide that every society must have a committee of at least three members which has responsibility for the affairs of the society.
- R20 The statute should require that the constitution of the society contain rules that set out the composition, roles and functions of the committee including:
- the number of members that may be on the committee;
 - the election or appointment of committee members;
 - the terms of office of committee members;
 - qualifications for appointment; and
 - grounds for removal from office.

Statutory officer

- R21 The statute should provide that every incorporated society must have a statutory officer at all times. The name and address of that person, and any changes, must be notified to the Registrar.
- R22 The statutory officer of an incorporated society must be a member of the society's committee, and may hold any other office as a committee member or in the society.
- R23 The statute should provide that committee members must be natural persons. A person should be disqualified from being appointed or holding office as a committee member if he or she is:
- an undischarged bankrupt;
 - prohibited from being an officer of an incorporated society under the new Incorporated Societies Act;
 - prohibited from being a director or taking part in the management of an incorporated or unincorporated body under the Companies Act 1993, the Securities Act 1978, the Securities Markets Act 1988, or the Takeovers Act 1993 (or their successors);
 - an individual who is subject to a property order made under the Protection of Personal and Property Rights Act 1988; or

- an individual who does not comply with any qualifications for officers contained in the constitution of the society.

R24 In addition to fulfilling the qualifications for a committee member, the statutory officer must be at least 18 years of age and resident in New Zealand.

R25 The statute should provide the following:

- A statutory officer, committee member or other officer of a society must retire if he or she becomes disqualified.
- If a person is disqualified or banned from being an officer of a society but acts as one, then for the purposes of the provisions of the Act that impose obligations and duties on a statutory officer, committee member or other officer, the person is to be treated as occupying the relevant class of officer.

R26 The actions of any person as statutory officer, a committee member or other officer are not invalid merely because the person's appointment was defective or the person was not qualified for appointment to the relevant office.

The duties of officers

R27 The statute should state the duties with which officers of the society must comply when exercising their powers and performing their functions. That provision should, similarly to the Companies Act 1993, state the duties of officers in general terms.

R28 The statute should provide that officers owe to the society the following duties:

- a. to act in good faith and in the best interests of the society, and use powers for a proper purpose;
- b. to comply with the Incorporated Societies Act and with the society's constitution, except where the constitution contravenes the Act;
- c. to exercise the degree of care and diligence that a reasonable person with the same responsibilities within the society would exercise in the circumstances applying at the time;
- d. to not allow the activities of the society to be carried on recklessly or in a manner that is likely to create a substantial risk of serious loss to the society's creditors; and
- e. to not allow the society to incur obligations that the officer does not reasonably believe will be fulfilled.

R29 The statute should provide that:

- The duties are mandatory duties that must not be excluded by any rule or provision in a society's constitution. Any rule or provision in a constitution that attempts to exclude any of the duties will have no effect.

- The duties are owed to the society and not to members. Consequently a member or former member may only bring an action against an officer for a breach of these duties on behalf of the society, and then only where the court has granted leave for the member to bring that action.

R30 For the purposes of the duties of officers an “officer” should be defined as:

- a. the statutory officer of a society;
- b. all members of the society’s committee;
- c. any other office holder provided for in a society’s constitution;
- d. a person, including any member of the society or employee of the society, who makes, or participates in making, decisions that affect the whole, or a substantial part, of the operations of the society;
- e. a person who has the capacity to significantly affect the society's financial standing; or
- f. a person whose instructions or directions the statutory officer, the committee of the society, or other office holders are accustomed to acting in accordance with.

R31 A person who gives advice to an incorporated society in that person’s professional capacity or as a result of that person's business relationship with the society should not be considered to be an officer of the society merely because of that advice.

R32 The statute should provide that, except in the situations listed in R33 below. A society is not able to exclude the liability of an officer or indemnify an officer in respect of any liability for any action as an officer or the costs incurred by the officer in defending or settling any claim or proceedings against that officer. Any rule or provision in a constitution that attempts to exclude liability or any indemnity given by a society that does not comply with this rule will have no effect.

R33 A society may, if expressly authorised by its constitution:

- indemnify an officer for the costs incurred in defending criminal or civil proceedings relating to liability for his or her actions as an officer where judgment is given in favour of the officer or he or she is acquitted;
- indemnify an officer against liability to third parties for the officer's actions in his or her capacity as an officer (and for costs relating to any claim or proceedings relating to that liability), not including any criminal liability or any liability resulting from any breach of the duty to act in good faith and in the best interests of the society; or
- arrange insurance for an officer in respect of liability (except criminal liability) for any acts or omissions committed by the officer in his or her capacity as an officer.

Conflicts of interest

R34 The statute should require that an officer of an incorporated society who has a financial interest in a matter being considered by or affecting the society must, as soon as practically possible after the officer becomes aware of his or her interest in the matter, disclose the nature and extent of that interest to the committee of the society.

- R35 The statute should require that where an officer has disclosed a financial interest in a matter:
- he or she must not vote in any decision on the matter, however that officer can be present at the time of the decision and can contribute to the discussion leading to the decision; but
 - the committee may, where it considers it appropriate, exclude the officer from any further discussion or involvement with the matter.
- R36 The statute should require that an officer who is prevented from voting on a matter because he or she has a financial interest in it may continue to be counted as part of the quorum.
- R37 The statute should require that where 50 per cent or more of those forming the committee's quorum are prevented from voting on the matter because they have disclosed a financial interest, then the remaining committee members must call a special general meeting to determine the matter.
- R38 The statute should require that an officer should be considered to have a financial interest in a matter if he or she:
- may derive a financial benefit from the matter;
 - is the spouse, partner, child, or parent of a person who may derive a financial benefit from the matter;
 - may have a financial interest in an entity to which the matter relates; or
 - is a partner, director, officer, board member, or trustee of a person who may have a financial interest in an entity to which the matter relates.
- R39 The following interests should be excluded from the definition of financial interest:
- remote or insignificant interests of a nature that could not reasonably be regarded as likely to influence the officer when carrying out his or her responsibilities; and
 - an interest that the officer has in common with other members of the society as a result of membership.
- R40 The definition of officer for the purposes of these conflict of interest provisions should be the same as that in R30 (which deals with duties of officers) so any person who owes fiduciary duties to the society is required to disclose a financial interest.
- R41 The statute should provide that the committee of each society must maintain a register of disclosures made by officers of financial interest in matters that are being considered by or affect the society. The committee should present a summary at each annual general meeting of the nature and extent of any disclosures recorded during the year.
- R42 The statute should require that unless the constitution of a society provides otherwise, the register of disclosures should not be open to inspection by members of the incorporated society who are not officers or committee members of the society.

Financial and other reports

- R43 The statute should require all societies to prepare annual financial reports, and file copies of these with the Registrar.
- R44 The requirements for financial reports should be determined by the External Reporting Board, with the standards applied to be in accordance with Financial Reporting Act divisions (once enacted), including whether each society crosses any threshold for size, complexity or accountability.
- R45 The statute should provide for an online annual return to be prescribed by regulations. As a minimum, the annual return should include:
- a. confirmation that the general meeting has been held;
 - b. the date of and numbers of members who attended the general meeting;
 - c. the number of current members as at the end of the reporting period;
 - d. the names of committee members and further contact details, including an email address and telephone number, for the statutory officer;
 - e. the address, telephone and email address details for the society; and
 - f. certification that the society is continuing to operate in accordance with its constitution.

Chapter 7 Constitutions

Optional rules for constitutions

- R46 The statute should provide that a society may include rules in its constitution for the following purposes, so long as those rules are consistent with the constitution and the statute:
- to empower it to make bylaws;
 - to express its tikanga or culture; and
 - to provide for any other matter relevant to the society's affairs.
- R47 Bylaws made or continued under the new statute should no longer be subject to the Bylaws Act 1910.

Amending the constitution

- R48 The statute should provide that, in addition to any other requirements in the constitution, every amendment to a constitution must be approved by a majority vote of members attending and voting at a general meeting of the incorporated society.
- R49 The statute should provide for the following registration requirements for the alteration of constitutions:
- a. All alterations to constitutions must be notified to the Registrar within 30 days.
 - b. Every alteration to the constitution must be signed by at least three members of the society and delivered to the Registrar accompanied by a certificate by an officer of the society certifying that the alteration has been made in accordance with the constitution and Act.

- c. If satisfied that the amendment complies with the Act and the society's constitution, the Registrar must register the amendment.
- d. The amendment will take effect from the time of registration or a later date that is specified in the amendment.
- e. The Registrar may refuse to register an amendment to a society's purposes if he or she believes that the amendment may prejudicially affect any existing creditor of the society and that all such creditors have not consented to the amendment.
- f. The Registrar may refuse to register an amendment to the name of a society until the proposed amendment has been publicly advertised in such manner as the Registrar directs.

- R50 The statute should give a court a power to amend a constitution on the following grounds:
- it is satisfied that an amendment to the constitution was not made in accordance with the constitution of the incorporated society, or the Act;
 - it is not practicable for the society to amend the constitution itself using the procedure set out in the constitution;
 - it is satisfied that the constitution is operating, or would operate in an oppressive, unfairly discriminatory or unfairly prejudicial manner; or
 - in any other circumstances in which the court considers it is just and equitable to do so.

A model constitution

- R51 The statute should enable a model constitution to be made in regulations.
- R52 The statute should require that every society applying for incorporation must either submit a constitution complying with the statutory minimum requirements or indicate that it adopts the whole model constitution. The adoption of the model constitution should be deemed by the statute to be sufficient compliance with the statutory requirements for the content of constitutions.
- R53 If a society indicates that it adopts the model constitution, the Registrar should indicate that fact on the register. If a society submits its own constitution or submits additional clauses to the model constitution, the Registrar must place it on the register if he or she is satisfied that the constitution or additional clauses comply with the statute.
- R54 The statute should provide that a society that adopts the model constitution will automatically be subject to any amendment to the model constitution.

What this means for existing societies

- R55 The statute should provide a transitional period by the end of which every constitution must comply with the requirements of the new statute.
- R56 After the transition period, the Registrar should have a power to declare that the applicable rule from the model constitution applies to a society that does not have a rule required by the new statute, or in place of a rule that does not comply with the requirements of the new statute.

Mandatory requirements for every constitution

- R57 The statute should require that every constitution must contain rules covering the following matters:
- a. the name of the society;
 - b. the purposes of the society;
 - c. how the registered office of the society will be determined;
 - d. how people become members of the society and cease to be members;
 - e. arrangements for keeping the society's register of members up to date, and whether and how the society will provide access for members to the register of members;
 - f. the composition, roles and functions of committees, including:
 - the number of members that may be on the committee;
 - the election or appointment of committee members;
 - the terms of office of the committee members;
 - qualifications for appointment of committee members;
 - the functions and powers of the committee;
 - grounds for removal from office of committee members; and
 - how the statutory officer will be elected or appointed;
 - g. how the society may enter into legal obligations;
 - h. how the society will control and manage its financial resources and other assets, including how it will keep financial records, how it will pay expenses and how authority to make decisions will be given;
 - i. procedures for resolving disputes, including the grievances of members and complaints concerning the misconduct or discipline of members;
 - j. arrangements and requirements for general meetings, including:
 - the intervals between general meetings;
 - the information that must be presented at general meetings;
 - when minutes are required to be kept;
 - the manner of calling meetings;
 - the time within which, and manner in which, notices of general meetings and notices of motion must be notified;
 - the quorum and procedure for general meetings; and
 - voting procedures for general meetings;
 - k. what information held by the society, members can have access to and how that access will be provided;
 - l. the method by which the constitution may be altered; and
 - m. the nomination of a particular incorporated society, or other not-for-profit entity or trust, or a class or description of not-for-profit entity to which any surplus assets should be distributed, on liquidation or removal from the register.

Registered office

- R58 The statute should provide that a society must have a registered office at all times and must notify the Registrar of the physical address of that office and any changes to it.
- R59 Any amendment to the registered office should take effect from the date stated in the notice of amendment to the Registrar, or five working days after the notice is registered, whichever is the later.

Membership

- R60 The statute should provide that every society must maintain a register that identifies each member.
- R61 The statute should provide that members must expressly consent to being members.

Legal obligations

- R62 The statute should not require every society to have a common seal, but should expressly permit its use if desired by a society.

General meetings

- R63 The statute should provide that:
- Societies must hold a general meeting not later than 15 months after the previous annual meeting.
 - The following information must be presented by the committee at a general meeting at least once in every 15 months:
 - an annual report reviewing the society's activities since the previous general meeting;
 - the financial reports for the most recent financial year; and
 - a summary of the nature and extent of any disclosures made by officers of financial interest in matters being considered by or affecting the society, recorded during the year.
 - Minutes must be kept of all general meetings.
- R64 The statute should expressly allow a general meeting to be held at 2 or more venues using any technology that gives each member a reasonable opportunity to participate.
- R65 The statute should provide that members have a right to access the financial reports presented to the annual general meeting and the minutes of previous annual general meetings.

Chapter 8 Complaints and grievances

- R66 The statute should provide that societies must include procedures for dealing with internal disputes in their constitutions.
- R67 The statute should leave societies free to continue, develop or adopt disputes procedures that meet their needs, so long as a society's procedures and practice satisfy the requirements for natural justice defined in the statute.
- R68 The statute should provide that the categories of dispute that societies must maintain procedures for are:
- a. *complaints* concerning misconduct of members, or discipline of members; and
 - b. *grievances* brought by members concerning their rights or interests as members.
- R69 The statute should provide that a society may elect not to consider or continue consideration of any complaint or grievance if it is satisfied that:
- a. the matter is trivial or does not appear to disclose material misconduct or material damage to members' interests;
 - b. the complaint appears to be without foundation or there is no apparent evidence to support it;
 - c. the complainant has insufficient interest in the matter or otherwise lacks standing to bring it; or
 - d. the conduct, incident, event or issue has already been investigated and dealt with by the society.
- R70 The statute should provide that the features and content of each society's misconduct complaint procedure are for each society to determine, except that each society's procedure and practice must satisfy the relevant natural justice minima specified in the Act. The minima regarding achieving a fair hearing should provide that:
- a. Where a society considers a complaint or institutes a disciplinary procedure regarding alleged misconduct of a member, and the outcome may affect the member's rights or interests, the member has a right to be heard before the complaint or procedure is resolved or any outcome is determined.
 - b. The member's right to be heard will be satisfied if, taking into account the circumstances of the case:
 - the member is fairly advised of all allegations concerning them, with sufficient details and time given to enable the member to prepare a response;
 - the member has an adequate opportunity to be heard, either in writing, or at an oral hearing if the decision-maker considers that an oral hearing is needed to ensure an adequate hearing; and
 - any oral hearing is held before the decision-maker, or any written statement or submissions are considered by the decision-maker.
- R71 The statute should include provisions to avoid bias and apparent bias affecting decision-makers in all classes of disputes within societies. The bias provisions should provide that:
- a. a member may not decide or participate as a decision-maker regarding a complaint if two or more members of the society's committee or any complaints sub-committee

consider that there are reasonable grounds to infer that the person may not approach the complaint or grievance impartially or without a predetermined view;

- b. such a decision must be made taking into account the context of the society and the particular case, and may include consideration of facts known by the other members about the decision-maker so long as the decision is reasonably based on evidence that supports or negates an inference that the decision-maker might not act impartially.

R72 The features and content of grievance procedures should be for each society to determine, except that each society's procedure and practice must satisfy the relevant natural justice minimum standards to be included in the statute. These should provide that:

- a. where a society agrees to consider a grievance of a member alleging damage to the member's rights or interests as a member, or to members' rights and interests generally, caused by a decision, action or failure to act by the society or its officers, the member's right to be heard will be satisfied if:
 - the member has an adequate opportunity to be heard, either in writing, or at an oral hearing if the decision-maker considers that an oral hearing is needed to ensure an adequate hearing; and
 - any oral hearing is held before the decision-maker, or any written statement or submissions are considered by the decision-maker;
- b. the procedures for avoiding any bias or apparent bias should be those followed for misconduct complaints.

R73 The statute should not require appeal rights but should permit societies to include them in their disputes procedures.

R74 The statute should confirm that societies may meet their obligations to provide complaints or grievance procedures by:

- a. referring some or all complaints or grievances to an external arbitrator or arbitral tribunal, so long as minimum standards of natural justice consistent with those specified in the Act are satisfied; or
- b. appointing a visitor (or referee) to deal with some or all of any disputes that arise.

R75 The statute should specify that:

- a. a provision in a constitution stipulating arbitration under the Arbitration Act 1996 for some or all complaints or grievances will be an effective arbitration agreement under the Arbitration Act 1996, binding the society and any affected member, and that the constitution may contain further procedural provisions governing any arbitration; and
- b. the decision of a duly appointed visitor on any dispute referred to them is subject to judicial review, but is otherwise binding, except for challenge on grounds of lack of jurisdiction or improper appointment, breach of natural justice or a decision contrary to public policy.

Chapter 9 Civil enforcement

Enforcing the constitution

- R76 The statute should provide that a society, a member or a former member may apply to a court for orders to enforce the constitution of an incorporated society. The court should have powers to limit inappropriate or unnecessary applications.
- R77 The statute should provide that the Registrar may apply to a court for orders to enforce the constitution if it is in the society's interest and the public interest to do so.
- R78 The statute should give the following guidance about the factors for the Registrar to consider when determining what constitutes the public interest:
- the size of a society;
 - the income and assets of a society;
 - the source of the society's income and assets;
 - the society's ability or intention to act; and
 - the impact that failure to act would have.
- R79 The statute should also provide that when considering the public interest, the Registrar should weigh the factors in R78 and any others against the society's right generally to be free to manage its own affairs.

Enforcing the statutory duties

- R80 The statute should provide that a society may apply to a court for orders for redress from breaches of the duties of officers.
- R81 The statute should provide that a member may apply, on behalf of the society, with the leave of the court, for orders for redress from breaches of the duties of officers. The court should have powers to control such proceedings. Any settlement, compromise or discontinuation must have the approval of the court.
- R82 The statute should provide that the Registrar may apply on behalf of societies for orders for redress from serious breaches of the duties of officers if it is in the society's interest and the public interest to do so.
- R83 The court should have power to order that the society bear the whole or part of the reasonable costs of the member or Registrar in bringing this type of action.

A remedy for oppressive conduct

- R84 The statute should provide that a member or a former member may apply to a court for orders on the grounds that the conduct of the society has been, is being, or is likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him or her.

Restoring monetary gain to the society

R85 The statute should provide that a society may apply to a court for orders to restore to the society any money wrongly paid to members as being a breach of the prohibition against monetary gain.

- The statute should provide that a member may apply, with the leave of the court, on behalf of the society, for orders to restore to the society any money wrongly paid to members as being a breach of the prohibition against monetary gain.
- The statute should provide that the Registrar may apply to a court for orders to restore to the society any money wrongly paid to members as being a breach of the prohibition against monetary gain, if it is in the society's interest and the public interest to do so.

Chapter 10 Criminal sanctions and powers of the Registrar

R86 The statute should provide the following offences:

| Offence | Maximum penalty |
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| <p>Every person commits an offence who is in a position of responsibility within a society and who dishonestly uses that position to directly or indirectly:</p> <ol style="list-style-type: none"> obtain any property, privilege, service, monetary advantage, benefit or valuable consideration; or cause loss to any other person. | <p>Conviction and imprisonment for a period not exceeding five years or a fine not exceeding \$200,000.</p> <p>When convicting a person under this provision the court may also impose a banning order.</p> |
| <p>Every person commits an offence who provides any information required under this Act that is false or misleading, knowing that information to be false and misleading.</p> | <p>Conviction and imprisonment for a period not exceeding one year or a fine not exceeding \$50,000.</p> <p>When convicting a person under this provision the court may also impose a banning order.</p> |
| <p>Every officer, member or employee commits an offence who:</p> <ol style="list-style-type: none"> fraudulently takes or applies property of the society for his or her own use or benefit or for a use or purpose other than those of the society; or fraudulently conceals or destroys property of the society. | <p>Conviction and imprisonment for a term not exceeding five years or a fine not exceeding \$200,000.</p> <p>When convicting a person under this provision the court may also impose a banning order.</p> |
| <p>Every person commits an offence who, with intent to defraud or deceive, makes a false entry or omits, removes or alters an entry in a register or document required by the Act or the constitution of the society.</p> | <p>Conviction and imprisonment for a maximum term of five years or a fine not exceeding \$200,000.</p> <p>When convicting a person under this provision the court may also impose a banning order.</p> |
| <p>Every person commits an offence who knowingly is a party to an incorporated society carrying on business with intent to defraud the society's creditors or for a fraudulent purpose.</p> | <p>Conviction and imprisonment for a maximum term of five years or a fine not exceeding \$200,000.</p> <p>When convicting a person under this provision the court may also impose a banning order.</p> |

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| Every person commits an offence who breaches an order of the court banning him or her from holding a governance or management role within an incorporated society. | Conviction and imprisonment for a maximum term of one year or a fine not exceeding \$50,000. When convicting a person under this provision the court may also impose a further banning order. |
| Every person commits an offence who, without lawful justification or excuse fails to comply with a requirement by the Registrar to supply information or to get information audited. | Conviction and imprisonment for a maximum term of one year or a fine not exceeding \$50,000. When convicting a person under this provision the court may also impose a banning order. |

| Offence | Maximum penalty |
|--|--|
| Every person commits an offence who, without lawful justification or excuse hinders, obstructs or delays a Registrar's inspection or investigation or refuses or fails to answer a question. | Conviction and imprisonment for a maximum term of one year or a fine not exceeding \$50,000. When convicting a person under this provision the court may also impose a banning order. |
| Every person commits an offence who contravenes a direction of the Registrar (in relation to the Registrar's powers of intervention). | Conviction and imprisonment for a maximum term of one year or a fine not exceeding \$50,000. When convicting a person under this provision the court may also impose a banning order. |
| Every person commits an offence who hinders, obstructs or prevents a society giving effect to a direction of the Registrar (in relation to the Registrar's powers of intervention). | Conviction and imprisonment for a maximum term of one year or a fine not exceeding \$50,000. When convicting a person under this provision the court may also impose a banning order. |

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| <p>R87 A court should have the power to ban a person from holding a position of governance or management of an incorporated society or from being the statutory officer of a society, upon convicting that person of an offence under the statute, in addition to any other penalty provided for that offence.</p> <p>R88 The statute should provide for an infringement offence regime in respect of societies, covering the administrative obligations of the statute, including:</p> <ul style="list-style-type: none"> • operating without a current registered office; • failing to maintain a register of members in accordance with the statutory requirements; • failing to notify the Registrar of amendments to the constitution; • failing to hold a general meeting at least every 15 months; • failing to keep minutes of general meetings; • having a constitution that does not comply with the Act; and • failing to file an annual return or financial report. |
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R89 The statute should provide the Registrar of Incorporated Societies with the following powers, within a statutory framework similar to that in Parts 1 and 2 of the Corporations (Investigation and Management) Act 1989:

- to require information to be supplied relating to the business, operation, or management of the society;
- to require information to be audited;
- to require an auditor to disclose information to the Registrar;
- to enter upon and search any premises and inspect, remove, and take copies of any documents;
- to investigate the affairs of a society;
- to give advice and assistance; and
- to direct that property or funds not be dealt with for a period of 21 days.

Chapter 11 Terminations, restructures and rescues

R90 The current practice of the Registrar accepting requests for dissolution from societies should be discontinued and replaced with a new statutory power for the Registrar to remove a society from the register on request. The new power should be in equivalent terms and on equivalent grounds as provided in ss 318(1)(d) and 318(2) in the Companies Act 1993, in respect of companies.

R91 The new statute should replace the existing provisions for revocation of dissolution with procedures for restoration to the register.

R92 The provisions for restoration of societies to the register should follow ss 328 to 330 of the Companies Act, to confirm that the status of removed societies is similar to that of removed companies, and that similar considerations and effects apply to any restoration to the register.

R93 The statute should provide that the Registrar may apply to the court to grant directions if necessary to properly restore the society to its pre-removal position.

R94 The statute should provide that unless a society's constitution requires a greater majority or some further steps or both, a resolution of the majority of members voting at a single general meeting is required for any decision to appoint a liquidator, or to request the Registrar to remove the society from the register.

R95 The statute should provide that notice of a proposal to appoint a liquidator or to request the Registrar to remove the society from the register must be given to members in accordance with the constitution, and not less than 30 days in advance of the meeting to consider the proposal. The purpose of the meeting and a copy of the proposed resolution must be included in the notification.

R96 The statute should include provisions to facilitate amalgamations and mergers of societies, with the following features:

- Subject to any further constitutional requirements, any two or more societies can amalgamate into a new society, so long as each society agrees to the proposed

amalgamation by separate majority resolutions and the new society meets all the requirements for incorporation and registration.

- Two or more societies may merge, by one or more former societies merging into an existing society, so long as similar requirements as for an amalgamation, adjusted as required, are satisfied.
- The constitution of the new society must provide that all members of the former societies are automatically members of the new society.
- All the property and all the obligations of each society are deemed transferred to the new society upon its registration without any further formality.
- Where any real property is to be transmitted and registered in the name of the new society or it is otherwise convenient to do so, the new society may request the Registrar to give directions under the provisions applying to transmission of property on the distribution of the assets of a society (Incorporated Societies Act 1908, s 27(3) refers).
- An amalgamation or merger of societies does not adversely affect the rights of creditors of any former society, and the new or continuing society as the case may be is liable for all debts and obligations of each former society.

R97 The new statute should provide, by reference to Part 15A of the Companies Act 1993, that financially distressed societies may be placed into voluntary administration in accordance with that Part, modified as required.

R98 The decision to place the society into administration may be taken by the society's committee or other governing body; by the society's statutory officer if there is no committee or it cannot or will not act; by a secured creditor as provided in Part 15A; or by the Registrar applying to a court to appoint an administrator.

R99 The statute should provide that the constitution of an incorporated society must contain a rule nominating a particular incorporated society, other not-for-profit entity or trust, or a class or description of not-for-profit entity to which any surplus assets should be distributed, on liquidation or prior to the society being removed from the register.

R100 The statute should provide that the final meeting of the society may approve a different distribution to a different entity from that proposed in the constitution. If it complies with the constitution in all other respects, but cannot otherwise change the allocation provided for in the constitution except by a valid constitutional amendment.

R101 The statute should provide that:

- a. for a transitional period of not less than four years, any society's rule that expressly provides for distribution of the society's assets to individual members on dissolution or liquidation of the society, and which existed when the transition period comes into effect, is not invalid;
- b. for the duration of the transitional period, any dissolution or liquidation by an affected society will be dealt with for the purposes of distribution of assets as if the 1908 Act had not been repealed.

R102 The statute should retain or adapt similar provisions to the machinery provisions for transmission of property contained in s 327(3)-(7) of the 1908 Act.

Chapter 1

Our review: origins, justification and principles

- 1.1 There are over 23,000 incorporated societies in New Zealand. Those societies are as diverse as New Zealand itself. This report recommends replacing the current Incorporated Societies Act 1908 with a new statute, which we believe will better serve incorporated societies, their members and their communities.
- 1.2 This review has its origins in concerns that the 1908 Act does not provide incorporated societies in New Zealand with all that a modern statute ought. The Act does not set out the obligations of those who are involved in the running of incorporated societies. It fails to give sufficient guidance to those many New Zealanders who volunteer to run societies. Moreover, the statute says little about how disputes, which inevitably occur, should be dealt with. Much of what is legally necessary for the running of incorporated societies is also not expressly set out in the statute.
- 1.3 A new Incorporated Societies Act will deal with these deficits, but will build on the success of the 1908 Act. The proposed new Act will allow both current and future incorporated societies to continue to flourish without imposing unnecessary burdens. Our report recommends a new Act that:
 - confirms societies are essentially private organisations, and that the primary role in enforcing the obligations that are owed by them belongs to societies and their members;
 - includes modern governance provisions;
 - provides for model rules that will apply to societies unless they adopt their own;
 - sets out better procedures for resolving disputes and for members to control societies; and
 - clarifies the legal capacity of an incorporated society and the limitations on the liability of members.
- 1.4 Incorporated societies comprise an array of diverse sporting, social and cultural clubs, societies and not-for-profit organisations. They also operate in a range of cultural environments. We were aware throughout our review that Māori have made considerable use of incorporated societies as a vehicle for community endeavours. We were fortunate to be able to attend a hui held in collaboration with the University of Waikato Law School's Te Mata Hautū Taketake (Māori and Indigenous Governance Centre) that canvassed views on our proposed reforms. At that meeting we were given the clear message that Māori societies would like to strengthen the way tikanga is reflected in their operations, and is recognised by the courts. This was similar to the concern of other societies representing other cultures, that their own customs should be respected. At that hui, we also heard concerns about the lack of clarity over such things as the duties owed by those running societies. This was also a feature of other consultation and submissions. It is important to people that the legal framework under which they operate offers the right balance of autonomy, flexibility and accountability.

THE INCORPORATED SOCIETIES ACT 1908

- 1.5 The 1908 Act was based on the Unclassified Societies Registration Act 1895.¹⁶ The origins of both Acts appear to lie in the difficulties encountered by voluntary associations that could not incorporate under other statutes over how to hold and manage property. The parliamentary debates mention the “Star Boating Club” in Wellington, which was reported to have accumulated over £2,000. It was said during the debate that “[t]his Bill would place such clubs in a proper position, and give them a status”.¹⁷
- 1.6 Previously, societies had to make use of a device of giving property to trustees, who were entrusted to use it in ways that members could not necessarily control. This appears to have been considerably problematic, as explained in 1895 to the Legislative Council by then Attorney-General, Sir PA Buckley:¹⁸
- ... a short time ago a deputation, composed of representatives of different clubs, such as rowing clubs and football clubs, and other kindred associations, waited upon the Premier and represented the unsatisfactory position in which they were placed through having no status. Some of these associations had acquired very large sums of money, which was placed in the hands of trustees who could do what they liked with it, the members of the association having no voice in the matter. There had been some abuses, although not many, he was happy to say. To prevent similar occurrences, however, it was thought desirable that such clubs should be given some recognised status, as provided in the Bill.
- 1.7 In parliamentary speeches relating to the Bill these clubs were contrasted with profit-making companies, and with friendly societies that provide financial benefits to their members. Clubs could not register under the Friendly Societies Act 1882 because they were not devised for the financial benefit of members.¹⁹
- 1.8 The 1895 Act, while creating a new form of incorporation, did not include some of the features of the later 1908 Act, especially provisions limiting liability for members.²⁰ The 1908 Act, by contrast, was considerably expanded, including a number of features such as limited liability, which we would associate with a modern incorporation statute. The reason behind the 1908 Act was summarised in a note prepared by the then Chief Law Drafter, John Salmond:²¹

The object of the Bill, as of the repealed Act, is to provide a simple method by which societies established for any purpose other than pecuniary gain may become incorporated. In recent years the Unclassified Societies Registration Act, 1895, has been extensively made use of by societies of a much more complex and important character than those for which the Act seems to have been primarily designed, and numerous deficiencies in the law have consequently come to light. The present Bill is an attempt to make a more adequate provision for the incorporation, management, control, and dissolution of societies to which it relates.

WHY A NEW STATUTE FOR A NEW CENTURY?

- 1.9 John Salmond referred to the need to essentially modernise the 1895 Act because of the range and nature of organisations seeking incorporation under it. We now believe that the 1908 Act

16 The societies were “unclassified” in the sense of not being covered by other statutes such as the predecessors to the Companies Act 1908 or the Friendly Societies Act 1908.

17 (27 September 1895) 90 NZPD at 553 (LC).

18 (27 September 1895) 90 NZPD at 553 (LC).

19 See for instance, Friendly Societies Act 1882, s 7; Friendly Societies Act 1908, s 10.

20 The key operative clause of the 1895 Act was s 8 which provided:

Every such society when incorporated shall have perpetual succession and a common seal, and its corporate name and title may hold and dispose of real and personal property, and may sue and be sued, and may recover any moneys due to the corporation, whether by a member thereof or not.

21 Note attached to the Bill as introduced, Incorporated Societies Bill 1908-1.

should again be updated to take account of changed times, as well as a different appreciation of what is needed from an incorporation statute. Since 1908, the Companies Act has been through two major revisions, in 1955 and 1993. The second revision involved a fundamental review of the basis of New Zealand company law.²² In comparison there have been only a number of relatively minor amendments to the 1908 Act since the branch society provisions were added in 1920.

- 1.10 John Salmond produced a modern corporation statute in 1908 terms, but he did not deal with issues that have since become important in relation to incorporations, for example, the abolition of the ultra vires doctrine. Nor did he make explicit, in a way we believe a modern law drafter would, the duties that lie on those who run incorporated societies. He did not attempt to deal with how disputes were to be resolved. In seeking to reform the 1908 Act, we are not suggesting that the core of the statute is broken, but rather that a new statute needs to take account of modern realities and a renewed understanding of what an incorporation statute ought to contain.
- 1.11 The case for reform of the Incorporated Societies Act is, therefore, not revolutionary, but incremental and evolutionary. The issues confronting community groups in New Zealand are mainly pragmatic ones. The difficulties that we identified in our *Issues Paper 24* have been confirmed in large part through the submission process.²³
- 1.12 We have been told repeatedly that what the sector needs is a statute that is usable, sensible and self-explanatory. The Auckland District Law Society expressed this well in its submission:
- In our view, the Incorporated Societies Act 1908 (Act) falls significantly short when questions are raised about governance, rights and obligations. [...]
- Case law is not particularly accessible or useful for most Incorporated Societies because in general the people that run societies:
- (a) may not have the funds to take legal advice about what case law exists;
 - (b) have limited legal training;
 - (c) if able to obtain legal advice, may find it difficult to determine what the case law may mean for the society and its application to resolving a current issue in a cost-effective manner.
- Similarly members of societies face additional difficulties if they want to take legal action to challenge the actions of a society. That is because such action often needs to be funded from personal means, can be slow, and requires the involvement and associated expense of the High Court due to its inherent jurisdiction which is often the only recourse by which to examine and hold to account a society's activities.
- 1.13 Much of the law of incorporated societies is not found in the statute itself but in the case law that applies to incorporated societies (as it does to other forms of incorporation where people take on obligations to look after others' best interests). We think a new statute ought clearly to set out the basic nature of those obligations and how they can be fulfilled. We believe that a new statute, which makes that law more transparent and more accessible, would greatly aid in the governance of incorporated societies. This was confirmed by those with whom we have consulted. Our aim is to make life easier, not harder for those who volunteer to be involved in matters of governance of incorporated societies, almost always without reward.
- 1.14 Rather than trying to impose too many new obligations on incorporated societies, the changes we recommend clarify and simplify the obligations that incorporated societies, and those who

22 See Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989); Law Commission *Company Law Reform: Transition and Revision* (NZLC R16, 1990).

23 Law Commission *Reforming the Incorporated Societies Act 1908* (NZLC IP24, 2011) [*Issues Paper 24*].

work with them, must comply with, where possible. The changes are also designed to prevent problems occurring, or to provide assistance when problems do occur.

R1 The Incorporated Societies Act 1908 should be replaced by a new Incorporated Societies Act.

The broader context of our recommendations

- 1.15 The largely voluntary space in which incorporated societies operate is an important part of New Zealand society and of the economy. Uncertainties and difficulties in the current incorporated society regime not only create significant problems for particular incorporated societies, but also create uncertainty and difficulty for the sector as a whole. During consultation, especially with those who advise community groups, we were frequently told that such difficulties and uncertainties are significant barriers that those seeking to be involved in this area must overcome.
- 1.16 It is difficult to quantify in monetary terms the benefit of providing greater certainty to such organisations, whether starting up, in operation, or coming to an end. However, the prevalence of the incorporated society model in New Zealand society suggests that the benefits must be significant. Moreover, we believe that the wider community and the government have an interest in providing greater clarity and assistance to incorporated societies. Clearly one of the trends over the last few years has been the use of community groups, often incorporated societies, to provide services under contract for central or local government. We were told that there was uncertainty, both on behalf of community groups and on the part of officials seeking to contract with those community groups, as to what the ideal corporate form might be, through which the community group might provide its services.
- 1.17 One of the major benefits of reform will be to clarify the basic legal, governance and accountability obligations of those that run incorporated societies. From those certain foundations, we think it will then be easier for both the community groups and government agencies to add on the extra requirements that are necessary in government procurement contracts.
- 1.18 During consultation, community groups mentioned a range of other matters, that they thought needed to be reformed over and above what we have thought appropriate in relation to an incorporation statute. Such matters included:
- clarification of trustees' obligations in charitable trusts (which often fulfill a similar role to incorporated societies);
 - specification of government procurement contracts; and
 - greater regulation of how donated funds should be dealt with.
- 1.19 The Law Commission intends, as part of its trusts law review, to deal expressly with some of the current difficulties relating to charitable trust law. While the reform of the Incorporated Societies Act will not necessarily solve all of the issues in the not-for-profit sector, we believe that our proposed reforms are a useful and important first step in strengthening that vital sector of the community.

PRINCIPLES GUIDING OUR RECOMMENDATIONS

- 1.20 At the beginning of *Issues Paper 24*²⁴ we referred to the United Nations International Classification of Non-profit Organisations as a guide to the kinds of organisations that might appropriately be registered under a new Incorporated Societies Act.²⁵ We also referred to a list of our own devising, which was similar. Our list provided that societies should:²⁶
- be established for a public purpose or for the (non-financial) benefit of their members;
 - be private and independent;
 - be self-governing; and
 - in general, not channel their income and profits to members, trustees or anybody else except as reasonable compensation for services rendered.
- 1.21 Submissions largely agreed with these as a basic starting point for our review. We often heard of the importance that people place on their ability to form self-governing societies that are designed to fulfil either a community interest or to aid members. In one meeting, we were told without much hint of exaggeration, that the Incorporated Societies Act was “what had made New Zealand great”. It is clear to us that New Zealanders value a statute that enables them to get together in the way the Incorporated Societies Act has provided over the last 100 years.

Incorporated Societies are organisations run by members

- 1.22 For us, the essence of the incorporated society remains, as both the United Nations classification criteria and our own list indicated: a self-governing group of individuals who have associated for a non-financial purpose, but who wish to have a legal identity that is separate from the individual members’. This includes, in the New Zealand context, members who are themselves bodies corporate; indeed, in some sectors such as sports, it is common for some incorporated societies to be “federations” of other incorporated societies.
- 1.23 This contrasts with other modes through which individuals might choose to get together to achieve a common purpose. Incorporated societies differ importantly from trusts, which are also often used in the not-for-profit sector in New Zealand. Essentially the incorporated society is a membership model of organisation, in which the members determine the fate of the organisation.
- 1.24 Throughout this paper, we have emphasised the key importance of membership to the incorporated society model. In doing so we acknowledge that the mission of some incorporated societies has become less about members, as such, and more about providing services to the general public, or to those with a particular need. In saying that the core of an incorporated society is its members, we are not denying the value of those organisations, or indeed their place within the Act’s framework. However, members have a key role in terms of the final governance of the incorporated society, through the annual general meeting, and most often through the election of officers. In focusing on this role, we do not mean to say that a society needs to be democratic in the sense of giving the same voting role for all members. Indeed, there are incorporated societies that for appropriate reasons give different voting rights to different members. One example is a national federation, which may choose to give more votes to the

24 *Issues Paper 24*, above n 23, at [1.10].

25 Lester M Salamon and Helmut K Anheier “The International Classification of Nonprofit Organizations: ICNPO-Revision 1, 1996” (Working Papers of the Johns Hopkins Comparative Non-profit Sector Project, no 19, The Johns Hopkins Institute for Policy Studies, Baltimore, 1996) cited in Jackie Sanders, Mike O’Brien, Margaret Tennant, S Wojciech Sokolowski and Lester M Salamon *The New Zealand Non-profit Sector in Comparative Perspective* (Office for the Community and Voluntary Sector, 2008).

26 *Issues Paper 24*, above n 23, at [1.12].

Auckland region than to, say, the West Coast, based on the number of participants in particular areas.

Societies should not distribute profits or financial benefits to members

- 1.25 Incorporated societies should not distribute profits or financial benefits to members. Members do not have an ownership interest in a society. Incorporated societies differ from companies in which shareholders might have an ownership interest and from which they may have a right to receive dividends, income or ultimately to participate in the distribution of the assets of that company. They also differ from other less common, but still important, forms of enterprise such as friendly societies, founded to provide for certain kinds of financial benefits to their members. They also differ from trusts in which property is formally owned by the trustees on behalf of either the beneficiaries in the case of private trusts, or for a charitable purpose in the case of a charitable trust.

Societies should be self-governing and independent of the government

- 1.26 Incorporated societies should be self-governing. A key aspect of this is freedom from inappropriate state interference, however well-meaning. Such interference is not intended as part of this review. Submitters generally agreed that incorporated societies are essentially independent of government and should remain so. Indeed, for some organisations that are registered as incorporated societies, independence from government is crucial to their identity. The independence of trade unions, for example, is guaranteed by international conventions.²⁷
- 1.27 Under our recommendations, societies themselves have the primary role in enforcing duties owed to them and members have the primary role in enforcing obligations that societies owe to them. We have recommended for instance that by and large there is little role for the criminal law in our new statute, except in cases of dishonesty or fraud.
- 1.28 While we think that respecting the private nature of incorporated societies is a core value, and one that we have tried to maintain throughout this review, we do believe that there are circumstances in which there might well be appropriate public intervention. This reflects three factors: the size of some incorporated societies; the reality that many incorporated societies seek public funds; and that members of incorporated societies may have insufficient resources, or incentive, to protect the interests of the society when there has been misgovernance. We have therefore suggested that in a limited range of circumstances, the Registrar of Incorporated Societies ought to be able to enforce, on behalf of the society, obligations that may be owed to it by those managing or governing the society.
- 1.29 Another more practical dimension of independence is that almost all incorporated societies rely on volunteers. New statutory requirements should therefore not pose unnecessary or undue burdens on them. Compliance costs should be kept to a minimum for both societies and those that run them.
- 1.30 A key message we received from consultation was that reforms should not overburden incorporated societies. Well-meaning regulation should be looked at critically. Moreover, it was emphasised to us that one of the key challenges facing the not-for-profit sector in New Zealand is being able to attract people into volunteering their time to run, or be involved in, societies. Imposing too many additional obligations on civic-minded people might risk those people retreating from those organisations.

²⁷ Freedom of Association and Protection of the Right to Organise Convention CO87 (signed 9 July 1948, entered into force 4 July 1950); Right to Organise and Collective Bargaining Convention CO98 (signed 1 July 1949, entered into force 18 July 1951).

1.31 We have taken this concern seriously in developing the reforms in this report. We have asked ourselves repeatedly whether a particular reform or recommendation would unnecessarily interfere with what are essentially private organisations, run by people in their private capacities. While, for instance, this report does recommend clarification and setting out of the obligations of committee members and other officers, we have been mindful always of whether our recommendations are imposing an extra burden and whether that extra burden can be justified. In some areas we have decided that such extra burdens could not be justified. Where remedies are necessary we have preferred to rely on civil remedies rather than the criminal law. Where we have recognised obligations, we have tried to emphasise that those obligations should take account of the ability of those charged with fulfilling them and in determining how those obligations might be fulfilled.

Chapter 2

The not-for-profit sector: legal structures and status

INCORPORATION AND STATUS

- 2.1 The central purpose of the Incorporated Societies Act 1908 is to enable the creation and registration of a body corporate that is separate from its members and which can incur obligations and hold property in its own right.
- 2.2 The 1908 Act is not the only way that New Zealanders, who associate to pursue common activities or public benefits, may seek incorporation. Furthermore, incorporation for such ends is not always necessary; trusts, which are not necessarily incorporated, remain an important means by which people can safeguard property to achieve charitable ends, and in many respects act as a separate entity.²⁸ Our review is focused on achieving a modern membership-based corporation statute for those who do choose to associate in a corporate form for not-for-profit motives.
- 2.3 Whether or not a body is incorporated is only one of the important decisions that those founding an organisation need to consider. A choice must also be made as to whether to seek registration under the Charities Act 2005. Registration as a charity under that Act does not require any particular legal form.²⁹ Rather it focuses on the intentions behind the organisation, the use to which its assets will be put, and whether certain legal protections exist to prevent the assets from being applied to the private benefit of those behind the organisation.³⁰ Many organisations value registration as a charity not only for the tax advantages, but also the reputational and branding advantages that are perceived to accompany such registration. We were told by some philanthropic donors that registration as a charity has advantages for organisations when they apply for funding, because it signalled to donors that certain standards are adhered to by those running the society.
- 2.4 Under the separate charities regime there is a stronger case for greater public oversight and regulation than there is simply in an incorporation statute like the Incorporated Societies Act. The charities regime involves a higher degree of auditing and supervision of those that fall under it. This extra regulation can be justified by the value that exists in the status of charity in terms of the financial advantages that flow from tax rules, and from the enhanced reputation that charities have in the community. A charity is likely to have greater success in seeking money from the public or donors than other organisations. Moreover, the organisations that register as charities have done so voluntarily.

28 In the case of charitable trustees, the trustee can incorporate as a board under the Charitable Trust Act 1957.

29 Charities Act 2005, s 13.

30 Charities Act 2005, s 13.

UNINCORPORATED ASSOCIATIONS

- 2.5 Not-for-profit organisations do not have to incorporate and register under the Incorporated Societies Act. Not-for-profit organisations can choose not to incorporate at all, although this means that the body lacks legal personality in its own right, and the members share the organisation's liabilities as well as its assets. In *Issues Paper 24* we briefly discussed whether there ought to be some consideration of the place of unincorporated associations within this report.³¹ We referred to the Scottish proposals, which would have created a special form of personality for unincorporated bodies.³² We suggested that in view of the relative ease of incorporation through the Incorporated Societies Act in New Zealand another regime was not needed to deal with societies that do not incorporate under the Incorporated Societies Act.³³ We are still of that view. The focus ought to be on providing a statute which provides a form of incorporation that is as accessible as possible.

COMPANIES

- 2.6 There is nothing inherent in the limited liability company model that requires companies to be run for profit or to provide a return to their shareholders. Indeed, it is possible to be registered both as a limited liability company in New Zealand under the Companies Act 1993 and as a charity under the Charities Act, so long as the company's constitution contains certain safeguards against distribution of income or assets to the shareholders, and the company observes the requirements under the Charities Act.³⁴
- 2.7 In jurisdictions like the United Kingdom, which have lacked a general not-for-profit incorporation statute, companies have been a common way for charities to incorporate. In the United Kingdom, prior to the Charities Act 2011 (UK),³⁵ which created the legal entity of the "charitable incorporated organisation", charities tended to incorporate as companies limited by guarantee, as opposed to being companies limited by shares.³⁶ What is important is not so much the guarantee given by shareholders as to liability but that this corporate form prevents distribution to members.
- 2.8 In New Zealand the Companies Act abolished the ability to incorporate a company by way of guarantee. The rationale was that companies could expressly limit distributions to shareholders in their constitutions so there was no need to retain the option to incorporate as a company limited by guarantee.³⁷
- 2.9 Since companies can be registered as charities under the Charities Act, some might question why we need a separate Incorporated Societies Act, especially if it does not differentiate a particular kind of incorporation. The obvious answer is provided by the sheer number of organisations that have registered under the Incorporated Societies Act. The Incorporated Societies Act is, for this broad group, perceived to provide a more appropriate structure. The Companies Act contains numerous provisions that may either be inapplicable, or unsuitable, for the vast majority of incorporated societies. Indeed, there has been a debate over the suitability of

31 Law Commission *Reforming the Incorporated Societies Act 1908* (NZLC IP24, 2011) at [1.36]-[1.41] [*Issues Paper 24*].

32 At [1.38].

33 At [1.39]-[1.40].

34 See Charities Act 2005, s 13.

35 Charities Act 2011 (UK), Part 11.

36 Companies Act 2006 (UK), s 5.

37 Law Commission *Company Law Reform and Restatement* (NZLC R9, 1989) at [242]-[255].

a generic model of company across both large and small, closely-held companies.³⁸ There seemed to be little awareness of the flexibility of the company model, and also perhaps some wariness of trying to use that flexibility. Moreover, during consultation, it was clear that many societies do not see themselves as engaged in the same sphere of activity as companies.

- 2.10 In formulating recommendations for this report, we have started by considering what the characteristics of incorporated societies are in order to determine what statutory provisions are necessary or desirable. In doing so, we have referred to the Companies Act. The desirability of making as much use of Companies Act provisions as is consistent with the nature of incorporated societies was emphasised by the Auckland District Law Society in its submission:

While there are clearly large sections of the Companies Act which may not be so relevant to an Incorporated Society (provisions relating to shares including issues, redemptions and security) there are also significant parts which are relevant ... Modelling any legislation on the Companies Act may well make it easier for officers of societies to use and understand the law.

INCORPORATION UNDER THE CHARITABLE TRUSTS ACT 1957

- 2.11 The Charitable Trusts Act 1957 enables the incorporation of charitable trust boards and charitable societies. As discussed in *Issues Paper 24*, the Charitable Trusts Act allows societies or associations (as well as trustees) to become incorporated under it.³⁹ The Charitable Trusts Act does not deal with such matters as limitation of liability or ultra vires. Some submitters strongly agreed with combining incorporation under a general not-for-profit incorporation statute. The New Zealand Law Society, for instance, favoured having one statute for incorporation of not-for-profit organisations. It said:

Confusion is caused by the present multiplicity of statutes (and government agencies) dealing with community societies – including the Incorporated Societies Act, Charitable Trusts Act, Agricultural and Pastoral Societies Act 1908 (to say nothing of the many special statutes enacted to assist individual A & P Societies), and also the Industrial and Provident Societies Act 1908 – to which one might add (at least) the Friendly Societies and Credit Unions Act 1982.

- 2.12 The Incorporated Societies Act expressly limits the liability of members to their membership fees,⁴⁰ but there is no corresponding provision relating to members of incorporated charitable trust boards. However, an incorporated charitable trust board is able to incur obligations and to be liable for those obligations separately from the liability of trustees.⁴¹ A blanket limitation of the liability of trustees would, in fact, not necessarily be appropriate because trustees already owe obligations personally as a result of their assumption of trustee responsibilities. Indeed, one of the concerns of including incorporated charitable trust boards within a general not-for-profit incorporation statute might be the diminution of the additional obligations that trustees owe as trustees, and which might not be appropriately owed by people who are merely officers or committee members of incorporated societies.
- 2.13 At our consultation meetings a few people commented on the difficulty of choosing between incorporating as an incorporated society under the Incorporated Societies Act or the Charitable

38 The Companies Act 1993 has been itself critiqued as not being designed to deal with the realities of small closely held companies. For example, see Robert Dugan “Closely Held Companies under the Draft Companies Act” (1990) 20 VUWLR 161 and Matthew Farrington “A Closely-Held Companies Act for New Zealand” (2007) 38 VUWLR 543.

39 *Issues Paper 24*, above n 31, at [1.21].

40 Incorporated Societies Act 1908, s 13.

41 See Charitable Trusts Act 1957, s 13: “Every Board shall have perpetual succession and a common seal, and (subject to this Act and to the rules and other documents providing for the constitution of the board) shall be capable of holding real and personal property of whatsoever nature and whether situated in New Zealand or elsewhere, and of suing and being sued, and of doing and suffering all such acts and things as bodies corporate may lawfully do and suffer.”

Trusts Act, or forming a charitable trust and having the trustees incorporating into a charitable trust board. For these organisations, the difficulty was compounded by the reality that registering under the Charitable Trusts Act as a charitable trust board does not mean that they will automatically be registered under the Charities Act. To be incorporated, the trustees or the executive of a society must satisfy the Registrar of a broad principally charitable purpose,⁴² whereas before registering an organisation as a charity the Charities Board independently assesses the organisation's eligibility. The difficulty is caused by differing definitions of what might be charitable. For the purposes of incorporation under the Charitable Trusts Act there is a slightly broader definition than that which must be considered as charitable under the Charities Act.⁴³

- 2.14 Trust Waikato, which funds community organisations, submitted that the Incorporated Societies Act should not be reviewed in isolation from the difficulties created by other Acts, such as the Charities Act and the Charitable Trusts Act:

... a number of related pieces of legislation including the Charities Act and the Charitable Trusts Act 1957, as well as the Incorporated Societies Act, should be reviewed at the same time, culminating in one statute to deal with all aspects of not-for-profit organisations, for clarity and ease of use. A legal regime is required which is distinct from companies, which may be conducted for profit. The intention would be to legislate for both the member and public benefits of not-for-profit organisations.

- 2.15 Community Waikato, an organisation that provides advice to community organisations, suggested that the current legislation is confusing, and there are not clear guidelines about the processes required for establishment and maintenance of societies. It submitted that:

Any new legislation should include provision for the different stages of development, size and nature of community organisations so that the compliance requirements are aligned with the organisation's capacity and needs.

- 2.16 We were told during consultation that the choice between forming an incorporated society and establishing a trust with an incorporated trust board was sometimes made not so much with the underlying differences of those models in mind but rather with a view as to administrative convenience. For instance, while an incorporated society needs to file a statement of accounts with the Registrar every year, there is no such requirement for charitable trust boards.

- 2.17 While we agree with the tenor of Community Waikato's and Trust Waikato's submissions, we are mindful of what we can achieve within the scope of this review rather than what is perhaps needed more widely within the sector. For instance, we see some merit in pursuing the suggestions from several submitters that one body be responsible for registering both charities and incorporated charitable trusts.

- 2.18 For this report, however, we put these broader suggestions aside and focus on improving the Incorporated Societies Act. We acknowledge that there is much commonality between what is needed for incorporated charitable trust boards and incorporated societies. Nevertheless, there are difficulties in completely equating incorporated societies with charitable trust boards. Incorporated societies are member-driven institutions. The statute is designed to protect membership involvement and a degree of democratic decision-making. Trusts are not about membership participation, nor are they about democratic decision-making across a membership base, but rather are a way of holding and distributing property. Nor is it clear to us that the same rules relating to concepts such as limitations of liability are necessarily applicable to a charitable

42 Charitable Trusts Act 1957, s 11. See also s 8.

43 Compare the definition of charitable purpose in s 2 of the Charitable Trusts Act 1957 with that used in the Charities Act 2005, s 5.

trust board as they are to an incorporated society. The duties of trustees are different from those of committee members.

- 2.19 The Charitable Trusts Act enables the incorporation as trust boards of charitable societies in addition to trusts.⁴⁴ It appears from a recent judgment of the High Court that the nature of such societies is essentially similar to those of incorporated societies, but of course with the overlay of a charitable status or purpose. In *Bath v Singh*, Venning J wrote:⁴⁵

There is a distinction between a charitable trust board with trustees incorporated as a board under s 7 of the Charitable Trusts Act and a charitable society with membership incorporated as a board under s 8 of that Act. A trust board will generally not be structured along democratic lines whereas a society will be. The members of a society will have a contractual relationship with the society and each other through the society...

- 2.20 While we have concerns that it is inappropriate to deal with incorporated charitable trust boards in the Incorporated Societies Act, we do not think that it is necessary to continue to enable the registration of charitable societies separately from incorporated societies. In our view, charitable societies ought no longer to be incorporated under the Charitable Trusts Act. Those that have been should be transitioned to become societies registered under the new Incorporated Societies Act.

R2 Charitable societies should no longer be able to incorporate under the Charitable Trusts Act 1957. Those that are currently incorporated under that statute should transition to become societies incorporated under the new incorporated societies statute.

OTHER POSSIBLE COMPANY-LIKE STRUCTURES

Community interest companies

- 2.21 One innovation, recently introduced in England and Wales and Scotland, is the “community interest company” (CIC) a modified version of the ordinary company.⁴⁶ The key innovation provided by the CIC structure is to place an asset lock on a company’s assets that prevents them from being distributed to shareholders and to provide for an enforceable limitation on distributions that may be made to investors. An advantage of the CIC model over the incorporated society model is it enables limited returns to investors or shareholders. This allows for situations where investors may be motivated both by community interest and potential profit-making. They may be encouraged to make investments in community interest corporations that they might otherwise not make.
- 2.22 We have not reached any conclusion as to whether it would be desirable for New Zealand to adopt a similar model. Much would depend upon careful analysis of how well the model works in the United Kingdom and why. A key question for New Zealand might also be whether what can be achieved under the CIC model can equally be achieved here under either the Companies Act or under the Incorporated Societies Act. It must be remembered that traditionally the United Kingdom has not had a model that enables general not-for-profit incorporation. In the United Kingdom the CIC model gives not-for-profit organisations the ability to distinguish

⁴⁴ Charitable Trusts Act 1957, s 8; see also *Bath v Singh* [2012] NZAR 50 (HC) at [36].

⁴⁵ *Bath v Singh*, above n 44, at [40].

⁴⁶ See the Companies (Audit, Investigations and Community Enterprise) Act 2004 (UK), Part 2 Community Interest Companies, and the Community Interest Company Regulations 2005 in England and Wales. Information about Community Interest Companies can be found at Department for Business, Innovation and Skills <<http://www.bis.gov.uk/cicregulator>>.

themselves from companies, in a way that the Incorporated Societies Act currently enables not-for-profit organisations to differentiate themselves here in New Zealand.

- 2.23 Regardless of whether New Zealand should in the future adopt a specific CIC-like model, we believe that there remains space for a separate Incorporated Societies Act. Many of those organisations registered under the rubric of the Incorporated Societies Act would not satisfy the community interest test that is set out in the United Kingdom statutes. One way forward is the promulgation of model constitution clauses that would essentially provide the same asset lock and dividend restrictions that are imposed by the English, Welsh and Scottish CIC legislation.

OTHER FORMS OF INCORPORATION

- 2.24 *Issues Paper 24* posed a wider question of whether New Zealand might have only one statute for the incorporation of bodies that are not companies.⁴⁷ There are a number of advantages behind such an approach. It would enable New Zealand to move beyond the current situation where there are a number of different legal regimes which apply to non-company bodies corporate.

Agricultural and pastoral societies

- 2.25 We particularly asked submitters whether there was merit in moving to a generic “not-for-profit” statute which might incorporate bodies incorporated under the Agricultural and Pastoral Societies Act 1908 and the Industrial and Provident Societies Act 1908. Although we did not mention it, a statute might also conceivably deal with friendly societies, which are not incorporated. On one view it can be argued that the Agricultural and Pastoral Societies Act, for instance, is similar to the Incorporated Societies Act in that it was a perfectly adequate incorporation statute at the time it was passed, but is now in need of some modernisation. We expressly asked in our *Issues Paper 24*⁴⁸ whether there ought to be a merger of the two regimes, which in some cases are quite similar, into one kind of society under the Incorporated Societies Act. We received a relatively large number of submissions from current agricultural and pastoral societies which generally opposed such a move. These submissions argued that:

The 1908 [Agricultural and Pastoral] Act was created to suit the needs of the [Agricultural and Pastoral] Associations and our committee feels this Act best serves our needs.

[Agricultural and Pastoral] Associations have a governing body - The Royal Agricultural Society of New Zealand (RAS) and the RAS has a robust structure in the form of a Constitution, Equestrian Rulebook, Showing Rules & Regulations, and a Code of Conduct which includes dispute resolution. Members are required to abide by these rules.

The RAS is registered with the Charities Commission as are many of the Agricultural and Pastoral Associations, (our Association being one of them).

We as an Agricultural and Pastoral Association, have our own individual Constitution/Rules and Regulations based on the original 1908 Act along with relevant matters particular to our Association. The RAS also provided a 'draft Constitution' back in 2007 in order for all Associations to update their rules and comply with the Charities Commission.

⁴⁷ *Issues Paper 24*, above n 31, at [1.33].

⁴⁸ *Issues Paper 24*, above n 31, at [Q5].

- 2.26 We also received an extensive submission from the Auckland Agricultural and Pastoral Society which emphasised the complex nature of its activities and the difficulties of simply folding it into another regime. By contrast we received a submission from the Ministry of Agriculture and Fisheries (now the Ministry for Primary Industries) which is responsible for the registration of agricultural and pastoral societies. That submission supported moving agricultural and pastoral societies within a more general statute.
- 2.27 In making the tentative suggestion in *Issues Paper 24* the Commission did not wish to detract from the important contribution that agricultural and pastoral societies have made to New Zealand life, especially rural life. Given the level of opposition from agricultural and pastoral societies to our suggestion, we do not recommend that these societies be automatically folded within the new Incorporated Societies Act.
- 2.28 Nevertheless, we think that there are advantages to the modern incorporation statute that we recommend in this report. We consider that agricultural and pastoral societies clearly fall within the kinds of bodies that might be registered under the new statute and that over time they might wish to consider being registered under it.⁴⁹ We therefore recommend that a new incorporated societies statute contain a provision that would make the voluntary transfer of registration from the Agricultural and Pastoral Societies Act to incorporation under the new Incorporated Societies Act easy and efficient.

R3 The statute should provide an easy and efficient mechanism for agricultural and pastoral societies to transfer registration voluntarily from the Agricultural and Pastoral Societies Act 1908 to incorporation under the new Incorporated Societies Act.

Industrial and provident societies

- 2.29 We also raised in *Issues Paper 24* the prospect of potentially incorporating those bodies currently registered under the Industrial and Provident Societies Act within the new statute. The Industrial and Provident Societies Act enables the incorporation of “a society for carrying on any industry, business, or trade, whether wholesale or retail, specified in or authorised by its rules, including dealings of any description with land, but excepting the business of banking”.⁵⁰
- 2.30 We did not receive many submissions from industrial and provident societies. One we did receive, however, was from Foodstuffs New Zealand, which is a large industrial and provident society. It emphasised that it was not appropriate to think of industrial and provident societies as generally being within the not-for-profit sector. We also received a submission from the now Ministry of Business, Innovation and Employment which was strongly in favour of taking a broad approach to the review of non-company corporate entities. The Ministry referred us to a previous project of their own which had looked at the governance arrangements of mutual financial institutions.⁵¹
- 2.31 On consideration, while we agreed there is merit in a wider project that might look at the governance of commercial entities that are not currently under the Companies Act, that project is not this one. We have, therefore, decided not to make a recommendation relating to industrial and provident societies.

⁴⁹ At present there are several agricultural and pastoral societies registered as incorporated societies. It would seem, therefore, that some agricultural and pastoral societies already find that the incorporated societies regime suits them well.

⁵⁰ Industrial and Provident Societies Act 1908, s 4.

⁵¹ Ministry of Economic Development *Review of Financial Products and Providers: Mutuals' Governance* (Discussion Document, September 2006).

2.32 During this review we have come across a large number of other statutes which enable the incorporation of either not-for-profit organisations or indeed, organisations for business. We think there is merit in a review which considers the appropriateness of having so many different corporate forms in New Zealand.⁵² But this review is focused on New Zealand having the best possible incorporated society statute possible.

52 See the approach of Mr Bruce Paton in his submission in 1972 on amendments to the Incorporated Societies Act. In his submission Mr Paton wisely suggested that there was considerable advantage in New Zealand enacting a general corporation statute from which these particular kinds of incorporation might draw: Bruce H Paton “Submission to the Statute Revision Committee on the Incorporated Societies Amendment Bill 1971” (Archives ABGX W3706 16127, Box 28).

Chapter 3

What kinds of societies can be registered under the Act?

THE ORIGINAL SCOPE OF THE ACT

3.1 We have emphasised in our guiding principles that societies cannot be conducted for members' profit. This is currently reflected in ss 4 and 5 of the Incorporated Societies Act 1908. Section 4 provides:

- (1) Any society consisting of not less than 15 persons associated for any lawful purpose but not for pecuniary gain may, on application being made to the Registrar in accordance with this Act, become incorporated as a society under this Act.
- (2) No such application shall be made except with the consent of a majority of the members of the society.

Section 5 defines pecuniary gain:

Persons shall not be deemed to be associated for pecuniary gain merely by reason of any of the following circumstances, namely:

- (a) That the society itself makes a pecuniary gain, unless that gain or some part thereof is divided among or received by the members or some of them:
- (b) That the members of the society are entitled to divide between them the property of the society on its dissolution:
- (c) That the society is established for the protection or regulation of some trade, business, industry, or calling in which the members are engaged or interested, if the society itself does not engage or take part in any such trade, business, industry, or calling, or any part or branch thereof:
- (d) That any member of the society derives pecuniary gain from the society by way of salary as the servant or officer of the society:
- (e) That any member of the society derives from the society any pecuniary gain to which he would be equally entitled if he were not a member of the society:
- (f) That the members of the society compete with each other for trophies or prizes other than money prizes.

3.2 This chapter considers the option raised in *Issues Paper 24* that a new Act could distinguish between members benefit and public benefit organisations. The chapter then considers what it means for an organisation to be not-for-profit, in particular the meaning of the provision in the 1908 Act allowing societies to trade if the proceeds are retained for the society rather than the benefit of their members.

A DIVERSITY OF ORGANISATIONS

3.3 It is clear from Hansard that the original 1895 Act and the 1908 Act were intended to cover what might be referred to as members clubs.⁵³ What the Act's drafter, John Salmond

⁵³ See (27 September 1895) 90 NZPD LC 553 and (3 July 1908) 143 NZPD HR 155.

could not have anticipated is the sheer diversity of bodies that have come to be incorporated as incorporated societies. As noted in *Issues Paper 24*, there are approximately 40,000 incorporated societies, incorporated charitable trust boards and charitable societies. Organisations are spread over the whole range of New Zealand society and community endeavour. For instance, without wanting to exclude others, we received submissions from, or talked to:

- national sporting bodies that are responsible for multi-million dollar budgets;
- racing clubs that organise major events;
- social service organisations that provide services to the community rather than necessarily providing services to their members;
- health-based organisations that provide services to the general public or those affected by a particular condition, or support those who are caring for those with particular conditions;
- professional bodies that may have a quasi-regulatory role like Law Societies;
- private clubs;
- industry groups that may represent particular industries or coordinate participants in a particular industry; and
- small sporting, hobby or community groups that may, or may not, have assets.

- 3.4 We are also conscious that some organisations that are incorporated societies are also subject to significant legal recognition or regulation in other statutes. While trade unions must be registered as incorporated societies, they are subject to registration under the Employment Relations Act 2000.⁵⁴ Unions, in Professor Anderson's phrase, gain their legal personality from the Incorporated Societies Act and their industrial personality from the Employment Relations Act.⁵⁵ Sporting bodies are also subject, in some cases, to disciplinary and dispute resolution mechanisms provided by the International Court for the Arbitration of Sport.⁵⁶
- 3.5 Some of these bodies are funded by government to provide particular goods or services, whilst others receive no funding beyond small membership contributions, which help them with their day-to-day affairs. In short, it is impossible to generalise beyond the basic criterion that they may not be conducted for the monetary gain of their members.
- 3.6 This very diversity makes it difficult even to talk of the statute currently covering a single not-for-profit sector. In fact it currently covers, and we recommend generally it continue to cover, this broad range of organisations (so long as the individual societies adhere to the essential characteristics of the incorporated societies model). The traditional clubs and associations that perhaps were the object of the original 1895 Act and the current 1908 Act focus on the needs of their particular members, while social service or health organisations, for instance, are more focused on those in the community that need their help. Indeed, membership of a traditional club or association carries with it an expectation of benefitting from the club and the notion of being involved in the governing of the club, electing officers and committee members and holding them to account through general meetings. Membership in a social service or health organisation may in many ways be a token of support for that organisation. In our view, to be registered under the Act, members ought to have a formal governance role and be entitled to participate in that governance. How that participation is structured is, however, properly determined by the society's rules.

54 See Employment Relations Act 2000, ss 13-17.

55 See Gordon Anderson and others (ed) *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [2205].

56 See for example the Sports Anti-Doping Act 2006.

MEMBER BENEFIT AND PUBLIC BENEFIT SOCIETIES – AN IMPOSSIBLE DEMARCATION?

- 3.7 One potential way of dealing with the diversity amongst societies might have been, as we suggested in our *Issues Paper 24*, to expressly recognise that diversity by providing for different categories of societies. Our sense was that while registered societies share certain common needs for an incorporation statute, there might also be important differences that the statute might recognise. In particular, while we see member participation as a touchstone for member benefit organisations, we were not sure that this is necessarily so for public benefit organisations. Moreover the public benefit nature of different organisations might mean that different rules would apply to those societies. In *Issues Paper 24*, therefore, we suggested a possible division between member benefit and public benefit incorporations.
- 3.8 Reaction to this proposal was somewhat mixed. Just over half of submitters thought it inadvisable to divide societies on this basis because many societies had both objectives and benefits to members and to the public, which cannot always be clearly separated. Most saw little value in the distinction, especially as public benefit is considered in determining whether a society has a charitable purpose and so can be registered as a charity. Given the difficulty of defining public benefit, some suggested that the current approach, where a distinction is drawn between charitable and non-charitable status for taxation and dissolution purposes, was appropriate. The New Zealand Law Society also made the point that the legal nature of an entity and the nature of the entity's purpose should not be confused or conflated. They seemed to also consider a distinction (other than that between charitable and non-charitable) as too difficult to make.
- 3.9 About 40 per cent of submitters favoured dividing societies into members benefit and public benefit for some purposes and a few were ambivalent, seeing advantages and disadvantages. Some considered that public benefit societies had different purposes from members benefit ones and it would help to clarify the purposes of societies. The three areas identified where the distinction was considered relevant by submitters were:
- Public benefit societies should have tax benefits (some seemed to suggest that public benefit should replace and broaden the definition of charitable purpose).
 - The assets of public benefit societies should not be distributed to the members on dissolution but should go to another public benefit society.
 - Public benefit societies should be subject to a stricter accountability regime.
- Some of those who favoured the categorisation recognised that there are hybrid societies that are both.
- 3.10 Having reflected on these submissions, our view is that there is limited utility and much confusion in creating a distinction between private and public benefit. The consequence of this is that we recommend that a new statute should apply uniformly across all kinds of incorporated societies. It should be remembered that many public benefit organisations are eligible to register, or already have registered under the Charities Act.

THE "PECUNIARY GAIN" RESTRICTION

- 3.11 It appears from parliamentary debates that the particular issue that gave rise to the enactment of the 1908 Act was the inability of the Victoria University College Students Association to incorporate to run a hostel. This was presumably because of an intention to charge board for those staying at the hostel.⁵⁷ This resulted in ss 4 and 5 of the 1908 Act, which allow

⁵⁷ See the speech of Sir Joseph Ward at (3 July 1908) 143 NZPD HR 155.

- incorporated societies to essentially trade so long as the profits of that trade are not to be distributed to members. This important innovation of drafter John Salmond has been copied in other jurisdictions. We think it should be retained in the new statute.
- 3.12 It is important that a new statute clearly differentiates those societies that can be incorporated under it, and those that cannot. While it is generally understood that the Incorporated Societies Act enables the incorporation of not-for-profit organisations, in fact the Act currently uses a “double negative” way of defining which entities can be an “incorporated society”. Section 4 sets out the general provision that a society of at least 15 people, associated for any lawful purpose but not “for pecuniary gain” may become incorporated. Section 5 then sets out a number of activities that are not in themselves enough for a society to be considered to be operating for pecuniary gain.
- 3.13 Eligibility is defined by what a society must not be, as opposed to what it must be. We consider the current drafting of ss 4 and 5 could be improved to better describe the concept behind the pecuniary gain restriction; that the members may not benefit financially because of their position as members, and cannot have an ownership interest in the assets of the society.
- 3.14 We have come to the view that a negative definition, which excludes what cannot be registered, is inevitable. There are a number of reasons for this. The diversity of this sector means that the common characteristics, beyond stating that a society is not run for the profit or gain of members, are not easy to articulate.
- 3.15 As we have said, one essential characteristic of an incorporated society is that it is a membership organisation in which members can participate in the governance of the society at the annual general meeting and, through representatives, provide further governance and often management. This characteristic, however, is shared by companies, and so is not sufficient to differentiate incorporated societies from companies. It is possible to construct a list of purposes for which societies might be incorporated as has been done in South Australia⁵⁸ and in British Columbia,⁵⁹ but our view is that given the diversity of the use of the form of incorporation in New Zealand such an exercise would be futile and undesirable. Nor would the definition of community interest as used in the United Kingdom for community interest companies be appropriate as it would not catch many of the members benefit organisations that are currently registered under our Act.⁶⁰ It is for citizens to decide for what purposes they will come together, rather than government.
- 3.16 Moreover while there might be advantages in a more positive definition to make clear the purpose of the statute, a negative definition may in this case better explain the relationship between the Act and the Companies Act. The Companies Act is the default statute under which bodies can be incorporated. The Incorporated Societies Act, by contrast, ought to remain a specialist statute that deals with a subset of incorporations for which the scaled down provisions of that Act are appropriate. Moreover, submissions have told us that there is something unique about the incorporated societies “sector”, which means such societies should be established and regulated under a different regime from companies. In our view, the current negative definition helps fulfil this role.
- 3.17 Some submissions argued for restrictions on the incorporation as incorporated societies of entities that allow indirect financial benefits to members. One example given was the formation

58 Associations Incorporation Act 1985 (SA), s 18.

59 Society Act RSBC 1996 c 433, s 2.

60 Section 35(2) of the Companies (Audit, Investigations and Community Enterprise) Act 2004 (UK) reads:

“A company satisfies the community interest test if a reasonable person might consider that its activities are being carried on for the benefit of the community.”

of residents associations, which effectively work to preserve the property values of those residents. However, the kind of indirect benefit that such residents gain is not readily distinguishable from other kinds of indirect benefits that people can form societies to achieve.

3.18 There has been little judicial consideration of ss 4 and 5 in New Zealand.⁶¹ It is clear from early files in the Registrar of Incorporated Societies' office, that the definition of pecuniary gain created some difficulty, and that the particular exceptions detailed in s 5 are the result of earlier cases in which the registration of entities was challenged on the basis that there was a kind of indirect gain for some members.⁶² Despite the fine difficulties with the definition described below, staff from the Companies Office have told us that the definition presents few difficulties in the registration process.

3.19 Two leading commentators, Fletcher, and to some extent White, take the view that what is important about the exceptions in s 5 is not so much their actual terms but their elaboration of the general point that activities can be conducted so long as they are not for the benefit of individual members. Fletcher in his book refers to this approach as the "pecuniary benefit dictionary". He writes:⁶³

The pecuniary benefit dictionaries in the various Acts serve a variety of purposes – to clarify, expand or limit the meanings which would otherwise attach to the exclusionary provisions associated with the primary definition of the word "association". Taken as a whole they achieve their goal of educating both administrator and potential user of the intention of the legislature but both the New Zealand and Queensland Acts would be enhanced by pruning. The removal of all references to non-monetary benefits would enable the real meaning of "pecuniary gains" to be discerned more clearly.

3.20 Having critiqued White's analysis of the *Hastings Volunteer Fire Brigade* case, Fletcher goes on:⁶⁴

White's whole critique would be well-founded if the New Zealand Act strictly prohibited associations or their members from making pecuniary gains. However, that is not the case. A major purpose of s.5 is to admit to incorporation any associations which are not commercial, in the sense of paying dividends to their members, whether or not they make gains for themselves. In this context it is difficult to discern why volunteer firemen paid attendance money when called out on duty should be in a different position to professional sportsman paid to play for their clubs.

3.21 After some analysis Fletcher continues:⁶⁵

Even after 70 years, the true meaning of s. 5 has not been revealed by litigation but White has probably divined the intent of the legislator:

"The effect of this section is to explain the phrase 'pecuniary gain' in broad terms. The words 'merely by reason of any of the following circumstances' and subss (a), (c) and (e) in particular, show that the Act should be construed to include any society which does not acquire gain directly for its members."

61 There are two New Zealand cases that consider ss 4 and 5, both of considerable antiquity. These are *Hastings Volunteer Fire Brigade (Inc) v Brause* (1915) 17 GLR 653 (SC) and *New Zealand Jockeys' Association v Young* [1922] NZLR 1011 (SC). However, the major considerations of the provisions are Keith Fletcher "Eligible Associations" in *The Law Relating to Non-Profit Associations in Australia and New Zealand* (Law Book Co, Northryde (NSW), 1986) 223 and Douglas White "The Definition of Gain for the Purpose of Incorporation" (1968-1970) 5 VUWLR 536. Both pieces focus on the relationship between the broad prohibition in s 4 and the particular exceptions in s 5.

62 See New Zealand Registrar of Incorporated Societies Archive "Revising Barrister, Wellington - Incorporated Societies Act 1908 - Pecuniary Gain, Opinions as to what constitute "pecuniary gain" and "restraint of trade" within the meaning of the Act" (Archives AATJW5171 7945, Box 1).

63 Keith Fletcher *The Law Relating to Non-Profit Associations: in Australia and New Zealand* (Law Book Co, Northryde (NSW), 1986) at 239.

64 At 240.

65 At 241.

3.22 Fletcher concludes:⁶⁶

That intention would be more clearly communicated if the term “pecuniary profits” was used instead of “pecuniary gains”. Pecuniary gains suggests that all payments to members are prohibited, whereas the dictionary section and the Chief Justice’s ruling [in the Hastings Fire Brigade case] both recognise that many incidental payments are permitted. The primary purpose of the provision is to ensure that associations which plan to return all or part of the surplus generated by their operations to their members are not incorporated under this Act. A prohibition on the distribution of pecuniary profits would express that idea directly.

3.23 We recommend that the statute should replace the word “pecuniary” with the word “monetary”. It was clear from our consultation that many individuals involved in societies do not understand the meaning of the word “pecuniary”. There is widespread confusion about what is permitted and what is not permitted. We think that simplifying the language will help to make those obligations better understood.

3.24 The phrase “operating for the monetary gain of members” should be defined so that the policy is clear; that is, in incorporated societies, members can have no ownership interest and cannot receive profits in the way that a shareholder of a company has either an ownership interest or the right to receive dividends. This would be similar to the relevant provision in New South Wales.⁶⁷

3.25 It follows that the new monetary gain section should not continue the current exemption from breaches of the prohibition against monetary gain, merely by reason that the members of the society are entitled to divide between them the property of the society on its dissolution. As we discuss in chapter 11, such rules are not consistent with the broad principle that members do not have an ownership interest in the societies of which they are members. Under a new statute, societies must not have rules that allow such distribution. In chapter 11 we suggest that societies that currently have such rules be given an adequate transition period to consider either changing their rules, or transitioning to a company structure under which such interests are appropriate. Given this, the transitional provisions of the new statute should make it clear that for that transitional period, the existence of such a rule will necessarily mean that a society is not operating for monetary gain.

3.26 The definition should provide guidance in relation to common practical examples that were raised with us in consultation:

- Members who are employed by a society can be paid appropriately for their employment.
- Members can be reimbursed for reasonable expenses.
- Societies can provide discounted services or goods so long as the provision of those services is incidental to the purposes of the society.
- Societies may provide benefits to the public, some of whom may be members or their families.

3.27 In addition, it is common in New Zealand for national bodies to distribute money to member organisations to promote their joint purposes. In order to remove any argument that would

66 At 241-242.

67 Section 5 of the Associations Incorporation Act 2009 (NSW), reads:

Definition of “pecuniary gain”

(1) An organisation provides “pecuniary gain” for its members if:

- (a) it carries on any activity for the purpose of securing pecuniary gain for its members, or
- (b) it has capital that is divided into shares or stock held by the organisation’s members, or
- (c) it holds property in which the organisation’s members have a disposable interest (whether directly, or in the form of shares or stock in the capital of the organisation or otherwise), or
- (d) it is an organisation that is, or is included in a class of organisations that is, prescribed by the regulations for the purposes of this subsection.

breach the statutory prohibition against the provision of monetary gain to members, the statute should permit payments to corporate members that are themselves not operating for the monetary gain of their own members.

- R4 The statute should prohibit societies from operating for the monetary gain of members.
- Societies must not operate for the purpose of, or with the effect of, returning all or part of the surplus generated by their operations to their members, in money or in kind, or conferring any kind of ownership in the society's assets on its members.
 - However, a society is not operating for the monetary gain of members in breach of the statute simply because:
 - a. it trades on its own behalf;
 - b. it provides a member with payments that are incidental to the purposes of the society, and that member is a body corporate or trust that is prevented by its constitutional documents or deed from acting for the monetary gain of its members;
 - c. it reimburses a member for reasonable expenses legitimately incurred on behalf of the society or while pursuing the society's purposes;
 - d. it provides benefits to the public some of whom may be members or their families;
 - e. it provides a member with salary, wages or other payment for services to the society, so long as such payment is at arms length and in accordance with normal commercial terms and does not include any profit share, percentage of revenue or other reward linked to gains made by the society; or
 - f. it provides a member with incidental benefits such as prizes or discounts on products or services, provided that the purpose of the provision is in accordance with the purposes of the society.

Chapter 4

Establishment and registration of societies

- 4.1 Our review indicates that the existing statutory and administrative arrangements for establishing and incorporating societies by registration are working reasonably well. The Registrar of Incorporated Societies advises that nearly all societies applying to incorporate succeed in doing so. This is even though up to a third of applications are rejected because they fail to provide for one or more of the requirements set out in s 6 of the Incorporated Societies Act 1908.⁶⁸ Applicants generally resubmit with deficiencies addressed, and are registered. The Registrar reports up to 80 applications a month. The number of incorporated societies continues to grow at a modest rate.
- 4.2 We nevertheless consider there are some areas where establishment and registration can be improved, for the benefit of users and to facilitate administration. We address the following issues in this chapter:
- the minimum number of members required to obtain and retain registration;
 - the criteria and process for accepting or rejecting proposed names for societies; and
 - whether branch societies or federal structures of societies should be provided for in the principal Act.
- 4.3 In addition, the initial application rejection rate could be reduced. This may be assisted by the promulgation and promotion of model rules. We address model rules for constitutions in chapter 7.

THE MINIMUM MEMBERSHIP REQUIREMENT

Current provisions

- 4.4 Under s 4 of the Incorporated Societies Act, a society wishing to incorporate must have at least 15 members. Under s 7, at least 15 members must sign the application for incorporation. The Act does not specify any automatic or mandatory consequence if a society later falls to fewer than 15 members, but under ss 25 and 26 the High Court may appoint a liquidator of a society on the application of a member, creditor or the Registrar, if membership is less than 15.

Issues

- 4.5 The origins of the 15 member requirement are unclear, including why 15 was chosen over other possibilities. A minimum threshold requirement such as this is inevitably somewhat arbitrary. Our consultations suggest that some societies can function effectively with fewer members. The ability to continue with lower numbers may be important to maintain community infrastructure, for instance in remote or low population areas. The on-going number of members may be less important for some not-for-profit organisations than their capacity to continue to function for the purpose for which they were established.

68 Verified by Incorporated Societies Registry staff in discussions with Law Commission, August 2012.

- 4.6 Against these considerations is the need for any body corporate to retain sufficient resources to meet its obligations and remain viable. Further, a feature distinguishing incorporated societies from other entities such as companies or charitable trust boards is that incorporated societies are membership-based. Is there a point at which too small a membership should disentitle an entity from adopting or retaining the incorporated society form?
- 4.7 The issue of whether the minimum membership requirement continues to apply after registration also needs to be settled. A number of submitters have pointed out that the Act is unclear and should be clarified.

Discussion

- 4.8 We consider that the case for retaining a requirement for a minimum number of members is strong. Despite the diversity of incorporated societies, they are fundamentally membership-based organisations. The legislation presumes an incorporated society is a group of persons who choose to associate together for a lawful purpose.⁶⁹ It allows them to achieve a corporate form and status to pursue their purpose.⁷⁰
- 4.9 There is no special reason for the minimum requirement to be 15 members. A number of Australian statutes require fewer members. For example, Victoria and New South Wales allow the incorporation of associations of only five members.⁷¹ Societies whose purposes focus mainly on providing activities or benefits for members will naturally tend to have more than 15 members in many cases. Nonetheless, there will inevitably be societies that will have fewer than 15 members and who will function well in pursuing their purposes.
- 4.10 In our view there is scope to reduce the minimum member requirement. We accept that any revised minimum will still be arbitrary, but should require a sufficient number to ensure that societies retain their character as membership-based organisations.
- 4.11 We also think that the requirement to maintain a minimum number of members should be clearly stated to apply throughout a society's existence as a body corporate. If being a membership-based organisation is important, it remains important once a society has been incorporated and commences operating. If the requirement is not on-going then there could even be a possibility of sham or shell incorporated societies. In our view the scheme of the Act is to permit the incorporation and operation of membership-based societies. An on-going requirement to maintain membership at or above the specified minimum level is a necessary part of this scheme.

Views of submitters

- 4.12 About one third of submitters who addressed the 15 member requirement preferred the status quo. They thought that keeping a high minimum number encouraged community involvement and discouraged proliferation of very small groups. Some foresaw that if membership could be as low as say five, virtually every member might have to be a committee member and maintaining quorums would be difficult. Many thought that there was not any clear case for change.
- 4.13 The balance of submitters stating a preference favoured some sort of reduction in the minimum requirement. The most common preference of those wanting a change was a five member minimum. Most others favoured minimums of between seven or 10. A few submitters simply

⁶⁹ Incorporated Societies Act 1908, s 4(1).

⁷⁰ Incorporated Societies Act 1908, s 10.

⁷¹ Associations Incorporation Reform Act 2012 (Vic), s 3; Associations Incorporation Act 2009 (NSW), s 6.

suggested the minimum be lowered without stating an exact preference. One or two submitters suggested that there could be different minima for different types of group.

- 4.14 The main reason stated for reducing the minimum number was that 15 individual members was difficult for some organisations to achieve, particularly for some small sport and hobby societies or social service organisations. One submitter commented that harmonisation with Australia would be useful.
- 4.15 Many submissions, regardless of the number of members proposed, agreed that the new Act should make it clear whether the society needs to maintain the set level of membership, after incorporation.

Our recommendation

- 4.16 We consider that the minimum membership requirement should be reduced to 10 members. Corporate members should continue to count as three members for this and other purposes.⁷² We also propose that the new Act contain a definition to clarify the requirements for a corporate member.
- 4.17 As stated above, 10 members may appear a somewhat arbitrary figure, but it strikes a balance between increased flexibility for small sport and hobby societies as well as social service organisations, while ensuring that incorporated societies remain membership-based. This number also takes into account the views of submitters which provided reasonable support for lowering the minimum requirement.
- 4.18 The requirement to maintain membership at not less than 10 members should be clarified. The purport of the amended provisions will be that a society does not lose its incorporated status and its actions do not become invalid merely because its membership drops to nine members or less. However the Registrar may give six months notice to any society that has insufficient members, and must remove the society from the register if the notice period (and any extension granted by the Registrar) elapses and the society has not satisfied the minimum requirement.
- 4.19 The Registrar does not currently receive regular information about societies' membership, though the Registrar can request details of a society's membership register if required.⁷³ There is little point confirming that the minimum membership level is a continuing requirement if the Registrar does not have the necessary information to verify compliance. We discuss lodging of annual statements and returns in chapter 6. We consider that each annual return must include a membership total, broken down into classes of membership if necessary and certified correct by an officer of the society.

R5 The minimum membership requirement for incorporation of a society under the new statute should be 10 members, with 10 applicant members to be named on any application for incorporation. Corporate members should continue to count as three members.

R6 The statute should provide that:

- a. the minimum membership requirement continues after incorporation;
- b. a society that falls below the 10 member requirement is not automatically deemed de-registered, nor are its actions invalidated only because it has insufficient members;

⁷² See Incorporated Societies Act 1908, s 31.

⁷³ Incorporated Societies Act 1908, s 22.

- c. the Registrar may give not less than six months notice to any society that has insufficient members that it must bring its membership up to the required level or it will be removed from the register and its assets distributed in accordance with the society's constitution and the Act.

NAMES OF SOCIETIES

4.20 Section 11(1) of the Act provides that a society cannot be registered under a name which:

... is *identical* with that of any other society registered under this Act, or of a company carrying on business in New Zealand (whether registered in New Zealand or not), or of any other body corporate established or registered in New Zealand under any Act, or *so nearly resembles* that name as to be calculated to deceive, except where that other society or company or body corporate, as the case may be, signifies its consent in such manner as the Registrar requires, and the Registrar is satisfied that registration of the society by the proposed name *will not be contrary to the public interest*.

(2) Except with the consent of the High Court, no society shall be registered by a name which, in the opinion of the Registrar, is *undesirable* (emphasis added).

4.21 This provision is similar, but not the same, as the naming provisions in the Companies Act 1993.⁷⁴ The Companies Act requires applicants to reserve an intended name prior to registration.⁷⁵ The Incorporated Societies Act has no equivalent to this, although the Registrar has in the past operated an informal system to allow intending societies to reserve their preferred name, before submitting a registration application. More significantly, the restrictions in s 22(2) of the Companies Act on identical, nearly identical and “undesirable” names are different:

(2) The Registrar must not reserve a name—

- (a) the use of which would contravene an enactment; or
- (b) that is identical or almost identical to the name of another company or another company under the Companies Act 1955; or
- (c) that is identical or almost identical to a name that the Registrar has already reserved under this Act or the Companies Act 1955 and that is still available for registration; or
- (d) that, in the opinion of the Registrar, is offensive.

4.22 Apart from the separate issue of whether societies need or could benefit from a name reservation system, we think that there are likely to be benefits for societies in adopting the Companies Act naming criteria. Company registrations have the advantage of scale, meaning that a reasonable body of law and practice exists as to how the criteria should be applied. For the most part the Companies Act leaves the resolution of disputes over names to intellectual property laws, and the Fair Trading Act 1986. But the High Court has also provided useful guidance about what the statutory criteria mean and how they should be applied. For instance, there is reasonably clear guidance as to how the “offensive” criterion from the Companies Act should be applied.⁷⁶

4.23 By comparison, the existing Incorporated Societies Act criterion “undesirable” is unclear as to scope. Apart from clearly offensive names, what other categories of names should the Registrar consider to be undesirable, and how should the Registrar decide? We asked submitters whether

⁷⁴ Companies Act 1993, pt 4.

⁷⁵ Companies Act 1993, s 20.

⁷⁶ See for example *South Pacific Airlines of New Zealand Ltd v Registrar of Companies* [1964] NZLR 1 (SC), at 5.

it would be appropriate to move to a name regime similar to that in the Companies Act. Our main interest was whether the same tests should be applied under both Acts, but we were also interested to hear submitters' views about name reservation.

Views of submitters

- 4.24 The majority of submitters who responded agreed that it was appropriate to move towards the Companies Act scheme. Some said it would be good to have a consistent approach. Others considered that this would help prevent another society copying an existing society's name. But one submitter correctly pointed out that revised rules for name registration would not prevent nearly defunct societies "squatting" on a desirable name, if the society continued to meet annual filing requirements (though having a requirement to report on membership numbers may help prevent abuse).
- 4.25 A smaller group of submitters opposed adopting provisions similar to the Companies Act. Their reasons included the following:
- Companies and incorporated societies would be able to reserve names and then not use them.
 - Voluntary not-for-profit societies are not companies and they should be free to decide whatever name they wish, provided it is not the same as that of an existing organisation. Most not-for-profit organisations would wish to emphasise their unique characteristics and choose a name that reflects that uniqueness.
 - The current provision is adequate and should be retained.
- 4.26 The New Zealand Law Society took the view that the present legislative provisions appear to work well in practice so there seems to be no compelling reason for any change, although there may be merit in having one register for all names for incorporated bodies and provision for societies to reserve names.

Discussion

- 4.27 We agree with the Law Society that the current provisions work reasonably well, in the sense that there is no evidence of societies frequently being in conflict over names or having to spend significant effort obtaining or retaining rights to names. We nevertheless consider that it would be worthwhile adopting the Companies Act regime, or parts of it, for several reasons.
- 4.28 We acknowledge that the current regime for incorporated societies already prevents the registration of names that are identical or similar to the name of another society, company or body corporate. However, we consider that adopting the Companies Act regime would provide a much simpler, more predictable and more efficient basis for decision-making. Using the Companies Act regime would mean that the Registrar would not be required to make an evaluative judgement as to whether a proposed name "so closely resembles" another name as "to be calculated to deceive". A society would also not have to seek the consent of the other society, company or body corporate whose name the proposed name resembles and decide whether "the registration of the proposed name would be contrary to the public interest". Most importantly, we think that the "identical or nearly identical" test will be much easier for intending societies to understand and apply. Similarly, it will be far easier for societies to avoid submitting "offensive" names than trying to work out whether their chosen name might be "undesirable" in some way.
- 4.29 The Registrar advises that adopting the Companies Act approach may reduce registration costs for incorporated societies as it would allow for the automation of name searches so that societies would be able to be registered more quickly than at present. Further, the Registrar noted that only a small percentage of societies would likely have any need to become involved in litigation

under the Fair Trading Act or intellectual property laws over the use of a name. Therefore overall, societies would not bear greater costs as a result of the reform, and may have their costs reduced.

- 4.30 We recognise however that societies' interests in names may still overlap with other corporate entities apart from companies, for example incorporated charitable trust boards. We therefore propose that the rejection of names that are identical or nearly identical to another body corporate's name should continue to apply to other registered bodies corporate, as well as societies and companies, but without the present option to seek consent from another body corporate to a nearly identical name. A consent option would produce a more complex process, and is not needed given the change to the test.
- 4.31 We are not persuaded that societies would benefit from being able to reserve names prior to registration. Section 20 of the Companies Act requires the reservation of a proposed company name prior to registration. This can be for up to 20 working days, which can be extended for a further 20 working days on application to the Companies Office. Incorporated societies could arguably require a longer period of time than companies, as they are often established by volunteers in the community and are likely to require more time to reach the necessary decisions and apply for incorporation. However, in the absence of evidence of competition for desirable names, intending new societies may still find it simpler to handle approval of names at the same time as all other registration formalities, as they do now. It is straightforward for applicant members of a proposed new society to search the register to check a name's availability. In the circumstances, we cannot see any real benefit, administratively or for societies, in inserting an extra step in the registration process.
- 4.32 We therefore propose that the Companies Act criteria for names be introduced, but without a system for reserving society names in advance of registration.

- R7 The provisions for the names of societies under s 11 of the current Act should be replaced by a provision mirroring company name rules in s 22 of the Companies Act 1993, but without the requirement to first reserve a name. A suitable provision should set out that:
1. An application to approve the name of a society must be sent or delivered to the Registrar with the relevant application to incorporate the society, and must be in the prescribed form.
 2. The Registrar must not approve a name:
 - a. the use of which would contravene an enactment; or
 - b. that is identical or almost identical to the name of another society, a company registered under the Companies Act 1993 or any other body corporate that is registered under a New Zealand Act; or
 - c. that, in the opinion of the Registrar, is offensive; or
 - d. if the name does not include either the word "Incorporated" or the word "Manotōpu", or both words, as the last word or words of the name.
 3. The Registrar must advise the applicant by notice in writing whether or not the Registrar has approved the name and if the proposed name has been rejected the reason for rejection.

BRANCH SOCIETIES AND FEDERAL STRUCTURES

Current law on branch societies

- 4.33 The Incorporated Societies Act 1908 did not provide for branch societies. A separate Act, the Incorporated Societies Amendment Act 1920, provides that branch societies or groups of branch societies may be incorporated by registered parent societies.⁷⁷ The 1920 Amendment Act has never been consolidated into the 1908 Act, but s 1 of the Amendment Act provides that the Amendment Act is to be read together with and deemed part of the 1908 Act.
- 4.34 Branches once incorporated have the same range of powers as societies directly incorporated under the 1908 Act, for instance to own property and undertake activities consistent with their rules.⁷⁸ However members of branches automatically remain members of the parent society and remain subject to their obligations to the parent society, however arising.⁷⁹ These arrangements mean there is ample scope for conflict if a branch and society develop differing priorities or views over, for instance how property is to be managed or income is to be collected or applied.
- 4.35 Sections 2, 3 and 4 of the Incorporated Societies Amendment Act 1920 set out the requirements and process to be followed to incorporate branches of societies (or groups of branches).⁸⁰ The requirements largely mirror those for incorporating a society, including that the branch must have at least 15 members and the majority of the members of the branch or each of the branches in the proposed group consent to the incorporation. One particular requirement from s 4 is that the Registrar must be satisfied that the rules of the branch are not inconsistent with those of the society. This would appear to retain some level of hierarchical control of society over branch, which would help resolve potential conflicts albeit at the expense of local autonomy. But there is nothing in the 1920 Amendment Act to make this a continuing obligation, meaning societies and branches can and sometimes do have conflicting rules.
- 4.36 In recent years, the 1920 Amendment Act has been the subject of litigation by Federated Farmers. The Court of Appeal has held that branch societies are autonomous:⁸¹
- But once formed, a branch is "truly" incorporated with its own separate corporate personality, which enables it to own its own property, and to attend to financial matters. The legislation itself recognises this "separateness": s 5 of the 1920 Act applies the provisions of the 1908 Act to branches including the legal consequence of separate corporate personality.
- 4.37 Mark von Dadelszen has helpfully set out key principles that were articulated in the earlier *Federated Farmers* District Court decision:⁸²
- The object of the Incorporated Societies Amendment Act 1920 was to enable incorporated branches to become separate and independent legal entities, and the underlying purpose of the 1920 Amendment Act was to enable branches to hold funds and property in their own right.
 - In the absence of a membership contract by which a branch is a member of the parent body, an incorporated branch is not in any relevant legal sense part of the parent body. The 1920 [Amendment] Act does not make incorporated branches subservient, subordinate or accountable to

77 Incorporated Societies Amendment Act 1920, s 2.

78 Incorporated Societies Amendment Act 1920, s 5.

79 Incorporated Societies Amendment Act 1920, s 6.

80 So far as we can tell, the ability to incorporate groups of branches is rarely used today. It is difficult to see any useful purpose for this option, and we recommend it be dispensed with.

81 *Federated Farmers of New Zealand Inc v Federated Farmers New Zealand (Northland Province) Inc* CA 144/04, 23 June 2005 at [93].

82 Mark Von Dadelszen *Law of Societies in New Zealand* (3rd ed, LexisNexis, Wellington, 2013) at 78; discussing *Federated Farmers of New Zealand Inc v Federated Farmers New Zealand (Northland Province) Inc* [1998] DCR 1044.

the similarly incorporated parent body, nor does it require them to pay membership levies to the parent body or to agree to future changes to the rules of the parent body.

- Members of branches are automatically members of the parent body, creating a dual membership situation.
- By rules constituting an interrelationship or by contract, parent and branch societies may create legally binding obligations, but these will not be readily implied. Such obligations might, for instance, require branches to adopt rules prescribed from time to time by the parent body and to pay membership levies to the parent body.
- Nothing in the 1920 [Amendment] Act assists when a separately incorporated parent and branch cease to co-exist peacefully.

4.38 The inability of societies to impose requirements on their branches, including regarding membership levies does not preclude the society from making and enforcing rules in respect of its members, who include all members of branches pursuant to s 6 of the 1920 Amendment Act. The scope for on-going problems is obvious. The *Federated Farmers* litigation has confirmed the general autonomy of branches, but also underlines that the current legislative provisions are potentially unworkable, should disputes arise.

Issues with branches

- 4.39 The cases illustrate that the current legislative scheme may lead to disputes between societies and branches, or lead to relationships and administrative arrangements that neither the society nor the branch are satisfied with. It would be helpful if the legislation provided clearer guidance on respective branch and society rights and obligations, or at the very least mandated a process for resolving differences over these, should they arise.
- 4.40 Do we still need the option for an incorporated branch of a society? If branches are autonomous, why not have them incorporate as societies like all others? To the extent that many will still wish to operate as national bodies and local branches, this could be achieved by the adoption of suitable rules by society and branches, or relationship agreements setting out how society and branches will work together, or a combination of these two strategies. Societies could retain dual membership if they wish, by providing in their rules that members of branches are automatically members of the society. Alternatively, branches and societies could develop different membership models, for instance with branches comprising the membership of the society, as corporate members.
- 4.41 Some not-for-profit organisations today prefer to operate within a federal structure that enables the opportunity to co-operate, often nationally. The society and branches model in the legislation is unlikely to suit groups seeking federal structures. The 1920 Amendment Act provisions require a society to exist first and then apply to incorporate branches. A federal model may develop from a number of societies wishing to set up a federal “umbrella”.
- 4.42 Societies wanting to act collectively or federally can already do so under the 1908 Act, and will be able to do so under the new statute.

Views of submitters

- 4.43 We asked submitters whether the current provisions for branches created any problems and if so how they could be altered to avoid those problems. We also asked submitters whether they thought there was still a need for branches.
- 4.44 Just under half of the submitters who responded thought that there were problems with the current branch provisions, reflecting the issues we have described. Some submitters considered that branch structures were outmoded, too top-down and inflexible. But a small number of

submitters saw a need for strong central control, with branches being clearly subsidiaries of the parent.

- 4.45 Some particular problems were mentioned. Situations where a bequest or donation was intended for a branch but was instead brought in to the national organisation, have caused friction. For other societies how membership fees that are collected in branches should be spread across the organisation, was an issue. Some branches also considered that competing successfully for funding was more difficult as a branch rather than as a standalone society. Some of the issues that submitters raised, such as issues with donations and application of fee income are not problems with the legislation, but the particular rules of a parent society, or are simply issues that will arise where there are branch structures.
- 4.46 Almost half of the submitters who responded to our second question thought that there is still a need for branch societies and a smaller number thought the opposite. There were also a few submitters who preferred branches to be clearly subordinate to the parent society rather than autonomous, so that the parent society can control or direct the branch society.

Our recommendation

- 4.47 Our view is that if the incorporated societies legislation were being drafted today from scratch, it would not have provided separately for branches. Groups wanting to set up a national organisation and branch structure could instead arrange to incorporate as many societies as needed for their branch structure. Branch operations and relationships with the national body could be provided for in contracts between the parent society and the branch societies and in their respective rules. The exact nature of the relationships, including issues such as whether members would have double membership, would be a matter for the societies and their rules, not the legislation. The question of what happens when relationships between a parent society and a branch society break down, or when a parent society or branch is dissolved, could also be resolved through contracts and the relevant rules, including the grievance procedures that we recommend in chapter 9 each society should be required to establish.
- 4.48 The 1920 Act has been in place for 93 years. It is not possible to tell from the register exactly how many entities are registered as branches or groups of branches rather than as societies. A simple search for bodies on the register that have “branch” as part of their title gathered nearly 500 entities, though spot checks suggest that many of these have been simply incorporated as societies, not branches. We expect that some other entities not styled as “branches”, especially some long established incorporations, may have been formally incorporated as branches under the 1920 Amendment Act. So there are at least several hundred entities incorporated as branches.
- 4.49 Feedback from submissions confirms that many organisations are operating as societies and branches under the provisions of the 1920 Amendment Act. Most are operating successfully, and have resolved for themselves, where necessary, any issues arising out the statutory provisions such as the effects of dual membership or potential inconsistency between society and branch rules. There is no pressing need to compel branches into becoming societies, albeit with interlocking rules to their previous parent societies.
- 4.50 We accept that some societies and branches will struggle to agree on necessary constitutional or contractual changes, and a change imposed by statute may upset existing relationships, cause considerable tension and require otherwise unneeded work. For this reason we recommend that while there ought to be no new branches registered under the 1920 Act, those that are currently registered should continue as societies but with the benefits and obligations of branches created under the 1920 Act, as if that Act had not been repealed. There should be a provision in the

new statute that enables branches to transition easily to the full status of a society under the new statute, provided that both the members of the old branch and old parent society agree.

- R8 The Incorporated Societies Amendment Act 1920 should be repealed when the new statute comes into force.
- R9 The statute should make no separate provision for incorporation of branches, but any branch to be incorporated may be incorporated as a society in the normal way.
- R10 Any new branch incorporated as a society and its parent society may make constitutional amendments, enter into contracts to define their relationship or both, which should be registrable, but the Act should not place any restrictions or additional requirements on these other than those applying to all societies.
- R11 A grandparenting provision should be included in the statute and provide that branches incorporated under the Incorporated Societies Amendment Act 1920 will be described as societies from the commencement of the new Act; but ss 6 and 7 of the Incorporated Societies Amendment Act 1920 will continue to apply to each former branch and its parent society as if the Amendment Act had not been repealed.
- R12 The statute should provide that any former branch and parent society may at any time after commencement of the new Act choose to remove the application of the repealed provisions to their societies by providing appropriate notice to the Registrar.

Federal structures

- 4.51 We do not think that it is necessary to expressly provide for federal structures in the Act. Societies already adopt a range of federal structures that appear to work well for their organisations. Providing for one kind of federal structure in the Act may hamper existing structures and will not add any value to the operations of societies involved in federal groupings. A key benefit of the incorporated society model is its simplicity. This makes it adaptable to differing or developing circumstances. Societies can choose now whether to adopt the incorporated society form for any federal or umbrella body and can craft membership arrangements and rules that suit them. We expect that to continue.

Chapter 5

The Legal Dealings of an Incorporated Society

- 5.1 Gaining a separate legal personality is at the heart of why societies incorporate. In this chapter we recommend changes to the Incorporated Societies Act 1908 to bring it into line with modern models of incorporation.
- 5.2 In *Issues Paper 24* we raised issues relating to the effect and nature of incorporation for an incorporated society. In particular, we asked questions relating to the current limitation on members' liability, corporate capacity and the potential application of the ultra vires doctrine.⁸³ We asked principally whether there ought to be closer alignment between the way incorporation is described in the Incorporated Societies Act and the way that these are dealt with in the Companies Act 1993.
- 5.3 We received comprehensive submissions from the New Zealand Law Society (NZLS) and the Auckland District Law Society (ADLS). Those submissions confirmed that updating what the Act says about the corporate capacity of incorporated societies is essential for a modern statute.
- 5.4 In its submission, ADLS made a strong case for alignment, where possible, between the Companies Act and a new Incorporated Societies Act; there being advantage in consistent wording reflecting consistent policy. NZLS suggested making use of provisions from different jurisdictions, most notably from British Columbia.

LIMITATION OF LIABILITY

- 5.5 Section 13 of the 1908 Act provides:
- Except when otherwise expressly provided in this Act, membership of a society shall not of itself impose on the members any liability in respect of any contract, debt, or other obligation made or incurred by the society.
- 5.6 This is slightly different from the equivalent provision in the Companies Act which gives limited liability to shareholders in the following terms:⁸⁴
- (1) Except where the constitution of a company provides that the liability of the shareholders of the company is unlimited, a shareholder is not liable for an obligation of the company by reason only of being a shareholder.
 - (2) Except where the constitution of a company provides that the liability of the shareholders of the company is unlimited, the liability of a shareholder to the company is limited to—
 - (a) any amount unpaid on a share held by the shareholder:
 - (b) any liability expressly provided for in the constitution of the company:
- [. . .]

⁸³ Law Commission *Reforming the Incorporated Societies Act 1908* (NZLC IP24, 2011) at [Q 2],[Q29] and [Q 30] [*Issues Paper 24*].

⁸⁴ Companies Act 1993, s 97.

- (3) Nothing in this section affects the liability of a shareholder to a company under a contract, including a contract for the issue of shares, or for any tort, or breach of a fiduciary duty, or other actionable wrong committed by the shareholder.

We recommend that the provision in the new statute should be modelled on this provision but that “shareholders” and “shares” are obviously changed to “members” and “membership”.

- 5.7 One concern expressed during consultation was that members might be exposed to liability in tort, or to a civil wrong as a result of being actively involved in a society. For example, where a person who has volunteered to cook for a meeting leaves an element on causing a fire, which damages the building in which the meeting is being held. The normal principle of civil liability is that the person is personally liable for the damage, although the incorporated society might also be held vicariously liable for the person’s actions.
- 5.8 In some circumstances, this has been a particularly controversial issue in New Zealand company law. Since *Trevor Ivory Ltd v Anderson* in 1992, it is possible that a director of a company who commits a tort or civil wrong might be held not to have committed it in his personal capacity, but in his capacity as a director of the company, and therefore the company alone would be liable.⁸⁵ In that case it was held that a director of a one man weed-spraying company was not liable for the advice that he gave in relation to the application of Roundup poison to kill weeds around a raspberry patch. The Court of Appeal held that it was the company as opposed to the person who had given the advice.
- 5.9 Some submissions were concerned at the exposure of members to the potential of personal liability when they are trying to do the work of the incorporated society. We consider that while these are valid concerns, the limitation of liability provision in the Act is not designed to deal with them.
- 5.10 The decision in *Trevor Ivory* has received severe criticism from academic commentators who have maintained that it confuses the issue of whether someone might be personally liable, with the issue of whether the company in question might also be directly liable for the tort that has been committed.⁸⁶ A preferable way of dealing with this issue is to make it clear in the statute that an incorporated society can indemnify its members who act in good faith in pursuance of the purposes of the society, and that it can arrange appropriate insurance to cover that indemnity. We discuss whether societies should be able to indemnify their officers against any personal liability in chapter 6.

R13 The statute should provide that a member is not liable for an obligation of the society by reason only of being a member. The provision should be aligned to that in s 97 of the Companies Act 1993, with the necessary changes.

R14 The statute should expressly allow societies to indemnify members and employees who act in good faith in pursuance of a society’s activities, and allow societies to take insurance, if they so wish, for the purposes of that indemnity.

⁸⁵ *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).

⁸⁶ See for instance the articles listed in *Body Corporate 202254 v City Rental Trustees Ltd and Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [30]; Neil Campbell “Claims Against Directors and Agents” [2003] NZLJ 109; Ross Grantham and Charles Rickett “Directors’ ‘Tortious’ Liabilities: Contract, Tort or Company Law?” (1999) 62 MLR 133; Ross Grantham and Charles Rickett “Company Directors’ Liability for Torts” [2003] NZLJ 155; Samuel D Carpenter “Directors’ Liability and Leaky Buildings” [2006] NZLJ 117; Greg Seagar and Caroline Eric “Affirmation and Clarification of *Trevor Ivory*” [2006] NZLJ 268; Peter Watts “*Trevor Ivory v Anderson* — Reasoning from the Wrong Planet” *NZ Lawyer* (New Zealand, 15 December 2006).

CORPORATE CAPACITY

5.11 In *Issues Paper 24*, we referred to another distinction between the Companies Act and the Incorporated Societies Act,⁸⁷ namely, the Incorporated Societies Act does not provide that the society has the powers of a natural person, but rather states:⁸⁸

Upon the issue of the certificate of incorporation the subscribers to the rules of the society, together with all other persons who are then members of the society or who afterwards become members of the society in accordance with the rules thereof, shall, as from the date of incorporation mentioned in the certificate, be a body corporate by the name contained in the said rules, having perpetual succession and a common seal, and capable forthwith, subject to this Act and to the said rules, of exercising all the functions of a body corporate and of holding land.

5.12 In contrast, the Companies Act provides:⁸⁹

- (1) Subject to this Act, any other enactment, and the general law, a company has, both within and outside New Zealand,—
 - (a) full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and
 - (b) for the purposes of paragraph (a), full rights, powers, and privileges.
- (2) The constitution of a company may contain a provision relating to the capacity, rights, powers, or privileges of the company only if the provision restricts the capacity of the company or those rights, powers, and privileges.

5.13 On occasion, there has been a question as to whether incorporated societies have a capacity that is not given specifically in its rules. While it appears that New Zealand courts might be prepared to take an expansive approach to capacity, it is far better for the statute to state explicitly what legal capacity those societies have.⁹⁰

5.14 The two Law Societies' submissions were broadly in favour of adopting the Companies Act provisions. One difference between the proposal from ADLS and NZLS is that NZLS suggests adopting a provision from the British Columbian legislation. This legislation, in addition to saying that an incorporated society has the powers of a natural person, goes on to specify a number of particular powers:⁹¹

- (1) From the date of the certificate of incorporation, the members of a society are members of a corporation
 - (a) with the name contained in the certificate,
 - (b) having perpetual succession,
 - (c) with the right to a seal, and
 - (d) with the powers and capacity of a natural person of full capacity as may be required to pursue its purposes.
- (2) The powers referred to in subsection (1) include but are not limited to the following powers:
 - (a) to buy, sell, exchange, develop and mortgage property;
 - (b) to borrow money and give security for it and secure or purchase money obligations;

87 *Issues Paper 24*, above n 83, at [4.1].

88 Incorporated Societies Act 1908, s 10.

89 Companies Act 1993, s 16.

90 *Walker v Mt Victoria Residents Association Inc* [1991] 2 NZLR 520 (CA).

91 Society Act RSBC 1996 c 433, s 4.

- (c) to issue negotiable instruments;
- (d) to receive and make gifts;
- (e) to enter contracts and leases;
- (f) to employ persons;
- (g) to belong to other societies or associations, whether or not incorporated, with similar purposes or purposes beneficial to the society.

(3) A society may sue and be sued, contract and be contracted with, in its corporate name.

- 5.15 The advantage of the British Columbian approach over that of the Companies Act is it makes clear that there are particular powers given to an incorporated society within the general capacity of incorporation. It may be an advantage for an incorporated society to be able to point to those powers when negotiating with third parties.
- 5.16 We have made a similar recommendation in our forthcoming review of the law of trusts regarding whether certain powers of trustees ought to be set out in legislation as a way of giving comfort to those dealing with the trustees.⁹² In that report, we will recommend that a new Trusts Act should provide that, as a default position, a trustee has the powers of a natural person, but that the terms of a trust deed may override this default position. That recommendation recognises that there may be important reasons why a settlor of a trust might want to limit the capacity of trustees to do particular things.
- 5.17 Before the new statute comes into force however, the relevant publicity should clearly tell societies of this provision, and sufficient time should be given for them to alter their constitutions, if they so wish, to avoid these powers. This would be particularly important in relation to those powers that relate to investing or borrowing money, which must be separately provided for in societies' rules at present.⁹³

R15 The statute should provide that a society has full capacity to carry on or undertake any business or activity, do any act or enter any transaction. The provision should be aligned to that in s 16 of the Companies Act 1993, but it should also state, for avoidance of doubt, that a society has the following powers (unless expressly negated in the society's constitution):

- to buy, sell, exchange, develop and mortgage property;
- to borrow money and give security for it;
- to issue negotiable instruments;
- to receive and make gifts;
- to enter contracts and leases;
- to employ persons; and
- to belong to other societies or associations, whether or not incorporated, with similar purposes or purposes beneficial to the society.

⁹² Law Commission's final report on the review of the law of trusts, due to be tabled in Parliament in August 2013.

⁹³ Incorporated Societies Act 1908, s 6(1)(i) and (j).

ULTRA VIRES

5.18 As explained in *Issues Paper 24*, ultra vires is an old common law doctrine based on the simple logic that if a corporation is bound by a constitution, articles of association (in the case of companies before 1993), or rules (in the case of incorporated societies), those bodies cannot act outside those rules:⁹⁴

The ultra vires doctrine could result in injustice to those who had honestly dealt with a corporation, while being unaware of the restrictions imposed upon the corporation by either its purpose or its rules. It was also possible for those who dealt with the corporation to use the doctrine against the corporation itself. This could occur by refusing to comply with what would otherwise have been a contractual obligation owed to the corporation but which it turns out the corporation could not itself have entered into in terms of its rules.

5.19 Developments in the ultra vires doctrine at common law may have affected the doctrine in relation to incorporated societies. However, there remains the risk that certain transactions might still be held to be invalid as a result of the doctrine.

5.20 In New Zealand, the ultra vires doctrine was effectively removed from company law in 1986. The current relevant provisions are ss 17 and 18 of the Companies Act 1993. Section 17(1) provides the general provision that transactions cannot be invalidated merely because of a lack of capacity:

No act of a company and no transfer of property to or by a company is invalid merely because the company did not have the capacity, the right, or the power to do the act or to transfer or take a transfer of the property.

5.21 Australian association statutes adopt a modified reform which would still enable members to invalidate transactions but which would protect third parties who were unaware of the potential incapacity when they completed the transaction.⁹⁵ The Companies Act achieves the same protection through s 18, which provides that a company cannot assert its own incapacity against a third party unless “the person has, or ought to have, by virtue of his or her position with or relationship to the company, knowledge of the matters”.

5.22 The two Law Societies’ submissions preferred the Companies Act model. NZLS took the view that the Australian approach was a minimum, but the Companies Act model was a logical consequence of giving the incorporated society full capacity. We agree that it makes sense to use the Companies Act provisions in ss 17 and 18, with appropriate changes. We have given thought to whether the Australian provisions should be preferred, but have decided that there is merit in maintaining consistency with the Companies Act.

5.23 We said in *Issues Paper 24* that it may be important to maintain the rights of members to restrict what an incorporated society can appropriately do and that this should be recognised in the statute.⁹⁶ There was general agreement in our consultation meetings that this was important. The Companies Act provides that nothing in s 17 prevents shareholders from taking action to prevent the directors of the company from doing something in breach of the constitution.⁹⁷ We would recommend that the new statute incorporate, with appropriate changes, the equivalent provisions that would allow members to apply to restrain the society from breaching its

94 *Issues Paper 24*, above n 83, at [4.4].

95 See for instance, Associations Incorporation Act 1985 (SA), s 27; Associations Incorporations Act 2009 (NSW), s 24.

96 *Issues Paper 24*, above n 83, at [4.8]-[4.9].

97 Companies Act 1993, s 17(2) provides:

Subsection (1) does not limit—

(a) section 164 (which relates to injunctions to restrain conduct by a company that would contravene its constitution); or...

(3) The fact that an act is not, or would not be, in the best interests of a company does not affect the capacity of the company to do the act.

constitution. In chapter 9 we discuss a new statutory power under which members can apply to the court for orders to enforce rights and obligations under the constitution.

- R16 The statute should provide that no act of a society and no transfer of property to or by a society is invalid merely because the society did not have the capacity, the right, or the power to do the act or to transfer or take a transfer of the property.
- R17 The statute should protect third parties who are unaware of any incapacity when they deal with a society.

SECURITY FOR COSTS AND CORPORATE PERSONALITY

- 5.24 One of the issues raised in a submission by a group with environmental concerns, was that the fact of incorporation may deny the other party in a court proceeding that party's right to costs. At the moment, s 17 of the Incorporated Societies Act 1908 expressly provides:

Where a society is the plaintiff in any action or other legal proceeding, and there appears by any credible testimony to be reason to believe that if the defendant is successful in his defence the assets of the society will be insufficient to pay his costs, any Court or Judge having jurisdiction in the matter may require sufficient security to be given for those costs, and may stay all proceedings until that security is given.

- 5.25 There are two issues. First, whether s 17 is necessary. Both the District and High Court Rules make it clear that security for costs can be awarded against incorporations.⁹⁸ In addition, the leading commentary on the High Court Rules, *McGechan on Procedure*, argues that the section itself is superfluous.⁹⁹ Second, and more substantively, whether reform of the Incorporated Societies Act ought to do anything about this issue. Judgments, principally in the Environment Court, have sometimes emphasised the discretionary nature of the award of security for costs and the importance of the overarching nature of the public interest.¹⁰⁰ The fact that an incorporated society may be impecunious itself, is not necessarily a conclusive factor for the award of security for costs if there is an overriding public interest.¹⁰¹
- 5.26 We understand the tenor of the submission we received to be that judges often do not award security for costs because of the public interest concerns and hence any costs awarded to a successful party at the end of the proceedings are valueless. However, the appropriate place to deal with this concern is not in an Incorporated Societies Act as such, but in the reform of the civil procedure rules.

- R18 The new statute should not include a provision relating to security for costs.

98 Judicature Act 1908, sch 2, r 5.45 (High Court Rules); District Court Rules, r 4.20.

99 *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR5.45.16].

100 For an example of the impecuniousness of the society leading to a requirement for security for costs, see *Nelson Gambling Taskforce Inc v Nelson City Council* HC Nelson CIV-2010-442-368, 16 December 2010.

101 For a review of the principles in the environmental context, see *Official Bay Heritage Protection Society Inc v Auckland City Council* HC Auckland CIV 2006-404-005947, 26 February 2007 per Rodney Hansen J.

Chapter 6

Committees, officers, duties and arrangements for running societies

- 6.1 This chapter makes recommendations about the duties and obligations of those members of a society (called officers) who are elected or appointed to a committee to govern or run the society.
- 6.2 The topics considered in the chapter are:
- governance arrangements, including whether societies should have committees;
 - whether there should be a code of duties for officers and other members of a society who exercise significant influence over the governance of the society, and how breaches of duties by officers should be addressed;
 - how conflicts of interest should be managed; and
 - whether annual reporting obligations should be imposed on officers of incorporated societies.
- 6.3 The chapter also considers whether the duties and conflict of interest obligations imposed on the officers of a society, should also extend to other members of the society occupying positions that allow them to significantly influence the management or administration of the society.

GOVERNANCE ARRANGEMENTS

- 6.4 The Incorporated Societies Act 1908 does not require societies to have any particular governance structures or arrangements. It does not, for example, require a society to have a committee to run the society's affairs nor does it require a society to have any particular officers or office holders.
- 6.5 However, the Act does assume that all societies will have some officers with responsibility for ensuring the society complies with its various legal obligations. Section 6(1)(g) requires that the rules of every society provide for the appointment of officers of that society. There is also an assumption underpinning other sections of the Act that there will be officers with responsibility for ensuring the society complies with the various requirements imposed by the Act.¹⁰² Indeed the notion of corporate personality requires somebody with the power and responsibility to make decisions and act for the entity.
- 6.6 As was discussed in *Issues Paper 24*, the more recent Australian counterparts to our aging Act contain express requirements in this area.¹⁰³ Both the New South Wales and Victorian statutes, for example, impose minimum governance requirements on societies.¹⁰⁴ In New Zealand, the Companies Act 1993 also imposes minimum governance arrangements on companies.¹⁰⁵

102 See for example Incorporated Societies Act 1908, ss 23A and 23B.

103 Law Commission *Reforming the Incorporated Societies Act 1908* (NZLC IP24, 2011) at [3.1] [*Issues Paper 24*].

104 See for example Associations Incorporation Reform Act 2012 (Vic), ss 82-87 (on duties of office holders); Associations Incorporation Act 2009 No 7 (NSW) s 31 (on conflict of interest).

105 Companies Act 1993, ss 131-138 (on directors' duties).

- 6.7 We consider that a new Act similarly should clearly set out the governance arrangements that societies must have in place.

Should societies be required to have committees?

- 6.8 The Companies Act requires all companies to have one or more directors to manage or supervise the affairs of the entity.¹⁰⁶ The directors, or the single director if there is only one, constitute a board of directors and the business and affairs of the company must be managed by, or under the direction or supervision of the board.¹⁰⁷
- 6.9 Both the Victorian and the New South Wales statutes require societies to have committees to manage their affairs. The Victorian statute provides that the rules of an incorporated association must make provision for the name, membership and powers of the committee or body having responsibility for managing the incorporated association.¹⁰⁸ The New South Wales statute requires every association to have a management committee with three or more members, with at least one member normally resident in Australia and all members aged 18 or over.¹⁰⁹

Submitters' views

- 6.10 Submitters were asked whether societies should be required to form committees responsible for running the society. Most acknowledged that clearly defined governance structures, clear roles for officers and processes that supported good governance were advantageous to societies. However, views were divided on the extent to which a new Act should prescribe arrangements for societies.
- 6.11 More than half of the submitters who addressed this issue considered that requiring committees was too prescriptive and argued that societies are best able to determine their structures. Some of these submitters acknowledged the benefits of having committees but were uncomfortable about such arrangements being prescribed by legislation.

Discussion

- 6.12 We consider that it is desirable for an incorporated society to have some form of committee to make decisions and run its affairs. While most societies already appoint a number of officers who form a committee, some do not, and will not wish to structure their affairs in such a way. If such a society has a reasonably small membership, it may choose to provide that all society members are the committee members. However we consider that maintaining even a small committee is a necessary safeguard, to help ensure that each society will have officers or representatives able to act or liaise with the Registrar when required.
- 6.13 We have kept the prescription to a minimum, and recommend that the statute require every society to have a committee of at least three members. We accept however, that the optimum size for a committee would typically be bigger than this. It follows that every society's constitution must contain rules providing for the composition, roles and functions of that committee.
- 6.14 We deal with qualifications and disqualification of committee members in the following section, when we deal with the related issue of the qualifications for a statutory officer for each society.

¹⁰⁶ Companies Act 1993, s 150.

¹⁰⁷ Companies Act 1993, s 128.

¹⁰⁸ Associations Incorporation Reform Act 2012 (Vic), ss 3 and 77.

¹⁰⁹ Associations Incorporation Act 2009 (NSW), ss 28(2) and 28(3).

- R19 The statute should provide that every society must have a committee of at least three members which has responsibility for the affairs of the society.
- R20 The statute should require that the constitution of the society contain rules that set out the composition, roles and functions of the committee including:
- the number of members that may be on the committee;
 - the election or appointment of committee members;
 - the terms of office of committee members;
 - qualifications for appointment; and
 - grounds for removal from office.

Should societies be required to have a statutory officer?

- 6.15 The next issue is whether societies should be required to have a statutory officer to undertake the various statutory functions of the society and provide a liaison between the society and the Registrar?
- 6.16 Again the Australian statutes require the appointment of certain officers to undertake essential functions. New South Wales requires each association to have a public officer appointed to be the liaison between the Registrar and the association.¹¹⁰ The public officer must be a natural person (not a corporate person) and be aged 18 or older and resident in New South Wales.¹¹¹ The Victorian statute requires an incorporated association to have a secretary.¹¹² The secretary must be an individual person, be at least 18 years old and be resident in Australia.¹¹³
- 6.17 About three-quarters of submitters considered societies should have at least one statutory officer, responsible for interactions with government and others. The remainder disagreed and said that societies should address the issue in their constitution.
- 6.18 We consider that all societies should have to nominate a member who is accountable to undertake the statutory requirements of the society and whom the Registrar can contact when needed. The identification of a contact point for each society is a necessary aspect of a modern incorporation regime. The statutory officer should be a member of the committee to ensure administrative efficiency and that he or she has full access to information, but it should be up to each society to determine in its constitution which committee member will be the statutory officer.

Restrictions on eligibility for appointment as statutory officer

- 6.19 We have considered whether there should be statutory restrictions on who may be appointed or elected to be the statutory officer.
- 6.20 Both the New South Wales and Victorian regimes prohibit a person from being an officer if he or she is:¹¹⁴
- not resident in Australia;

110 Associations Incorporation Act 2009 (NSW), s 34.

111 Associations Incorporation Act 2009 (NSW), s 34.

112 Associations Incorporation Reform Act 2012 (Vic), s 72.

113 Associations Incorporation Reform Act 2012 (Vic), s 72.

114 Associations Incorporation Reform Act 2012 (Vic), ss 72 and 78; Associations Incorporation Act (NSW), ss 34 and 35.

- under 18 years of age;
 - bankrupt, or has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - a mentally incapacitated person under some form of guardianship order.
- 6.21 Aside from the residency requirement, the other exclusions are concerned principally with a person's legal capacity to contract and deal with property rather than their suitability. Both regimes also provide that only an individual person and not a corporation may be appointed as an officer. Societies may also impose additional qualification requirements in the rules of their association.
- 6.22 The New Zealand Companies Act provisions regarding qualifications for directors are similar in form and exclude people largely on the basis of capacity or a court ordered or Registrar ordered prohibition. The Act provides that a director must be a natural person rather than another corporation, and provides for disqualification of persons affected by similar incapacities as in the Australian associations legislation, including age, bankruptcy or mental incapacity. The Companies Act further confirms the disqualification of anyone prohibited by a court or the Registrar from being or performing as a director or company manager, whether under the Companies Act or related New Zealand securities and takeovers legislation, or the law of another country.¹¹⁵
- 6.23 There is currently no requirement that a company director reside in New Zealand, however, the issue is being considered as part of the Companies and Limited Partnership Amendment Bill 2011.¹¹⁶ The Select Committee report on the Bill suggests a requirement to have at least one director who lives in New Zealand, or who lives in and is a director of a company in a country with which New Zealand has reciprocal arrangements for the enforcement of low-level criminal fines.¹¹⁷

Discussion

- 6.24 We consider that statutory restrictions on who may be a statutory officer, or committee member or officer, should be similar to those for company directors. Societies should be able to impose additional qualification requirements (if they wish) in their constitution.
- 6.25 As in the Companies Act, we think that the statutory officer must be at least 18 years old, have full legal capacity, and must be an individual person rather than a corporation. For other committee members, we consider that it should be up to the society whether it wishes to impose a minimum age. However, committee members should still meet all other requirements for legal capacity. As with the statutory officer, committee members must also be individuals, not corporations.

115 Companies Act 1993, s 151.

116 Companies and Limited Partnerships Amendment Bill 2011 (344-2).

117 Companies and Limited Partnerships Amendment Bill 2011 (344-2) (select committee report), at 2-3.

- 6.26 We also support including a requirement that the statutory officer must live in New Zealand. This would help ensure that there is at least one individual person with a substantive connection with the society who is available and can be questioned about the activities of the society. In certain circumstances that person could more readily be held to account for the society's activities.
- 6.27 In chapter 10 we recommend that the statute should provide a power in the court to ban a person from holding a position of management or governance in a society or from being the statutory officer, if he or she is convicted of an offence under the statute. A person who has been banned under that provision or equivalent provisions in other legislation should be disqualified from being a statutory officer, committee member or other officer of a society.
- 6.28 Finally, the Companies Act provides that if a person is disqualified from being a director but acts as one, then for the purposes of the provisions of the Act that impose the obligations and duties on a director, the person is a director.¹¹⁸ Section 158 also provides that the acts of a person as a director are valid even though the person's appointment was defective or the person was not qualified for appointment. A similar provision should be included in the new Incorporated Societies Act to cover the situation where the statutory officer, other officer or committee member becomes disqualified while in office and continues to act. To protect the society, the disqualified person still acting as a committee member, officer, or statutory officer should continue to be bound by the statutory obligations imposed on them. Also the actions of the person as a committee member, officer or statutory officer should be valid even though the person's appointment was defective or the person was not qualified for appointment.

- R21 The statute should provide that every incorporated society must have a statutory officer at all times. The name and address of that person, and any changes, must be notified to the Registrar.
- R22 The statutory officer of an incorporated society must be a member of the society's committee, and may hold any other office as a committee member or in the society.
- R23 The statute should provide that committee members must be natural persons. A person should be disqualified from being appointed or holding office as a committee member if he or she is:
- a. an undischarged bankrupt;
 - b. prohibited from being an officer of an incorporated society under the new Incorporated Societies Act;
 - c. prohibited from being a director or taking part in the management of an incorporated or unincorporated body under the Companies Act 1993, the Securities Act 1978, the Securities Markets Act 1988, or the Takeovers Act 1993 (or their successors);
 - d. an individual who is subject to a property order made under the Protection of Personal and Property Rights Act 1988; or
 - e. an individual who does not comply with any qualifications for officers contained in the constitution of the society.
- R24 In addition to fulfilling the qualifications for a committee member, the statutory officer must be at least 18 years of age and resident in New Zealand.

R25 The statute should provide the following:

- A statutory officer, committee member or other officer of a society must retire if he or she becomes disqualified.
- If a person is disqualified or banned from being an officer of a society but acts as one, then for the purposes of the provisions of the Act that impose obligations and duties on a statutory officer, committee member or other officer, the person is to be treated as occupying the relevant class of officer.

R26 The actions of any person as statutory officer, a committee member or other officer are not invalid merely because the person's appointment was defective or the person was not qualified for appointment to the relevant office.

DUTIES OF A SOCIETY'S OFFICERS

Introduction

6.29 In this section we consider what provisions the new Act should contain that set out the obligations and duties of those members who are elected or appointed as the statutory officer or to the committee, or who otherwise take on roles within the society that give them significant influence over the affairs of the society. We use the term "officer" in the discussion below to cover all of these people.

Current law

- 6.30 The 1908 Act provides that a society's constitution must prescribe how officers are appointed.¹¹⁹ There are, however, no provisions dealing with the obligations of officers once appointed. The Act says nothing, for example, about conflicts of interest, the obligation to act in the interests of the society, or any prohibition on using a committee position or office for personal advantage.
- 6.31 Although the Act is silent on such matters, case law imposes obligations in these areas on those governing or running incorporated societies. The officers probably owe similar fiduciary duties to their society, as company directors do to their companies.¹²⁰
- 6.32 Depending on the circumstances, Mark Von Dadelszen says these duties may include a duty not to profit from a position of trust and not to allow any conflicts to arise between an executive member's duties and personal interests.¹²¹ In the leading case *New Zealand Netherlands Society "Oranje" Inc v Kuys and The Windmill Post Ltd (Kuys)* the Privy Council agreed that, as a matter of principle, a committee member could not take advantage of business opportunities that arose from his involvement with a society without first disclosing what he was doing.¹²²
- 6.33 Historically, equity has taken a strict approach to duties of good faith. For example, a director was not allowed to put him or herself in a position where his or her interest and duty conflict. In cases where directors have had such conflicts, equity has taken the position that any resulting

119 Incorporated Societies Act 1908, s 6(1)(g).

120 A fiduciary is a position which involves an undertaking to act in the interests of another, in circumstances where the other could be harmed if the "fiduciary" does not act in that person's best interests.

121 Mark Von Dadelszen *Law of Societies in New Zealand* (3rd ed, LexisNexis, Wellington, 2013) at [6.5.4].

122 *New Zealand Netherlands Society "Oranje" Inc v Kuys and The Windmill Post Ltd* [1973] 2 NZLR 163 (PC), agreeing generally that the strict self-dealing duties might apply to dealings with incorporated societies.

contract is voidable at the instance of the company.¹²³ For companies this strict equitable principle has been modified by provisions in the Companies Act. However, for incorporated societies, this is probably still the law.

Issues

- 6.34 Although the duties and obligations of those members who govern an incorporated society are central to good governance, they are not set out in the Act. Because the duties are not found in the Act, they are not clearly understood or easily accessible. Most members taking on a governance role or involved in running a society are not legally trained, and it is understandable that some may not fully understand their obligations.
- 6.35 A further issue is whether the duties that officers owe to their society are sufficiently clear from case law. Much of the case law that is considered relevant has dealt with the duties directors owe to companies. It is likely that the officers of incorporated societies owe similar fiduciary duties to their societies to those that company directors owe to their companies, but there has been very little consideration of duties in the incorporated society context. While it is reasonably clear from the cases that an officer, because he or she holds a position of trust, owes a duty of good faith to his or her society, the extent of most other duties and how they are to be discharged is unclear.
- 6.36 Finally, as illustrated above, some of the obligations and duties as they have developed through case law are too strict. It is probably not appropriate, for example, that societies are able to avoid contracts where disclosure of a conflict has not been made by an officer.

Should officers' duties be in legislation?

- 6.37 In *Issues Paper 24* we indicated that we thought the reasons for including a code of duties in a new Act were quite compelling, although we still invited submissions on the issue.¹²⁴
- 6.38 The majority of submitters who responded considered that a new Act should include a code of duties. In its submission the Charities Commission strongly supported including committee members' duties in legislation, and said that it has seen numerous examples of individuals involved in governance who appear to have little understanding of their duties in relation to the governance of charities. Clubs NZ¹²⁵ also said that including a code of duties in new legislation would provide guidance and act as a reference point for committee members. It would set clear standards for them.
- 6.39 However, there was not universal support among submitters. A few submitters did not favour the inclusion of duties in a new Act. Some considered that the members of each society should determine what (if any) duties are imposed on those running their society. They said the issue should be addressed by each society in its constitution. A few, noting the broad range of possible governance models operating in the voluntary sector, questioned whether one code of duties could be readily developed to apply to all societies.
- 6.40 We agree that it is important to support and not stifle the diversity of governance models in use within the not-for-profit sector. We think a key strength of the 1908 Act is the autonomy it gives societies to develop their own governance framework. However, we do not believe such diversity would be threatened by the inclusion of a code of basic duties in the new Act.

123 *Aberdeen Railway Co Ltd v Blaikie Brothers* (1854) 1 Macq 461; *Bray v Ford* [1896] AC 44, 51; John Farrar and Susan Watson (eds) *Company and Securities Law* (online ed, Brookers) at [14.4.1]; Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (LexisNexis, Wellington 2011) at [15.1].

124 *Issues Paper 24*, above n 103, at [3.5]-[3.6].

125 An umbrella group of chartered, sports and other clubs that provide recreational facilities to members.

- 6.41 It is important to remember that existing case law probably already imposes most of the duties that would be in such a code on those running incorporated societies. Case law already recognises that officers owe duties to the incorporated entity.¹²⁶ These obligations flow from the role of the officers in the society.¹²⁷
- 6.42 The fact that some submitters appear to not be aware of the duties that officers already have at common law argues strongly for clearly articulating them in legislation. Among the objectives of our review are those of modernising the 1908 Act to create a more useful framework for the sector, and clarifying aspects of the law that are unclear. The inclusion of a clear and accessible code of duties better supports these objectives.

Nature of a code of duties

- 6.43 We intend that the duties provision would be similar in nature to the provisions on company directors' duties in the Companies Act. This means they would not be a prescriptive statutory code that abrogates and replaces the common law. The duties would be expressed in broad terms and the detail of how the law requires the duties to apply in practice would come from case law, including previous company cases where appropriate.
- 6.44 The director duties in the Companies Act are a code in this sense also. They state principles of law in general terms. In its 1989 report upon which the reforms enacted in the Companies Act were based, the Law Commission described the intention of the recommendations relating to directors' duties as to:¹²⁸
- ... distil the general principles from the cases and express them in the statute, to make them more accessible. Such a statement of general principle was recommended by the Macarthur Committee and has been adopted by the Canadian and Australian Acts. The response to the [Law Commission's] discussion paper indicated overwhelming support for similar reform.
- 6.45 It is generally considered that the common law continues to be relevant in the law of company directors' duties as an aid to the interpretation of the general principles in the Companies Act and to the extent that the Companies Act does not address a particular duty or remedy for breach of a duty.¹²⁹
- 6.46 We think that a similar soft code might also be the best approach in relation to incorporated societies. It is not appropriate to enact a prescriptive statutory code that abolishes or abrogates the common law. However, given the desirability of having clear standards, it would also be unhelpful to expressly preserve the common law because officers would have both statutory and common law duties to comply with.

126 *New Zealand Netherlands Society "Oranje" Inc v Kuys and The Windmill Post Ltd* [1973] 2 NZLR 163 (PC).

127 A body corporate needs someone to act and make decisions for it. Officers take that role and are in a position where they have undertaken to act in the interests of the body corporate, in circumstances where the body corporate could be harmed if the officer does not act in the corporate's best interests.

128 Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989) at [186].

129 *Brookers Company Law* (online ed, Thomson Reuters) at [CA131.01]. In *Benton v Priore* [2003] 1 NZLR 564 at [46], Heath J commented that the duties provisions "should be seen as a restatement of basic duties in an endeavour to promote accessibility to the law". In *Sojourner v Robb* [2006] 3 NZLR 808 at [100], Fogarty J stated: "A statute such as this does not supplant the common law when it enacts a common law standard which is of its character a principle rather than a rule. As a principle it has to be applied in a wide variety of circumstances and such application is appropriately guided by the common law cases which led to the articulation of the principle in the first place."

What duties should officers have?

- 6.47 The Companies Act requires that directors must:
- act in good faith and in the best interests of the company,¹³⁰ and use powers for a proper purpose;¹³¹
 - not act, or agree to act, in contravention of the Companies Act or the company's constitution;¹³²
 - not agree to the business of the company being run recklessly or to create a substantial risk to creditors;¹³³
 - not agree to the company incurring obligations that the director does not reasonably believe will be fulfilled;¹³⁴ and
 - exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances, taking into account (without limitation) the nature of the company, the nature of the decision, and the position of the director and the nature of the responsibilities undertaken by him or her.¹³⁵
- 6.48 *Issues Paper 24* asked submitters what alterations (if any) were needed to the above code of company director duties to reflect the differences between companies and societies.¹³⁶
- 6.49 Overall the majority of submitters supported the approach of using the company directors' duties as a starting point. Approximately half thought that the directors' duties were about right and only needed some minor editing. However, the remaining half raised more fundamental questions around the appropriateness of some of the duties in the directors' code. Many submitters considered that the duties imposed on officers of societies need to reflect the significant differences between many societies and companies. Many incorporated societies are small organisations. Officers are often volunteers, taking on roles for no reward and as a public service because they are committed to the objectives of the society. Some submitters were concerned also that the business flavour of some of the directors' duties would not be appropriate in the case of incorporated societies.

A duty to act in good faith and in the best interests of the society

- 6.50 The first duty of a company director is to act in good faith to further the interests of the corporate entity.¹³⁷ Directors must also only exercise their powers for a proper purpose.¹³⁸ We have already suggested that anyone who takes on responsibility for acting and making decisions for any corporate entity must be expected to act in the best interests of that entity and to act with honesty. The duty to act in good faith and in the best interests of the society should be the first duty in any code of duties for committee members or officers of incorporated societies as well as for directors of companies.
- 6.51 The duty to act in good faith requires that a person act honestly and not in bad faith, not promoting his or her own interests where this would not promote those of the society.¹³⁹ A

130 Companies Act 1993, s 131.

131 Companies Act 1993, s 133.

132 Companies Act 1993, s 134.

133 Companies Act 1993, s 135.

134 Companies Act 1993, s 136.

135 Companies Act 1993, s 137.

136 *Issues Paper 24*, above n 103, at [3.5]-[3.6].

137 Companies Act 1993, s 131.

138 Companies Act 1993, s 133.

139 Watts, Campbell and Hare, above n 123, at [13.3].

conscious failure to make any genuine attempt to do what a well-motivated officer would do may amount to bad faith.¹⁴⁰ The obligation of good faith would preclude the person from acting recklessly and may even be breached by a failure to act at all in some circumstances.

A duty to comply with the Act and the constitution

- 6.52 Company directors must not act, or agree to act, in contravention of the Companies Act or their company's constitution.¹⁴¹ We think that the new Act should recognise that officers running an incorporated society have a similar duty to comply with their society's constitution as well as the Act. A few submitters consider that it would be preferable to express this, and all other duties, in the positive rather than the negative. We agree and suggest that in the incorporated societies context the duty should be to comply with the Act and the constitution.

A duty of care and diligence

- 6.53 The next duty to consider in the company director code is the obligation to exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances.¹⁴² Directors are expected to have a reasonable standard of skill when making decisions. The standard here is an objective one of a "reasonable director" but what is required of any reasonable director depends upon the actual circumstances.
- 6.54 The words "the same circumstances" impose a sliding scale of obligations that tailors the standard of care that must be exercised in any situation to the particular circumstances of the director and company.¹⁴³ Where directors have been appointed or elected to bring particular expertise and skills into their role, more may be expected of them than would normally be expected of an ordinary director.
- 6.55 We propose that the code of duties for officers of societies should recognise a duty to exercise the degree of care and diligence that a reasonable person would exercise in the circumstances if that person were an officer of the society with the same responsibilities. We consider it likely that a court would hold that an equivalent common law duty of care applies to society officers, in a suitable case.¹⁴⁴ Even where people taking on these roles are volunteers and the objectives of a society are of a social nature, it is reasonable that those running the society meet an objective test of diligence and care.
- 6.56 However, we prefer not to include a requirement that an officer meet a reasonable standard of skill. Unlike care and diligence, which are concerned with the manner in which people go about their roles, skill is a measure of competence. Officers of societies may be chosen for reasons other than their management competence. Many are elected or appointed because they have the confidence and support of the membership based on a broader set of considerations. Many also take on roles because it is their turn or because no one else is willing or available. In such circumstances we think it is reasonable to expect people to be reasonably careful and diligent when undertaking activities for the society but it may not be reasonable to find them wanting because they do not have the necessary competence to undertake the role to a reasonable standard.

140 *Adams v R* [1995] 1 WLR 52, (1994) 12 CRNZ 379 (PC) as cited in Watts, Campbell and Hare, above n 123, at [13.3].

141 Companies Act 1993, s 134.

142 Companies Act 1993, s 137.

143 The authors of *Company Law in New Zealand* describe the test as a prima facie objective test, but with a sliding scale attached. See Watts, Campbell and Hare, above n 123, at [16.2.1].

144 Given the analogy with the companies situation, and the courts' preparedness to recognise relevant duties in societies, depending on the subject matter: *New Zealand Netherlands Society "Oranje" Inc v Kuys and The Windmill Post Ltd* [1973] 2 NZLR 163 (PC).

- 6.57 Applying the sliding scale approach, the standard of care and diligence that would be expected would be determined by the surrounding circumstances. An officer would essentially be expected to meet the standard of care that a reasonable person with the same responsibilities within the society would exercise in the circumstances applying at the time. This means that the standard that should be expected from an ordinary volunteer office holder helping out a small social club would be lower than the standard that would be expected from a professional board member, appointed for his or her governance skills, to chair the board of a large complex social service organisation. In each case the test is whether the person's actions met the standard that a reasonable person with the same responsibilities within the same society would have exercised in all the circumstances. Whether societies exist to achieve social goals for their members or whether they operate businesses and employ staff are all matters that will be relevant in determining the standard of care and diligence that should reasonably be expected from those running the society.
- 6.58 It follows that the applicable standard of care will normally be most affected by the requirements and circumstances of the society or the relevant office, rather than the special attributes and skills of a particular office holder. A lawyer, accountant or businessperson who accepts appointment as an officer should not be held to a higher standard than other officers unless the office they accept necessarily demands particular professional or business skills that are not required of other offices. If, for example, an accountant accepts appointment as financial controller of a large, complex charity, he or she might reasonably expect to be held to a higher standard than if they accepted office as an ordinary committee member of a small local tennis club.

Reckless trading and creating a substantial risk to creditors

- 6.59 Under s 135 of the Companies Act company directors must not agree to the business of the company being run recklessly or in a matter that creates a substantial risk to creditors. There has been some debate about how this duty should be interpreted, particularly because risk of financial loss is intrinsic to the operation of many commercial enterprises. Rather than taking a literal approach the courts have indicated that the test is whether the risks taken were legitimate.¹⁴⁵ The Court of Appeal has said that the essence of s 135 is “a failure to exercise reasonable care in the particular circumstances”.¹⁴⁶
- 6.60 In the case of incorporated societies there is a question as to whether a specific duty around reckless trading is really necessary. Our proposed code of duties already imposes a general duty on officers that they must exercise reasonable care. It is questionable whether a specific obligation not to run certain business risks is also needed. However, it might still be better to expressly state this important obligation not to engage in reckless trading.
- 6.61 Some submitters argued against including this specific duty and the duty (discussed next) that an officer should not incur obligations that he or she does not reasonably believe the society can fulfil. These submitters argued that these two duties are inappropriate for societies because their objective is to constrain commercial risk-taking behaviour. Companies are in the business of pursuing profit and balancing risk, so such obligations are necessary to constrain risk-taking behaviour. Some submitters argued that incorporated societies are not charged with generating wealth for shareholders in the way directors are, so are not engaging in commercial risk-taking.
- 6.62 However other submitters, including the New Zealand Law Society, favoured including all of the duties from the Companies Act model. They preferred a provision that spells out these

¹⁴⁵ *Re South Pacific Shipping Ltd (in liq)* (2004) 9 NZCLC 263,570 (HC) at [129]-[130].

¹⁴⁶ *FXHT Fund Managers Ltd (in liq) v Oberholster* [2010] NZCA 197 at [30].

specific obligations in the same way as the Companies Act rather than the type of limited code some other jurisdictions have adopted for not-for-profit entities.

- 6.63 We accept the point that incorporated societies are in general far less involved in commercial risk-taking activity than companies. However, some incorporated societies are engaged in business activities. Some run extensive businesses and must weigh and manage commercial risks in much the same way as companies. The duty therefore needs to be included in the code to ensure that those incorporated societies that do engage in business and manage commercial risk are subject to similar duties around reckless trading as companies.
- 6.64 We see no difficulty in imposing a duty on anyone charged with acting and make decisions for an incorporated society. We think they should be under an obligation not to conduct their society's business activities (whatever the extent) in a manner that is likely to create a substantial risk of serious loss to the society's creditors.
- 6.65 For many small societies the duty will be almost irrelevant because they are not engaged in any trading at all. For those medium sized societies where it is more relevant, all that will often be required is that the officers act with reasonable prudence when incurring liabilities when trading.

The duty in relation to incurring obligations

- 6.66 The duty in s 136 of the Companies Act prohibits a director from agreeing to the company incurring an obligation unless he or she believes on reasonable grounds that at that time the company will be able to perform the obligation when required to do so.¹⁴⁷ The standard imposed is again one of reasonableness. The director's belief that the obligation can be fulfilled must be a reasonable one.
- 6.67 We propose that the code of duties for officers of societies also include a duty not to allow the society to incur obligations that the officer does not reasonably believe the society will be able to fulfil. While the duty will have little practical effect on small societies it is again needed to ensure that those incorporated societies with more significant involvement in business and assets are subject to similar duties to company directors.

All the duties must be complied with

- 6.68 The Companies Act provides that a company's constitution cannot negate the duties set out in the Act. Section 31(1) provides that provisions of the constitution that contravene or are inconsistent with the Act are invalid.
- 6.69 It is proposed that the same approach should be taken in respect of officers' duties under new legislation. The duties included in the Act should form an irreducible set of obligations that apply to all officers. In other words these duties would be mandatory and it would not be possible for societies to include any rule or provision in their constitutions that seeks to exclude any of the duties discussed above. Any rule or provision that did attempt to negate the mandatory duties would have no effect. A society could, however, add to the core duties included in the new Act and impose additional obligations on their officers in their constitution.
- 6.70 The issue of whether societies may exclude liability where officers breach the mandatory duties or provide indemnities to officers is discussed later in this chapter.

¹⁴⁷ Watts, Campbell and Hare, above n 123, at [17.2.4].

Who should be considered to be an “officer”?

- 6.71 Another important issue to resolve is who should be considered an “officer” bound by the code of duties. One option is to only impose the code of duties on those members who are actually elected or appointed to the committee or as other officers of a society. However, the problem with this approach is that it focuses on those members who are formally appointed to positions rather than those members who have influence and control within the society. It will not always include everyone who exercises significant influence over the affairs and decisions of a society. It would also make holding a formal office or position unattractive and might result in people preferring to exercise their influence more informally outside the formal governance structures established for the society. This would not be transparent and would be undesirable.
- 6.72 The alternative is the type of approach that focuses on who has actual control and influence over a society’s affairs rather than those with nominal responsibility. As well as imposing governance duties on the formal office holders within a body corporate, modern incorporation statutes also impose governance duties on other people where they control or exercise significant influence over the management and finances of a corporate entity.

Definition of “officer” in the Companies Act

- 6.73 The Companies Act takes a broad inclusive approach to defining “director” for the purposes of the duties. The definition catches everyone who exercises or is able to exercise powers that give them significant influence over the affairs of the entity. In summary the definition of director includes:¹⁴⁸
- a. a person actually appointed as a director whether called a director or something else;
 - b. a shadow director or person with managerial powers, who directs or has the power to direct the actions of the appointed director or directors or one who is entitled to exercise or control the exercise of powers which, apart from the constitution, would be exercised by the directors;
 - c. any person to whom a power or duty of the directors has been delegated or who exercises a power or duty with the agreement of the directors;
 - d. a person with ultimate control who can direct or instruct any of the persons falling within a. to c. above in respect of his or her duties and powers; and
 - e. shareholders where they are empowered by the constitution to exercise powers or make decisions that would otherwise be exercised by the directors. When exercising such powers or taking part in such decisions shareholders are also deemed to be directors.¹⁴⁹
- 6.74 The categories in b. to d. above do not include a person that acts only in a professional capacity.¹⁵⁰ For example, a solicitor or accountant whose advice the directors are accustomed to following will not be deemed a director where such advice is given in his or her capacity as professional adviser to the directors. However, in some circumstances, a professional adviser may be considered a director, especially if their actions fall outside their professional role.¹⁵¹

148 Companies Act 1993, s 126(1).

149 Companies Act 1993, s 126(2)-(3).

150 Companies Act 1993, s 126(4).

151 See the discussion on this point in Farrar and Watson, above n 123, at [14.5.8].

Definition of “officer” in the Charities Act

- 6.75 A similar broad inclusive definition of officer, which catches all persons who are able to exercise significant control, is used in the Charities Act 2005 in relation to charitable entities other than trusts. An officer is:¹⁵²
- a. a member of the board or governing body of the entity if it has a board or governing body; or
 - b. any person occupying a position in the entity that allows the person to exercise significant influence over the management or administration of the entity (for example, a treasurer or a chief executive).

Definition of “officer holder” in the Victorian Act

- 6.76 The recently enacted Victorian associations legislation contains a definition of “office holder” for the purposes of identifying those members of a society that are bound by the governance duties imposed on office holders by the Act.¹⁵³ In addition to members of the committee, a person (including an employee of the association) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the operations of the society and a person who has the capacity to significantly affect the association’s financial standing is also an office holder, as is any person who can effectively instruct the committee of the association to act. Any person who gives advice to the association in the person’s professional capacity is excluded.

Discussion

- 6.77 The only real difference between the Companies Act and the other two definitions is that the Companies Act more specifically identifies the different classes of people who, in addition to the formal directors or officers, are able to exercise significant control or influence. The Charities Act and the Victorian Act group some of these into fewer but broader categories of people who can exert significant influence over the entity.
- 6.78 Whether a longer list of specific classes or a shorter list of broader ones is preferable is a matter to resolve when drafting a provision at a later point. Our recommendation uses the shorter list modelled on the Victorian Act, although we recognise that there may be benefits in mirroring the approach in the Companies Act.
- 6.79 However the provision is drafted, we recommend a definition that catches any person who participates in making significant decisions that affect the affairs of the society or who is able to exercise significant influence over the management or administration of the entity, because of the position they hold or because the office holders are accustomed to acting in accordance with their wishes or instructions. Any person who gives advice to an incorporated society in that person’s professional capacity should be excluded.
- 6.80 A final point to consider is whether it is necessary to expressly include a reference in the definition to members where they are empowered by the constitution to exercise powers or make decisions. As noted above, the Companies Act deems shareholders to be directors when they are exercising powers or taking part in decisions that would otherwise fall to the directors. We think a specific provision is unnecessary and may be confusing. Our preference is to instead include “any member of the society” as an example, in addition to an employee, who makes, or participates in making, decisions that affect the whole, or a substantial part, of the operations of the society.

152 Charities Act 2005, s 4(1).

153 Associations Incorporation Reform Act 2012 (Vic), s 82.

Responding to breaches of duties

- 6.81 Another important question to consider is what happens when an officer breaches one or more of their duties. Who should be able to take action, and what type of actions should be available?
- 6.82 The current position is that a society would probably take internal disciplinary action against an officer who breached his or her duties to the society. Any serious breach would be grounds for removing the officer from office, and possibly expelling the person from the society. In addition, officers who breach their duties also face the possibility of civil action being brought against them by the society for compensation or restitution for any losses arising from the breach.

Approach taken in the Companies Act

- 6.83 In the case of company director duties, the position at common law was that the duties were owed to the company and not to the individual shareholders. As a consequence only the company rather than individual shareholders, could bring an action against a director for any breach of their duties.¹⁵⁴ Also relevant is the principle known as the internal management rule under which the court viewed disputes between members as matters of internal regulation over which the court would not exercise jurisdiction. It was for the members to decide the internal affairs of the corporation including whether or not the corporation should bring an action in order to remedy any wrong against it, such as suing a director for breach of duty.¹⁵⁵
- 6.84 The Companies Act altered that position somewhat by providing that directors owe certain duties, imposed by the Companies Act, to shareholders. As a consequence, shareholders or former shareholders now have statutory rights to bring civil actions against a director for breach of a duty owed to the shareholder.¹⁵⁶ However, only a few of the duties imposed on directors under the Companies Act are owed to shareholders. Most duties, including almost all of the duties we are proposing for officers of societies, are owed to the company and not to shareholders.¹⁵⁷
- 6.85 The one exception is that the Act does not specifically state whether the duty of a director to comply with the Act and the company constitution is owed to the company or to the shareholders.¹⁵⁸ The position seems to be that whether the duty is owed only to the company or to both the company and the shareholders depends on the nature of the provision in the constitution in question.¹⁵⁹

Duties owed to the society

- 6.86 In the case of incorporated societies we favour the new Act specifying that the duties are owed to the society itself rather than to the members. We favour an approach that is generally consistent with the Companies Act. Under the Companies Act the core duties, which are the ones we are largely replicating, are owed only to the body corporate itself. We do not support the duties being owed to members because individual members or former members would be

154 *Foss v Harbottle* (1843) 2 Hare 461; *Burland v Earle* [1902] AC 83 at 93. *Foss v Harbottle* is widely recognised as the source of the principle that in the case of a wrong done to a company, the company is the proper plaintiff and not individual shareholders. *Foss v Harbottle* involved a corporation created by a statute. In *Burland v Earle* the principle was applied to a company incorporated by registration. Here Lord Davey stated the principle as: “in order to redress a wrong done to the company ... the action should prima facie be brought by the company itself.” See also KW Wedderburn “Shareholders’ rights and the Rule in *Foss v Harbottle*” [1957] CLJ 194 at 196.

155 *MacDougall v Gardiner* (1875) 1 Ch D 13 at 25. Mellish LJ said “if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly ... there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes”. See also *Burland v Earle*, above n 154; KW Wedderburn, above n 154, at 198.

156 Companies Act 1993, s 169(1).

157 Companies Act 1993, s 169(3).

158 Companies Act 1993, s 134.

159 See Brookers, above n 129, at [CA169.01].

able to enforce those duties against officers and bring actions against the officers for breach of duty. The interests of individual members and the society do not always coincide. Sometimes individuals can be disadvantaged by actions that are generally of benefit to the society. There is also real potential for the duties to become a source of increased conflict and dispute and to fuel litigation by disgruntled society members, if the duties are owed to both the society and the members.

Member actions on behalf of a society

- 6.87 One consequence of officers owing their duties to the society and not to the individual members is that civil action for breaches of duties may only be taken by the society unless specific statutory provision is made that gives members some form of derivative rights to issue proceedings on behalf of the society.
- 6.88 We consider that it would be appropriate for the new statute to include provisions under which members can, with the leave of the court, take proceedings on behalf of the society against officers to prevent a breach of duty or to obtain compensatory damages or recover monies or profits made in breach of the duty. Members need to have the ability to bring an action because otherwise it is the very officers against whom misconduct is alleged who must bring an action against themselves. While one would normally expect that such officers would be removed and replaced and action then taken on behalf of the society by the new officers, that will not always be the case and there needs to be some back-up mechanism to protect the societies' interests.
- 6.89 Section 165 of the Companies Act addresses this type of situation by enabling shareholders to apply to the court for permission to bring a "derivative action" on behalf of the company. Derivative actions are a statutory device introduced to address the fact that at common law shareholders lacked standing to bring actions for wrongs (such as breaches of duties) committed against the company by directors. A derivative action can be brought by shareholders under s 165 to cover allegations of breach of duties. Under s 165 the court determines whether to permit a derivative action. If the court allows the action, the costs are usually borne by the company rather than the individual shareholder.
- 6.90 We think that situations where such action would be needed on behalf of an incorporated society would be rare. There should nevertheless be a provision under which a member could, with the consent of the court, bring an action on behalf of the society to protect the interests of the society. This is dealt with in chapter 9.

Exclusion clauses and indemnities

- 6.91 Another issue that arises in respect of the duties is whether societies should be able to exclude liability to the society where officers breach any of the duties and also whether societies should be able to indemnify their officers against any personal liability to others where the officers breach any of their duties. Arrangements that indemnify officers against liability, or exclude liability for a breach of duty, do not remove the duties but do remove the most significant consequences of a breach of the obligations.

The Companies Act approach

- 6.92 The Companies Act 1993 restricts the ability of a company to indemnify directors. Section 162 provides that a company may only:
- indemnify a director for costs incurred in defending criminal or civil proceedings relating to liability for his or her actions as a director where judgment is given in favour of the director, or he or she is acquitted;

- indemnify a director against liability to third parties for the director’s actions in his or her capacity as a director (and for costs relating to any claim or proceedings relating to that liability), but not including any criminal liability or any liability resulting from any breach of the duty to act in good faith and in the best interests of the company; and
 - effect insurance for a director in respect of liability (except criminal liability) for any acts or omissions committed as a director.
- 6.93 A company is not otherwise permitted to indemnify its officers for liability to the company as this could prevent or discourage directors from complying with their duties to the company and would also deter the company from enforcing them.¹⁶⁰ The Companies Act does allow the company to procure insurance for directors.
- 6.94 Incorporated societies should not be allowed to fully exclude liability to the society for breaches of the duties the officers owe to the society. If societies could do so the duties become essentially notional or “empty”. An exclusion of this type places all liability for any breach by the officer back on to the society.
- 6.95 However, we think that a society should be able to indemnify its officers against liability to anyone other than the society. Where an officer acts in good faith and for a proper purpose in the pursuance of his or her role and responsibilities it would be appropriate for him or her to be indemnified against any third party claim. It is in our view unreasonable for individuals to be expected to take on officer roles within societies that expose them to personal liability when acting for the society in good faith.
- 6.96 Societies should be free to indemnify their officers against third party claims, provided the officers have acted in good faith and in the best interests of the society. Except in relation to criminal liability, we can also see no reason why the statute should impose restrictions on the ability of a society to obtain insurance for its officers.

R27 The statute should state the duties with which officers of the society must comply when exercising their powers and performing their functions. That provision should, similarly to the Companies Act 1993, state the duties of officers in general terms.

R28 The statute should provide that officers owe to the society the following duties:

- a. to act in good faith and in the best interests of the society, and use powers for a proper purpose;
- b. to comply with the Incorporated Societies Act and with the society's constitution, except where the constitution contravenes the Act;
- c. to exercise the degree of care and diligence that a reasonable person with the same responsibilities within the society would exercise in the circumstances applying at the time;
- d. to not allow the activities of the society to be carried on recklessly or in a manner that is likely to create a substantial risk of serious loss to the society’s creditors; and
- e. to not allow the society to incur obligations that the officer does not reasonably believe will be fulfilled.

¹⁶⁰ Brookers *Companies Act and Securities Law* (online ed, Brookers) at [CA162.01].

R29 The statute should provide that:

- The duties are mandatory duties that must not be excluded by any rule or provision in a society's constitution. Any rule or provision in a constitution that attempts to exclude any of the duties will have no effect.
- The duties are owed to the society and not to members. Consequently a member or former member may only bring an action against an officer for a breach of these duties on behalf of the society, and then only where the court has granted leave for the member to bring that action.

R30 For the purposes of the duties of officers an "officer" should be defined as:

- a. the statutory officer of a society;
- b. all members of the society's committee;
- c. any other office holder provided for in a society's constitution;
- d. a person, including any member of the society or employee of the society, who makes, or participates in making, decisions that affect the whole, or a substantial part, of the operations of the society;
- e. a person who has the capacity to significantly affect the society's financial standing; or
- f. a person whose instructions or directions the statutory officer, the committee of the society, or other office holders are accustomed to acting in accordance with.

R31 A person who gives advice to an incorporated society in that person's professional capacity or as a result of that person's business relationship with the society should not be considered to be an officer of the society merely because of that advice.

R32 The statute should provide that, except in the situations listed in R33 below, a society is not able to exclude the liability of an officer or indemnify an officer in respect of any liability for any action as an officer or the costs incurred by the officer in defending or settling any claim or proceedings against that officer. Any rule or provision in a constitution that attempts to exclude liability or any indemnity given by a society that does not comply with this rule will have no effect.

R33 A society may, if expressly authorised by its constitution:

- indemnify an officer for the costs incurred in defending criminal or civil proceedings relating to liability for his or her actions as an officer where judgment is given in favour of the officer or he or she is acquitted;
- indemnify an officer against liability to third parties for the officer's actions in his or her capacity as an officer (and for costs relating to any claim or proceedings relating to that liability), not including any criminal liability or any liability resulting from any breach of the duty to act in good faith and in the best interests of the society; or
- arrange insurance for an officer in respect of liability (except criminal liability) for any acts or omissions committed by the officer in his or her capacity as an officer.

CONFLICTS OF INTEREST

Introduction

- 6.97 A conflict of interest occurs:¹⁶¹
- ... when a board [member's] ... duty of loyalty to [an] ... organisation comes into conflict with a competing financial or personal interest that he or she (or a relative) may have in a proposed transaction.
- 6.98 The current 1908 Act contains no framework for managing conflicts of interest. In contrast, later incorporation statutes expressly address conflict of interest and prescribe rules for managing them.
- 6.99 The Companies Act contains provisions relating to the disclosure of conflict of interest in transactions. Members on the governing boards of crown entities, district health boards, education boards and bodies (including school boards of trustees) are all subject to statutory conflict of interest rules.¹⁶² In addition, the conflict of interest regime in the Local Authority (Members Interests) Act 1968 applies to members of local authorities, members of city councils, district councils, community boards, tertiary institutions, and a range of other public bodies.
- 6.100 It is commonplace in other jurisdictions to include prescribed requirements for managing conflict of interest in not-for-profit incorporation statutes. For example, the Acts under which associations and societies incorporate in the states of New South Wales, Western Australia and Victoria all contain such provisions.¹⁶³ Reviews undertaken in other Australian states, such as Queensland, are also proposing that conflict of interest provisions be included in their not-for-profit incorporation statutes.¹⁶⁴

Statutory conflict of interest rules

- 6.101 In *Issues Paper 24* the Commission proposed that some minimum standards of conflict of interest rules ought to be part of the new statutory regime for incorporating societies, as they are in the Companies Act and in most comparable not-for-profit incorporation statutes in other jurisdictions.¹⁶⁵ We asked submitters if they agreed.

Submitters' views

- 6.102 The vast majority of submitters who expressed a view on this issue agreed that conflict of interest rules ought to be part of the new statutory regime. They considered that it was good practice and was necessary for any society to have such rules. Many said that clear rules would assist societies who currently struggle to manage these types of problems.
- 6.103 Some made the point that for many small societies it is impossible to avoid conflict of interest situations completely and continue to function. These submitters argued that any mandatory rule should require disclosure but should not require the person to remove themselves from further decision-making on the issue, because sometimes for pragmatic reasons the conflicted person needed to remain involved.

161 Council of Social Services of New South Wales *Managing Conflicts of Interest* (2012).

162 See Crown Entities Act 2004, ss 62-72; New Zealand Public Health and Disability Act 2000, sch 1, cl 36; Education Act 1989, sch 6 cl 8(8).

163 Associations Incorporation Act 2009 (NSW), s 31; Associations Incorporation Act 1987 (WA), s 21; Associations Incorporation Reform Act 2012 (Vic), s 80.

164 Queensland Government *Supporting Queensland Associations: A Modern Framework for a Civil Society* (2012).

165 *Issues Paper 24*, above n 103, at [3.7]-[3.9].

6.104 Some submitters on this issue did not agree that conflict of interest rules should be included in the statute. They thought that statutory rules would be cumbersome and hard to apply. Some said that by definition all members of a society are “interested”. It is precisely because they have an interest in an activity that they belong to the society. Some submitters considered that it would be better to require societies to address conflict of interest in their constitutions. There was some concern that one set of rules would not be appropriate for all societies. The point was also made that obligations of this kind could simply be another disincentive to volunteers becoming involved.

Discussion

6.105 We consider that rules for dealing with conflict of interest are an essential part of any governance regime for bodies corporate. We think they may be even more important for bodies incorporating under not-for-profit legislation because a range of interests bring the members together and proper management of conflicts in respect of these shared interests is consequently essential.

6.106 We, like most submitters, favour an express statutory provision that sets a minimum requirement. This seems preferable to the alternative approach, which would be to have a requirement for all incorporated societies to address the issue in their own rules or constitution. A mandatory provision in the legislation has the advantage of being transparent and educative.

6.107 Express provisions in the Companies Act and overseas corporation statutes have varied and replaced previous judge-made rules that left interested transactions voidable. If conflict of interest is not addressed in the new Act then interested transactions may remain voidable. As was discussed in the previous section, in a number of cases where a director has been interested in a transaction and has been conflicted, equity has taken the position that any resulting contract is voidable at the instance of the company. This strict equitable principle has been negated for companies by including a conflict provision in the Companies Act but it is probably still the position for incorporated societies.

Defining the scope of “interest”

6.108 The first issue to consider is how broadly “interest” should be defined in any new conflict of interest requirement. Essentially the options are:

- limit the definition of “interest” to material financial or monetary interest (which is the approach taken in the Companies Act and all other incorporation statutes in New Zealand);
or
- define “interest” to also include non-financial material personal interest (which is the approach taken in some overseas jurisdictions).

Material financial interests

6.109 Traditionally concern about conflict of interest has focused on financial conflicts. Most, if not all, conflict of interest provisions in New Zealand incorporation statutes confine the definition of interests that must be disclosed to financial or monetary interests. This is the approach taken in legislation governing boards of crown entities, district health boards, education boards and bodies, and school boards of trustees.¹⁶⁶ It is also the approach taken in the Local Authority (Members Interests) Act 1968, which applies to local authorities and various other local, educational and community bodies.

166 See above n 162.

- 6.110 Section 139 of the Companies Act defines the circumstances where a director is “interested in a transaction”. These include where the director is a party to the transaction or has a material interest in a party; where the director or an entity they are a director of may derive a material financial benefit or the director is closely related to someone who may derive such a benefit; or where the director is materially interested in some other way, including indirectly.
- 6.111 The test in s 139 requires that the interest must be material. Receiving material benefits or material interests would involve obtaining substantial, important, or essential financial advantages, derived from the fact of the transaction.¹⁶⁷ The introduction of the concept of materiality can be contrasted to more recent provisions, such as those applying to the boards of crown entities and district health boards. Instead of referring to “material” financial interest, the approach taken here is to cover all financial interests or financial benefits, but then exclude interests that are so remote or insignificant they could not reasonably be regarded as likely to influence the person in carrying out his or her responsibilities.
- 6.112 Both approaches recognise that the justification behind requiring disclosure of financial interests is that, left undisclosed, such interests may raise a presumption of self-interest. An impartial observer might reasonably expect the interested person to be favouring their own financial interests over those of the entity. For decision-making to be credible, members of the society and third parties need to be able to see that decisions are free from any appearance of bias.
- 6.113 At a minimum the statute must require the disclosure of financial interests. We favour the approach taken in the later New Zealand statutes. The provision should cover all financial interests, but exclude interests that are so remote or insignificant that they could not reasonably be regarded as likely to influence the person in carrying out his or her responsibilities. A further exclusion should be made for financial interests of a type that committee members have in common with all other members of the society due to their membership (such as discounts on services, free entry to affiliated facilities).

Other material personal interests

- 6.114 A more difficult issue to resolve is whether conflict of interest rules should go further and also require disclosure of other types of interests. In the report *Waka Umanga: A Proposed Law for Māori Governance Entities* the Law Commission argued that non-financial interests of representatives involved with the governance of the waka umanga “may create as great a potential for conflict as a financial interest”.¹⁶⁸ The Commission concluded that there ought to be default provisions setting out a procedure to deal with the disclosure of non-financial interests.¹⁶⁹
- 6.115 Until 2009, the equivalent Australian statutes limited the disclosure of interest to financial interests. This approach has recently changed in both New South Wales and Victoria. The Associations Incorporation Act 2009 (NSW) requires a committee member to disclose any “direct or indirect interest in a matter being considered or about to be considered at a committee meeting” where that “interest appears to raise a conflict with a proper performance of the committee member’s duties in relation to the consideration of the matter”.¹⁷⁰ The provision requires disclosure of any conflict of interest between a committee member’s own affairs and

167 *Brookers Company Law*, above n 129, at [CA139.03].

168 Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2006) at [15.42] [*Waka Umanga*].

169 At [15.46].

170 Associations Incorporation Act 2009 (NSW), s 31.

the affairs of the association and covers direct and indirect interests of a financial and non-financial nature.

- 6.116 In 2010 the state of Victoria amended their Associations Incorporation Act to extend coverage to non-financial material personal interests also.¹⁷¹ That same broad approach has been continued in the new Associations Incorporation Reform Act 2012 (Vic).¹⁷²
- 6.117 An important cautionary point to consider with the Australian legislation is that Australia's Corporations Act 2001 (Cth), which is the Commonwealth equivalent of New Zealand's Companies Act, also defines "interest" in this broader way. In Australia directors of companies are required to disclose "material personal interests" in any matter and not just material financial interests as in New Zealand.¹⁷³ The Victorian Minister of Consumer Affairs, when introducing the 2010 amendment said that the definition of interest in the statute was being amended to make the terminology and scope of the provision consistent with the equivalent provisions in the Commonwealth Corporations Act.¹⁷⁴ It would seem that Australian legislation generally defines "interest" across its incorporation statutes broadly.

Different requirements for non-financial interests

- 6.118 In *Issues Paper 24* the Commission suggested that there should be a requirement in the new statute for disclosure of other material personal interests.¹⁷⁵ It was suggested that even if non-financial interests were to be disclosed, different rules might apply after disclosure, or there might be different consequences for failing to disclose.
- 6.119 This was the approach taken by the Commission in *Waka Umanga*. There the Commission concluded that, while there ought to be default provisions setting out a procedure to deal with the disclosure of non-financial interests, it should still be possible to allow the conflicted representative to continue to contribute to the decision-making process.¹⁷⁶ In contrast, the Commission recommended that representatives who were conflicted by material financial interests should neither vote nor participate in the decision.¹⁷⁷ Non-financial interests are generally not seen as such a threat to integrity as financial interests. For this reason, and because these interests potentially arise in a very wide range of situations, the Commission recommended in *Waka Umanga* that there be a provision for the representative to act despite the interest, so long as the rūnanganui passes a resolution to that effect.

Submitters' views

- 6.120 About three-quarters of submitters who discussed this issue favoured a requirement for the disclosure of both financial and other material personal interests. Many submitters considered that non-financial interests may, in the not-for-profit context, create the potential for more significant conflicts of interests than financial ones. Some said that the rules should require all relevant conflicts to be declared as soon as they became apparent rather than requiring committee members to make a general disclosure of all their interests on a regular basis.
- 6.121 Only a small proportion of submitters preferred the alternative of confining the interests that had to be disclosed to financial or monetary ones. Some considered that the rule should be kept

171 Associations Incorporation Amendment Act 2010 (Vic), s 24 substituted "a material personal interest in a matter" for "any direct or indirect pecuniary interest" in ss 29B and 29C.

172 Associations Incorporation Reform Act 2012 (Vic), s 80.

173 Corporations Act 2001 (Cth), s 191.

174 (26 May 2010) Victoria PD Legislative Assembly at 1911.

175 *Issues Paper 24*, above n 103, at [3.11].

176 *Waka Umanga*, above n 168, at [15.46].

177 *Waka Umanga*, above n 168, at [15.11].

simple. They considered that it would be difficult to define other material personal interests and that trying to include non-financial interests would be confusing for societies.

- 6.122 The remaining submitters rejected the idea of the Act imposing any requirement for the disclosure of interests. This group, some of whom agree that conflicts should be disclosed, consider that it should be left to each society to determine their own rules in this area. They said that each society is best placed to establish rules and procedures that best fit the needs of that society.

Discussion

- 6.123 We accept that adopting only a financial interest rule cannot address all possible situations. We also recognise the view of most submitters, that conflict of interest rules should cover non-financial material personal interests as well as material financial interests. However, we are reluctant to recommend conflict of interest rules that are more comprehensive (and consequently stricter) than those currently applying to company directors and members of boards under other incorporation statutes in New Zealand. It will take many societies significant time and effort to adapt their operating procedures to incorporate conflict of interest rules. We have concluded that it would be unreasonable to ask all societies to deal with material personal interests as well as financial interests.
- 6.124 We therefore recommend that the interest provisions in the new Act apply only to financial interests, though societies should be free to adopt rules dealing with material personal interests if they wish. We also consider that should conflict of interest rules for companies or other sectors be upgraded to provide for material personal interests, it would be sensible that the requirements for incorporated societies be revised at the same time.

Addressing conflict of interest

- 6.125 We have considered three options for dealing with conflict of interest.

Option one: disclosure is sufficient

- 6.126 This option requires no more than that the interest be disclosed. Once the interest has been disclosed, the interested officer would be allowed to contribute to discussion and decision-making on the matter in which he or she is interested. He or she would also be able to vote on the matter. This is the approach taken in the Companies Act.¹⁷⁸ Under those provisions the company is allowed to avoid the conflicted transaction within three months of it being reported to shareholders, provided it can be established that the transaction was not for fair value. Professor Farrar, in his leading textbook on corporate governance, comments that New Zealand company law is “relatively lax on self-interested transactions”.¹⁷⁹ Option one might reasonably be described as the minimum that could be expected of officers.

Option two: prohibited from voting on matter

- 6.127 This option allows an officer, once he or she has disclosed the interest, to participate in the consideration of the matter, but not to vote or otherwise make decisions on the matter. This is the approach that operates in Western Australia,¹⁸⁰ and South Australia.¹⁸¹

178 Companies Act 1993, ss 139-149.

179 John Farrar *Corporate Governance: Theories, Principles and Practice* (3rd ed, Oxford University Press, Melbourne, 2008) at 123.

180 Associations Incorporations Act 1987 (WA), s 22.

181 Associations Incorporations Act 1985 (SA), s 32.

Option three: removal of interested officer

6.128 This option is the most stringent and requires an interested officer to completely remove him or herself from a matter in which he or she is conflicted. The officer could not be involved at all in the consideration of the matter as well as not being part of decision-making or voting on the matter. This is essentially the approach taken in the New South Wales Act,¹⁸² and more recently in the new Victorian Act.¹⁸³

Submitters' views

6.129 Many submitters favoured option one and considered that the new Act should only require disclosure of an interest. Some submitters felt that the statute should require this minimum and that societies should be able to determine whether other action was necessary. In appropriate cases a society could require recusal from voting or from the decision-making process. Some submitters argued that disclosure may reveal a range of interests, from relatively immaterial ones, to those that involved the prospect of substantial financial benefits. It was suggested that it is unrealistic to legislate for the full range of consequences. Some also considered that disclosure, and the transparency and openness it entails, may be sufficient to deal with many interests. Some said that it is also difficult to justify a substantially different (and stricter) regime than the one currently applying to company directors.

6.130 However, most submitters favoured either option two or three or a combination of these. They considered that disclosure and standing down from voting should be required. Approximately a third of all submitters favoured option three. Many others thought that standing down from voting (option two) was sufficient. Some proposed this as a minimum, suggesting that once a disclosure had been made the other people involved in the decision-making should decide whether the circumstances required the interested person to remove him or herself from all further involvement rather than just be recused from voting. Submitters were concerned that the interested officer could have information that could assist others in reaching an appropriate decision. There was also concern that the conflicted members may be needed to ensure the decision-making process remain quorate. Many believed that societies should have some flexibility to assess the implications of the declared conflict and make a decision on a case by case basis as to whether that member should take any further part in the discussion.

6.131 A number of submitters proposed that a mix of options should be legislated for. The New Zealand Law Society favoured a combination of options two and three whereby disclosure and prohibition from voting (option two) could be applied to smaller societies and a stricter regime of disclosure and removal from the meeting (option three) could be applied to larger societies.

Assessing the options

6.132 Option one, which requires no more than disclosure of an interest, sets the bar too low for some situations. In addition, provisions that allow the society to avoid a conflicted transaction that was not for fair value within a certain time would also be needed. We think this is unnecessarily complex for incorporated societies. The most straight forward way to address the potential for self-interest or the perception of self-interest on the part of an officer is simply to preclude the person from taking part in the decision. We therefore prefer option two, which requires an officer to disclose his or her interest in the matter and then recuse him or herself from taking part in the decision (voting) on the matter. We consider that in most cases this should be sufficient. We do not think it is normally necessary to preclude the interested person

182 Associations Incorporation Act 2009 (NSW), s 31(5).

183 Associations Incorporation Reform Act 2012 (Vic), s 81(1).

from taking any further part in any discussion of the matter. In fact, as some submitters have indicated, requiring a conflicted officer to be absent from all discussion and involvement with the matter would not only be unrealistic in some cases but also quite burdensome for many societies because the individual will often be key to the functioning of the society and have information of value to contribute.

- 6.133 However, in some situations it would be appropriate to preclude a conflicted officer from taking any part at all in the matter. The significance or nature of the disclosed interest and the circumstances may be such that the presence of the conflicted officer may influence the decisions taken by the non-conflicted members or be perceived to have done so. We think that the committee should determine whether the conflicted officer should also be excluded completely from any further involvement in the matter.
- 6.134 To address concerns that submitters have raised over problems that may arise over maintaining quorum where a number of committee members have disclosed an interest in a matter, we propose that the conflicted officers should continue to be counted for the purposes of maintaining the quorum. While this approach addresses the problem of maintaining quorum, it could mean that a significant decision is left to a small fraction of the original committee. To avoid this possibility, we recommend that in any situation where 50 per cent or more of the minimum needed for the quorum have been recused from voting because of a conflict of interest the remaining members of the committee must call a special general meeting to determine the matter. Referring a matter to the general membership seems to be the only way to address a situation where those entrusted with a significant decision are deeply conflicted.

A register of conflicts

- 6.135 Most conflict of interest provisions provide that disclosure must be made, at least in the first instance, to the other members of the committee. Many require disclosures of interests to be recorded in writing, sometimes in the minutes or in a separate register of conflicts that is maintained for this purpose.¹⁸⁴ In some provisions both a register and disclosure in the minutes are required.¹⁸⁵
- 6.136 Disclosure is usually also required as soon as is practicable after the conflicted person has become aware that he or she has the interest and the potential conflict. Provisions are more or less prescriptive, but normally require disclosure of the nature and extent of the interest.
- 6.137 The Victorian regime also requires the interested officer to make a disclosure of the nature and extent of their interest at the next general meeting of the association.¹⁸⁶ The New South Wales Act provides that the committee record the particulars of disclosures in a book kept for that purpose and the book is available for inspection by any member of the association.¹⁸⁷ This is also the preferred option in a recently released consultation paper on new not-for-profit legislation for Queensland.¹⁸⁸ Although less direct, the Companies Act requires that conflicts entered into a conflicts register are reported on to shareholders.¹⁸⁹
- 6.138 Balancing the potential privacy interests against the need for transparency we propose that the new statute require an interested officer to make his or her disclosure to the society's

184 For example, the Companies Act 1993, s 140 requires a director to enter the conflict in the interests register. If the company has more than one director then disclosure to the board is also required.

185 For example, the New Zealand Public Health and Disability Act 2000, s 36(3) requires both.

186 Associations Incorporation Reform Act 2012 (Vic), s 80(2).

187 Associations Incorporation Act 2009 (NSW), s 31(3).

188 Queensland Government, above n 164, at 31.

189 Companies Act 1993, s 211(e).

committee. The committee should be required to keep a register of such conflicts. This register would not be open for general inspection by the members. However, the committee should be required to present a summary of the nature and extent of any conflicts recorded during the year to the annual general meeting of the society. We think that this would ensure members were made aware of relevant matters without being unnecessarily intrusive into committee members' private commercial affairs.

Removal from office most appropriate sanction

- 6.139 In *Issues Paper 24* we briefly discussed the use of criminal sanctions as a mechanism for enforcing the conflict of interest requirements.¹⁹⁰ The issue was raised largely because the Companies Act 1993 makes the failure to declare a conflict of interest an offence punishable by a fine.
- 6.140 In *Waka Umanga* the Commission recommended that a failure to disclose a conflict of interest should be a ground for removal from a governing body, rather than being an offence.¹⁹¹ The Commission was concerned over the ineffectiveness of the criminal penalties in Auditor-General's Report into the Local Authorities (Members' Interests) Act 1968.¹⁹²
- 6.141 We propose taking that same approach for the same reasons. In our view a failure to disclose a conflict should not be a criminal offence punishable by a fine. First, we are not persuaded that it is appropriate to criminalise this type of conduct in this context. Second, criminal penalties in an area like this are unlikely to be effective. Third, we are concerned that the possibility of criminal prosecution might be off-putting to potential volunteers who may be inhibited by fears of prosecution for failing to comply with their obligations.
- 6.142 Our conclusion is that societies should be left to deal with any failure to disclose a conflict as a breach of the officer's duty of good faith and their duty to comply with the Act. Where an officer fails to comply with their statutory obligation to disclose and manage a conflict he or she breaches his or her duty to comply with the Act and the society's constitution. In some cases such an action will also breach the duty of good faith. Such breaches are civilly actionable in the way we have already discussed.
- 6.143 We will fully examine the issue of enforcing obligations under the proposed new Act in chapter 9.

R34 The statute should require that an officer of an incorporated society who has a financial interest in a matter being considered by or affecting the society must, as soon as practically possible after the officer becomes aware of his or her interest in the matter, disclose the nature and extent of that interest to the committee of the society.

R35 The statute should require that where an officer has disclosed a financial interest in a matter:

- he or she must not vote in any decision on the matter, however that officer can be present at the time of the decision and can contribute to the discussion leading to the decision; but
- the committee may, where it considers it appropriate, exclude the officer from any further discussion or involvement with the matter.

¹⁹⁰ *Issues Paper 24*, above n 103, at [3.19]-[3.24].

¹⁹¹ *Waka Umanga*, above n 168, at [15.50].

¹⁹² Controller and Auditor-General *The Local Authorities (Members' Interests) Act 1968: Issues and Options for Reform* (Wellington, June 2005) at 11.

- R36 The statute should require that an officer who is prevented from voting on a matter because he or she has a financial interest in it may continue to be counted as part of the quorum.
- R37 The statute should require that where 50 per cent or more of those forming the committee's quorum are prevented from voting on the matter because they have disclosed a financial interest, then the remaining committee members must call a special general meeting to determine the matter.
- R38 The statute should require that an officer should be considered to have a financial interest in a matter if he or she:
- may derive a financial benefit from the matter;
 - is the spouse, partner, child, or parent of a person who may derive a financial benefit from the matter;
 - may have a financial interest in an entity to which the matter relates; or
 - is a partner, director, officer, board member, or trustee of a person who may have a financial interest in an entity to which the matter relates.
- R39 The following interests should be excluded from the definition of financial interest:
- remote or insignificant interests of a nature that could not reasonably be regarded as likely to influence the officer when carrying out his or her responsibilities; and
 - an interest that the officer has in common with other members of the society as a result of membership.
- R40 The definition of officer for the purposes of these conflict of interest provisions should be the same as that in R30 (which deals with duties of officers) so any person who owes fiduciary duties to the society is required to disclose a financial interest.
- R41 The statute should provide that the committee of each society must maintain a register of disclosures made by officers of financial interest in matters that are being considered by or affect the society. The committee should present a summary at each annual general meeting of the nature and extent of any disclosures recorded during the year.
- R42 The statute should require that unless the constitution of a society provides otherwise, the register of disclosures should not be open to inspection by members of the incorporated society who are not officers or committee members of the society.

FINANCIAL REPORTING

Current position

- 6.144 The financial reporting requirements for societies are currently in s 23 of the 1908 Act. Each society is required to deliver an annual financial statement to the Registrar. The statement must contain:
- the society's income and expenditure for the past financial year;
 - the society's assets and liabilities at the end of the year; and
 - details of mortgages, charges or other encumbrances over any society property.
- 6.145 The requirements are not onerous and do not stipulate any particular form or standard of reporting beyond these basic requirements. An officer of the society is required to provide a

certificate to the Registrar to verify that the statement has been submitted to the members at a general meeting and approved by them.

- 6.146 Statements, as for all other documents lodged with the Registrar, are required by s 34 of the Act to be available for public inspection. Statements of societies can presently be searched for and obtained free of charge from the online Register.
- 6.147 Despite the relative simplicity of the reporting requirements, many societies struggle to comply. For nearly all of the approximately 200 society dissolutions each year that are initiated by the Registrar because the society is not operating, the initial evidence is the society failing to file its annual statement. The confirmation comes from continued failure to file, despite reminders and a warning notice.
- 6.148 Where a society fails to provide the statement and certification, every officer is liable to a fine. The Act does not require that the statement or society accounts be audited, but societies may require audited accounts in their rules.

Proposals for changes

- 6.149 Difficulty with achieving compliance is not the only issue. More fundamental questions are:
- Is the current level of reporting to members sufficient or necessary for all societies or societies of widely differing size and complexity?
 - Should members be able to decide whether reporting and filing of statements is necessary?
 - If societies do need to report to members, what can be done to improve reporting standards?
- 6.150 Similar issues to these have recently been considered in respect of financial reporting for the range of corporate and unincorporated entities. A Financial Reporting Bill 2012 is before Parliament, aiming to make significant changes to reporting requirements for entities including large and small commercial companies, public sector entities, trusts, partnerships and a range of special purpose entities including varieties of not-for-profit organisations. The Bill aims to bring a consistent, principles-based approach to financial reporting and at the same time reduce compliance costs by only requiring entities to prepare and file complex general purpose financial reports (GPFRs) which meet generally accepted accounting practice, or have such reports audited, when such financial reporting is in the public interest.¹⁹³ The Bill also gives some entities the ability to “opt out” of production or audit of GPFRs, usually if 95 per cent of shareholders, owners or members agree.
- 6.151 The Bill adopts as the primary objective for the financial reporting system that the overarching reason for financial reporting is to provide information to external users who have a need for an entity’s financial statements but are unable to demand them.¹⁹⁴ Three indicators help establish whether financial reporting to GPFR or another standard will be in the public interest for a particular entity or class:

Public accountability: when an entity receives money directly from the public which is then reliant on GPFR to assess how well that money is being managed. This arises in the case of issuers of securities who invite the public to invest directly; public sector accountability for public money to taxpayers and ratepayers; and not-for-profit entities which receive donations from the public.

¹⁹³ Financial Reporting Bill 2012 (42-2) (select committee report), cl 4: See also Financial Reporting Bill 2012 (42-1) (explanatory note), at 1-2.

¹⁹⁴ Accounting Standards Review Board “Proposed application of accounting and assurance standards under the proposed new statutory framework for financial reporting” (unpublished discussion document, September 2009) at 17. The primary principle was developed by the then Ministry of Economic Development; see also Financial Reporting Bill (42-2) (explanatory note) at 1.

Economic significance: where there is likely to be a significant economic or social impact on the national or regional economy if the entity fails and where stakeholders are reliant on GPF to assess the financial position and performance of the entity.

Separation of Ownership and Management: where there is a degree of separation of the owners from management and the owners are therefore reliant on GPF to assess performance, financial position and cash flows of the entity.

- 6.152 In order to establish whether public financial reporting is required, each entity or class must be considered against each indicator in turn. The indicators are arranged in order of significance. The position of an entity regarding any one indicator may be enough to justify it being required to prepare GPFs. However it is best to deal with the indicators in order, starting with public accountability. If an entity must produce GPFs because it receives public funds and must account for their use, or because it is large enough to have economic significance then there is no need to consider the remaining indicators.
- 6.153 If the indicators determine that public financial reporting is necessary for a not-for-profit entity, the size or activity level of the entity may determine the standard of reporting required. For example, an entity may be required to prepare financial reports to satisfy public accountability, for instance a small registered charity that accepts public donations. However, it may be too onerous to require such a small charity with only modest operations to produce GPFs, which require the application of accrual accounting standards and may require more complex record-keeping and information systems than a small not-for-profit organisation can manage. The Bill, as reported back to Parliament, will allow small not-for-profit organisations that make annual payments of less than \$125,000 per year to prepare simple, cash accounting-based financial reports, based on standards approved by the External Reporting Board (XRB).¹⁹⁵ Such reports may reach a higher or more informative level of reporting than many organisations achieve now, because of the guidance available from the XRB and the standard, without necessarily being more onerous or difficult to complete.

Applying the indicators to incorporated societies

- 6.154 Up to one third of incorporated societies seek registration as charities under the Charities Act 2005.¹⁹⁶ This group does not currently lodge annual financial statements with the Registrar, because they are already complying with Charities Act requirements. Assuming members of this group either accept or are prepared to accept donations from the public, they are subject to public accountability, along with other charities. They will need to prepare GPFs if they are above the \$125,000 threshold, or may apply the standards being developed by the XRB for not-for-profit groups if their payments are below \$125,000 per annum.
- 6.155 Incorporated societies that are not registered as charities have not been addressed in the Bill because the Law Commission's review was underway.¹⁹⁷ The intention is that incorporated societies, incorporated charitable trust boards and others such as charitable societies will be brought within the Bill's scheme once the Commission's review and any related work is completed and subject to any relevant recommendations affecting reporting requirements. These entities should however be dealt with consistently and in accordance with the principles underlying the Bill, including the indicators.

195 Financial Reporting Bill 2012 (42-2) (select committee report), cl 45.

196 See Charities Register at www.register.charities.govt.nz/charitiesregister. A search of the register on 24 June 2013 revealed 7757 incorporated societies that have registered as charities, of which 756 have subsequently been de-registered.

197 Incorporated charitable trust boards and charitable societies, both incorporated under the Charitable Trusts Act 1957 are similarly excluded for now, unless they are separately registered as charities, because it is expected that either this report or forthcoming work on charitable trusts and incorporated trust boards will address these entities.

- 6.156 We do not expect non-charity incorporated societies to come within the public accountability indicator. Societies are essentially private organisations that do not normally seek or rely on public money.¹⁹⁸ Nor should they be involved in issuing securities to the public or in banking.
- 6.157 In terms of economic significance, we expect there will be a very small number of societies whose scale and activities mean that their failure could have significant impact.¹⁹⁹ Several such societies can be observed in the sporting area. These societies are already likely to be producing GPFRs, which are audited. We are not aware of other societies outside of sporting bodies to which the economic significance indicator is likely to apply.
- 6.158 That leaves the separation of ownership and management indicator. This indicator is present in virtually all societies because of their structure. Societies are often small and local, but their activities and business affairs are normally run by the society committee or executive, separate from the balance of members. This separation suggests that some provision needs to be made to ensure members receive adequate financial information about their society.
- 6.159 For non-charity incorporated societies that are not large there is therefore likely to be a public interest in favour of financial reporting, based on the separation between members and the committee. This public interest is not as strong as it would be if the public accountability or economic significance indicators applied. Also the separation between members and committees may also be less pronounced than for example, in a widely held company. The default position for incorporated societies should nevertheless be that financial reports are required. The standard of reporting (GPFRs or cash accounting-based) will depend on the annual payment levels of the society.

Ability to opt out of preparing statements

- 6.160 This default position is not the end of the matter. There is an argument that members of non-charity societies should be able to elect not to prepare financial reports, at all. This would be consistent with the proposed treatment of other entities for whom only the “separation of ownership and management” indicator applies. The Bill anticipates that for companies where only that indicator applies, a super-majority of shareholders may decide each year that financial reports need not be prepared, or that they be prepared but not audited.²⁰⁰ The related provision for not-for-profit entities where only the separation indicator applies would enable them to opt out of preparing financial reports, as well. Unlike companies, it is proposed that not-for-profit entities should be able to opt out on a simple majority of all members.
- 6.161 Currently the Bill applies this default provision to friendly societies that do not provide insurance;²⁰¹ they being the only not-for-profit entities where only the separation of ownership and management indicator applies. But this scheme is described as the default for not-for-profit entities.²⁰² This default would imply that societies should be required to prepare reports but that members be able to elect each year not to prepare financial reports so long as half of all members agree.

198 Though some societies may occasionally seek government funding, for example for capital works or as a community grant. Equally, some societies may seek government contracts, for example for the provision of welfare services related to the society’s purposes. Some of the societies involved will already be reporting, as charities. For others, the accountability arrangements for the public expenditure involved should be as required by the particular funding arrangement or contract.

199 It is not currently possible to search data on the register of incorporated societies to identify any economically significant societies. Our observations are based on our and officials’ knowledge of the register and registered societies.

200 Financial Reporting Bill (42-2) (select committee report), cl 85, inserting Companies Act, new s 207H. A majority of not less than 95 per cent of shareholders voting will be required. “Large” companies as defined in the Bill cannot vote not to prepare GPFRs, but can still elect not to have them audited: Companies Act, new s 207I.

201 Financial Reporting Bill (42-2), Part 2, sub-part 4.

202 Ministry of Economic Development Regulatory Impact Statement “The review of the financial reporting framework” (28 June 2011) at 24, table 31.

Appropriate scheme for societies

- 6.162 We consider the proposed default provisions, including the ability to opt out of preparing reports, are not appropriate for incorporated societies. A requirement for all societies to prepare financial reports each year is necessary to ensure that members receive at least a minimum standard of information. Further, there are public benefits in such reports being filed on the register.
- 6.163 The requirement to prepare statements and present them to and have them approved by the general meeting provides at least a minimum level of accountability within societies. If members are not guaranteed to receive some form of financial reporting once a year there are likely to be societies where a significant minority of members will be deprived of financial information and therefore any real ability to participate in the affairs of their society.
- 6.164 This situation is different from that likely to apply in companies, both closely and widely held. Part of the rationale for allowing widely held companies to opt out of having to prepare GPFs²⁰³ is that such reports are unlikely to be the only source of financial information available to shareholders. A company may choose to provide other financial information to shareholders, and at the very least shareholders will in future be guaranteed access to financial statements prepared for tax purposes.²⁰⁴ Incorporated societies typically do not file tax returns. Members' ability to participate in running the society including at general meetings would be significantly compromised, without financial reports.
- 6.165 With respect to filing reports, incorporated societies registry staff have told us that the requirement to prepare accounts, have them approved by members and then lodge them with the Registrar, acts as an effective compliance requirement; is relatively easy to complete; and is the only regular gauge of whether a society is still operating. If lodging of statements became voluntary, a new device such as an annual return would be needed, to help gauge whether societies are still operating. It is not clear that an annual return would be as effective at indicating the state of a society. The amount of information provided in societies' current annual financial statements varies widely, but even simple cash accounts may still provide significant information that it could be difficult to capture in a return. In any case, the mere fact that a society is still able to produce its own simple cash accounts may be a better demonstration that the society continues to operate, than the fact one person manages to complete a return for a society.
- 6.166 We are satisfied that the proposed not-for-profit default provision is not appropriate for incorporated societies. Such a provision could undermine internal accountability, especially if it became the norm for a society not to prepare or file some kind of annual financial report. The prospect that it could lead to society members receiving no financial information from year to year is likely to be contrary to the purposes of the new Act, in particular having societies run by the members. It would also be contrary to the primary objective for financial reporting, espoused in the Financial Reporting Bill.

The filing requirement

- 6.167 We have therefore recommended that incorporated societies continue to prepare financial reports. Reports ought to be prepared to the appropriate standards, meaning societies with

203 Shareholders in closely held companies would, in contrast, be able to "opt in". Not even the separation indicator applies in a closely held company, so there is no statutory requirement to prepare GPFs. But shareholders with a minimum of five per cent of voting power may elect that GPFs be required: Financial Reporting Bill (42-2) (select committee report), cl 86 inserting Companies Act new s 207J.

204 Financial Reporting Bill (42-2) (select committee report), cl 86 inserting Companies Act new s 207EA.

payments over \$125,000 will need to produce GPFs and others can take advantage of the cash accounting-based standard developed for not-for-profit entities by the XRB.

- 6.168 We considered the option of societies being required to prepare financial reports, but not being required to file them with the Registrar. We have decided against this option, for a number of reasons.
- 6.169 We accept officials' advice regarding the usefulness of annual reporting in gauging whether societies are still operating. Using financial reports in this way to identify societies that may have ceased operating has benefits for the integrity of the register. There is a noticeable difference between the incorporated societies register, where societies presently have to file annual financial statements, and the register of incorporated charitable trust boards, that do not have to file.
- 6.170 We have had comments from societies and their advisers that there are important benefits to the sector in having financial information stored on a central register. Having access to an electronic register means members have access to financial records easily and quickly, and there are fewer problems with lost or missing records. Having to file financial reports also removes or resolves any argument over which is the authoritative set of accounts for a society.
- 6.171 Dispensing with the filing requirement would remove only one bureaucratic step, which nowadays can be done online. The compliance costs saved would be minimal. In contrast, not having to file would remove failure to file as a first step towards dissolution or removal from the register. A society is never removed from the register simply for failing to file its annual financial statements on the due date. A failure to file triggers a process of assessing whether a society is no longer operating. The process includes reminders and warnings and takes not less than seven months, or longer if a society seeks more time. If financial reports were not available the Registrar would still need to assess whether societies are still operating, most likely by following up societies who do not provide an annual return.
- 6.172 We conclude that continuing the requirement to file annual financial statements or financial reports has few costs and several benefits. We therefore recommend that the requirement to file financial reports with the Registrar should continue.

Annual return

- 6.173 Even assuming financial reporting continues, there is scope to improve the content and usefulness of information collected by the Registrar. We propose that a short annual return be required at the same time financial reports are filed. As with companies, an annual return for a society requires an organisation on a register to provide or confirm some key information each year, thereby improving the quality and accuracy of records held, and potentially providing some additional information that may allow officials to improve services or policy affecting organisations on the register. Most returns can be completed online.
- 6.174 We consider that the new Act should allow for annual returns. The content of the annual return may develop or change over time, but should remain simple for all societies to complete. The content of annual returns should be set by regulation. We envisage that an annual return could initially seek the following information:
- a. confirmation that the general meeting has been held;
 - b. date and numbers attending the general meeting;
 - c. number of current members as at the end of the reporting period;

- d. names of committee members; and further contact details for the statutory officer, including email address and telephone number;
- e. address, telephone and email address details for the society; and
- f. certification that the society is continuing to operate, in accordance with its constitution.

Anti-money laundering obligations

6.175 Incorporated societies that handle money are likely to be reporting entities, with obligations under s 6 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (Anti-Money Laundering Act). Section 6(b) stipulates that the Act only applies where a reporting entity that is not a financial institution is carrying out activities that may give rise to a risk of money laundering or of financing terrorism. Depending on their activities, societies should check periodically for such risk, and respond according to the Anti-Money Laundering Act if they identify a risk. We do not propose any additional provisions specific to societies, regarding money laundering.

- R43 The statute should require all societies to prepare annual financial reports, and file copies of these with the Registrar.
- R44 The requirements for financial reports should be determined by the External Reporting Board, with the standards applied to be in accordance with Financial Reporting Act divisions (once enacted), including whether each society crosses any threshold for size, complexity or accountability.
- R45 The statute should provide for an online annual return to be prescribed by regulations. As a minimum the annual return should include:
 - a. confirmation that the general meeting has been held;
 - b. the date of and numbers of members who attended the general meeting;
 - c. the number of current members as at the end of the reporting period;
 - d. the names of committee members and further contact details, including an email address and telephone number, for the statutory officer;
 - e. the address, telephone and email address details for the society; and
 - f. certification that the society is continuing to operate in accordance with its constitution.

Chapter 7

Constitutions

- 7.1 The constitution of an incorporated society defines the purposes of the society and how it is organised and managed. It covers such matters as who can be a member, how decisions are made, how resources are managed, and how disputes are resolved. The constitution helps to ensure that the relationships within the society are successful and that the society can fulfil the purposes for which it is formed. It provides the fundamental structure under which the society will operate, but may also deal with more detailed matters, if the society chooses. Together, the set of rules is referred to as “the constitution,” however, the Incorporated Societies Act 1908 does not use that term.
- 7.2 The constitution should be distinguished from bylaws. Bylaws are a subsidiary form of rulemaking that is usually reserved for detailed matters. They may sometimes be given different names, such as regulations, policies or guidelines. Common examples of bylaws include restrictions on the use of club facilities, the rules of competitions in sporting clubs, financial delegations and codes of conduct, although these matters could equally be provided for in the constitution. While the 1908 Act requires every society to have certain rules, it is up to societies themselves to decide whether or not they will have bylaws.
- 7.3 In this chapter we begin with a discussion of the following general issues for constitutions:
- whether constitutions should be mandatory;
 - whether constitutions must be registered;
 - whether the statute should encourage societies to include their tikanga or culture in their constitutions;
 - whether the statute should prescribe the power to make bylaws;
 - whether a model constitution should be provided by the statute, and if so, how it should operate;
 - whether and how the statute should prescribe amendments to constitutions; and
 - how the minimum content requirements for constitutions should be enforced.

Following that we discuss in detail the statutory minimum content requirements for all constitutions.

GENERAL MATTERS ABOUT CONSTITUTIONS

Should every incorporated society be required to have a constitution?

- 7.4 Currently every society is required by the statute to have rules covering at least the minimum matters prescribed in s 6(1) of the Act.²⁰⁵ Those rules make up the society’s constitution. In most cases, a society’s constitution covers many more matters than those required by statute.

²⁰⁵ Incorporated Societies Act 1908, s 7(1)(a).

- 7.5 A different regime applies to companies. Under the Companies Act 1993 a company does not have to have a constitution.²⁰⁶ If it does not have a constitution, the Act contains provisions that cover all the rights, powers, duties and obligations of the company, the board, the directors and the shareholders.²⁰⁷ A company may have a constitution that can modify or negate those statutory rights, powers, duties, and obligations.²⁰⁸
- 7.6 We have considered whether the Companies Act model should apply to incorporated societies. Submissions on *Issues Paper 24* were clear that societies would like the administrative processes for incorporation to be as streamlined as possible. They also suggested there is significant value for societies in having a constitution that can be easily and regularly referred to. We agree that this is preferable to having rules located in statute.
- 7.7 Later in this chapter we recommend that the statute provide for a model constitution in regulations that a society could adopt as its own by “ticking a box” on its application for incorporation. That constitution would only cover the mandatory rules required by the statute, so it would not cover many of the subjects that most societies may want. In addition to adopting the model constitution, therefore, societies should be encouraged to adopt additional rules.

Registration of the constitution

- 7.8 The 1908 Act provides that the Registrar must register the rules of a society applying for incorporation if satisfied that the requirements of the Act have been met.²⁰⁹ Any person may inspect the rules on the register or may obtain a copy of the rules on payment of the prescribed fee.²¹⁰
- 7.9 We have considered whether there should continue to be a requirement that a society’s constitution is registered and available to be inspected by any person. We have concluded that while there may be many things a society can do in private, a transparent constitution is a fundamental requirement for members to be able to hold societies accountable. Outsiders must also be able to access an up-to-date copy of the constitution if they are to understand the nature of the society they are dealing with, and protect their own interests.²¹¹ We recommend therefore that the statute should continue to require the constitution to be registered and anyone should be able to inspect a copy of the constitution on the register. If a society adopts the model constitution that should be clearly noted on the register.

Including tikanga into constitutions

- 7.10 We have described elsewhere the sheer diversity of incorporated societies in New Zealand, and the value those societies place on operating under an entity with sufficient flexibility to accommodate their culture and philosophy. This is true for all societies, but has been particularly stressed to us in relation to Māori societies. Many Māori societies are looking for ways to strengthen both their tikanga in their operations and the recognition of that tikanga by external agencies, such as the courts.
- 7.11 In its 2001 paper *Māori Custom and Values in New Zealand Law* the Law Commission suggests that “tikanga” is used to describe the body of rules developed by indigenous societies to

206 Companies Act 1993, s 26.

207 Companies Act 1993, s 28.

208 Companies Act 1993, s 27.

209 Incorporated Societies Act 1908, s 8(c).

210 Incorporated Societies Act 1908, s 34(1) and (2).

211 Although it should be noted that, while a third party could protect its interests by reading a society’s constitution, for those that have not read the constitution, we proposed in chapter 5 that a new statute for incorporated societies should protect third parties who were unaware that a society was acting beyond its constitutional powers.

govern themselves.²¹² It is a word in common usage. It encompasses the cultural understanding underpinning the way a society operates. Non-Māori societies will of course also have their own underlying cultural principles.

- 7.12 Currently the Act is silent as to the culture or philosophy of societies. We consider that there are a number of ways in which a new statute should specifically recognise the tikanga or culture of a society.

A tikanga or culture provision

- 7.13 In addition to the list of rules that the statute should state are mandatory for all constitutions, it should also state that societies *may* include a rule expressing their tikanga. There is nothing to stop a society including such a rule currently, or in the future, but the inclusion of a specific statutory power will encourage societies to think about their culture when they are applying for incorporation, and how that culture will influence the way it operates.
- 7.14 Societies can describe their tikanga or culture in whatever way they wish, but one such method is for a rule to describe the relevant principles and state that the constitution must be interpreted in light of those principles. This express recognition of tikanga or culture in the statute will encourage the courts to give greater weight to it when they are interpreting constitutions.

Documents in te reo Māori

- 7.15 At a consultation hui it was suggested to us that some Māori societies would like to be able to write and submit their constitutions (and other documents) in te reo Māori. They tell us that would considerably enhance the incorporation of tikanga into a society's operations.
- 7.16 The office of the Registrar informed us that they have had very few, if any, requests to register documents submitted in te reo Māori. The Registry is happy to accept documents in te reo Māori, and would ask for a translation of the document. A translation helps with checking that the constitution complies with the Act.
- 7.17 We agree that the Registrar should accept constitutions and other documents in te reo Māori. It is generally good for the cultural development of Māori societies which leads to greater Māori social and economic development. We also consider that the te reo Māori constitution should be the official and authoritative constitution. However, a translation into English should be available because there remain certain aspects of a society's business that the Registrar must be involved with from time to time.

Māori Land Court

- 7.18 In a consultation hui we also received a strong submission that Māori societies would like to take any disputes over the enforcement of their constitutions that cannot be resolved internally, to the Māori Land Court, instead of the District Court or High Court. This is consistent with the Law Commission's 2006 recommendation in *Waka Umanga: A Proposed Law for Māori Governance Entities*, that the Māori Land Court should have a broader jurisdiction in respect of Māori entities.²¹³
- 7.19 We see advantages for Māori societies in being able to choose to have their disputes resolved in a forum inherently better equipped to understand their tikanga. However, such a recommendation would require a substantial expansion to the Māori Land Court's current

212 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [3]-[5].

213 Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R96, 2006) at [9.51].

jurisdiction under the Te Ture Whenua Maori Act 1993. Te Puni Kōkiri is currently overseeing a review of that Act.²¹⁴ An expansion of jurisdiction of this kind is not within its current review.

Bylaw empowering rules

- 7.20 In addition to rules in the constitution, societies often make use of subsidiary forms of rulemaking to manage more detailed matters. These subsidiary rules may be given different names, including bylaws, regulations, guidelines or policies. The main distinction between rules in the constitution and these subsidiary forms of rulemaking is that bylaws do not need to be registered. They also cannot override or conflict with the registered constitution. They are therefore, commonly used to prescribe matters of operational detail that may need to be altered more frequently, for example, the detailed rules for sporting competitions. They are not generally suitable for matters related to the structure and functioning of societies.
- 7.21 The Incorporated Societies Amendment Act 1953 gives societies a specific power to include a bylaw-making power in their constitutions, so long as the bylaws were not inconsistent with the principal Act or with the constitution of the society.²¹⁵ We consider that while incorporated societies could give themselves a bylaw-making power without such an empowering provision, there are advantages in having the provision in the legislation. It fills an educative role of informing incorporated societies about the option of bylaws while making the limitations (consistency with the Act and the constitution) very clear.
- 7.22 We have considered whether the statute should place additional restrictions on the making of bylaws to increase the ability of members to hold societies accountable. For example, the statute could prescribe the purposes of bylaws, require that bylaws be notified to members or available for inspection, or require that bylaws be made or amended in a certain way (perhaps by way of a resolution of a general meeting). However, on balance we consider that such regulatory requirements cannot be justified. We propose below some additional accountability requirements for the amending of the constitution, but believe the distinction between rules in the constitution and bylaws is valuable and should be retained.
- 7.23 Bylaws, like the constitution itself, can frequently be the source of disputes within societies. Currently, if a society's own dispute resolution processes (where they exist) do not resolve the matter, bylaws can be challenged in the High Court under judicial review or under the Bylaws Act 1910.²¹⁶ The latter gives the court the power to quash or amend any bylaw it considers is invalid.²¹⁷ We propose that the power we recommend in chapter 9, for members to apply to the court for orders to enforce the constitution, extend to the enforcement of bylaws. In light of that, we also recommend that bylaws of incorporated societies should no longer be subject to the Bylaws Act.

214 Te Puni Kōkiri *Te Ture Whenua Māori Act 1993 Review Panel* (Discussion Document, March 2013).

215 Incorporated Societies Amendment Act 1953, s 4.

216 For example, see *Kemp v New Zealand Rugby Football League Inc* [1989] 3 NZLR 463 (HC).

217 Bylaws Act 1910, s 12.

R46 The statute should provide that a society may include rules in its constitution for the following purposes, so long as those rules are consistent with the constitution and the statute:

- to empower it to make bylaws;
- to express its tikanga or culture; and
- to provide for any other matter relevant to the society's affairs.

R47 Bylaws made or continued under the new statute should no longer be subject to the Bylaws Act 1910.

Amending the constitution

Limits on making amendments

- 7.24 The power to alter the constitution can be a useful tool to modernise a society or to overcome problems. However, the power can also be abused or used to produce an unjust result for members. We have therefore, considered how the statute might prescribe the method of amending constitutions to ensure societies remain accountable to their members.
- 7.25 Incorporated societies are bodies of free association. A member is, in theory, free to leave if a society amends its constitution in a way that member does not agree with. In reality however, that choice is often not straightforward. Also the integrity of the incorporated societies model demands that statutory provisions balance the need for societies to grow, adapt and change, against some basic provisions to ensure that amendments to constitutions are transparent and not used in an oppressive manner.
- 7.26 Currently the statute places no limits on the way in which societies amend their constitutions so long as any amendment is in accordance with the society's constitution and the Act.²¹⁸ Societies adopt a range of practices from requiring a special resolution of all members, through to permitting a governing committee to amend the constitution.
- 7.27 There is however, some case law in this area providing three principles that may limit the power to amend a constitution:²¹⁹
- For a member to be bound by an amendment to a constitution, it must have been foreseeable at the time when the member joined the society.²²⁰
 - Proposed amendments must not alter the fundamental purpose of the organisation.²²¹
 - An amendment to a constitution must not be arbitrary and haphazard in nature.²²²
- 7.28 We consider that the application of these principles in the New Zealand context is quite limited. All incorporated societies must have a rule about how their constitution can be altered, added to or rescinded.²²³ It must therefore be within the contemplation of every member who agrees to be bound by the constitution of the society that the constitution may change in the future. That

218 Incorporated Societies Act 1908, s 21(1).

219 Rowan Armstrong "The Whistle has Blown ... Game Over... Or is it Really? Challenging the Decisions of Sports Governing Bodies in New Zealand" (2008) 14 Canterbury L Rev 65.

220 *Waitakere City Council v Waitemata Electricity Shareholders Inc* [1996] 2 NZLR 735 (HC).

221 *Doyle v White City Stadium Ltd* [1935] 1 KB 110.

222 *Pharmaceutical Society of Great Britain v Dickson* [1968] 2 All ER 686.

223 Incorporated Societies Act 1908, s 6(1)(e).

- must, to some extent, include the purposes of the society if it is to grow, adapt and change over time.
- 7.29 Fundamentally, we consider that societies ought to be able to determine the method by which they will alter their constitutions. There should be room within any statutory provision on this subject to reflect the culture of the society. Our preferred position is that so long as all amendments to the constitution have been approved by at least a majority of members attending and voting on that matter at a general meeting, the statute should not prescribe the method for altering a constitution. This is because one procedure could never reflect the diversity required within the incorporated society sector.
- 7.30 This recommendation for approval by a simple majority of members contrasts with the position in the Companies Act, which requires a special resolution (a majority of at least 75 per cent) to alter or revoke the constitution. We consider that the companies context is different from that of incorporated societies where it is more likely that each member has a single vote and so a small number of members are unlikely to have disproportionate control over the society. Currently the 1908 Act does not require special resolutions, but many societies have adopted them in their constitutions in respect of important decisions they require strong support for. We see no reason why that should change in a new statute.
- 7.31 An issue arises when considering the alteration of constitutions, in which our member-based view of democracy for incorporated societies clashes with the desire to recognise the individual cultures of societies. The constitutions of some societies require the approval of an external body or person before the constitution can be altered. This is particularly common in branch structures where the external approval of a parent body is a method of ensuring that a branch society does not stray too far from the parent.
- 7.32 The rules requiring this type of external approval are entrenched in that, in theory, the external body could veto any attempt to alter the rule requiring its approval. That entrenchment threatens the ability of the membership to determine the future direction of the society through democratic means. This was the situation addressed in *Bath v Singh*.²²⁴ The High Court in that case held that the defendant society was able to amend its constitution despite the absence of the required approval by the plaintiff's society. The attempt to entrench the rules was inconsistent with the contractual nature of the relationship between the defendant society and its members, and consequently was void and of no effect.
- 7.33 We have considered whether the threat to members' rights and interests of such external approval rules is sufficiently great that the statute should have a majoritarian override provision where, for example, the approval of a course of action by the majority of members would override any external veto power. We have concluded that it is not. The will of the majority of members, while generally a positive check on the power of the society, can also be used in some instances to produce an unjust result for the minority, or fail to take due regard of values of the society. In addition, societies that find themselves bound by the veto of an external party against the will of the society will now have alternative remedies.

Registration of amendments

- 7.34 The provisions for registration of amendments to constitutions are set out in s 21 of the 1908 Act. We consider that these should remain largely unchanged, with only minor amendments, as follows:

224 *Bath v Singh* [2012] NZAR 50 (HC).

- Every alteration to the constitution must be signed by at least three members of the society and delivered to the Registrar, accompanied by a certificate by an officer of the society certifying that the alteration has been made in accordance with the constitution.
 - The Registrar must register the amendment if satisfied that it complies with the Act and the society's constitution.
 - The amendment takes effect from the time of registration or later date if specified in the amendment.
 - The Registrar may refuse to register an amendment to the purposes of a society if he or she believes that the amendment may prejudicially affect any existing creditor of the society and that all such creditors have not consented to the amendment.
 - The Registrar may refuse to register an amendment to the name of a society until the proposed amendment has been publicly advertised in such manner as the Registrar thinks fit.
- 7.35 We would, however, make two additions to these provisions. First, the statute should provide a time frame for delivery of amendments to the Registrar. We consider that 30 days from the date the amendment was made is appropriate. There should be the potential to impose an infringement offence on any society that does not register amendments within the timeframe. We discuss infringement offences in more detail in chapter 10.

The court's power to amend a constitution

- 7.36 The High Court currently has a statutory power to void an amendment to an incorporated society's constitution,²²⁵ but otherwise has no statutory power to amend a constitution. Under s 21(3A) of the 1908 Act the High Court has a discretion to make orders if it is satisfied that an amendment has not been properly made. It may declare an alteration to be void (in whole or in part), order that the registration of an amendment be cancelled (in whole or in part), or make any directions or provisions as seem just in the circumstances. We recommend that this power is continued in a new statute.
- 7.37 We are not recommending that the final sentence of s 21(3) be replicated in a new statute. That sentence reads:
- Such registration shall be conclusive evidence that all conditions precedent to the making of the alteration, or to the registration thereof, have been duly fulfilled.
- 7.38 That sentence has always sat awkwardly with the power of the court in s 21(3A) to void an amendment that was not properly made. The main purpose of this sentence is the protection of third parties dealing with the society and relying upon any amended powers. We suggested in chapter 5 that the statute provide a similar protection for third parties as is found in s 18 of the Companies Act. There is, therefore, no need to replicate this confusing sentence in a new statute.
- 7.39 In relation to companies, the court also has a power to amend a constitution if it is satisfied that it is not practicable to amend the constitution of the company using the procedure set out in the Act or in the company's constitution itself.²²⁶ This situation may occur, for example, when a company can no longer achieve the quorum required by the constitution to amend the constitution. Incorporated societies may also find themselves in this situation from time to time. In addition, the court may alter the constitution of a company when the conduct of the

²²⁵ Incorporated Societies Act 1908, s 21(3A).

²²⁶ Companies Act 1993, s 34.

company is oppressive, unfairly discriminatory or unfairly prejudicial to someone.²²⁷ We discuss an oppression remedy for incorporated societies in chapter 9.

7.40 The court already has an inherent jurisdiction to intervene in the operations of an incorporated society if the interests of justice demand it and it is exercised on proper juristic principles, in accordance with the statute.²²⁸ This may extend, in some situations, to a power to amend a constitution of an incorporated society. However, we consider that in the interests of certainty, the court should have a statutory power to make such orders as it thinks fit, including to amend the constitution of an incorporated society in the following circumstances:

- if it is satisfied that an amendment to the constitution was not made in accordance with the constitution of the incorporated society, or the Act;
- if it is not practicable to amend the constitution using the procedure set out in the constitution itself;
- if it is satisfied that the amendment is operating, or would operate in an oppressive, unfairly discriminatory or unfairly prejudicial manner; or
- in any other circumstances in which the court considers it is just and equitable to do so.

R48 The statute should provide that, in addition to any other requirements in the constitution, every amendment to a constitution must be approved by a majority vote of members attending and voting at a general meeting of the incorporated society.

R49 The statute should provide for the following registration requirements for the alteration of constitutions:

- a. All alterations to constitutions must be notified to the Registrar within 30 days.
- b. Every alteration to the constitution must be signed by at least three members of the society and delivered to the Registrar accompanied by a certificate by an officer of the society certifying that the alteration has been made in accordance with the constitution and Act.
- c. If satisfied that the amendment complies with the Act and the society's constitution, the Registrar must register the amendment.
- d. The amendment will take effect from the time of registration or a later date that is specified in the amendment.
- e. The Registrar may refuse to register an amendment to a society's purposes if he or she believes that the amendment may prejudicially affect any existing creditor of the society and that all such creditors have not consented to the amendment.
- f. The Registrar may refuse to register an amendment to the name of a society until the proposed amendment has been publicly advertised in such manner as the Registrar directs.

R50 The statute should give a court a power to amend a constitution on the following grounds:

- a. it is satisfied that an amendment to the constitution was not made in accordance with the constitution of the incorporated society, or the Act;

227 Companies Act 1993, s 174.

228 *Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472 (HC); *Te Runanganui o Ngati Kahungunu Inc v Scott* [1995] 1 NZLR 250 (HC); *R v Moke and Lawrence* [1996] 1 NZLR 263 (CA).

- b. it is not practicable for the society to amend the constitution itself using the procedure set out in the constitution;
- c. it is satisfied that the constitution is operating, or would operate in an oppressive, unfairly discriminatory or unfairly prejudicial manner; or
- d. in any other circumstances in which the court considers it is just and equitable to do so.

A model constitution

- 7.41 In *Issues Paper 24* we discussed whether the new Act should include a model constitution.²²⁹ This is a generic set of rules that societies could adopt instead of drafting their own constitution.
- 7.42 Tasmania adopted a model constitution for incorporated societies in 1964.²³⁰ This approach has since been followed by every Australian state except Western Australia. The advantages of model constitutions in Australia have been described as follows:²³¹
- ... it is educational, economical and administratively convenient. All association members are given an example of what a comprehensive and Act-satisfying body of rules should contain. Associations which choose to draft their own rules have a standard for comparison. Others obtain a body of rules without the expense of individual drafting. Where Model Rules are adopted, the registering authority has no need to check rules for compliance with the statutory minimum-content requirements.
- 7.43 We discussed in *Issues Paper 24* how a model constitution would operate.²³² We suggested that New Zealand should have a basic set of generic rules that would apply automatically where a society's own constitution was silent. We noted however, that due to the sheer variety of societies in New Zealand, it would be difficult to draft a constitution that would suit all societies.

Submissions

- 7.44 The submissions were generally supportive of the proposal. Of the 81 submitters who addressed this question, an overwhelming majority favoured a model constitution, but in many cases it was not clear whether they were referring only to a model constitution, or to a model constitution that applied automatically where a society's own constitution was silent. Many submitters agreed that a model constitution would make the incorporation process easier and would help societies, particularly small societies. They said that the model constitution would need to be simple and of universal application. Many submitters thought that societies should still be encouraged to write their own constitution or at least actively choose the particular model rules to adopt.
- 7.45 The following excerpt from the submission from the New Zealand Law Society encapsulates the benefits of a model constitution while recognising that those benefits are limited:
- Many of the existing problems arise because constitutions are drawn by people without the requisite expertise (either the technical expertise or an adequate knowledge of the way an entity operates), or the constitutions have become out-dated. Those problems will not be cured by foisting on societies a model set of rules because their adaptation to the needs of a society will still require some technical

229 Law Commission *Reforming the Incorporated Societies Act 1908* (NZLC IP24, 2011) at [2.7]-[2.11] [*Issues Paper 24*].

230 Associations Incorporation Act 1964 (Tas), s 16.

231 Keith L Fletcher *The Law Relating to Non-Profit Associations in Australia and New Zealand* (The Law Book Company Limited, Sydney, 1986) at 267.

232 *Issues Paper 24*, above n 229, at [2.7]-[2.11].

expertise and an adequate knowledge of the way an entity operates. However, the problems arising from the model rules approach are likely to be less serious than those that arise at present.

- 7.46 A small minority of submissions addressing this question were clearly not in favour a model constitution applying to societies automatically. Some suggested that a model constitution should operate only as a precedent that could be copied into a society's own constitution. This group were strongly opposed to the imposition of rules on a society. Some submitters thought that the huge diversity and variation between societies meant that no generic default constitution could cover every society.

Discussion

- 7.47 During our consultation, we heard many times of societies with rules that did not serve the purposes of the society well because they were poorly drafted. Often those societies could not afford to buy in expert help at the time of incorporation and did not have access to experts within their membership. When problems arose in later months or years, resolving them became very frustrating, time consuming and often expensive.
- 7.48 We are in no doubt that a model constitution would be well received by new societies wishing to incorporate. It would enable societies to incorporate easily and cheaply, and would provide societies with an assurance that those rules satisfied the statutory requirements. It does not necessarily follow that the model constitution would serve the society well over time. A model constitution should contain only generic rules that do not necessarily reflect the purposes or the culture of the society. We have formed the view that in most cases, time spent in drafting a constitution to suit the particular needs of the society is time well spent. Such a constitution is much more likely to serve the society well into the future.
- 7.49 Nonetheless, we consider that there remain sufficient advantages in the legislation containing a model constitution. Societies should always be encouraged to take time to ensure that the constitution meets their needs, but the advantages of having access to a simple set of basic rules that comply with the statutory requirements would be reassuring and helpful to many new societies.

The form of a model constitution

- 7.50 We have considered whether a model constitution should exist in legislation or outside of legislation. A model constitution existing outside of legislation would operate merely as a precedent. It could exist as a sample on the website of the Registrar, similar to the sample constitution that exists there now. The main advantage of this approach is that there could be numerous versions of the model, suitable for different types of societies, for example, for sports clubs; for societies that provide social services; for societies with a federal structure; and for those with a very simple structure. The disadvantages of the approach are that a society could not merely state on its application for incorporation that it wishes to adopt the model constitution. It would operate only as a precedent, so would have to be "cut and pasted" into a society's own document and submitted with other documents for the application for incorporation.
- 7.51 If the model constitution were to be included within legislation, it should be in regulations. A model constitution in regulations would give assurance that it satisfied the statutory requirements and could be more easily adapted over time than if it were in the statute itself.
- 7.52 We have concluded that the advantages of streamlining the incorporation process and providing a statute-satisfying model constitution are sufficient to warrant a model constitution being included in regulations made under the statute.

- 7.53 We considered whether the model constitution should cover only the mandatory rules required by the statute for every constitution, or whether it should extend to other rules which, although not mandatory, would be desirable for most societies. We concluded that the huge diversity of societies means that a model constitution can be of most advantage to the sector if it takes a minimalist approach. Societies that adopt the model constitution, however, should be encouraged to include additional rules covering other subject matter to suit their needs.

How the model constitution would operate

- 7.54 As indicated, many of the submissions in favour of a model constitution were not clear whether they favoured that constitution operating by default or only when specifically selected by a society. The main advantage of the model operating by default is that any society that finds that its constitution does not cover a particular subject matter would be automatically covered by the rule in the model constitution. The main disadvantage is that societies may find that rules apply to it that it has not considered, and that are not appropriate for it.
- 7.55 We have concluded that the model constitution should not generally operate by default. There are concerns with individual rules automatically applying to a society and the problem of societies having gaps in their constitutions is not significant enough to justify this solution. Also, a regime whereby rules operated by default makes no sense when the model constitution only covers the rules that are required by the statute to be included in every constitution. Under such a scenario, in theory, every society must have equivalent rules to all of those included in the model constitution, so there would be no gaps.
- 7.56 We recommend therefore, that the statute provides for a model constitution to be made in regulations. That model constitution should cover all of the rules required by the statute for every constitution. When a new society is applying for incorporation, it may state that it adopts the model constitution instead of submitting its own constitution, but it may also include additional rules of its own if it wishes.

An internet constitution builder tool

- 7.57 A number of submissions suggested that an internet-based constitution builder tool would be an excellent resource for providing education and guidance to incorporated societies in relation to drafting their constitutions. A model is provided on the Ministry of Business, Innovation and Employment website in the form of an “Employment agreement builder” tool.²³³ That tool takes the drafter through each suggested clause, prompting him or her to fill in the gaps in simple clauses or to choose between several options in more complicated clauses. It has colour coded the mandatory clauses and voluntary clauses. Each page comes with explanatory notes guiding the drafter to consider relevant matters.
- 7.58 During our consultation we were constantly told of the need for education and guidance for societies in drafting their constitutions and in running societies in general. An internet-based constitution builder tool would provide that guidance and would greatly enhance the quality of constitutions for incorporated societies. Not only would it offer the rules from the model constitution, but it could offer guidance for societies to help them consider whether those rules are suitable for their situation. It could offer additional rules to those included in the model constitution, and alternative rules in various subject areas to suit various types of society.

233 See generally Ministry of Business, Innovation and Employment “Employment Agreement Builder” < <http://www.dol.govt.nz/er/starting/relationships/agreements/builder.asp> > .

- 7.59 We recognise that there is much greater demand for employment agreements than for incorporated society constitutions. Nonetheless, this model, or a modified version of it, would go a long way towards providing the education and guidance that is needed in this sector.

Adopting amendments to the model constitution

- 7.60 If a society adopts the model constitution, there is a question whether it must automatically be subject to any amendments made to the model constitution in regulations or whether it will only be subject to those amendments if the society specifically adopts those amendments in accordance with its rules on amending its constitution. While there is some appeal in the latter position, because it ensures that societies must consider whether amendments will suit their needs, such a position is impractical and creates uncertainty. If a society that has adopted the model constitution is not automatically subject to amendments, it will become impossible to determine what version of the model constitution the society is subject to.

R51 The statute should enable a model constitution to be made in regulations.

R52 The statute should require that every society applying for incorporation must either submit a constitution complying with the statutory minimum requirements or indicate that it adopts the whole model constitution. The adoption of the model constitution should be deemed by the statute to be sufficient compliance with the statutory requirements for the content of constitutions.

R53 If a society indicates that it adopts the model constitution, the Registrar should indicate that fact on the register. If a society submits its own constitution or submits additional clauses to the model constitution, the Registrar must place it on the register if he or she is satisfied that the constitution or additional clauses comply with the statute.

R54 The statute should provide that a society that adopts the model constitution will automatically be subject to any amendment to the model constitution.

What this means for existing societies

- 7.61 Many submitters were concerned that our recommendations would require an expensive and time consuming redraft of their constitutions. When the new Act is in force, every existing society will have to check both that its constitution covers all the subject matter required by the statute to be covered and that each rule complies with any new statutory requirements for the content of those rules. Many societies will find that their constitutions already comply with all the requirements and they need do no more.
- 7.62 Those societies with non-complying constitutions will be required to amend their constitutions within a statutory transition period. We have been told by societies that constitutional amendments can be a time consuming process. They may require numerous steps, some of which require a vote at an annual general meeting. We acknowledge the concerns of societies and consider societies should be given adequate time to ensure their constitutions comply with the new statutory requirements. While it is hard to determine how long that should be, we doubt it should be less than four years.
- 7.63 The statute must also provide for what might happen if societies fail to ensure their constitutions comply with the new statutory requirements. There are three options:

- First, the Registrar could impose an infringement fee on the society, of up to \$1,000. This would provide some motivation to make any necessary amendments, but seems unnecessarily harsh in light of the following more pragmatic solutions.
 - Second, the applicable model rule could automatically apply in place of any non-complying or non-existent rule. The advantage of this option is that it operates without the need for the intervention of the Registrar. However, in many instances it would not be clear whether the society's rule complied with the statute or not. That would result in confusion over which rule applied to the society.
 - Third, the Registrar could declare that the applicable model rule applies to the society. This option would provide certainty to societies and a pragmatic solution. It would however, necessitate a systematic search by the Registrar of the register for non-complying constitutions. In the event that a non-complying constitution is not detected by the Registrar, the society could continue to operate in contravention of the statute, until action is taken by the society or its members.
- 7.64 None of these options are without problems but each provides either some incentive on societies to ensure constitutions comply with the statutory requirements or a pragmatic solution in the event that they do not. Our preferred approach is the third option because it avoids punishment, but provides certainty and some motivation to take action. The other options are, however, workable compromises. We do not believe that any concern about funding the necessary work of the Registrar for the third option should prevent the adoption of the main recommendations of this report.

R55 The statute should provide a transitional period by the end of which every constitution must comply with the requirements of the new statute.

R56 After the transition period, the Registrar should have a power to declare that the applicable rule from the model constitution applies to a society that does not have a rule required by the new statute, or in place of a rule that does not comply with the requirements of the new statute.

MINIMUM CONTENT REQUIREMENTS FOR CONSTITUTIONS

- 7.65 The 1908 Act provides only a skeletal framework for a society's constitution. Every constitution must provide for the following matters:²³⁴
- the name of the society;
 - the objects for which it is established;
 - the modes in which people become members;
 - the modes in which people cease to be members;
 - the mode in which the rules may be altered, added to or rescinded;
 - the mode of summoning and holding general meetings and of voting;
 - the appointment of officers;
 - the control and use of the common seal;
 - the control and investment of the funds;
 - the powers (if any) of the society to borrow money;

²³⁴ Incorporated Societies Act 1908, s 6(1).

- the disposition of the property in the event of the society being put into liquidation; and
 - such other matters as the Registrar may require to be provided for.
- 7.66 *Issues Paper 24* discussed whether a new statute should expand on the current list of subjects that societies are required to cover in their constitutions.²³⁵ We outlined the New South Wales legislation by way of example, and asked whether it offered a good starting point for the rules that must be covered by every society applying for incorporation under New Zealand legislation.
- 7.67 There was much support in the submissions for greater guidance in a new statute for societies writing their constitutions. Nearly two-thirds of submissions agreed that the New South Wales legislation was a good starting point, although many also thought that it was more prescriptive than was necessary.
- 7.68 In contrast, some submitters considered that their current constitutions were working adequately and were concerned that any new requirements would necessitate a costly process of redrafting their constitutions.
- 7.69 We consider that new legislation should include an expanded list of rules required in every constitution. That list should include the rules that all modern, well-managed incorporated societies in New Zealand should have, no matter their purpose or their size. It should cover both basic organisational rules (such as membership, purposes and powers of the society) and basic accountability rules that protect membership involvement and democratic decision-making (such as access by members to society information and internal dispute resolution procedures).
- 7.70 In the remainder of this chapter we discuss each rule required in constitutions by the New South Wales legislation, plus others that should be considered. In addition to recommending in each case whether that matter should be included in the list of rules required for every incorporated society in New Zealand, we also discuss any statutory requirements for the content of those rules. In some cases we also make recommendations for other statutory provisions related to the content of those rules. In Appendix A we list our recommendations for the mandatory content of all constitutions (in this chapter and other chapters). We also list other recommendations that should be taken into account when drafting the model constitution or a society’s own constitution.

The name of the society

- 7.71 Under the current statute, the name of the society with the addition of the word “Incorporated” as the last word in that name must be included in the society’s constitution.²³⁶
- 7.72 Unlike in the Companies Act 1993, there is no statutory requirement that an incorporated society must clearly state its name in every written communication or document creating a legal obligation.²³⁷ The mandatory use provision in the Companies Act, together with the requirement to add the words “Limited” or “Tapui (Limited)” to the company name, acts as a warning to third parties that the shareholders’ liability is limited.²³⁸
- 7.73 We recommend that the statute continues to require the name of the society to be stated in its constitution. We also recommend that the statute should provide a Māori word as an alternative

235 *Issues Paper 24*, above n 229, at [2.2]-[2.6].

236 Incorporated Societies Act 1908, s 6(1)(a).

237 Companies Act 1993, s 25(1).

238 Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (LexisNexis, Wellington 2011) at 114.

to “Incorporated”. The newly launched *He Papakupu Reo Ture: a Dictionary of Māori Legal Terms* indicates that the most appropriate word is likely to be “Manatōpū”.²³⁹

- 7.74 We recommend that the word “Incorporated” or the word “Manatōpū” should be required to be at the end of the name and that a similar mandatory use provision, as is in the Companies Act, should be added to the legislation. As with shareholders, members of incorporated societies have limited liability. It is important that this is signalled to third parties entering into legal obligations with the society. Other issues related to the names of societies are discussed in chapter 4 on registration.

The purposes of the society

- 7.75 Currently, the constitution of a society must state the objects for which the society is established.²⁴⁰ The only limitations on those objects are that a society must be associated for a lawful purpose, and not for the members’ pecuniary gain.²⁴¹ If a society operates outside those stated objects, the Registrar may give notice to the society to stop carrying on that operation. Every officer and every member of the committee or other governing body is liable to a fine of \$2 per day if the society does not stop that operation, unless he or she shows that the operation was taking place without his or her authority or consent.²⁴² The nature of pecuniary gain is discussed in more detail in chapter 3, where we recommended that it is referred to as “monetary gain”.
- 7.76 We considered whether societies should continue to be required to state their purposes in their constitutions. Companies are not required to state their purposes; should incorporated societies be different? We have concluded that it is the statement of purposes and the requirement that the operations of the society are limited to those purposes that are the key distinctions between incorporated societies and other legal entities, particularly companies. Therefore, the statute should continue to require the purposes to be stated in the constitution. We also consider that the statute should use the word “purposes” rather than “objects” because it is more widely understood and brings the incorporated societies legislation into line with the Charitable Trusts Act 1957 in this regard.
- 7.77 We have also considered whether the statute should place limits on how broadly the purposes of society should be stated. We have concluded that there should be no limits on the breadth of the stated purposes, so long as they are coherently stated. A society should be able to operate for a very broad purpose if it chooses, but if the stated purposes are incoherent or indeed illegal or for the monetary gain of members, then that would constitute non-compliance with the statutory requirement.

The registered office of the society

- 7.78 The 1908 Act does not require a rule in respect of the registered office, but does require every society to have a registered office and to notify the Registrar of the address of the registered office, and any changes to it.²⁴³ The purpose of requiring a registered office for an incorporated society is so that the Registrar and other third parties can communicate with it, serve documents on it when required and enforce the obligations the statute imposes on societies.

239 Māmari Stephens & Mary Boyce (eds) *He Papakupu Reo Ture: a Dictionary of Māori Legal Terms* (LexisNexis, 2013) at 39.

240 Incorporated Societies Act 1908, s 6(1)(b).

241 Incorporated Societies Act 1908, s 4.

242 Incorporated Societies Act 1908, s 19.

243 Incorporated Societies Act 1908, s 18.

- 7.79 Incorporated societies are likely to consult their constitutions more regularly than the statute. Therefore, it would be helpful to societies if the constitution had to contain all the matters that must regularly be considered by societies. On that basis, we recommend that, in addition to a continuing requirement to have a registered office and to notify the Registrar of the physical address of that office and any changes to it, the statute should require every society to have a rule providing for how the society's registered office will be determined and amended as required over time.
- 7.80 In line with the equivalent provisions in the Companies Act,²⁴⁴ any amendment to the registered office should take effect from the date stated in the notice of amendment to the Registrar, or five working days after the notice is registered, whichever is the later.
- 7.81 Under the 1908 Act, every officer of a society and every member of the committee or other governing body of the society is liable to a fine not exceeding 10 cents for every day in which the society carries on its operations without having a registered office.²⁴⁵ We consider that under the new statute, operating without a current registered office should make the society subject to an infringement fee. A regime of infringement fees for incorporated societies is discussed in chapter 10.

Membership

Qualification, termination and records

- 7.82 Currently the 1908 Act requires a rule covering how people become members and cease to be members.²⁴⁶ It does not require a rule covering the keeping of a membership register, but the Act requires that every society keep a register of its members containing their names and addresses, and the dates when they became members. If requested to do so, the society must send the Registrar a certified list of the names and addresses of members.²⁴⁷
- 7.83 The submissions received on *Issues Paper 24* indicated very strong support for rules that establish the qualifications for membership of the society. Few commented specifically on the termination of membership or the requirement for a register.
- 7.84 We consider that it is important for all societies to have certainty about who is a member and who is not a member. Members have rights and obligations under the constitution, the statute and common law. Societies should have processes for determining who may exercise those rights and obligations, and the statute should require certain basic processes to enhance that goal.
- 7.85 We recommend two requirements in relation to membership. First, every society must maintain a register that identifies each member. Second, members must expressly consent to being members. While the courts have held that membership only occurs with the voluntary act of joining the society,²⁴⁸ enshrining that principle in statute would serve a useful educative role.

244 Companies Act 1993, s 187(3).

245 Incorporated Societies Act 1908, s 18(4).

246 Incorporated Societies Act 1908, s 6(1)(c) and (d).

247 Incorporated Societies Act 1908, s 22.

248 *Te Runanga o Muriwhenua Incorporated Society v Noho* HC Whangarei CP43/98, 2 December 1998 at 4.

- 7.86 In addition, the statute should require every incorporated society to have rules covering:
- how people become members;
 - how people cease to be members;
 - arrangements for keeping the society's register of members up to date; and
 - whether and how the society will provide access for members to the register of members.

Fees and subscriptions paid by members

- 7.87 The New South Wales legislation requires a rule covering the setting of entrance fees, subscriptions and other amounts (if any) to be paid by the members.²⁴⁹ Few submissions addressed this matter specifically. We consider that the setting of fees and subscriptions is not common to every society so should not be a mandatory rule for constitutions. Indeed in some cases this would already be covered by the rule for the qualification of members. If a society wishes to set fees or subscriptions, it must provide a rule for how that will be done.

Liability of members

- 7.88 The 1908 Act does not require a rule about the liability of members, but the statute provides that membership in and of itself does not impose any liability in respect of any contract, debt, or other obligation made or incurred by the society.²⁵⁰ In contrast, the New South Wales legislation requires a rule covering the liability (if any) of the society's members to contribute towards the payment of the debts and liabilities of the association, or the costs, charges and expenses of the winding up of the association.²⁵¹
- 7.89 Few submissions dealt specifically with the New South Wales requirement for a rule covering the liability of members. Those that did thought that societies needed such a rule. In chapter 5 we addressed whether the current statutory limitation of liability is sufficient. We concluded that the statute should align with the Companies Act provisions for liability of shareholders.²⁵² Members should not be liable for the obligations of societies by reason only of being members. A society will be covered by this statutory provision, so a rule covering the liability of members should not be mandatory. However, a society may limit the applicability of that provision by a rule in its constitution, if it wishes.

Committees and the statutory officer

- 7.90 In chapter 6 we discussed whether the statute should require all societies to establish some form of committee. We concluded that all societies should be required to have a committee of at least three people, that the names of all three people must be notified to the Registrar and that at least one committee member must be elected or appointed as the statutory officer. We also proposed some statutory restrictions on eligibility for committee members and the statutory officer, and that societies may include additional rules on eligibility or qualifications for their officers, in their constitutions.
- 7.91 Given these recommendations, all societies must have rules providing for the following matters:
- the number of committee members;
 - the election or appointment of officers or committee members;

249 Associations Incorporation Act 2009 (NSW), sch 1.

250 Incorporated Societies Act 1908, s 13.

251 Associations Incorporation Act 2009 (NSW), sch 1.

252 Companies Act 1993, s 97.

- the terms of office of the officers or committee members;
- qualifications for appointment;
- the functions and powers of the committee;
- grounds for removal from office; and
- how the statutory officer will be elected or appointed.

Powers of societies and entering into legal obligations

- 7.92 In chapter 5 we recommended that a new statute should give societies the powers of a natural person, in a similar way to the Companies Act. However, we also recognise that a society may wish to override that default position and specifically limit the powers of the society. For example, a society may wish to prescribe in its constitution the method by which it will enter into legal obligations.
- 7.93 The Property Law Act 2007 sets out the requirements for a body corporate (including an incorporated society) entering into legal contracts or other obligations.²⁵³ In respect of contracts required to be made by deed, the deed must be signed in the name of the society by one director if there is only one; by two directors if there are two or more; or by one director or other person if the society’s constitution authorises deeds to be made that way.²⁵⁴ “Director” includes a person occupying a position in the society that is comparable with that of a director of a company.²⁵⁵ In respect of other obligations (whether required to be in writing or not), a person acting under the society’s express or implied authority may enter into the obligation on behalf of the society.²⁵⁶
- 7.94 The 1908 Act sets out similar requirements, but in respect of contracts made by deed, it requires the contract to be “in writing under the common seal of the society”.²⁵⁷ The common seal is a rubber stamp containing the name of the society and the words “common seal”. It is traditionally used on contracts and other legal documents signed by the society to indicate that the documents were signed with the authority of the society.
- 7.95 The two provisions in the different Acts do not sit comfortably together in respect of the requirements for deeds because each has different specific requirements. By way of contrast, the Companies Act removed the requirement for a company to affix its common seal to a contract it was entering into, although it continues to expressly permit the use of the common seal if the company has one.²⁵⁸
- 7.96 We consider that a new statute should remove any doubt and follow the Companies Act by removing the requirement for a common seal, but expressly permitting its use if desired by the incorporated society. If a constitution requires the use of a common seal, it should also provide rules about its control and use.
- 7.97 If the statute gives societies the powers of a natural person, as we recommend, it is not strictly necessary for every society to have rules concerning the powers of the society. However, many societies will wish to limit that default position in their constitutions.

253 Property Law Act 2007, pt 2.

254 Property Law Act 2007, s 9.

255 Property Law Act 2007, s 4.

256 Property Law Act 2007, s 13(2)(b).

257 Incorporated Societies Act 1908, s 15(1).

258 Companies Act 1993, s 180(1A).

The management of money and other assets

- 7.98 Currently the 1908 Act requires rules about:²⁵⁹
- the control and investment of the funds of the society; and
 - the powers (if any) of the society to borrow money.
- 7.99 By contrast the Australian legislative regimes require more detail, including rules about the sources of the funds, the mode of drawing and signing cheques, the custody and inspection of the books, and a rule about the financial year for the society.²⁶⁰
- 7.100 Few submissions discussed these matters specifically. Those that did generally said that a rule would be helpful, but that it should be broad enough to leave the society free to determine its own processes. A couple of submissions said that the Australian legislation was too prescriptive, and that it did not provide for technological advances in the management of money.
- 7.101 We consider that the best balance between providing guidance but not being too prescriptive is achieved by requiring constitutions to provide a rule on how the society will control and manage its finances and other assets. The rule should include how it will keep financial records and pay expenses. The statute should specifically permit electronic methods of controlling and managing financial resources. In chapter 6 we discussed the related matter of financial reporting by incorporated societies.

Dispute resolution

- 7.102 Disputes inevitably arise between members of incorporated societies. The 1908 Act does not currently require any rules on dispute resolution, reflecting the era in which it was drafted. Submitters strongly supported rules for resolving disputes being included in a new statute. Some submitters said that recourse to the courts or other external support was often too expensive. Others expressed frustration that the inability to resolve disputes often resulted in the resignation of members.
- 7.103 There are several advantages to the statute requiring a procedure for dispute resolution. Having a set of procedures will help to resolve disputes before they escalate. That in turn will reduce the emotional and financial cost of resorting to external resources for resolving disputes. In addition, we see potential for the statute to specify certain requirements for those procedures that will benefit societies by ensuring that their processes are legally sound. In chapter 8 we examine the statutory requirements for rules on dispute resolution procedures.

General meetings

- 7.104 A general meeting is a meeting of the society which every member is entitled to attend. Incorporated societies are, by their nature, ultimately controlled by their memberships. The holding of general meetings (either annually or more frequently) is a vital tool to enable members to hold decision-makers to account within societies. Members may also participate in making fundamental decisions for the society. A society must have rules therefore to ensure that general meetings are run in a manner that enables members to perform that function effectively. This includes being run in an orderly fashion and providing members with sufficient information in a timely manner.

²⁵⁹ Incorporated Societies Act 1908, s 6(1)(i) and (j).

²⁶⁰ Associations Incorporation Reform Act 2012 (Vic), sch 1, ss 20 and 21; Associations Incorporation Act 2009 (NSW), sch 1, cls 11, 12 and 13.

7.105 The Act is largely silent on general meetings apart from the requirement to have a rule about the mode of summoning, holding and voting at general meetings.²⁶¹

7.106 Most submissions that addressed the question of general meetings were in favour of specific requirements. Many also stressed the need for the constitution to take account of technological developments, for example, permitting members to participate in general meetings from more than one location at the same time via audio visual technology or similar.

7.107 We consider that the statute should be strengthened in this regard to ensure that general meetings function effectively. The statute should contain the following requirements:

- Incorporated societies must hold a general meeting not later than 15 months after the previous annual meeting (the 15-month requirement enables flexible timetabling for an annual general meeting).
- The following information must be presented by the committee at a general meeting at least once in every 15 months:
 - a. an annual report reviewing the society's activities since the previous general meeting;
 - b. the financial report for the most recent financial year (we discussed the requirement for an annual financial report in chapter 6); and
 - c. a summary of the nature and extent of any disclosures made by officers of financial interest in matters being considered by or that affect the society, recorded during the year.
- Minutes must be kept of all general meetings.

7.108 In addition to these statutory requirements, every society must have rules covering at least the following minimum matters relating to general meetings:

- the intervals between general meetings;
- the information that will be presented at general meetings;
- when minutes are required to be kept;
- the manner of calling meetings;
- the time within which, and manner in which, notices of general meetings and notices of motion are to be notified;
- the quorum and procedure for general meetings; and
- voting procedures for general meetings.

7.109 Societies are increasingly using modern technology in all their operations including in the holding of general meetings. This is to be encouraged if it facilitates the more effective operation of societies. The statute should remove any doubt over its use, by expressly permitting its use. The following provision from the New South Wales legislation provides a useful example:²⁶²

If the association's constitution so provides, a general meeting may be held at 2 or more venues using any technology that gives each of the association's members a reasonable opportunity to participate.

Rights of members to information

7.110 An issue raised by submitters in consultation on *Issues Paper 24* is that of members' rights to information. The 1908 Act is silent about the rights of members to access information held by

261 Incorporated Societies Act 1908, s 9(1)(f).

262 Associations Incorporation Act 2009 (NSW), s 37(3).

the society. In contrast, s 178 of the Companies Act provides a regime under which shareholders can request any information from companies, and companies must respond within 10 working days. In responding, companies may provide the information, agree to provide the information within a set timeframe, agree to the request upon the payment of a reasonable charge, or refuse the request and provide reasons. The shareholder may challenge in court any time period, any proposed charge or any reasons for refusal. The court has powers to limit the use that may be made of the information.

- 7.111 The Auckland District Law Society argued that the question of members' entitlement to information was a recurring difficulty and the genesis of disputes. It thought that members should be entitled to full information unless there are valid commercial reasons not to provide the information. The nature of incorporated societies as being accountable through their members requires that members have access to certain society information.
- 7.112 We consider that every society must consider and provide rules covering what information members are entitled to access and how they can obtain access to that information. However, the question remains – what information should members have a right to in every society?
- 7.113 Australian case law suggests that members may have a more general right to information. In *Grogan v McKinnon* the Supreme Court of New South Wales held that a member of an unincorporated society who was seeking the office of the President was entitled to inspect the registry of members.²⁶³ In *McKay v Australian Alpaca Association* the South Australian Supreme Court held that a member of the Alpaca Association was entitled to Alpaca breeding information owned by the Association.²⁶⁴
- 7.114 We do not favour a statutory requirement that members should be entitled to all the information held by an incorporated society. Incorporated societies may possess not only information relating to governance of the society, but also proprietary information that is similar to any other assets held by the society. It is not appropriate that members should have a general right to access proprietary information. Societies that do not have rules allowing such access potentially risk a member claiming such a right, and courts interpreting the constitution as implying such an obligation. However, we note that with the exception of the *Alpaca* case there is not much case law suggesting that courts will take an expansive view of members' right to information.
- 7.115 In relation to members' rights to access the register of members, we have reviewed provisions relating to access to membership registers in similar legislation in Australia and Canada. Some Australian statutes enable inspection of the membership register by other members. The Victorian statute provides that members can inspect the register of members, but that is subject to a prohibition on that information being used to contact persons on the register, and the statute gives members the ability to apply to keep their membership confidential to the committee.²⁶⁵ In Canada, the recently enacted federal not-for-profit statute also gives a wide right of access to the register of members, but only in order to contact those members for electoral purposes or other matters in relation to the administration of the associations.²⁶⁶ The New South Wales statute requires a register of committee members (rather than members), but that register must be available for inspection by any person.²⁶⁷

263 *Grogan v McKinnon* [1973] 2 NSWLR 290.

264 *McKay v Australian Alpaca Association* (1997) 69 SASR 218.

265 Association Incorporation Reform Act 2012 (Vic), ss 56-59.

266 Canada Not-for-profit Corporations Act SC 2009 c 23, ss 21 and 22.

267 Associations Incorporation Act 2009 (NSW), s 29(5).

- 7.116 We consider that in the New Zealand setting, members should not have an automatic right to access the membership register. Different societies will have different levels of sensitivity to issues such as the privacy of members and the use to which membership lists should be put. We consider that every society should determine for itself whether members can have access to the membership register, and if so, how that access can occur.
- 7.117 The new Act ought to provide members with a right to the minimum information necessary for members to hold the society to account at the annual general meetings. We consider that minimum information is the annual financial statements presented to the annual general meeting and the minutes of previous annual general meetings. Societies are free to provide rules for access to members to a wide range of information.
- 7.118 We also consider that the statute should follow the Companies Act and provide a regime under which members can request any information from a society, and the society has a statutory timeframe under which it must respond.
- 7.119 We are recommending a different position than proposed by the Law Commission in relation to the beneficiaries of private trusts in its report on the law of trusts. In that context we suggest that a trustee must provide sufficient information to sufficient beneficiaries to enable the terms of the trust to be enforced against the trustees. Beneficiaries of trusts are owed obligations in respect of the way that a trust is administered in a way that members of a society are not.

Amending the constitution

- 7.120 The 1908 Act requires societies to provide a rule about the way the constitution of the society may be altered, added to or rescinded.²⁶⁸ There are no statutory limits on how the constitution is amended so long as it complies with the Act and the process established in the society's rule.
- 7.121 We discuss broad issues relating to the amending of constitutions earlier in this chapter. We recommend there, that societies should be free to determine how the constitution should be amended so long as all amendments to the constitution have been approved by at least a majority of members. In this way, flexibility is retained while ensuring that amendments are subject to the accountability of members. Consequently, constitutions should continue to include a rule covering how amendments to constitutions are made.

Distribution of society property in the event of liquidation

- 7.122 Currently the 1908 Act requires societies to provide a rule as to the disposition of the property of the society in the event of the society being put into liquidation.²⁶⁹ We discuss the distribution of assets in the event of liquidation in more detail in chapter 11. In that chapter we recommend some new limitations on the distribution of those assets, including that every constitution must contain a rule nominating a particular incorporated society, or other not-for-profit entity or trust, or a class or description of not-for-profit entity to which any surplus assets should be distributed, on liquidation or removal from the register.

268 Incorporated Societies Act 1908, s 6(1)(e).

269 Incorporated Societies Act 1908, s 6(1)(k).

- R57 The statute should require that every constitution must contain rules covering the following matters:
- a. the name of the society;
 - b. the purposes of the society;
 - c. how the registered office of the society will be determined;
 - d. how people become members of the society and cease to be members;
 - e. arrangements for keeping the society's register of members up to date, and whether and how the society will provide access for members to the register of members;
 - f. the composition, roles and functions of committees, including:
 - the number of members that may be on the committee;
 - the election or appointment of committee members;
 - the terms of office of the committee members;
 - qualifications for appointment of committee members;
 - the functions and powers of the committee;
 - grounds for removal from office of committee members; and
 - how the statutory officer will be elected or appointed;
 - g. how the society may enter into legal obligations;
 - h. how the society will control and manage its financial resources and other assets, including how it will keep financial records, how it will pay expenses and how authority to make decisions will be given;
 - i. procedures for resolving disputes, including the grievances of members and complaints concerning the misconduct or discipline of members;
 - j. arrangements and requirements for general meetings, including:
 - the intervals between general meetings;
 - the information that must be presented at general meetings;
 - when minutes are required to be kept;
 - the manner of calling meetings;
 - the time within which, and manner in which, notices of general meetings and notice of motion must be notified;
 - the quorum and procedure for general meetings; and
 - voting procedures for general meetings;
 - k. what information held by the society members can have access to and how that access will be provided;
 - l. the method by which the constitution may be altered; and
 - m. the nomination of a particular incorporated society, or other not-for-profit entity or trust, or a class or description of not-for-profit entity to which any surplus assets should be distributed, on liquidation or removal from the register.

- R58 The statute should provide that a society must have a registered office at all times and must notify the Registrar of the physical address of that office and any changes to it.
- R59 Any amendment to the registered office should take effect from the date stated in the notice of amendment to the Registrar, or five working days after the notice is registered, whichever is the later.
- R60 The statute should provide that every society must maintain a register that identifies each member.
- R61 The statute should provide that members must expressly consent to being members.
- R62 The statute should not require every society to have a common seal, but should expressly permit its use if desired by a society.
- R63 The statute should provide that:
- Societies must hold a general meeting not later than 15 months after the previous annual meeting.
 - The following information must be presented by the committee at a general meeting at least once in every 15 months:
 - an annual report reviewing the society's activities since the previous general meeting;
 - the financial reports for the most recent financial year; and
 - a summary of the nature and extent of any disclosures made by officers of financial interest in matters being considered by or affecting the society, recorded during the year.
 - Minutes must be kept of all general meetings.
- R64 The statute should expressly allow a general meeting to be held at 2 or more venues using any technology that gives each member a reasonable opportunity to participate.
- R65 The statute should provide that members have a right to access the financial reports presented to the annual general meeting and the minutes of previous annual general meetings.

Chapter 8

Complaints and grievances

THE NEED FOR DISPUTE RESOLUTION PROCEDURES

- 8.1 Whether they realise it or not, all societies already have obligations to resolve, or participate in the resolution of disputes or grievances that may arise in their society. Despite the Incorporated Societies Act 1908 saying nothing about disputes, the courts have regularly held that members of societies can bring matters to court, either by seeking judicial review or on the basis of alleged breach of contract.²⁷⁰
- 8.2 Having a case go to court, usually the High Court, is expensive in both time and money, and is highly likely to be divisive and potentially destructive within a society. In this chapter we propose new statutory provisions detailing that societies must have procedures to deal with conflicts without – or at worst, before – going to court. The new statutory provisions will require each society to include in their constitutions, and follow, internal processes for dealing with disputes. The Act will also specify minimum standards of natural justice for affected members that society processes must satisfy.
- 8.3 We emphasise that the mandatory provisions we propose for the Act will be minimum requirements. Societies will have considerable freedom in designing their procedures, so long as they satisfy the minimum requirements for natural justice. Societies are free to develop unique mechanisms that suit the culture and purposes of their society and members. They may also choose to adopt or develop procedures based on existing models used or tried elsewhere. Later in this chapter we discuss two particular methods of dispute resolution, arbitration or a “visitor” or “referee” system, which some societies may choose to explore.
- 8.4 We accept that disputes between members of a society, or between a member and the society they belong to, are inevitable at some point and to some extent. Many societies may experience conflict or disputes only rarely, which may only make the experience of dealing with a dispute all the more difficult and traumatic when it does occur. Given the practical inevitability of disputes, we consider that all societies should be required to at least have some minimum provisions in place, to deal with complaints, disputes or grievances when they arise, and to do so efficiently and fairly. Such provisions must satisfy existing legal norms for affording disputants natural justice, principally the right for any complainant or alleged “offender” to be fairly heard, and for any decision to be fairly made, without bias or the appearance of bias. If dispute resolution does not resolve a matter effectively, or fairly and in accordance with natural justice, the matter in dispute can continue to affect a society for years and may open it to expensive and disruptive court action. Both these risks can be avoided or at least minimised if a society has relatively simple procedures in place, and follows them when a complaint or grievance arises.
- 8.5 We do not envisage that all societies must have the same or similar procedures. We recommend that the new Act require that societies have rules or procedures for resolving disciplinary disputes and other grievances. The Act should contain minimum requirements for such rules,

270 For a recent example of judicial review, see *Gibson v New Zealand Land Search and Rescue Dogs Inc* [2012] NZHC 1320, [2012] NZAR 699 [*Gibson v NZ SAR Dogs Inc*]; for a case brought in contract see *Finnigan v New Zealand Rugby Football Union (No 3)* [1985] 2 NZLR 181 (HC and CA).

concentrating in particular on defining natural justice requirements for societies dealing with disputes. Some simple procedures that would satisfy the statutory minima may be set out in model rules, but each society remains free to develop or retain their own procedures, so long as they satisfy the statutory minima. Some larger, well-resourced societies, for instance sporting bodies, have well-developed disputes procedures, including access to external arbitral bodies.²⁷¹ Such procedures will almost certainly satisfy the natural justice minima imposed by the new Act, and societies will be able to continue to use the processes and providers that they have already developed or chosen. Other societies that currently do not have procedures may choose to adopt mixtures of internal resolution, access to external mediation and appointing some form of external arbitrator or referee.²⁷² The decision will rest with each society, so long as statutory minima are met.

R66 The statute should provide that societies must include procedures for dealing with internal disputes in their constitutions.

R67 The statute should leave societies free to continue, develop or adopt disputes procedures that meet their needs, so long as a society's procedures and practice satisfy the requirements for natural justice defined in the statute.

CATEGORIES OF DISPUTES

- 8.6 There are generally two broad classes of internal disputes that may arise in incorporated societies:
- a. complaints or concerns about a member's conduct or behaviour (misconduct complaints or discipline of members); and
 - b. complaints by members against other members, the committee or management or against the society itself (grievances).
- 8.7 Grievances will normally be brought by one or more members.²⁷³ We expect that most grievances will involve some aspect of the society's or committee's treatment or alleged mistreatment of that member or a class of members. However grievances could also cover other subject matter, for example:
- where a member has complained about the conduct or behaviour of another member or employee and the committee has failed, refused or decided not to take any action on the complaint;
 - the complaining member, a class of members including the complainant or all members are being unfairly disadvantaged, or oppressed by committee actions or policy; and
 - where a member considers that the committee or society is not complying with its constitution.²⁷⁴

271 The New Zealand Olympic Committee Inc provides in its constitution for certain disputes to go straight to the Sports Tribunal of New Zealand. Other disputes may be referred to the Tribunal if mediation does not resolve a matter. The International Court for Arbitration in Sport is available as an appeal body, or as a final arbiter for disputes that do not qualify for the Sports Tribunal.

272 See below for possibilities for external assistance.

273 A member or former member wishing to challenge the outcome of a disciplinary procedure brought against them should make use of any appeal process the society has. If no appeal process exists the member may bring a grievance. To meet the requirements of natural justice, a grievance in these circumstances would require a new decision-maker, not involved in the disciplinary investigation or outcome.

274 We recommend in chapter 9 that the new Act provide that members be able to bring court action to enforce the constitution. In most circumstances it will be reasonable to expect the member to have attempted to resolve their concerns by bringing a grievance first. Our recommendation includes granting the power to a court not to hear a matter if the member has not taken such reasonable steps.

- 8.8 There will be cases where an internal matter of member misconduct or a member's grievance overlaps or may overlap with external processes. Two common examples are where a member's alleged misconduct is or may become subject to a criminal investigation or charge, or where a member is also an employee and may bring a personal grievance or other employment action under the Employment Relations Act 2000. Such cases will be more difficult to manage and societies will have decisions to make, including whether to report alleged conduct to the Police or another agency, whether to delay any society process until after any external process is complete, and if so, whether to take any temporary action in the meantime such as suspending or restricting a member's membership or participation in activities. The society's complaint or grievance process is not subsumed in or replaced by an external process. The society's complaint or grievance still needs to be dealt with, either in parallel with the external process or once that process is complete. In addition, the natural justice obligations to members who are involved in a process remain and must be provided for.²⁷⁵
- 8.9 We doubt that it is necessary or that many societies would want to have several different procedures for several different classes of grievances dealing with different subject matter. However, it is sensible to have separate processes for dealing with misconduct or discipline cases, as opposed to grievances raised by members. Misconduct or discipline cases and some grievances can look similar and in some circumstances may overlap.²⁷⁶ But the two classes of dispute tend to have different subject matter, involve members in different capacities and have potentially different impacts on affected members. Misconduct complaints are generally brought by the society, about or against a member's alleged conduct, while grievances are brought by members most often against the society or its officers. These differences mean that natural justice considerations, though similar, are not the same. To avoid confusion and to prevent procedural or other errors compromising a process, it is better to treat the two processes separately, with processes that differ in detail where required.

R68 The statute should provide that the categories of dispute that societies must maintain procedures for are:

- a. *complaints* concerning misconduct of members, or discipline of members; and
- b. *grievances* brought by members concerning their rights or interests as members.

MISCONDUCT OR DISCIPLINE PROCEDURES: STATUTORY MINIMUM REQUIREMENTS

- 8.10 We recommend that each society be required by the statute to include in their constitution a procedure to investigate and resolve any complaints that are raised with the society regarding the conduct of a member. Subject to minimum requirements defined in the statute, societies should have freedom to design their own procedure.
- 8.11 A society does not have to launch a formal investigation or process for every complaint or grievance put to a committee member. Many minor matters will continue to be resolved as they are today, by a concerned member raising an issue and the committee dealing with the issue informally but with discussion with or advice back to the member. In general, a society should be able to decide not to subject a matter to formal complaints or grievance procedure if the matter does not raise material or serious issues, or if the member raising it has no real interest

²⁷⁵ The more complicated situation of an external process or investigation will often mean that extra care is needed to ensure fair treatment. A key decision may be whether the purpose and subject matter of the society's procedure means it can be fairly dealt with in advance of resolution of any criminal charge or other external event. Once again, this will depend on the facts.

²⁷⁶ For example, where a disciplined member brings a grievance to challenge the outcome of the discipline procedure.

in the matter. We propose that the new statute allow the committee to elect not to further investigate and to advise a complainant or grievant accordingly, if:

- the complaint is trivial or does not appear to disclose material misconduct or material damage to members' interests;
- the complaint appears to be without foundation or there is no apparent evidence to support it;
- the member bringing the dispute has insufficient interest in the matter or otherwise lacks standing to bring it; or
- the conduct, incident or matter complained of has already been investigated and dealt with by the society.

8.12 We do not propose a statutory appeal right against a decision not to investigate. Societies may however choose to provide for such an appeal right, for instance to encourage internal resolution of complaints.

- R69 The statute should provide that a society may elect not to consider or continue consideration of any complaint or grievance if it is satisfied that:
- a. the matter is trivial or does not appear to disclose material misconduct or material damage to members' interests;
 - b. the complaint appears to be without foundation or there is no apparent evidence to support it;
 - c. the complainant has insufficient interest in the matter or otherwise lacks standing to bring it; or
 - d. the conduct, incident, event or issue has already been investigated and dealt with by the society.

Natural justice

8.13 If a society decides to investigate a complaint it is essential as a matter of law that its procedure and decision-making is fair to the member complained of, and where appropriate, the complainant (natural justice).

8.14 Natural justice is not a fixed standard for all situations. The requirements and standards of natural justice vary, depending on factors including the subject matter and consequences of what is being decided, as well as the nature and resources of the decision-maker. The standards to be applied can be set out in legislation. If the relevant legislation, such as a new Incorporated Societies Act, does not spell out what is necessary and sufficient to satisfy the natural justice obligations for a particular process, a court may have to apply more general rules, which may set a higher standard than, for instance, a small society might otherwise expect.

8.15 The Legislation Advisory Committee (LAC) sets out good practice guidelines for policy-makers and drafters developing legislative provisions. For natural justice requirements, LAC recommends that the legislation should specify the procedural steps and protections that are required for a given procedure, rather than simply require the decision-maker to, for example, "act in accordance with the principles of natural justice".²⁷⁷

²⁷⁷ Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (May 2001 edition and amendments) at [13.6.1].

- 8.16 We agree that the legislation should be specific. The statute should nevertheless only set the required minima, not a detailed scheme for all cases. Each society must put in place procedures that satisfy these minima, and then adhere to them. A society may develop its own procedures provided they meet the natural justice requirements, or the society may adopt a procedure provided in a model rule, if one is available. The society could adopt all or part of a model rule procedure, or it may amend or adapt the provisions of a model rule to suit the circumstances of the society, so long as the procedure will operate fairly and comply with the statutory minima.
- 8.17 The two basic components of natural justice are:
- a. the person complaining or complained about has a fair opportunity to be heard on the matters in issue; and
 - b. the decision-maker is free from bias (including apparent bias) or pre-determination.

The standard and content of these two requirements will vary considerably depending on the circumstances, and may be varied or limited by a statute. Our recommended minimum requirements for societies to be specified in the statute are set out below.

- 8.18 The application of the statutory minima will still vary depending on the importance of the subject matter and the potential consequences. For example, societies should be prepared to hold an oral hearing if the outcome could include the member being excluded from the society, especially if that may then have significant negative consequences on the member, such as their ability to earn a living. For a more straightforward complaint with no prospect of the member having their membership terminated, the committee may choose to deal with the matter by asking for and considering a written statement or submissions from the member complained about.

The right to be heard

- 8.19 There are several essential components to ensuring that a member alleged to have engaged in misconduct receives their right to be heard. The first component, adequate advice of allegations made against the member, naturally only applies to misconduct or discipline complaints, not to grievances, where the fundamental allegation or grievance comes from the member. The remaining elements are required in all cases to ensure a fair hearing of a complaint or grievance, with modifications as necessary depending on the subject matter:
- a. Any member complained about must be fairly advised of any allegations concerning them, in sufficient detail and far enough in advance to allow the member to prepare a response.²⁷⁸
 - b. The member complained about must be given a reasonable opportunity to be heard in response to the allegations.
 - c. Depending on the circumstances the right to be heard may be satisfied by the decision-maker considering written evidence or submissions from each party. However, for serious or complex cases and, after taking into account the potential consequences if a complaint is upheld (for example, potential loss of membership), the decision-maker must consider whether to allow the member (and complainant if they wish) to be heard in person (“oral hearing”).

278 To satisfy this requirement, even in a straightforward matter, a society should usually, as a minimum, advise the member of:

- i. the names of any complainants or witnesses;
- ii. the nature and extent of the allegations;
- iii. the likely evidence that the member will need to respond to;
- iv. if there is a written complaint or written statements, the member should receive a copy;
- v. all of this information must be provided sufficiently in advance to allow the member reasonable time to prepare their response; and
- vi. a written summary or explanation of the allegations is highly desirable, even if these are also explained orally.

- d. If there is an oral hearing, it must be before the decision-maker.
- 8.20 These elements are not particularly complex, but they must be individually applied in each case. The committee or decision-maker needs to be satisfied that the member has received full disclosure of all allegations the committee is likely to consider, and that the arrangements for hearing the member are appropriate.

R70 The statute should provide that the features and content of each society's misconduct complaint or disciplinary procedures are for each society to determine, except that each society's procedure and practice must satisfy the relevant natural justice minima specified in the statute. The minima regarding achieving a fair hearing should provide that:

- a. Where a society considers a complaint or institutes a disciplinary procedure regarding alleged misconduct of a member, and the outcome may affect the member's rights or interests, the member has a right to be heard before the complaint or procedure is resolved or any outcome is determined.
- b. The member's right to be heard will be satisfied if, taking into account the circumstances of the case:
- the member is fairly advised of all allegations concerning them, with sufficient details and time given to enable the member to prepare a response;
 - the member has an adequate opportunity to be heard, either in writing, or at an oral hearing if the decision-maker considers that an oral hearing is needed to ensure an adequate hearing;
 - and any oral hearing is held before the decision-maker, or any written statement or submissions are considered by the decision-maker.

Preventing bias

- 8.21 The second leg of natural justice requires that the decision-makers for a society decide any dispute, whether a complaint or grievance, without being affected or influenced by bias or pre-determination of the issues. Any decision-maker who is, or appears to be, affected by bias or pre-determination should stand aside or be required to do so.²⁷⁹ The rule against bias or apparent bias in decision-making must be observed in all societies, including in small societies where many or most members and decision-makers may be very well-known to each other.
- 8.22 The appearance of bias, sometimes described as the reasonable apprehension that the decision-maker may not act impartially or apparent bias, is sufficient reason to exclude a decision-maker. The test that applies in New Zealand is that after a rigorous consideration of all the circumstances, a person should be required to step aside if a "fair minded lay observer" with knowledge of the circumstances might reasonably apprehend that the decision-maker might not bring an impartial mind to the case.²⁸⁰ This test has been refined and confirmed in New Zealand and overseas, typically in high-level judicial cases, where apparent bias of a superior judge or

279 Absence of bias is essential for fairness, yet positive proof of bias is difficult to obtain. Thus it will be sufficient for a decision-maker to be required to stand aside if the facts suggest "apparent bias" alone.

280 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [37]-[60]; approving *Porter v Magill* [2002] 2 AC 357, [2002] 1 All ER 465 at [102]-[103].

other high level decision-maker is in issue.²⁸¹ However, the same test has also been treated as applying to incorporated societies, for example in the recent *Gibson v NZ SAR Dogs Inc* case.²⁸²

- 8.23 We consider that this standard test is too onerous or unrealistic to place on all incorporated societies. Committees may manage to consider what a “fair minded lay observer” could conclude, after assessing all the relevant information as to whether a particular committee member “might not bring an impartial mind to the resolution of the question”.²⁸³ However we do not consider that the “fair minded lay observer” is the appropriate standard to be met in the case of incorporated societies. We propose that the standard for societies recognise that committee members or others involved in assessing apparent bias inevitably have significant personal knowledge and experience of the people and circumstances involved, and ought to be able to apply that knowledge in a fair and balanced way to determine any question of apparent bias.
- 8.24 We therefore consider that it is appropriate for the statute to offer more assistance to societies, by applying a modified version of the apparent bias test. We also propose a threshold, so that if at least two members of the committee, or the decision-making body, if it is separate, reasonably consider that the impartiality of another decision-maker is doubtful, that is sufficient to require that decision-maker to stand down on grounds of apparent bias.
- 8.25 The provision we propose for dealing with bias is described below. The recommendation aims to modify the strict application of the judicial standard, by:
- allowing decision-makers deciding on any bias or apparent bias of another decision-maker to take into account their own knowledge of that other decision-maker, other parties and the circumstances, when deciding on bias; and
 - nevertheless requiring any inference of bias to be founded on reasonable evidence.
- 8.26 Like other aspects of natural justice, assessment of apparent bias must be applied flexibly and with proper regard to the circumstances of the case. In particular, where a case involves potentially significant, for example professional or career consequences to a member of a well-resourced society that has well-developed disciplinary procedures, it may be more appropriate to use the judicial standard normally applied in courts and tribunals.
- 8.27 The approach aims to ensure that societies consider the issue of bias or apparent bias carefully and within the context of their own society when making arrangements to consider disputes. There may still be cases, for example, where a dispute has arisen after considerable factional conflict within a society, where all or nearly all of a committee may be alleged or appear to be biased against another member. If the decision-makers would normally consist of or be drawn from the committee, committee members will need to evaluate whether they can fairly conclude that there is not the relevant appearance of bias. If they cannot, then they may need to look for a suitable alternative decision-maker, such as a former society president, or an outsider. Such situations ought to be relatively rare. In any case, if societies consciously deal with the issue of

281 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 122, [2010] 1 NZLR 76.

282 *Gibson v NZ SAR Dogs Inc*, above n 270. In this case, a society expelled a founding member for alleged bad behaviour at the society’s annual general meeting and a social function afterwards. The High Court on review found numerous procedural failings by the society’s committee, both on failing to give Mr Gibson a fair hearing and apparent bias. The Court held that the committee may not have decided the matter impartially (that is, appeared to act with bias or in a predetermined way) due to three committee members effectively also acting as witnesses, and the appearance that the committee could have been influenced by the strong views of the society secretary. The secretary had stood down from the hearing, but still wrote in strong terms to other committee members to express what he considered should be the result. Mr Gibson’s appeal was also “fatally flawed” because members of the committee who had made the initial decision formed part of the appeal body. The Court required Mr Gibson’s membership to be restored but did not award any compensation, arguably because of Mr Gibson’s contribution to events.

283 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*, above n 281, at [4].

bias by applying an appropriate standard and process in context, they are much less likely to face a tenable claim for actual or apparent bias, afterwards.

- 8.28 The recommendations regarding bias and apparent bias apply equally to all society disputes, whether misconduct complaints or other disciplinary procedures, or grievances brought by members.

- R71 The statute should include provisions to avoid bias and apparent bias affecting decision-makers in all classes of disputes within societies. The bias provisions should provide that:
- a. a member may not decide or participate as a decision-maker regarding a complaint if two or more members of the society's committee or any complaints sub-committee consider that there are reasonable grounds to infer that the person may not approach the complaint or grievance impartially or without a predetermined view; and
 - b. such a decision must be made taking into account the context of the society and the particular case and may include consideration of facts known by the other members about the decision-maker so long as the decision is reasonably based on evidence that supports or negates an inference that the decision-maker might not act impartially.

GRIEVANCE PROCEDURES

Requirement

- 8.29 We recommend that the statute provide that each society is required to include in its constitution a procedure to investigate and resolve any grievance that is raised by a member regarding actions by the society, the committee or other officers, that have materially affected the rights and interests of a member, a class of members or all members.
- 8.30 A grievance may arise from a number of sources, but usually relates to how the society, its committee, employees or other members have treated or dealt with the complaining member, for instance where:
- the society's constitution or rules have been applied to a member or group arbitrarily or unfairly, or in a discriminatory manner, compared to other members;
 - the society has taken some other kind of unfair action which is to the disadvantage of the grievant or other members;
 - the actual behaviour of the society or its agents towards the complainant is harsh or oppressive; or
 - an action, course of conduct or failure to take action by the society is contrary to the society's purposes or is otherwise inconsistent with the constitution.
- 8.31 The list is not exhaustive. For a grievance to be substantiated, the complainant will need to prove that the society has taken some unjustified action or is failing to take required action and the society's action is to the disadvantage of the member, a class of members or members as a whole, or is contrary to the purposes of the society.
- 8.32 We recommend that a society's procedure must be included in its constitution and should specify how a complaint may be lodged (for example, orally to a given officer; or only in writing), and what, if any, previous steps a complainant needs to show they have taken to try to resolve their complaint informally before lodging their grievance.

- 8.33 As with conduct matters we recommend that a society may, after initial consideration of a grievance, elect not to further investigate it, and must advise the complainant accordingly, if it is determined that:
- the grievance is trivial;
 - the grievance appears to be without foundation or there is no apparent evidence to support it;
 - the member lacks any substantial connection with the matters alleged or otherwise lacks standing to bring the grievance; or
 - the facts, event or situation which the alleged grievance relates to have already been investigated and dealt with by the society.

Natural justice

- 8.34 If a society decides to investigate a grievance, its procedure must be fair to the grievant and to any other members complained of or otherwise involved (“natural justice”). The circumstances of a grievant will be different from a member dealt with under a disciplinary process. For example, there will normally be no need to advise the grievant of any complaints against them or the general subject matter involved, because the grievant has formulated the grievance. However the grievant must be dealt with fairly, have a fair opportunity to be heard, and to have their grievance resolved or determined fairly, by unbiased decision-makers.
- 8.35 As with misconduct complaints, it is up to each society to decide its procedure. The society can develop its own procedure and ensure it complies with minimum standards of natural justice prescribed in the new Act; it may adopt the procedure provided in a model constitution; or it may amend or adapt the provisions of a model constitution to suit the circumstances of the society, so long as the society is satisfied that the society’s procedure will operate fairly and satisfy the minimum requirements.
- 8.36 We consider that the minimum fair procedure required by statute must:
- Ensure that the complainant has a fair opportunity to be heard on the grievance. Depending on the circumstances, the procedure may allow the right to be heard to be satisfied by written evidence or submissions from the complainant, to the committee. However, depending on the seriousness of the allegations and the degree of actual or likely disadvantage claimed, the procedure may provide for the complainant to be heard in person (oral hearing). A well-conducted oral hearing may also have the benefit of clearing the air. If there is an oral hearing, it must be before or include the decision-makers.
 - The decision-makers must make their decision fairly and impartially, without reference to any preconceived or predetermined ideas or views: about the complainant or other affected members; any events that are alleged to have happened; or about other members who could be affected if the grievance is upheld.
 - The society’s committee must consider whether each intended decision-maker is able to make their decision fairly and free of bias. The process should be as for dealing with potential bias in misconduct or disciplinary complaints.

R72 The features and content of grievance procedures should be for each society to determine, except that each society’s procedure and practice must satisfy the relevant natural justice minimum standards to be included in the statute. These should provide that:

- a. where a society agrees to consider a grievance of a member alleging damage to the member's rights or interests as a member, or to members' rights and interests generally, caused by a decision, action or failure to act by the society or its officers, the member's right to be heard will be satisfied if:
 - the member has an adequate opportunity to be heard, either in writing, or at an oral hearing if the decision-maker considers that an oral hearing is needed to ensure an adequate hearing; and
 - any oral hearing is held before the decision-maker, or any written statement or submissions are considered by the decision-maker;
- b. the procedures for avoiding any bias or apparent bias should be those followed for misconduct complaints.

APPEALS

- 8.37 Procedures for complaints and grievances do not necessarily need to include an appeal process. We do not recommend a statutory requirement to include appeal rights in procedures. In reality, however, a member dissatisfied with the outcome of a misconduct complaint or discipline procedure may often be entitled to bring a grievance, even if there is no other appeal process.
- 8.38 It should be up to societies to choose whether to include an express appeal right. Having some sort of appeal process may be preferable to dissatisfied members lodging applications in court. It would be possible to include a "no appeals" provision in the new statute, but this would not exclude the possibility of judicial review or other court proceedings. A relatively simple, low-cost appeal process may avoid costly and disruptive court proceedings.
- 8.39 If a society chooses to provide for appeals, the procedures should set out how the person or authority to deal with an appeal is appointed. Orthodox natural justice principles require that any appeal be determined by a decision-maker who is completely separate from those who made the first decision.²⁸⁴ Small societies may once again find this difficult to achieve unless they elect to use an outsider. The procedure could provide that the appeal body will be an independent referee, arbitrator or visitor. We discuss the possibility of appointing an arbitrator or a visitor in the next section.
- 8.40 As with grievances, the appeal body can first discuss with the society and the member whether mediation or some other method of dispute resolution is desirable.

R73 The statute should not require appeal rights but should permit societies to include them in their disputes procedures.

ALTERNATIVE OR ADDITIONAL GRIEVANCE PROCEDURES

- 8.41 We have examined further options societies could choose to develop their disputes procedures. By developing a more sophisticated system of dispute resolution, societies could make resolution of disputes more predictable, less disruptive to normal society affairs, and more manageable

²⁸⁴ See *Gibson v NZ SAR Dogs Inc*, above n 270, at [51].

without the need for court intervention or supervision. A society may also better develop or tailor systems and processes that truly suit the culture and purposes of their particular society.

- 8.42 We have examined two possible options for developing complete alternative dispute resolution procedures for societies:
- arbitration under the Arbitration Act 1996; or
 - developing a “visitor” system, akin to the process that has been used in many universities and other educational and charitable institutions.
- 8.43 Each of these options has strengths and potential benefits for small, not-for-profit entities, including the chance to achieve dispute resolution on a totally internal basis, tailored to a particular society’s needs. Neither is perfect. Arbitration can be very flexible and has authority backed up by its Act. But, depending on the arbitrator and the parties, arbitrations can become legalistic, with formal, court-like procedures, meaning there may be little difference from going to court in terms of process, time and cost.
- 8.44 A visitor system may have real potential to produce a system specifically tailored to a particular society, but currently has no legal standing in New Zealand. The full potential of a visitor system of dispute resolution may not be realised if courts do not readily accept visitors as having binding, usually non-reviewable powers to resolve disputes put before them.
- 8.45 Information on each of the two approaches is set out below for purposes of discussion and development by societies if they wish. The information is necessarily general and limited. Any society interested in developing either an arbitration-based disputes resolution system, or a visitor system, should of course obtain its own advice and assistance as necessary, to help it design a scheme suitable to the society’s particular needs and priorities.

Referral to external referee or arbitrator

- 8.46 As an alternative or additional internal grievance procedure, a society may elect to adopt a procedure whereby any complaints or grievances that cannot be resolved by informal processes or mediation must be referred to a referee or arbitrator for binding arbitration.
- 8.47 This is clearly not a minimum requirement. Rather, by adopting a procedure with the characteristics and benefits of well-established methods of alternative dispute resolution, a relatively sophisticated society may decide to take control of its own affairs and further restrict the likelihood of internal disputes and grievances becoming subject to lengthy, public litigation. The courts are accustomed to arbitration as an alternative to court action, with appeals to court generally severely restricted, mainly to allegations of bias, other natural justice issues or a major procedural deficiency.
- 8.48 Some societies already make use of external arbitral systems. Some national sports bodies include appeals or referrals to the Sports Tribunal of New Zealand in their rules, for example, the New Zealand Olympic Committee. The Sports Tribunal is also recognised in statute as the tribunal responsible for dealing with anti-doping violations.²⁸⁵ Other societies may elect to refer disputes to the International Council for Arbitration in Sports (ICAS), or use this as an appeal body from the Sports Tribunal. These are good examples of societies developing or adopting procedures tailored to their needs. The new statute should not restrict societies from maintaining such systems or adopting new ones, so long as the basic natural justice

285 Sports Anti-Doping Act 2006, pt 3.

- requirements are met or exceeded.²⁸⁶ It is nevertheless sensible to make provision in the new Act to confirm that, subject to participants being afforded natural justice, societies can meet their obligation to provide fair procedures for resolving disputes or grievances by referring some or all such matters to an external arbitral tribunal.
- 8.49 Where societies are not using an established arbitral system, the society will need to have some guidance in place for members. Members with a grievance could still be expected to raise their grievance with the society informally, for example, by discussing with a manager or committee member, or by attending a committee meeting to raise and attempt to resolve their concerns. The committee may investigate the possibility of mediation with the complainant, or there could be a requirement to attempt mediation before any grievance can be referred to the referee.
- 8.50 It may be helpful for the statute to confirm that a society can appoint a referee, visitor or arbitrator, most likely for a term, for example one to three years, to act in any grievances requiring arbitration. The referee would then be called on to act should any grievance arise or member appeals from a conduct decision. The referee may have some former connection with the society, for example, a former president or trustee. But the referee would need to be sufficiently detached from the current or day to day affairs of the society to avoid frequent calls for him or her to stand down from particular cases. The procedure should desirably specify how an alternate referee is chosen. Having an appointed alternate referee may avoid the often difficult process of complainant and society having to agree on a referee or arbitrator, if the usual person is unavailable.
- 8.51 The grievance procedure in the constitution will need to specify that members agree to refer any unresolved grievances to the society's sole referee for arbitration in accordance with the Arbitration Act. The rule should state that it constitutes an arbitration agreement under the Arbitration Act between the society and any member who has a dispute or grievance with the society. We expect that societies would typically choose not to move straight to an external arbitrator to deal with a disciplinary procedure. Therefore the arbitration clause should exclude misconduct complaints and disciplinary matters, except where the arbitration process is used for an appeal. For safety, and because arbitration is normally a matter of contract, we recommend that the new Act confirm a sufficient process and content for a valid arbitration agreement covering a society and its members. Such a provision is anticipated in the Arbitration Act, which provides for its provisions to be subject to another Act, such as a new Incorporated Societies Act.²⁸⁷
- 8.52 Parties to arbitration agreements have choices regarding procedure. They can choose to use the basic arbitration provisions contained in Schedule 1 of the Arbitration Act, or to include the further and more detailed provisions in Schedule 2. Schedule 2 provides for appeal to the High Court in some cases, on points of law, plus provisions allowing the arbitrator to order more formal procedures such as discovery and rules of evidence.
- 8.53 As an alternative to following the Schedules, the parties may set out their own procedure in the arbitration agreement. The process must nevertheless comply with fundamental provisions, including equal treatment of the parties, and natural justice.
- 8.54 Given the relative simplicity of incorporated societies, we anticipate that most societies adopting a arbitral model would confirm in their grievance procedure that:

286 As independent tribunals such as the Sports Tribunal already need to maintain standards of natural justice, we expect no difficulties under the new Act for societies which have already delegated, or later choose to delegate, resolution of certain disputes to a properly constituted external body.

287 Arbitration Act 1996, s 9.

- Only the basic Arbitration Act Schedule 1 provisions apply, so appeals from a referee's decision will only lie in very limited circumstances, where a referee has exceeded their jurisdiction, acted contrary to natural justice, the arbitration agreement was invalid or the decision is contrary to public policy.
- Subject to assuring natural justice – giving relevant parties the right to be heard and affording them equal treatment, plus any decision is not tainted by actual or apparent bias – the referee should be free to adopt their own procedure, to encourage the speedy and just resolution of any grievance. The parties could specify their own procedure, by including procedures in the constitution. But for most situations likely to be encountered by small societies with modest means, giving the referee the power to control procedural matters not provided for in the constitution will be efficient and fair.

Developing a “visitor” system

- 8.55 As an alternative to traditional arbitration, incorporated societies could consider the option of appointing a society “visitor” to intervene in society disputes, assisting the parties to the dispute to achieve a resolution without the need for litigation before the courts. In Queensland, this proposal is being considered for the resolution of disputes within associations. As mentioned in the Queensland consultation document:²⁸⁸

[t]he role of Visitor was popularised in the 1500s to allow for an independent person to investigate and settle problems and disputes in religious and charitable corporations without involving the courts. There is a substantial body of common law developed around the conduct and appointment of Visitors. Visitors have been used in modern universities and still are in religious bodies.

- 8.56 We do not see “visitors” or “referees”, or whatever other name a society gives them, as officers to be created by the new Act. They will be part of a dispute resolution system developed by a society in keeping with its own needs and culture. Some mention of visitors in statute will be helpful however. The new Act should provide that a dispute resolution decision that is made by a visitor will be final and binding, except in respect of any application for judicial review. This would ensure that parties to a dispute are protected against an illegal decision made by the visitor, including any decision tainted by bias or predetermination. Apart from challenges for bias or unfair procedure, provisions that a visitor's decisions be non-appealable have survived until the later 20th Century. If this feature can be grafted onto societies' dispute resolution processes then a society can eventually expect fewer disputes, with such disputes as there are being resolved close to the relevant society and in accordance with its goals and culture.
- 8.57 A visitor system has potential to be relatively low-cost, depending on whether suitable “volunteer” visitors are available; that is, people with the requisite experience in business, community organisations and dispute resolution to act as credible visitors. Even if paid professionals have to be employed – for example, suitable arbitrators or mediators – such a system may still be more cost-effective than either arbitration or going to court.

288 Queensland Department of Justice and Attorney General *Supporting Queensland Associations: a modern framework for civil society* (Issues Paper, March 2012) at [7.2.1].

Difficulties to overcome

- 8.58 A key issue will be whether the status and authority of visitors can be adequately established. This will require, at least, a statutory provision that a duly appointed visitor is the ultimate dispute resolution authority for the society that has appointed them but subject to oversight of the courts on grounds similar to which an arbitrator's award can be set aside (excess of jurisdiction, not duly appointed, breach of natural justice and decision contrary to public policy).²⁸⁹
- 8.59 The statutory provision may not be enough on its own. More fundamental is the relative unfamiliarity of a society visitor to any court that has a decision of a visitor referred to it for review. Visitor systems survived for nearly 500 years in universities, including for some time in New Zealand.²⁹⁰ However visitors have been progressively ousted from Australian and New Zealand universities or reduced to purely ceremonial functions as more modern or specialised forms of dispute resolution have been introduced, for example, to deal with employment matters.²⁹¹ The decline or retreat of the historical visitor system makes it somewhat less likely that courts and parties will readily accept reference to previous case law or practice to provide a solid basis for new visitors' authority. Modern, society-appointed visitors may not look much like former university visitors, to the courts. Given the small size and limited resources of many societies and depending on who they appoint as a visitor, judges may not automatically accord such visitors deference, but rather be inclined to take at least a hard look or a very hard look at visitors' decisions. A visitor scheme will not succeed if it becomes evident that the visitor's decisions are not truly final but rather are readily subject to court review.
- 8.60 Overall, we have come to the conclusion that it is worth making provision for a visitor scheme, as one option societies may choose for themselves to improve how they deal with disputes. We are convinced that a visitor scheme can work well, including being potentially less adversarial or prone to accusations of bias or predetermination than simply having all disputes handled internally. If a society thinks carefully about its system, makes appropriate use of resources and makes an appropriate appointment of a visitor, then there is every reason to expect that the visitor and their decisions will be given respect by affected members and by the courts where necessary.

- R74 The statute should confirm that societies may meet their obligations to provide complaints or grievance procedures by:
- a. referring some or all complaints or grievances to an external arbitrator or arbitral tribunal, so long as minimum standards of natural justice consistent with those specified in the Act are satisfied; or
 - b. appointing a visitor (or referee) to deal with some or all of any disputes that arise.

289 Arbitration Act 1996, sch 1, cl 34.

290 The office arose in at least the late Middle Ages from ecclesiastical law relating to the supervision of charities: Patty Kamvounias and Sally Varnham "Legal challenges to university decisions affecting students in Australian Courts and Tribunals" (2010) 34 Melb ULR 140 at 147. Several New Zealand university statutes contained provision for the Governor-General to be the visitor to the university. In practice, performance of the office would be delegated, for example to a senior lawyer: University of Auckland Act 1961, s 5; University of Waikato Act 1963, s5. These provisions were repealed in 1991 as part of wider educational reforms: Education Amendment Act 1990, s 50(4).

291 Kamvounias and Varnham, above n 290, at 147-150.

R75 The statute should specify that:

- a. a provision in a constitution stipulating arbitration under the Arbitration Act 1996 for some or all complaints or grievances will be an effective arbitration agreement under the Arbitration Act 1996, binding the society and any affected member; and that the constitution may contain further procedural provisions governing any arbitration; and
- b. the decision of a duly appointed visitor on any dispute referred to them is subject to judicial review; but is otherwise binding, except for challenge on grounds of lack of jurisdiction or improper appointment, breach of natural justice, or a decision contrary to public policy.

Chapter 9

Civil enforcement

- 9.1 It is a fundamental characteristic of incorporated societies that they are accountable to their members. By and large it is far better if accountability issues are determined using internal processes without reference to the courts. This is why we recommend in chapter 8 that all societies must either develop or adopt procedures in their constitutions for resolving disputes. However, if those processes fail to resolve the issue, it is important that members have other tools to enforce the constitution and any bylaws. In some cases it may also be appropriate for members to have powers to enforce statutory obligations on societies and officers.
- 9.2 Currently when the internal processes fail to resolve the issue the Incorporated Societies Act 1908 is silent on how a member can enforce the constitution. Consequently a member must bring a civil case, usually in the High Court, if he or she wishes to take the matter further. Court proceedings can be complex, expensive, time consuming and damaging to reputations. In this chapter we recommend that the statute provides a more straightforward mechanism by which societies and members can apply to the court to resolve disputes.

CURRENT LAW

- 9.3 If a society or a member alleges non-compliance with the constitution an action may be brought in the High Court for a remedy under the civil law. There are three civil law routes usually used to resolve a dispute within an incorporated society: contract law; judicial review; and the Declaratory Judgments Act 1908. None of these options are conceptually or practically satisfactory for incorporated societies.

Contract Law

- 9.4 It has been accepted since 1924 that the rules of an incorporated society can be enforced as a contract between the members and the incorporated society:²⁹²

The rules of the club, so far as they purport to define the rights and privileges, obligations, and liabilities which are incident to club membership, constitute in their true legal nature and operation the terms of a binding contract between each individual member and the incorporated club itself. For any wrongful repudiation by the incorporated club of the obligations so incurred by it towards a member the remedy of that member includes, I think, an action for damages as for breach of contract.

- 9.5 While it is a well settled legal principle that in joining a society a member enters a contract with that society based upon the terms of the constitution, in the course of our consultation we have encountered the view, strongly held in some cases, that contract law does not adequately explain the relationship between a society and its members. We accept that there are contractual or quasi-contractual elements in the relationship between a society and its members, but that relationship is much richer than that which can be captured by contract law. This idea is reflected in the statement of Kós J in *Tamaki v The Māori Women's Welfare League Incorporated*

292 *Henderson v Kane and the Pioneer Club* [1924] NZLR 1073 (SC) at 1076.

that “the constitution requires to be given a liberal construction consistent with the tikanga of the League”.²⁹³

- 9.6 The law of contract provides private law remedies. It is well suited, therefore, to disputes within societies that are of a private law nature, for example, concerning access to club facilities. It is not so well suited to disputes where the society is exercising public or quasi-public functions, or where public law principles such as fairness, reasonableness or natural justice are being examined. Of course it is probably not relevant at all when the plaintiff is not a member of the society and so does not have a contract with the society, such as a person who alleges that he or she was wrongfully denied membership.

Judicial review

- 9.7 Under judicial review the High Court assesses whether people who exercise legal powers have exercised those powers as was intended by the law-maker. Although judicial review is concerned with the principles of public law, and incorporated societies are generally considered to be private entities, the courts have found that the decisions of societies may be amenable to judicial review in certain circumstances such as membership decisions,²⁹⁴ or disciplinary proceedings,²⁹⁵ or where the decision may have important public consequences or effects.²⁹⁶
- 9.8 In *Tamaki v The Māori Women’s Welfare League Incorporated* Kós J succinctly described the applicability of judicial review to incorporated societies:²⁹⁷

Although the League is a private body ... it is also a society incorporated under the Incorporated Societies Act. Where its actions involve a public or quasi-public function, judicial review under the Judicature Amendment Act 1972 may well be available. Typical qualifying circumstances will involve the denial of access to membership, the exercise of a disciplinary power, the deprivation of a licence or other economic concession, the alleged misapplication of a society’s constitution in a manner that offends natural justice or an alleged error of law in the application of a society’s constitution where the body concerned has a public or quasi-public function.

- 9.9 Judicial review has developed differently in New Zealand from overseas jurisdictions since the Judicature Amendment Act 1972 introduced a statute-based form of judicial review. Some academic commentators have suggested that consequently, this Act has enabled an overly broad approach to the applicability of judicial review – in essence, that this public law mechanism is being used to resolve private disputes that should be determined using private law doctrines.²⁹⁸

Declaratory judgments

- 9.10 An application may be brought to the High Court under the Declaratory Judgments Act 1908 for a declaration as to the correct interpretation of any document that prescribes the powers of an incorporated society (or company or other body corporate).²⁹⁹ This includes powers under the statute or regulations and the incorporated society’s constitution or bylaws. The court may declare that an action taken or decision made by an incorporated society was in breach of that

293 *Tamaki v Māori Women’s Welfare League Inc* [2011] NZAR 605 (HC) at [55].

294 *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, [2008] NZAR 329.

295 *Hopper v North Shore Aero Club Inc* [2007] NZAR 354 (CA).

296 *Wilson v White* [2005] 1 NZLR 189 (CA) at [21].

297 *Tamaki v Māori Women’s Welfare League Inc*, above n 293, at [43].

298 Jenny Cassie and Dean Knight “The Scope of Judicial Review: Who and What may be Reviewed” (Paper presented to the New Zealand Law Society Administrative Law Intensive Conference, August 2008) at 63; also see Dean R Knight “Privately Public” (2013) 24 PLR 108.

299 Declaratory Judgments Act 1908, s 3.

document. For example, in *Stratford Racing Club Inc v Adlam* the Court made a declaration that the transfer of society property was in breach of the society's purposes.³⁰⁰

- 9.11 The Declaratory Judgments Act does not provide for further orders by the court beyond a declaration. While that remedy may be too limited for some situations, it can be a powerful motivation for a society to rectify an illegality. In any case, an application under that Act is often combined with an application for judicial review.

Issues

- 9.12 None of these actions are satisfactory because they are either limited in their application or have had to stretch their limits to suit the incorporated society context. As a result time is spent not only arguing whether a remedy should be granted but also which cause of action is the appropriate mechanism for granting the remedies.
- 9.13 We consider that there is significant scope for the enforcement of the obligations within societies to be simplified by including new civil remedies in the statute. The remedies would provide straightforward mechanisms by which members can enforce the obligations of societies; societies can enforce the obligations of officers; and in certain cases, members can take action on behalf of societies to enforce the obligations of officers. The statute should allow the Registrar to take such action on behalf of societies, in rare cases when it is in the public interest to do so.
- 9.14 We envisage four types of disputes that may arise in the context of incorporated societies:
- actions to enforce the constitution (or bylaws, or other subsidiary rules made under the constitution);
 - actions to remedy the breaches of duties by officers;
 - actions for remedies as a result of oppressive conduct of societies; and
 - actions to restore to societies money wrongly paid to members.
- 9.15 We discuss each of these in turn.

ENFORCEMENT OF THE CONSTITUTION

- 9.16 In *Issues Paper 24* we made a preliminary suggestion that the new Act could provide a mechanism by which societies and members could take action to enforce the provisions of the constitution.³⁰¹ We referred to a similar mechanism in the Victorian statute.³⁰² Under that provision, a society or a member may apply to the Magistrates' Court for an order directing the performance of the rules; restraining a society from doing an act that is outside its purposes; or declaring and enforcing the rights and obligations of members or the society.³⁰³ The Registrar may also make such an application in rare circumstances if he or she is satisfied that it is in the public interest to do so.³⁰⁴ The court may refuse to make an order (or may make an order for costs against a party) if it is of the opinion that the issue is trivial, the unreasonable or improper conduct of a party has been responsible for the making of the application, or the application is unreasonable in any other way including because there was another method of resolving the dispute.

300 *Stratford Racing Club Inc v Adlam*, above n 294, at [104].

301 Law Commission *Reforming the Incorporated Societies Act 1908* (NZLC IP24, 2011) at [5.22]-[5.23] [*Issues Paper 24*].

302 At [5.25].

303 Association Incorporations Act 2012 (Vic), s 67. Prior to 2012, this provision was found in Associations Incorporations Act 1981 (Vic), s 14A.

304 Association Incorporations Act 2012 (Vic), s 67(4).

Submissions

- 9.17 In *Issues Paper 24* we asked whether aspects of the Victorian model should be incorporated into our own incorporated societies legislation.³⁰⁵ The majority of submitters who responded to our question agreed that they should. The reasons for favouring the Victorian model included that it is practical and flexible, it encourages other methods of dispute resolution before resorting to court, and it provides an incentive to society officers to act reasonably and responsibly from the outset and resolve disputes at an early stage.
- 9.18 Those submitters not in favour of the Victorian model often thought that resort to the courts was unnecessary, given we are also recommending that internal dispute resolution procedures become compulsory for all societies. Some submitters were concerned that the proposed provisions would encourage litigation.

Discussion

- 9.19 We consider that a new statutory mechanism for members to apply to the court for orders to enforce the constitution or bylaws would benefit the sector so long as the court can maintain control over unnecessary or inappropriate litigation.
- 9.20 Members should be able to apply to the court for orders to enforce the rights and obligations arising under the constitution or bylaws. The power should extend to conduct of the society or an officer that has produced, is producing, or is likely to produce a disadvantage to the member. We discuss which court these applications should be made to, at the end of this chapter.

What remedies should be available?

- 9.21 The court should have a broad power to grant a remedy where it considers it just and equitable to do so. Those remedies should include:
- a declaration of the rights or obligations of the incorporated society or any member under the constitution or bylaws;
 - an order requiring the incorporated society or any person to take, or refrain from taking, any action that is required under the constitution or bylaws of the society; and
 - compensation for the financial damage of the incorporated society or member or former member for the breach of rights under the constitution or the bylaws.
- 9.22 We recommend that any compensation awarded to members should, in the normal course of events, be restricted to compensation for economic losses that flow from the deprivation of a member's rights under the constitution. Societies should not be burdened, except perhaps in exceptional cases, with emotional or distress damages. Courts should rather focus on remedies that prevent such harms continuing. A squash club for instance might be required to compensate a squash player for the loss of amenities from a wrongful suspension, but not for distress or humiliation that such a suspension might have caused.

Court's power to limit litigation

- 9.23 There is a risk that there will be an unnecessary increase in litigation if members have a simple mechanism for enforcing the constitution. This risk can be managed if the courts have power to limit unnecessary or inappropriate litigation. The court should have power to refuse to hear an application or make an order if:
- the matter is trivial;

³⁰⁵ *Issues Paper 24*, at n 301, at [5.28].

- the applicant is an inappropriate person to bring the application;
- there are other reasonable but unutilised methods of resolving the matter;
- the conduct of any party has unreasonably prolonged the dispute or increased the costs of the proceedings; or
- it is otherwise not in the public interest.

Who should be able to apply?

The society, members and former members

9.24 The constitution may establish obligations on certain members. Societies themselves should be able to bring this type of civil action to enforce those obligations when their internal dispute processes fail. Members have rights under the constitution against the society, so it is also appropriate that they can enforce the constitution directly in their own names. Finally, we think that former members who have been members within the last six months should also have a right to apply for orders to enforce the constitution where it is through the loss of membership or a closely related matter that their rights have been breached.

The Registrar

9.25 Incorporated societies should remain largely self-regulating in terms of the enforcement of their constitutions. State intervention should continue to occur only in very rare cases, but there are circumstances where societies or their members are not able to or are not sufficiently motivated to take enforcement action themselves. Members of societies are different from shareholders or creditors of companies. Shareholders and creditors can be expected to act in their own rational self-interest and the bigger the interests at stake, the more incentive they have to act. The prospect of some recovery from an action and the relative prospects of success may provide sufficient incentive for shareholders or creditors to initiate and fund an action. By contrast, members cannot share directly in any financial benefit from taking action so may only be motivated by their interest or attachment to the society or its purposes.

9.26 This situation leaves a gap where otherwise useful or desirable actions are not taken, with negative consequences not only for particular societies and their members but also for the public interest. These negative consequences may impact on public or community interests where, for instance, assets or institutions delivering some elements of public benefit are put at risk or lost, but might have been protected with suitable intervention. External intervention can realistically come only from the most appropriate public official, in this case the Registrar.

9.27 We consider that where a society is failing to comply with its constitution, the Registrar should have a power to issue a notice to a society to require the society to amend its operations so that it will comply with its constitution. If the society fails to comply with the notice, or without issuing a notice at all (at the Registrar's discretion) the Registrar should have the power to apply to the court for orders to enforce the constitution of a society. This power should however be exercised rarely and as a last resort where the society or its members are unable or have failed or refused to act in the interests of the society, where such action is in the society's interest, and there is a strong public interest in intervention by the Registrar. We stress that this power does not indicate a need for increased regulatory activity or intervention by the Registrar. Instead it provides the Registrar with a power to undertake a practical response on rare occasions when the public interest demands it.

- 9.28 We recommend that the statute should provide guidance to the Registrar about the factors to consider when determining what constitutes the public interest. Factors the Registrar should be required to consider should include:
- the size of a society;
 - the income and assets of a society;
 - the source of the society's income and assets;
 - the society's ability or intention to act in the society's interests; and
 - the impact that failure to act would have.
- 9.29 In addition, those factors and any others should be weighed against the fact that societies should generally be free to manage their own affairs.

R76 The statute should provide that a society, a member, or a former member may apply to a court for orders to enforce the constitution of an incorporated society. The court should have powers to limit inappropriate or unnecessary applications.

R77 The statute should provide that the Registrar may apply to a court for orders to enforce the constitution if it is in the society's interest and the public interest to do so.

R78 The statute should give the following guidance about the factors for the Registrar to consider when determining what constitutes the public interest:

- the size of a society;
- the income and assets of a society;
- the source of the society's income and assets;
- the society's ability or intention to act; and
- the impact that failure to act would have.

R79 The statute should also provide that when considering the public interest, the Registrar should weigh the factors in R78 and any others against the society's right generally to be free to manage its own affairs.

ENFORCEMENT OF THE DUTIES

- 9.30 We recommended in chapter 6 that the statute specifies the duties that officers of societies must comply with when exercising their powers and performing their functions.
- 9.31 We consider that the statute should provide a straightforward mechanism by which societies can address the statutory duties of officers. This type of civil action under the statute would capture a wide range of behaviour by officers because the duties are, by necessity, broadly drafted. The second duty requires compliance with the Act. Societies could therefore bring an action to obtain orders requiring officers to comply with the Act, such as the statutory rules relating to the disclosure of conflicts of interest and the requirement to comply with natural justice requirements in disciplinary and grievance procedures.

What remedies should be available?

9.32 A broader range of remedies should be available because breaches of these obligations may involve personal gain. In addition to the remedies recommended to enforce the constitution, actions against officers for breach of duty should in appropriate cases result in an order for account of profit or the return of property.

Who should be able to apply?

The society and members (on behalf of the society)

9.33 The duties of officers are owed to the society, so it is only the society which has standing to take civil action to enforce them. In chapter 6 we discussed the possibility that a member should be able to seek leave to bring an action in the name of the society against an officer where there had been a serious breach of duty by the officer that caused loss to the society, if the society was unwilling or unable to bring the action itself. The leave of the court is necessary because the action is being taken on behalf of the society and is usually funded by the society.

9.34 In line with similar requirements of the Companies Act 1993,³⁰⁶ the court should only grant leave to a member if the society:

- does not intend to bring or diligently continue proceedings;
- has discontinued proceedings; or
- it is in the interests of the incorporated society that the conduct of the proceedings should not be left to the incorporated society.

9.35 In making that determination the court should have regard to:

- the likelihood of the proceedings succeeding;
- the costs of the proceedings in relation to the relief likely to be obtained;
- any action already taken by the incorporated society to obtain relief; and
- the interests of the society in the proceedings being commenced, continued, defended or discontinued, as the case may be.

The Registrar

9.36 There may be circumstances where both the society and the members are unwilling or unable to take action to address a breach of the duty against officers. In that situation the Registrar should be able to apply for orders to enforce the duties of officers if it is in the society's interest and in the public interest to do so. The factors that will be relevant to that determination are the same as were described earlier. Again, it is not intended that this power should lead to increased regulatory activity by the Registrar. Rather, it provides the Registrar with a power to undertake a practical response when the public interest demands it.

Court's power to control proceedings by a member

9.37 Where a member is bringing the action in the name of the society, it is appropriate for the court to have some powers to control proceedings to ensure that they continue to be in the interests of the society. We suggest that the new statute contain equivalent powers to those in s 167 of the Companies Act 1993. Those powers are to:

- authorise any person to control the proceedings;

306 Companies Act 1993, s 165.

- give directions for the conduct of the proceedings;
- require the company or the directors to provide information or assistance; and
- direct money that is to be paid by a defendant society to be paid to former and present members.

9.38 The new statute should also include an equivalent to the requirement in s 168 of the Companies Act that the court must agree to any settlement, compromise or discontinuation. That requirement will ensure that the interests of the society are protected.

Costs in proceedings by a member

9.39 If the court grants leave to a member or the Registrar to bring this type of action, the court should also consider whether the society should bear the whole or part of the reasonable costs of the member or Registrar in bringing the action.

R80 The statute should provide that a society may apply to a court for orders for redress from breaches of the duties of officers.

R81 The statute should provide that a member may apply, on behalf of the society, with the leave of the court, for orders for redress from breaches of the duties of officers. The court should have powers to control such proceedings. Any settlement, compromise or discontinuation must have the approval of the court.

R82 The statute should provide that the Registrar may apply on behalf of societies for orders for redress from serious breaches of the duties of officers if it is in the society's interest and the public interest to do so.

R83 The court should have power to order that the society bear the whole or part of the reasonable costs of the member or Registrar in bringing this type of action.

OPPRESSIVE CONDUCT

9.40 Not all abuses of power involve breaches of statutory or constitutional requirements. Other types of behaviour may be oppressive or unfairly prejudicial to members. Although the circumstances in which this will arise will be rare, we consider that the Act should provide a power for members to obtain orders in respect of oppressive conduct.

9.41 In the company context the most common scenario for oppressive conduct is when a minority shareholder claims that decisions of the majority are having an unjust and harsh effect on him or her. Unjust consequences of democratic procedures may also arise in the context of incorporated societies. Members should have the tools to be able to protect themselves in such situations.

Oppressive conduct remedy in company law

9.42 The Companies Act provides the following remedy for oppressive conduct:³⁰⁷

- (1) A shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity or in any other capacity, may apply to the court for an order under this section.

³⁰⁷ Companies Act 1993, s 174.

- (2) If, on an application under this section, the court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this subsection, an order—
- (a) requiring the company or any other person to acquire the shareholder's shares; or
 - (b) requiring the company or any other person to pay compensation to a person; or
 - (c) regulating the future conduct of the company's affairs; or
 - (d) altering or adding to the company's constitution; or
 - (e) appointing a receiver of the company; or
 - (f) directing the rectification of the records of the company; or
 - (g) putting the company into liquidation; or
 - (h) setting aside action taken by the company or the board in breach of this Act or the constitution of the company.

9.43 This remedy has been examined twice by the Court of Appeal. In *Latimer Holdings Ltd v SEA Holdings NZ Ltd* Hammond J considered that the remedy had been very successful at dealing effectively and cheaply with abuses of corporate power and described it as an alternative to winding up on the just and equitable ground:³⁰⁸

The argument was that winding up was much too drastic a remedy to utilise in many cases, and that it would be desirable to give Courts wider powers to intervene to set matters to right, whether by ordering one party to buy the other out or otherwise regulating the affairs of a company.

9.44 In that decision Hammond J confirmed the objective test as to the scope of the remedy established by the earlier case of *Thomas v HW Thomas Ltd*,³⁰⁹ namely that there must be “an unjust detriment to the interests of a member of the company”.³¹⁰ He went on to confirm that the remedy may be available even when the conduct accords with the company’s constitution, there is no want of good faith or lack of probity, or the members have been treated uniformly.³¹¹ Even in those cases inappropriate prejudice may arise.

9.45 In addition, Hammond J mentioned three well established principles limiting the application of the remedy. First, errors of judgement by management, inefficiencies, and poor business management without distinct elements of bad faith or self-interest cannot amount to oppression. Second, judges should exercise self-restraint when assessing business strategies. Third, the remedy should not be used to facilitate an exit from a company due to disagreements over company strategy.³¹²

9.46 It is likely that what is oppressive, unfairly prejudicial or unfairly discriminatory in the incorporated societies context will be different from that in the companies context, given the different operating conditions of incorporated societies. Nonetheless, we consider these broad principles would still be relevant to a remedy for oppressive conduct by incorporated societies.

The scope of the action

9.47 The Companies Act phrase “oppressive, unfairly discriminatory, or unfairly prejudicial” is also applicable in the incorporated societies context. It implies more than “unreasonable behaviour”, but still requires the elements of injustice and detriment to a member’s interests. The conduct to be examined under this action could involve omissions as well as positive actions, a one-off

308 *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328 (CA) at [57], [63].

309 *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 (CA).

310 *Thomas v H W Thomas Ltd*, above n 309, at 693 as cited in *Latimer Holdings Ltd*, above n 308, at [113].

311 *Latimer Holdings Ltd*, above n 308, at [113].

312 At [70]-[72].

action as well as a continuing course of action, and past action or future action. It must have or have had a detrimental effect on a member in his or her capacity as a member.

- 9.48 In many circumstances, behaviour which could be determined to be oppressive conduct will also be a breach of the constitution, for example, a failure to supply society information to a member in accordance with the constitutional rules. In those cases, an action to enforce the constitution proposed earlier will be a more straightforward path to a remedy than the oppressive conduct remedy. In fact, it is likely that a court would not grant relief under the oppressive conduct regime if other methods of resolving the issue have not been utilised.
- 9.49 Examples of oppressive conduct within incorporated societies that may not be a breach of the Act or constitution include:
- behaviour designed to unfairly exclude a member from involvement in the management of the society;
 - denying a member access to society information that would allow that member to exercise his or her rights, or hold the committee to account; and
 - amendments to the constitution that unfairly deny rights to a member contrary to their legitimate expectation.

What remedies should be available?

- 9.50 We consider that when the court finds oppressive conduct has occurred (or is likely to occur) a broad remedial power is appropriate for incorporated societies, similar to that provided for companies. While in the companies context a shareholder's ownership interest in the company may be at stake, in this context, despite no ownership interest at stake, it is possible that the member may rely upon the benefits of membership for his or her income and occupation. The circumstances under which oppressive conduct could arise are so broad that a limited list of remedies may unduly limit the court's ability to provide relief. Consequently, where the court considers it is just and equitable to do so, it should have a power to make any order it thinks fit.

Court's power to limit litigation

- 9.51 There is of course a risk here of unnecessary or inappropriate litigation by members who feel aggrieved by actions of a society. Similarly to the actions to enforce the constitution, the court should refuse to hear an application or to make an order if:
- the matter is trivial;
 - the applicant is an inappropriate person to bring the application;
 - there are other reasonable but unutilised methods of resolving the matter;
 - the conduct of any party has unreasonably prolonged the dispute or increased the costs of the proceedings; or
 - it is otherwise not in the public interest to do so.

Who should be able to apply?

- 9.52 This is a remedy specific to members who must demonstrate that their interests as a member have been detrimentally affected. It is not a remedy for people outside the society who may have their interests prejudicially affected by the conduct of the society, for example, people who benefit from services provided by the society. Those people must turn to other avenues for relief.

- 9.53 Similarly to the provision for enforcing the constitution above, former members who have been members within the last six months should also have standing to apply where the oppressive conduct relates to the removal of their status as a member.

R84 The statute should provide that a member or a former member may apply to a court for orders on the grounds that the conduct of the society has been, is being, or is likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him or her.

MONETARY GAIN

- 9.54 In chapter 3 we recommended that the current prohibition on incorporated societies providing monetary gain to their members is a fundamental principle of incorporated societies and should continue.
- 9.55 In chapter 10 we discuss the enforcement of the prohibition against monetary gain and recommend that it should not be a criminal offence because it does not necessarily involve a dishonest intent. However we also note in that chapter that if an officer breaches the prohibition, it would amount to a breach of his or her duty to comply with the statute and the society could apply for orders to rectify that breach as we describe above.
- 9.56 We consider that rectification of such a breach will require a mechanism whereby the money wrongly paid to members can be restored to the society. The statute currently permits a society to recover such money from members.³¹³
- Every member who derives any pecuniary gain from any act done by the society in breach of this section shall be deemed to have received the same to the use of the society, and the same may be recovered by the society accordingly.
- 9.57 This power should be continued in a new statute. There is no suggestion here that the member necessarily did anything wrong in receiving the monetary gain. It is quite possible that he or she was ignorant of the requirements of the statute and principle underlying it. Nonetheless, it was not within the power of the society to pay the money and where the sum is sufficiently large to warrant action, it should be recovered by the society.

Who should be able to apply?

The society

- 9.58 The prohibition against monetary gain under the new Act will be an obligation on the society. Thus, in the first instance the society should have the opportunity to put things right by requiring that the money wrongly paid to a member be restored to the society. Societies should first use their internal processes to restore the monetary gain. Where that fails, the ability to apply to the court for orders should strengthen a member's motivation to comply.

The members

- 9.59 There will be situations where the society is unable or unwilling to bring such an action, such as where the people controlling the society are the members receiving the monetary gain. In such situations other members should be able to apply to the court for leave to take this action on the society's behalf. While it will be rare that such an application is brought by a member, the ability to do so fits well with the overall philosophy of enabling members to hold societies to account.

313 Incorporated Societies Act 1908, s 20(4).

9.60 We also consider that in order to prevent unnecessary or vexatious litigation of this type, this action may only be taken by a member with the leave of the court. The court should refuse to grant leave if it considers that:

- the matter is trivial;
- the applicant is an inappropriate person to bring the application;
- there are other reasonable but unutilised methods of restoring the money to the society (including the society's internal grievance procedures);
- it has not been demonstrated that the society itself is unwilling or unable to take action to restore the money to the society; or
- it is otherwise not in the public interest to do so.

The Registrar

9.61 Unlike some other statutory obligations on societies, there may be no motivation on the society or its members to enforce the prohibition against monetary gain where many members are benefitting at the society's expense. In such cases, the Registrar should have the power to take action in the court to restore to the society the monetary gain wrongly paid to members, if it is in the society's interest and the public interest to do so. In extreme cases, where the provision of monetary gain is so extensive that it undermines the character of the organisation as an incorporated society, the court should also have a power to remove the society from the register.

9.62 It is likely that breaches of the monetary gain prohibition where all the members are benefitting would be very rare. It will be even rarer that the public interest would justify intervention by the Registrar. The Registrar would be able to take action in respect of monetary gain *against officers* of the society under the powers to enforce the statutory duties discussed above. However, we consider that this reserve power to restore monetary gain fills a gap in the other statutory powers of enforcement. Even if the power is rarely used, it is important that the Registrar has powers to be able to take constructive action in the public interest in rare cases.

R85 The statute should provide that a society may apply to a court for orders to restore to the society any money wrongly paid to members as being a breach of the prohibition against monetary gain.

- The statute should provide that a member may apply, with the leave of the court, on behalf of the society, for orders to restore to the society any money wrongly paid to members as being a breach of the prohibition against monetary gain.
- The statute should provide that the Registrar may apply to a court for orders to restore to the society any money wrongly paid to members as being a breach of the prohibition against monetary gain, if it is in the society's interest and the public interest to do so.

WHICH COURTS SHOULD HAVE JURISDICTION?

9.63 Currently when societies or members wish to invoke the courts to settle disputes within incorporated societies they usually take proceedings in the High Court in judicial review, contract or under the Declaratory Judgements Act. We have proposed new mechanisms for resolving those disputes in the court, so we have also considered the court in which these actions should be taken.

9.64 We consider that the choice of court should normally be left to the parties. The High Court will continue to have exclusive jurisdiction in respect of the liquidation of entities, including incorporated societies. Apart from that exception there is nothing in our recommendations to prevent a member or a society from applying for orders in either the High Court or the District Court. Which of these courts a society or member will apply to will depend upon a number of factors, including the size of any assets in dispute, and how legally complex the issues are. The District Court has jurisdiction to hear civil disputes up to the value of \$200,000.³¹⁴ The High Court handles matters over that amount. Where the plaintiff seeks orders that do not involve assets or money, he or she may apply to either court. Once a plaintiff has applied to a court, there is facility for the defendant to apply to transfer the proceedings to the other court if he or she wishes.³¹⁵

³¹⁴ District Courts Act 1947, s 29. Following the Law Commission's review of the Judicature Act 1908 and courts legislation the Government announced that the District Court's civil jurisdiction should rise to \$350,000 (Cabinet Minute of Decision "Government Response to the Law Commission's Report: Review of the Judicature Act 1908: Towards a New Court Act" (15 April 2013) CAB Min (13) 12/18 at [47]).

³¹⁵ District Courts Act 1947, ss 43 and 46.

Chapter 10

Criminal sanctions and the powers of the Registrar

- 10.1 The current statute provides a small number of minor administrative offences and more significant offences, with a range of very outdated fines. For example, failure to file the annual financial statement may make every officer of the society liable to a fine not exceeding 10 cents per day, and operating for pecuniary gain may make the society liable to a fine of \$200 and a member to a fine of \$40. Appendix B contains a full list of the current statutory obligations and sanctions. Quite obviously the fines are out of date and on-going or continuing offences are no longer considered appropriate.³¹⁶ We consider that the way the statutory obligations are enforced should be completely reviewed in light of modern enforcement principles.
- 10.2 The first part of this chapter discusses the theory of criminal sanctions, including infringement offences. It also discusses whether an order banning a person from holding a position of responsibility within an incorporated society should be one of the sentencing options upon conviction for an offence under the statute. The second part of this chapter analyses a range of potential offences and infringement offences and makes recommendations as to how they should be handled in a new statute.

THE NATURE OF CRIMINAL SANCTIONS

- 10.3 Criminal sanctions play a fundamentally different role from civil enforcement. The civil law is designed to uphold the rights of individuals. It results in a range of remedies designed to fix the harm, prevent potential harm, or compensate a person for the harm. By contrast, criminal cases are instigated by the state to maintain law and order and protect society. The purposes of criminal sanctions include punishment of the wrongdoer, denunciation of the conduct and to deter others from that conduct. In sentencing an offender, the courts may also aim to rehabilitate the offender, promote in him or her a sense of responsibility for the harm caused and provide for the interests of the victim, including reparation.³¹⁷ There is a far greater stigma attached to criminal sanctions because they may result in a criminal record and sometimes imprisonment. Criminal offences are the appropriate enforcement mechanism when there are relatively high levels of harm to individual or public interests, where the purpose of enforcement is punishment and deterrence rather than remedies for an individual, and where there is an appropriate enforcement agency in place.³¹⁸

Infringement offences

- 10.4 Infringement offences offer a less stigmatising form of criminal sanction. They are directly enforced via an infringement notice issued by an administrative agency. There is no requirement for a court hearing (unless the defendant wishes to defend the notice), and

316 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (May 2001 edition and amendments) at [12.6.2].

317 Sentencing Act 2002, s 7.

318 Legislation Advisory Committee, above n 316, at [12.1.3].

a conviction cannot result. The Legislation Advisory Committee Guidelines describe the procedure for infringement offences:³¹⁹

Infringement offences are offences which may be proceeded against, under section 21 of the Summary Proceedings Act 1957, by serving an infringement notice on a defendant, and, if the infringement fee remains unpaid, by subsequently serving a reminder notice. If the fee remains unpaid, a copy of the reminder notice may be filed in a District Court and, unless the defendant requests a hearing, an order is deemed to be made that the defendant pays a fine equal to the infringement fee for the offence and any prescribed costs.

- 10.5 Enforcement by way of infringement offence offers benefits and trade-offs. For the prosecuting agency, infringement offences are quicker, simpler and cheaper, but offer less of a deterrent effect than the possibility of a conviction would. For the defendant, there is no possibility of a conviction and the penalty is less than what would be required if he or she were proceeded against directly in court. However, the defendant has fewer legal rights under an infringement process than would be available via court enforcement.³²⁰

Corporate liability

- 10.6 Incorporated societies themselves, as well as their officers and members, can be liable to criminal prosecution. The Interpretation Act 1999 provides that “person includes a corporation sole, a body corporate and an unincorporated body”.³²¹
- 10.7 Of course the actual action (and the state of mind) alleged to have constituted the offence will always be the action of an individual (or a number of individuals). The extent to which those acts can be attributed to an incorporated society will depend upon the circumstances of the case and the interpretation of the statute creating the offence.³²² The culture of the organisation may be relevant, as well as the constitutional rules establishing the authority of individuals within a society.
- 10.8 For the purposes of this report, where we state below that “any person” may be liable for an offence, we intend that the incorporated society itself may also be liable.

Submissions

- 10.9 In *Issues Paper 24* we discussed the use of criminal sanctions against those people running incorporated societies.³²³ We said that one disadvantage of imposing criminal sanctions is that an unfounded fear of criminal prosecution may discourage people who behave honestly from taking on roles of responsibility as officers within a society. On the other hand, the disadvantage of leaving enforcement generally to the civil law is that it can be expensive and members might not be sufficiently motivated to take action. We asked submitters for their views on the criminalisation of an officer’s failure to disclose a conflict of interest and whether there should be an offence of the “dishonest use of position”.
- 10.10 Most of the submissions that responded to these questions were opposed or strongly opposed to criminalisation except where actual dishonesty has occurred. They tended to think that criminalisation was unnecessary, too heavy-handed and would act as a disincentive to volunteering for roles within incorporated societies. Many thought that any behaviour that was

319 Legislation Advisory Committee, above n 316, at [12.5.2].

320 Ministry of Justice “Infringement Guidelines” (approved by Cabinet March 2008) < <http://www.justice.govt.nz/publications/global-publications/i/infringement-guidelines> > at [7].

321 Interpretation Act 1999, s 29.

322 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 16.

323 Law Commission *Reforming the Incorporated Societies Act 1908* (NZLC IP24, 2011) at [3.19]-[3.26] [*Issues Paper 24*].

truly criminal would be caught by the existing criminal law. They thought that enforcement should generally occur via the society's own constitution or the civil law.

- 10.11 By contrast, two-thirds of submissions were supportive of a criminal offence for the “dishonest use of position” along the lines of s 33 of the New South Wales Act:³²⁴

A committee member of an association who uses his or her position as a committee member dishonestly with the intention of directly or indirectly:

- (a) gaining an advantage for himself or herself or for any other person, or
- (b) causing detriment to the association, is guilty of an offence.

- 10.12 The New Zealand Law Society summed up the flavour of most submissions in favour of a criminal sanction for a dishonest use of position-type offence. It said that while the availability of criminal sanctions for those governing community organisations may appear somewhat draconian, many society and trust problems involve the dishonest use of a position, so a prohibition would be useful as an educative signal to committee members.

- 10.13 Amongst those submitters who did not favour a criminal sanction for the “dishonest use of position”, some considered that this issue would be better dealt with in the statutory code of duties for committee members.

Discussion

- 10.14 We agree with the majority of submitters that generally criminal sanctions are not required for incorporated societies and that enforcement should usually be by members, via the society's constitution and the civil law. Criminal offences should be reserved for situations involving dishonesty.
- 10.15 Sections 377-380 of the Companies Act 1993 provide examples of a number of offences involving dishonest behaviour in the context of companies. We consider that a new statute for incorporated societies should include offences analogous to each of those offences and that the Registrar should be the prosecuting authority for them.
- 10.16 Much of the behaviour that would be captured by these proposed offences would already be covered by offences under the Crimes Act 1961. For example, the offences of obtaining by deception or causing loss by deception;³²⁵ theft by a person in a special relationship;³²⁶ dishonestly taking or using a document;³²⁷ and criminal breach of trust.³²⁸ While we are generally cautious about adding unnecessary offences to the statute book, we consider that there are strong advantages in the statute containing a set of offences specific to incorporated societies. Our consultation revealed many stories of societies run by people who have very little understanding of the legal obligations of their roles. In many cases this extended to a limited understanding of the obligation to act in the interests of the society rather than themselves. The general offences in the Crimes Act have a very limited educative or deterrent effect for those people precisely because they operate generally. We suggest that a set of offences specific to incorporated societies, together with a new set of duties for officers of incorporated societies as we discussed in chapter 6, will have that educative effect.

324 Associations Incorporation Act 2009 (NSW), s 33.

325 Crimes Act 1961, s 240.

326 Crimes Act 1961, s 220.

327 Crimes Act 1961, s 228.

328 Crimes Act 1961, s 229.

10.17 We also consider that infringement offences are an appropriate sanction for breaches of the administrative obligations under the statute, such as the requirement to file annual returns. An infringement offence regime is suitable for obligations where there are relatively low levels of moral fault, where it is straightforward to establish that the offending action occurred, and where there is no “mental element” required for the offence (the mere fact of doing or not doing the act is sufficient, without an additional requirement to intend to do it, or know it was wrong). Failure to comply with some administrative-type statutory obligations may occur due to neglect or uncertainty within societies as to who is responsible for the action, rather than deliberate wrong-doing. It is likely therefore, that the threat of an infringement fee would provide the necessary encouragement to ensure systems within societies are adequate.

Banning orders

- 10.18 Several commercial statutes provide powers in the court to ban or disqualify a person from holding a directorship or being involved in the management of companies.³²⁹ In *Issues Paper 24* we asked whether courts should have the power to consider banning individuals from being officers involved in the running of incorporated societies in the same way as individuals can be barred from being directors.³³⁰ Three-quarters of submitters on this question favoured courts having such a power and many thought that there should be no distinction between commercial directors and elected officers. However, some of the submitters thought that the power should only be used in the case of serious criminal conduct.
- 10.19 The submitters that were not in favour of such a power offered a variety of reasons. Some thought that societies are usually able to remove undesirable officers under their constitutional election procedures. Others doubted that such a ban could be enforced because societies are not required to notify the Registrar of the names of their officers. Several mentioned that the Charities Board can already disqualify officers from being an officer of an incorporated society that is also registered as a charity, for a period of up to five years, where they have already removed the entity from the Charities Register.³³¹
- 10.20 Some submitters suggested that it would be better to ban certain classes of people from becoming committee members in the first place. In chapter 6 we proposed a limited list of matters that would disqualify a person from being an officer. These include being an undischarged bankrupt or being banned from holding a directorship, or being involved in the management of an incorporated or unincorporated body under the Companies Act 1993, Securities Act 1978, the Securities Markets Act 1988 or the Takeovers Act 1993.
- 10.21 We recognise that there are already a number of avenues for preventing an undesirable person from being an officer of an incorporated society. However, we consider that the court should have a power to ban a person for a period of up to 10 years, from holding a position of governance or management of an incorporated society or from being the statutory officer of a society. That power would be available upon conviction of an offence under this Act and would be in addition to any other penalty available for that offence. A list of people banned under this provision should be made available on the Registrar’s website.
- 10.22 By restricting a banning order to convictions for these offences it would only be in circumstances of serious dishonesty or fraud that a ban would be considered. In that way, the potential for a banning order would not operate as a disincentive to well-intentioned people to volunteer for incorporated societies. We recognise that banned people may still be able to

329 Companies Act 1993, s 383; Securities Act 1978, s 60A; Takeovers Act 1993, s 44F.

330 *Issues Paper 24*, above n 323, at [3.27].

331 Charities Act 2005, s 31(4)(b).

exercise substantial informal power within societies, but consider that despite this, an order would send a strong signal to members about the person.

CRIMINAL OFFENCES AND INFRINGEMENT OFFENCES

10.23 In this section we discuss a range of potential offences and recommend how they should be dealt with in the statute. We also suggest a number of offences that should become infringement offences under the statute.

Dishonest use of position

10.24 In line with the submissions, we agree that the sector would benefit from a new offence of holding a position of responsibility within an incorporated society and dishonestly using that position directly or indirectly to obtain an advantage (whether monetary or otherwise) or cause a loss to any other person. Examples of behaviour that might possibly be covered by this offence include:

- taking bribes;
- using society information, such as the membership list, to make a profit for oneself; and
- selling society property to oneself or a relative for less than market value.

10.25 The word “dishonestly” has a specific definition in the Crimes Act 1961:³³²

[An act or omission] done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority.

10.26 This definition requires an examination of what the defendant actually believed, rather than whether that belief was reasonable or not.³³³ In the context of the proposed offence of “dishonest use of position”, “dishonesty” would capture the person who knew that he or she was acting inconsistently with the role of the office they hold by personally accepting money or a privilege for performing the tasks of that role. We consider that the definition of “dishonestly” in the Crimes Act should apply.

10.27 Both direct and indirect benefits would be captured by the proposed offence. In this way, it should be clear that as well as being wrong to take advantages for oneself, it is also wrong to use a position within a society to advantage one’s family or associates.

10.28 Offending at the more serious end of the spectrum under this proposed provision could be analogous to the offence of “theft by person in a special relationship” which carries a maximum term of imprisonment of seven years.³³⁴ However, the penalty for the proposed offence must also have parity with the other offences we are proposing, which are similar to offences in the Companies Act. Consequently, we think that the maximum penalty for this offence should be a term of imprisonment not exceeding five years, and a fine not exceeding \$200,000.

Providing false information

10.29 Under a new statute societies would be required to provide a range of information to the Registrar, both for the purposes of the registration regime (for example, an annual financial report) and for the purposes of the Registrar’s investigation powers. It is important for the integrity of the systems that the information provided to the Registrar is correct. We consider therefore that it should be an offence for any person to provide any information required

332 Crimes Act 1961, s 217.

333 *R v Hayes* [2008] NZSC 3, [2008] 2 NZLR 321 at [34], [51], [52] and [58].

334 Crimes Act 1961, ss 220 and 223(a).

under the Act that is false or misleading, knowing that information to be false or misleading. The offence should also extend to omitting a statement knowing that the omission makes the statement false or misleading, and to authorising someone else to make or omit such a statement.

- 10.30 We think that “any person” should be potentially liable to the offence so that it captures officers, members, employees and the society itself. The mental element of the proposed offence – knowing that statement is false or misleading – is sufficiently restrictive to capture only behaviour that is deliberately dishonest.
- 10.31 The equivalent provision in the Companies Act carries a conviction, and imprisonment for a maximum term of five years or a fine not exceeding \$200,000.³³⁵ The company context for this offence however, is quite different from that for incorporated societies. A false statement made in respect of a company may be a means of defrauding investors. Information required from incorporated societies under the Act will relate to the registration process, the Registrar’s investigation powers, or the liquidation and winding up processes. The potential harm in the context of incorporated societies does not justify a fine as high as that in the Companies Act. Instead we suggest that a conviction and imprisonment for a maximum term of one year in extreme cases, or a fine not exceeding \$50,000 is appropriate. This is greater than the fine for supplying information knowing it to be false or misleading in s 52 of the Charities Act 2005 but is in line with our recommendation for breaching a banning order and hindering a Registrar’s investigation.

Fraudulent use or destruction of property

- 10.32 Section 378 of the Companies Act makes it an offence for any director, employee or shareholder of a company to fraudulently take or apply property of the company for his or her own use or benefit, or for a use or purpose other than those of the company, or to fraudulently conceal or destroy property of the company. Some fraudulent use of property in respect of incorporated societies would be captured by the proposed new offence of dishonest use of position discussed above, but that offence applies only to the officers of incorporated societies. We propose that a new statute for incorporated societies should contain a similar provision to s 378 of the Companies Act that captures such fraudulent behaviour by employees and members as well as officers.
- 10.33 The Companies Act offence carries a conviction, and imprisonment for a maximum term of five years or a fine not exceeding \$200,000. Behaviour falling within this offence may carry similar levels of harm in the context of incorporated societies as in the companies context. Although many incorporated societies have very limited assets, others have substantial assets which could potentially be appropriated for a fraudulent purpose. Consequently, we consider that the penalty for the fraudulent use or destruction of property should be the same as the equivalent offence in the Companies Act, that is, a conviction, and either imprisonment for a term not exceeding five years or a fine not exceeding \$200,000.

Falsification of records

- 10.34 Under the Companies Act it is an offence for every director, employee or shareholder of a company, with the intent to defraud or deceive, to make a false entry in a document belonging or related to a company, or to destroy or alter such a document.³³⁶ It is also an offence for any person to record or store false matter on, or remove or destroy matter from, a device used

335 Companies Act 1993, ss 377 and 373(4).

336 Companies Act 1993, s 379(1).

for company records.³³⁷ The penalty for such offending is conviction, and imprisonment for a maximum term of five years or a fine not exceeding \$200,000.

- 10.35 We have considered whether the new statute should contain an offence of falsifying records with the intent to defraud or deceive. On the one hand, the falsification of records should normally be a matter for the internal processes of an incorporated society. On the other hand, the falsification of records “with intent to defraud or deceive” is a truly criminal action. There is a public interest in deterring and punishing any such behaviour.
- 10.36 We propose therefore, that it should be an offence for any person, with intent to defraud or deceive, to make a false entry, or omit, remove or alter an entry, in any register or document required by the Act or the constitution of the society. Such behaviour could capture truly criminal offending within incorporated societies on a similar level to that in companies. Consequently, the penalties should be the same.

Carrying on business fraudulently

- 10.37 Under the Companies Act, any person who is knowingly a party to a company carrying on business with intent to defraud creditors of the company or any other person, or for a fraudulent purpose, commits an offence. Such a person is liable to conviction, and imprisonment for a maximum term of five years or a fine not exceeding \$200,000.³³⁸ There are two similar offences for directors of a company.³³⁹
- 10.38 While some incorporated societies do not carry on business activities, many do, and some undertake significant business activities. Choosing to incorporate as a society rather than as a company should not provide a means to escape potential offences under the companies legislation. Consequently we consider that any person who is knowingly a party to an incorporated society carrying on business with intent to defraud creditors of the incorporated society or for a fraudulent purpose, should be liable to an offence. The context for this type of offending within societies could be similar to that within companies. The penalties therefore should be the same as the Companies Act penalties for this behaviour, that is, conviction, and imprisonment for a maximum term of five years or a fine not exceeding \$200,000.

Breaching a banning order

- 10.39 Earlier in this chapter we recommended that the court should have the power to ban a person from holding a position of governance or management of an incorporated society upon convicting a person of an offence under this Act. It follows therefore, that the statute should also contain an offence of breaching such a banning order.
- 10.40 If a person breaches a governance or management ban imposed by the court we consider that he or she should be liable to a conviction and imprisonment for a term not exceeding one year or to a fine not exceeding \$50,000. This is a significantly reduced sentence from those that can be imposed under the Companies Act, Securities Act 1978 and Takeovers Act 1993,³⁴⁰ and reflects the different, largely non-commercial context of incorporated societies.

337 Companies Act 1993, s 379(2).

338 Companies Act 1993, ss 380(1) and 373(4).

339 Companies Act 1993, ss 380(2) and (3).

340 Maximum term of five years imprisonment or a maximum fine of \$200,000 under ss 383 and 373(h) of the Companies Act 1993; and three years imprisonment or \$100,000 fine under s 60C of the Securities Act 1978 and s 44H of the Takeovers Act 1993.

Failing to comply with Registrar's directions

- 10.41 Later in this chapter we recommend that the Registrar have powers of investigation and intervention similar to those in Parts 1 and 2 of the Corporations (Investigation and Management) Act 1989. Additional offences are required to motivate compliance with those powers. These are as follows:
- failing to comply with the Registrar's requirement to supply information or to get information audited, without lawful justification or excuse;
 - hindering, obstructing or delaying a Registrar's inspection or investigation (including refusing to answer any question), without lawful justification or excuse;
 - contravening or failing to comply with a direction of the Registrar; and
 - hindering, obstructing or preventing a society from giving effect to a direction of the Registrar.
- 10.42 The maximum penalties for committing these offences should align with that of breaching a banning order, that is, a maximum term of imprisonment of one year or a fine of \$50,000. That is the same maximum term of imprisonment to that imposed for the equivalent offences under the Corporations (Investigation and Management) Act, but is a higher maximum fine. The fines under that Act are \$10,000 for an individual or \$25,000 for a corporation.³⁴¹

Improper use of "Incorporated"

- 10.43 The Companies Act makes it an offence for any person who is not incorporated with limited liability to carry on business under a name or title of which the last word is "Limited" or a contraction of that word.³⁴²
- 10.44 It is possible that a person or body of persons might falsely hold themselves out as being registered as an incorporated society, for example, for the purpose of demonstrating to funding bodies that they have the checks and balances of a member-based organisation governed by the Act and a constitution. However, prohibiting the use of the word "Incorporated" is problematic because that word is used in a more general sense than is the word "Limited" at the end of a name. Consequently, we recommend that the new statute does not contain an offence of improperly using the word "Incorporated". Any prosecution for offending of this type could still occur under s 242 of the Crimes Act (false statement by promoter).

Providing monetary gain to members

- 10.45 Currently, any society that does any act that, if that act were one of the society's purposes would mean that the society was associated for pecuniary gain, is liable to a fine not exceeding \$200.³⁴³ Furthermore, every member who is a party to that act is liable to a fine not exceeding \$40.³⁴⁴
- 10.46 We consider that operating for monetary gain (as we propose it should be called in the new statute) is not an action with a sufficiently criminal character to justify an offence within a modern enforcement regime for incorporated societies. Providing monetary gain to members in breach of the statute may occur due to a misunderstanding of the law, or of the fundamental character of incorporated societies, or of the nature of the payment being made. It does not necessarily have the "dishonest" character of the other criminal offences we are recommending. While an offence may in some instances provide motivation to comply with the statutory

341 Corporation (Investigation and Management) Act 1989, s 70.

342 Corporation (Investigation and Management) Act 1989, s 70.

343 Incorporated Societies Act 1908, s 20(2).

344 Incorporated Societies Act 1908, s 20(3).

prohibition against operating for monetary gain, it is more important that societies have access to an enforcement mechanism to restore to the society any money wrongly paid to members. We proposed such a mechanism in chapter 9. We also discuss at the end of this chapter actions we think the Registrar should be able to take in respect of monetary gain.

Breaches by officers of their duties

- 10.47 In light of a recent Bill before Parliament, we have considered whether breaches by officers of the duties they owe their societies should be subject to criminal sanctions. The Companies and Limited Partnerships Amendment Bill 2011 (as amended by Supplementary Order Paper No 249) proposes a criminal remedy if a director of a company exercises powers or performs duties as a director in bad faith towards the company, believing the conduct is not in the best interests of the company, and knowing or being reckless as to whether the conduct will cause serious loss to the company or will cause benefit or advantage to a person who is not the company (including for example, to the director). It proposes two limited defences in relation to actions in respect of a subsidiary company that are in the interests of the holding company, and in relation to joint ventures.³⁴⁵ A director convicted of such an offence would be liable to imprisonment for a term not exceeding five years or to a fine not exceeding \$200,000.
- 10.48 During the Bill's First Reading, the Minister of Commerce indicated that in formulating the policy, the Government was mindful of the possible disincentive effect that criminal offences would have on people's willingness to take up directorships. However it was thought that, in light of a number of finance company collapses, there was a need for public enforcement agencies to take action in the public interest. It was intended that the offences would capture only serious misconduct.³⁴⁶
- 10.49 Submissions to the Commerce Committee on the original draft Bill, which directly criminalised a breach of the duty to act in good faith and the reckless trading duty, indicated widespread support for the criminalisation of dishonest behaviour by directors, but equally widespread criticism of criminal liability that drops below that threshold.³⁴⁷ They thought that the intentionally egregious behaviour intended to be covered by the Bill would already be covered by the Crimes Act or the Companies Act. Many were concerned that criminalising the breach of these duties would discourage people from becoming directors, and would unjustifiably stifle the risk-taking by companies that is a necessary part of successful business.
- 10.50 In its report on the Bill, the Commerce Committee considered that some behaviour by directors is sufficiently blameworthy to justify new criminal sanctions, but it also recognised the view of submitters that the provisions could be perceived as criminalising legitimate risk-taking behaviour. It stated that it would support further consideration of the drafting of the provisions to ensure that the Act would provide clear guidance to directors and not have a chilling effect on legitimate business.³⁴⁸
- 10.51 The redrafted offences included in Supplementary Order Paper 249 now avoid directly criminalising breaches of duty. The new offences require additional mental elements, including knowledge of serious harm to the company or the creditors, depending on the offence. The offences, if enacted, should capture a smaller group of potential offenders encompassing those who indulge in deliberate wrongdoing and know they are causing or will cause serious harm.

345 Supplementary Order Paper 2013 (249) Companies and Limited Partnerships Amendment Bill 2011 (344-2), cl 4.

346 (24 July 2012) 682 NZPD 3854.

347 For example, see submissions on the Bill to the Commerce Committee from the New Zealand Shareholders Association Inc, the Institute of Directors in New Zealand Inc, the New Zealand Law Society and the New Zealand Institute of Chartered Accountants < http://www.parliament.nz/en-NZ/PB/SC/Documents/Evidence/?Custom=00DBHOH_BILL11152_1 >.

348 Companies and Limited Partnerships Amendment Bill 2011 (344-2) (select committee report) at 2.

- 10.52 We consider that irrespective of whether these clauses become law, there are strong grounds to distinguish the position of incorporated societies from that of companies and therefore it is not appropriate to criminalise breaches of the duties owed by officers to their societies. First, the impetus to criminalise breaches of directors' duties follows a wave of finance company collapses. The reforms are designed to address a perceived lack of enforcement under the current private enforcement system.³⁴⁹ There has not been a similar wave of problems with incorporated societies. While there have been the occasional example of intentional egregious behaviour within incorporated societies, we consider that this can be better dealt with by increasing the powers of the Registrar to intervene on behalf of societies in the public interest, and by making it easier for members to enforce their rights under the constitution.
- 10.53 Second, while some incorporated societies run businesses and so are concerned with risk-taking to make profit, many (possibly most) are not. In general the activities of incorporated societies are less likely to attract criminal-level behaviour than the profit-making activities of companies. Third, although some officers of incorporated societies have executive roles and receive payment, many are volunteers receiving no personal financial benefit. It is, therefore, even more important that the enforcement regime in place does not discourage people from volunteering for positions of responsibility in incorporated societies.
- 10.54 Instead of criminal sanctions, the duties of officers should be enforced in the first instance under the society's internal dispute resolution processes. Where that fails to resolve the matter, a society may bring a civil action seeking compensation or restitution. Members may also enforce those duties on behalf of the society via a civil action with the leave of the court. Finally, in rare cases where it is justified in the public interest, the Registrar may also bring such a civil action on behalf of the society.

Operating outside the purposes of the society

- 10.55 Currently, the Registrar may give notice to a society to stop any operations that are beyond the scope of the purposes of the society. If the society does not stop those operations, every officer and every member of the committee or other governing body is liable to a fine unless he or she proves that the operations have taken place without his or her authority or consent.
- 10.56 Under our recommendations in this report, it is no longer necessary for the statute to contain an offence for operating outside the purposes of the society. The purposes are part of a society's constitution. In most cases, members will be able to use the society's internal dispute resolution processes to stop a society from operating outside its stated purposes. In other cases, members can use the power proposed in chapter 9 to apply to the District Court or High Court for orders to enforce the constitution. When the society or the members cannot do so, it may be in the public interest for the Registrar to apply to the court for such orders.

Infringement offences

- 10.57 A number of administrative obligations will exist for societies under the statute. While in some cases members will be able to enforce those obligations themselves using informal processes or the society's internal disputes procedures, their minor nature make it unreasonable to expect members to take court action to enforce them when those processes fail. In such cases some form of public enforcement action is required to motivate compliance.
- 10.58 We consider that a new statute for incorporated societies should establish an infringement offence scheme for those obligations. The statute should enable the infringement offences to be established in regulations made under the Act. We consider that the maximum infringement

349 Ministry of Economic Development *Review of Securities Law* (Discussion Paper, June 2010) at 184.

fee should be \$1,000. This is consistent with the infringement guidelines issued by the Ministry of Justice in 2008.³⁵⁰ While this fine may be considered low for a body corporate, the proposed infringement offences relate to only administrative obligations, so breaches would result in relatively low levels of harm. A fine of \$1,000 should be sufficient to motivate compliance with the statutory obligations for most incorporated societies. The Registrar should be empowered to issue and enforce the infringement notices and the proceeds from infringement fees should be paid to the Crown bank account.

10.59 We consider that it is the society itself that should be liable to the infringement offence, rather than any particular officer. While it will be officers who will have responsibility for these administrative obligations, the society itself should have the checks and balances in place to ensure those responsibilities are complied with. Also, a personal liability for an infringement fee could operate as a disincentive to volunteer for leadership roles within societies.

10.60 The obligations that should be subject to an infringement offence include:

- operating without a current registered office;
- failing to maintain a register of members in accordance with the statutory requirements;
- failing to notify the Registrar of amendments to the constitution;
- failing to hold a general meeting at least every 15 months;
- failing to keep minutes of general meetings;
- having a constitution that does not comply with the Act; and
- failing to file an annual return or financial report.

R86 The statute should provide the following offences:

| Offence | Maximum penalty |
|--|---|
| <p>Every person commits an offence who is in a position of responsibility within a society and who dishonestly uses that position to directly or indirectly:</p> <ol style="list-style-type: none"> a. obtain any property, privilege, service, monetary advantage, benefit or valuable consideration; or b. cause loss to any other person. | <p>Conviction and imprisonment for a period not exceeding five years or a fine not exceeding \$200,000.</p> <p>When convicting a person under this provision the court may also impose a banning order.</p> |
| <p>Every person commits an offence who provides any information required under this Act that is false or misleading, knowing that information to be false and misleading.</p> | <p>Conviction and imprisonment for a period not exceeding one year or a fine not exceeding \$50,000.</p> <p>When convicting a person under this provision the court may also impose a banning order.</p> |
| <p>Every officer, member or employee commits an offence who:</p> <ol style="list-style-type: none"> a. fraudulently takes or applies property of the society for his or her own use or benefit or for a use or purpose other than those of the society; or b. fraudulently conceals or destroys property of the society. | <p>Conviction and imprisonment for a term not exceeding five years or a fine not exceeding \$200,000.</p> <p>When convicting a person under this provision the court may also impose a banning order.</p> |

³⁵⁰ Ministry of Justice, above n 320, at [27].

| | |
|--|---|
| Every person commits an offence who, with intent to defraud or deceive, makes a false entry or omits, removes or alters an entry in a register or document required by the Act or the constitution of the society. | Conviction and imprisonment for a maximum term of five years or a fine not exceeding \$200,000. When convicting a person under this provision the court may also impose a banning order. |
|--|---|

| Offence | Maximum penalty |
|--|--|
| Every person commits an offence who knowingly is a party to an incorporated society carrying on business with intent to defraud the society's creditors or for a fraudulent purpose. | Conviction and imprisonment for a maximum term of five years or a fine not exceeding \$200,000. When convicting a person under this provision the court may also impose a banning order. |
| Every person commits an offence who breaches an order of the court banning him or her from holding a governance or management role within an incorporated society. | Conviction and imprisonment for a maximum term of one year or a fine not exceeding \$50,000. When convicting a person under this provision the court may also impose a further banning order. |
| Every person commits an offence who, without lawful justification or excuse fails to comply with a requirement by the Registrar to supply information or to get information audited. | Conviction and imprisonment for a maximum term of one year or a fine not exceeding \$50,000. When convicting a person under this provision the court may also impose a banning order. |
| Every person commits an offence who, without lawful justification or excuse hinders, obstructs or delays a Registrar's inspection or investigation or refuses or fails to answer a question. | Conviction and imprisonment for a maximum term of one year or a fine not exceeding \$50,000. When convicting a person under this provision the court may also impose a banning order. |
| Every person commits an offence who contravenes a direction of the Registrar (in relation to the Registrar's powers of intervention). | Conviction and imprisonment for a maximum term of one year or a fine not exceeding \$50,000. When convicting a person under this provision the court may also impose a banning order. |
| Every person commits an offence who hinders, obstructs or prevents a society giving effect to a direction of the Registrar (in relation to the Registrar's powers of intervention). | Conviction and imprisonment for a maximum term of one year or a fine not exceeding \$50,000. When convicting a person under this provision the court may also impose a banning order. |

R87 A court should have the power to ban a person from holding a position of governance or management of an incorporated society or from being the statutory officer of a society, upon convicting that person of an offence under the statute, in addition to any other penalty provided for that offence.

R88 The statute should provide for an infringement offence regime in respect of societies, covering the administrative obligations of the statute, including:

- operating without a current registered office;
- failing to maintain a register of members in accordance with the statutory requirements;
- failing to notify the Registrar of amendments to the constitution;
- failing to hold a general meeting at least every 15 months;
- failing to keep minutes of general meetings;
- having a constitution that does not comply with the Act; and
- failing to file an annual return or financial report.

REGISTRAR'S POWER OF ENFORCEMENT

Investigation and intervention

Current powers of the Registrar

- 10.61 Currently the Registrar plays a very light-handed role in the regulation of incorporated societies. We consider that should continue. Societies should continue to be self-governing and independent from government. There are however, very rare circumstances in which public intervention is appropriate, such as when the society has a significant impact on the community or it has received large amounts of public money. We consider that the new statute should provide the Registrar with powers to take constructive action in those circumstances, even though they may be used only rarely.
- 10.62 Under the current regime, the Registrar does not generally get involved in societies with financial or operational problems, with two limited exceptions:
- If a society fails to lodge annual statements, the Registrar may, in due course, declare the society to be dissolved.
 - If a society decides to wind up, the Registrar may become involved in the distribution of assets in some circumstances.
- 10.63 In addition to these powers the 1908 Act gives the Registrar powers to:
- give notice to a society not to carry on operations beyond their objects;³⁵¹
 - request a list of a society's members' names and addresses;³⁵²
 - apply to the High Court for the appointment of a liquidator;³⁵³ and
 - inspect any registers, records, accounts, books or papers of the society.³⁵⁴

351 Incorporated Societies Act 1908, s 19.

352 Incorporated Societies Act 1908, s 22.

353 Incorporated Societies Act 1908, s 26

354 Incorporated Societies Act 1908, s 34A.

10.64 The Registrar may also prosecute a society for a range of statutory offences including operating for the pecuniary gain of members,³⁵⁵ or failing to file annual financial statements.³⁵⁶ We are unaware of any prosecutions being brought by the Registrar in recent years.

Proposed Powers

10.65 In this chapter we have recommended a new range of offences and infringement offences. In chapter 9 we recommended that the Registrar should have the same statutory powers as members and societies to bring civil actions to enforce constitutions and the statute, but the Registrar must only take such action when there are strong reasons in the public interest to do so.

Is there a need for additional powers?

10.66 In *Issues Paper 24* we asked whether there should be a greater role for a regulator in this sector.³⁵⁷ Most submitters were not in favour of this idea, especially if it were to be funded from within the sector itself. Many thought that greater regulation would stifle the diversity within the sector. Some suggested that a better outcome would be achieved through greater education and capacity building within the sector and by alternative mechanisms for holding societies to account.

10.67 We consider that the Registrar's powers of regulation and enforcement should remain light-handed. Most societies' affairs are not particularly complex. The vast majority of societies manage to conduct their affairs through the ups and downs, including through to the end of life stage. There is however, justification for intervention by the Registrar in some limited cases. Incorporated societies often perform pivotal roles in their communities or at a national level; are often the owners of what are perceived by members as community assets; and may receive significant funding from the general public, government or both.

10.68 The 2007 case *Registrar of Incorporated Societies v Hearing Association Whangarei Branch Inc* provides a rare example of action being taken by the Registrar after complaints of serious mismanagement of a society and significant media attention.³⁵⁸ In that case the Registrar successfully sought liquidation of the society on just and equitable grounds; the Court finding that there had been gross mismanagement of the society's affairs.

10.69 Our consultation has not revealed a significant need for the Registrar to become involved more frequently in the affairs of societies and we do not consider that appropriate. However, if the Registrar had increased powers of investigation, advice and intervention, on the rare occasion when intervention is warranted in the public interest, he or she could take action earlier that could save the society, rather than having to rely on the power to apply for liquidation.

Recommendations

10.70 Parts 1 and 2 of the Corporations (Investigation and Management) Act 1989 provide the Registrar of Companies powers of investigation and intervention in respect of corporations, including incorporated societies. We are informed that these powers have never been invoked in respect of incorporated societies, and are only invoked in respect of companies for which statutory management under Part 3 of that Act is being contemplated.

355 Incorporated Societies Act 1908, s 20.

356 Incorporated Societies Act 1908, s 23

357 *Issues Paper 24*, above n 323, at [2.22]-[2.23].

358 *Registrar of Incorporated Societies v Hearing Association Whangarei Branch Inc* HC Whangarei CIV-2007-488-000406, 25 October 2007.

- 10.71 The powers in Parts 1 and 2 provide a useful framework for investigation and intervention by the Registrar in respect of incorporated societies. While the Registrar could, in theory utilise those powers now, it would be preferable for the new statute to specifically include a similar framework of powers. Including the powers within the new Act for incorporated societies will make it clear that Parliament intends them to be used for incorporated societies, quite apart from any contemplation of statutory management.
- 10.72 The relevant powers of the Registrar under the Corporations (Investigation and Management) Act to request and obtain information are:³⁵⁹
- to require information to be supplied relating to the business, operation, or management of the society;
 - to require information to be audited;
 - to require an auditor to disclose information to the Registrar;
 - with the agreement of the owner or with a warrant, appoint any person to enter upon and search any premises and inspect, remove and take copies of any documents, if satisfied that any information supplied is false or misleading, or a corporation has failed to supply information as required; and
 - to investigate the affairs of a corporation for the purpose of determining whether to exercise powers of intervention.
- 10.73 After those investigations, the Registrar may declare that the corporation is at risk³⁶⁰ if he or she determines that it is being operated fraudulently or recklessly, it is desirable for the Act to apply to preserve the interests of members, creditors or beneficiaries, or it is otherwise in the public interest.³⁶¹ The Registrar has two additional powers in respect of corporations declared to be at risk:
- to give advice and assistance concerning the affairs of the corporation;³⁶² and
 - to direct that property or funds not be dealt with, or any other direction to protect the interests of members or creditors, for a period of 21 days.³⁶³
- 10.74 Finally, it should be made clear in the statute that the Registrar's powers of investigation and intervention do not imply a statutory duty to supervise the affairs of societies generally. Section 7 of the Corporations (Investigations and Management) Act provides such a stipulation. We think it should be repeated in a new statute for incorporated societies.

R89 The statute should provide the Registrar of Incorporated Societies with the following powers, within a statutory framework similar to that in Parts 1 and 2 of the Corporations (Investigation and Management) Act 1989:

- to require information to be supplied relating to the business, operation, or management of the society;
- to require information to be audited;
- to require an auditor to disclose information to the Registrar;

359 Corporations (Investigation and Management) Act 1981, ss 9, 10, 13, 17 and 19.

360 Corporations (Investment and Management) Act 1989, s 30.

361 Corporations (Investment and Management) Act 1989, s 4.

362 Corporations (Investment and Management) Act 1989, s 32.

363 Corporations (Investment and Management) Act 1989, ss 33 and 34.

- to enter upon and search any premises and inspect, remove, and take copies of any documents;
- to investigate the affairs of a society;
- to give advice and assistance; and
- to direct that property or funds not be dealt with for a period of 21 days.

Chapter 11

Terminations, restructures and rescues

- 11.1 Like all bodies corporate, individual societies need to be wound up, restructured or rescued from time to time. The Incorporated Societies Act 1908 currently provides some relatively basic machinery for dealing with societies that need to be wound up. For liquidations, some but not all of the relevant Parts of the Companies Act 1993 are imported or are available. The Registrar also has powers to dissolve societies, mainly on the grounds that they have ceased operating.
- 11.2 Feedback from submitters is that the existing provisions are generally adequate to enable societies to be wound up when required. The overwhelming majority of terminations of societies are achieved through a decision by the Registrar under s 28 of the 1908 Act to dissolve a society; with a much smaller number of liquidations under ss 24 to 26.³⁶⁴
- 11.3 Issues which we have considered are:
- Whether the current preponderance of Registrar’s dissolutions as against liquidations is appropriate?
 - If half of all dissolutions are effectively “on request”, does this de facto practice need to be regularised within the statute?
 - What is the legal effect of dissolution, especially given that dissolution decisions can be revoked, sometimes years after the dissolution? Would a system of removal from the register be more appropriate and consistent with the Companies Act?
 - Should members and creditors have access to a wider range of tools short of liquidation, for dealing with a financially distressed or potentially insolvent society?
 - Whether or not societies are in distress, should they have access to a statutory mechanism to allow straightforward amalgamations or mergers of societies?
 - How can the provisions for disposal of property of terminating societies be improved, to increase certainty and reduce the occasions when the Registrar must make allocations of property based on inadequate information?

LIQUIDATION AND DISSOLUTION OF SOCIETIES

Current law

- 11.4 Section 24 of the Incorporated Societies Act provides that members may pass a resolution at a general meeting to appoint a liquidator, provided that resolution is confirmed at a subsequent general meeting called for that particular purpose not less than 30 days later.
- 11.5 Alternatively, s 25 of the 1908 Act provides that the High Court can appoint a liquidator to put a society into liquidation if:
- the society suspends its operations for the space of a year;

³⁶⁴ Figures provided by the Registrar of Incorporated Societies indicate approximately 450 dissolution decisions annually. Up to half of these decisions are on the Registrar’s own motion based on evidence that a society is no longer operating, with the other half after a request from a society that it be dissolved. In contrast, formal liquidations notified to the Registrar may be fewer than 10 per year.

- the members of the society are reduced in number to less than 15;
 - the society is unable to pay its debts;
 - the society carries on any operation whereby any member makes any pecuniary gain contrary to the provisions of this Act; or
 - it is of the opinion that it is just and equitable that the society should be put into liquidation.
- 11.6 Section 26 provides that an application to the High Court for the appointment of a liquidator under s 25 may be made by the society, a member, the Registrar or a creditor. Section 26 also provides that the liquidation provisions of the Companies Act (Parts 16 and 17) apply to incorporated societies. However, the 2006 insolvency reforms to the Companies Act were not applied to incorporated societies. In particular the voluntary administration provisions (Part 15A of the Companies Act 1993) do not apply. In addition, the scheme for arrangements with creditors contained in ss 23A and 23B of the 1908 Act is less useful than the equivalent provisions in Part 14 of the Companies Act. This is because the Part 14 scheme does not require court supervision or approval. Both schemes are in turn inferior to the voluntary administration procedures, because an arrangement with creditors only prevents individual creditors taking unilateral action to recover debts once the arrangement is actually agreed, whereas appointment of an administrator automatically prevents recovery actions.
- 11.7 Separately from the liquidation provisions, s 28 of the 1908 Act gives the Registrar power to dissolve a society if he or she is satisfied that the society “is no longer carrying on its operations” or “has been registered because of a mistake of fact or law”. The Act also empowers the Registrar to revoke a dissolution and to restore a society to its previous existence “as if no dissolution had taken place, with effect from the time that the society was dissolved”.³⁶⁵ The only criterion for revocation of dissolution is that the Registrar is satisfied that a declaration of dissolution was made in error and should be revoked.³⁶⁶
- 11.8 Section 28 does not expressly provide for societies that are no longer operating to apply for, or request, dissolution. In practice, societies frequently do request to be dissolved and the Registrar’s practice is to accommodate requests so long as an officer of the society confirms in writing that: the society is no longer operating; the society has no assets or liabilities; and a resolution has been passed to apply to the Registrar for dissolution. The Registry has provided a simple form on its website to help societies certify these matters.³⁶⁷
- 11.9 Not all societies will be able to confirm a lack of assets and liabilities when they first enquire about dissolution. A lack of assets and liabilities is not a requirement under s 28, and the Registrar could in theory make a declaration of dissolution and then dispose of remaining assets using s 27. However, registry staff have told us that typically they tell societies to dispose of remaining assets in accordance with society rules, and then lodge a request for dissolution. Where a society is no longer operating but still has complex or substantial assets or liabilities, the more appropriate course may be to commence voluntary liquidation under s 24 or to apply to the court to appoint a liquidator.

Submitters’ views on liquidation and dissolution

- 11.10 Most submitters noted that they had not experienced any problems with the liquidation or dissolution provisions. The New Zealand Law Society and a number of other submitters noted that the liquidation provisions work reasonably well. However, some commented that the

³⁶⁵ Incorporated Societies Act 1908, s 28(6).

³⁶⁶ Incorporated Societies Act 1908, s 28(4).

³⁶⁷ See Companies Office “Request to Dissolve an Incorporated Society”. < <http://www.societies.govt.nz/cms/pdf-library/incorporated-societies-forms/form-is5-request-to-dissolve-an-incorporated-society-pdf> > .

procedures should be simplified or aligned to the Companies Act. Further, these submitters thought that it was problematic that a society could lose its registration if the number of its members dropped below the required 15 or it failed to file the annual financial statement.

- 11.11 A few submitters, including the Law Society, raised the possibility of the 1908 Act providing for an informal method of winding up a society by simply advising the Registrar that the society is no longer operating and requesting that the Registrar remove the society from the register. Such an informal method would avoid the cost of appointing a liquidator and would be similar to how requests for dissolution are handled at present. The Law Society also noted that the issues of clarifying the status of a society dissolved by the Registrar should be considered in our review of the 1908 Act. We agree, and this is dealt with in the following section. The remaining comments related to improving the speed of the procedure; providing for the appointment of receivers; providing societies with a range of options for winding up; and some guidance on the requirements to be met.

Request to dissolve a society

- 11.12 The availability and simplicity of s 28 dissolution as presently administered is almost certainly a principal reason why most submitters have not found “end of life” arrangements particularly troublesome. The majority of societies are able to deal with assets and liabilities and then apply to be dissolved. We consider that the process should be retained, but should be brought clearly within the statute, with criteria to define situations in which it is and is not appropriate.
- 11.13 Little change is required from the Registrar’s current form.³⁶⁸ The request, as the form currently provides, should confirm:
- the society, the persons applying and their office, if any, in the society;
 - if they are not an officer, how they have been authorised to make the request;
 - that the society is no longer operating, or has fewer than 10 members and cannot reasonably gain sufficient new members to bring membership up to 10;
 - that either:
 - a. the society has no surplus assets after paying its debts in full or in part, and no creditor has applied to the court under s 26 of the Incorporated Societies Act to put the society into liquidation; or
 - b. the society has distributed any surplus assets that it owns in accordance with its rules and the Incorporated Societies Act, and has discharged in full its liabilities to all its known creditors; and
 - a resolution has been passed by the members of the society to apply to the Registrar to have the society dissolved or removed from the register.
- 11.14 These requirements, apart from the ground relating to lack of members, follow s 318(1)(d) and (2) of the Companies Act, which provides for companies to request that they be removed

³⁶⁸ See above n 367.

from the companies register on the grounds set out in subs (2).³⁶⁹ We prefer the modern Companies Act approach and description of a removal from the register, rather than the 1908 Act's "dissolution", which was the language used in the company law statutes in 1908 and up to 1993. The "removal" description more accurately describes what is being done; allows for the possibility of restoration to the register in certain circumstances, as with companies; and will be more readily understood. The change also facilitates clarification of the status of societies that have been removed, which is discussed in the following section.

R90 The current practice of the Registrar accepting requests for dissolution from societies should be discontinued and replaced with a new statutory power for the Registrar to remove a society from the register on request. The new power should be in equivalent terms and on equivalent grounds as provided in ss 318(1)(d) and 318(2) of the Companies Act 1993, in respect of companies.

Clarifying the status of a society dissolved by the Registrar

- 11.15 The status of a dissolved incorporated society does not appear to have ever been authoritatively settled. The language naturally suggests that the body corporate ceases to exist on dissolution and therefore has no powers (for example, to hold property) and cannot act in any way. That reading is consistent with the step of dissolution under the Companies Act 1955 and its predecessors, where dissolution of a company was the final step after a company had been wound up.³⁷⁰ This approach is also consistent with the position of a company removed from the register under the current Companies Act 1993.³⁷¹ It has been held that the company ceases to exist for all legal purposes, even though it can later be restored to the register.³⁷²
- 11.16 However societies can have their dissolution revoked, sometimes several years – even a decade or more – after the declaration of dissolution. The 1908 Act provides that once a declaration of revocation is entered in the register, the society is revived as if no dissolution has taken place, with effect from the time the society was dissolved.³⁷³ Does this capacity for full resurrection suggest that something of the original society survives after dissolution? Strictly speaking a dissolved society cannot do anything, and if it held any property the Registrar should attend to its disposal. Societies are often dissolved after failing to file their annual financial statements. Such a society may indeed be inactive or moribund, but it may be carrying on with many of its

369 318 Grounds for removal from register

- (1) Subject to this section, the Registrar must remove a company from the New Zealand register if—
- [. . .]
- (d) there is sent or delivered to the Registrar a request in the prescribed form made by—
- (i) a shareholder authorised to make the request by a special resolution of shareholders entitled to vote and voting on the question; or
- (ii) the board of directors or any other person, if the constitution of the company so requires or permits— that the company be removed from the New Zealand register on either of the grounds specified in subsection (2);
- [. . .]
- (2) A request that a company be removed from the New Zealand register under subsection (1)(d) may be made on the grounds—
- (a) that the company has ceased to carry on business, has discharged in full its liabilities to all its known creditors, and has distributed its surplus assets in accordance with its constitution and this Act; or
- (b) that the company has no surplus assets after paying its debts in full or in part, and no creditor has applied to the court under section 241 for an order putting the company into liquidation.

370 Companies Act 1955, s 267.

371 Companies Act 1993, s 318.

372 *Douglas v Commissioner of Inland Revenue* (No 2) (2005) 22 NZTC 19,439 (HC) at [30].

373 Incorporated Societies Act 1908, s 28(6).

normal activities until it finally realises that it has been dissolved. Is it realistic to hold that the society is a non-entity in these circumstances?

11.17 Section 330(2) provides that:

A company that is restored to the New Zealand register shall be deemed to have continued in existence as if it had not been removed from the register.

The wording is not exactly the same as s 28(6) of the 1908 Act, but we detect no difference in effect.³⁷⁴ This wording also mirrors current or earlier companies legislation in other jurisdictions.³⁷⁵

11.18 There has not always been complete agreement on what s 330(2) means and requires. However, it has now been authoritatively held that the correct approach is that the company ceases to exist on removal from the register, or at the very least enters a state of “suspended inaction” where it is no longer a company.³⁷⁶ Nevertheless, a successful application to be restored is fully and retroactively effective, meaning neither the restored entity nor those dealing with it can challenge the validity of actions taken while it was removed. If necessary, the court has power to give directions and make orders, to ensure the pre-removal situation is fairly restored.³⁷⁷ From a practical point of view creditors can again pursue assets formerly held and now restored to the company.

11.19 We consider that similar provisions as for companies should be applied to societies. This can be achieved by updating the language as already suggested.³⁷⁸ We do not propose any change to the legal position of (former) committee or ordinary members of a society removed from the register, who continue to act as if a registered society still exists. If there is no registered society, any actions taken are those of the individuals involved. An application to restore the former society to the register may act as a rescue device, by assisting members who could otherwise have incurred personal liabilities. The restored society could then continue with its activities, or members could elect to wind up the now restored society.

11.20 We are conscious of a potential hazard if former society members who have allowed a society to be dissolved by inaction, then carry on activities and incurring liabilities and finally seek restoration of the society to protect their personal positions. In an extreme scenario, an unscrupulous member could seek to find and use a dissolved society, use the entity for their own business ends, and then avoid liability by seeking revocation of dissolution or restoration to the register. Third parties may easily be confused whether they are dealing with an individual or incorporated society.

11.21 If there is a proper basis for restoration there should be few opportunities for windfall gains or losses. The 1908 Act provision for dissolution requires only that the Registrar is satisfied that the declaration of dissolution was made in error.³⁷⁹ By necessary implication the relevant error would have to relate to one of the two grounds for dissolution, either: that the society was no longer carrying on operations; or that it had been registered because of a mistake of fact or law.³⁸⁰ By comparison, ss 328 and 329 of the Companies Act have a similar “still carrying on business”

374 Incorporated Societies Act 1908, s 28(6).

375 See references in *Clark v Libra Developments Ltd* [2007] 2 NZLR 709 at [186]-[195].

376 At [202].

377 At [203].

378 The practice for revocations has been relatively liberal, probably recognising the relatively common situation where dissolution results simply from failure to file. It means that the criteria for restoration should be tightened, at least to make lengthy delay a statutory consideration regarding whether to restore. This is important for the cases where a society seeks restoration after five, 10 or 15 or more years.

379 Incorporated Societies Act 1908, s 28(4).

380 Incorporated Societies Act 1908, s 28(1).

ground.³⁸¹ They also contain further grounds, including: where a creditor has a claim; there is a liquidation or receivership in progress; legal proceedings are in progress (or a party has grounds to bring them); or for any other reason it is just and equitable to do so.³⁸²

- 11.22 We recommend that the grounds for restoration of a society to the register follow the Companies Act provisions. Except in clear cases of fraud, restoration of a society that is still operating will usually be in the best interests of the society, members and creditors.³⁸³ The Registrar should have flexibility to impose conditions before approving restoration and if necessary, augment such conditions by seeking directions from the High Court. Such directions should be tailored to ensure that a society and other parties are in as similar a position as possible to that prior to removal from the register.

- R91 The new statute should replace the existing provisions for revocation of dissolution with procedures for restoration to the register.
- R92 The provisions for restoration of societies to the register should follow ss 328 to 330 of the Companies Act, to confirm that the status of removed societies is similar to that of removed companies, and that similar considerations and effects apply to any restoration to the register.
- R93 The statute should provide that the Registrar may apply to the court to grant directions if necessary to properly restore the society to its pre-removal position.

Voluntary liquidations: The double meeting requirement

- 11.23 *Issues Paper 24* asked for submitters' views on the requirement in s 24 that any resolution by members to appoint a liquidator must be confirmed at another general meeting at least 30 days later.³⁸⁴
- 11.24 The majority of submitters did not think that the double meeting requirement for voluntary liquidation should be altered. They considered that it provides a necessary safeguard to protect members' interests against rash decisions or decisions made by an active, disgruntled minority. Meetings may be poorly attended. A second meeting to confirm the resolution will ensure all members are aware of the proposal to dissolve the society and are able to be involved in the decision-making. Otherwise, inertia or complacency by members could result in a society being liquidated by a small number of members who attend the meeting and cast a vote. A few submitters thought that the requirement provides a cooling off period for members.
- 11.25 The submitters who thought the double meeting requirement should be altered commented that the requirement is impractical given the resource constraints on many societies. It may be difficult to organise a second meeting and members may be reluctant to attend another meeting. Submitters suggested that postal or electronic voting by all members could replace the second meeting.
- 11.26 The Law Society made the following comment:

The assumed rationale for the double meeting requirement in section 24(1) of the Incorporated Societies Act is to avoid liquidation occurring without all members having the opportunity to reflect

381 Companies Act 1993, ss 328(1)(a) and 329(1)(a)(i).

382 Companies Act 1993, s 329(1)(a)(i)-(v).

383 Members should be required to comply with statutory obligations that were not attended to while the society was off the register, including providing updated financial reports or other records. If any members have personally benefitted while acting personally during the hiatus a restoration should be on condition of return of any gains.

384 Law Commission *Reforming the Incorporated Societies Act 1908* (NZLC IP24, 2011) [*Issues Paper 24*], at [Q40].

on the wisdom of winding-up. In practice, however, once members lose enthusiasm for maintaining a society, expecting them to meet once, let alone twice, does cause practical difficulties in achieving a quorum. One meeting should suffice, but possibly with minimum statutory periods of notice to members and a requirement for the proposed motions and the reasons for them being set out in full.

- 11.27 We agree with submitters that it is important to have safeguards in place to protect societies from liquidation decisions being made by a small group of members or without sufficient consideration by all members. However, we acknowledge that some societies may have problems arranging a second meeting to confirm a resolution or achieving a quorum if a second meeting is arranged. The further delay involved in having to schedule a second meeting may also worsen damage to a society's financial position and the position of creditors, because a liquidator cannot yet be appointed.
- 11.28 Consequently, we have reached the conclusion that, subject to the society's own rules, (which can still require two meetings) members of a society should only be required to resolve at a single general meeting to put a society into liquidation. In order to ensure that societies are adequately protected, there should be a statutory requirement specifying a minimum notice period by a society's committee of a proposal to liquidate the society and of a general meeting to vote on the proposal. The length of notice required needs to balance competing considerations. It should give members adequate time to be informed and consider the proposal and supporting information, and arrange to attend a meeting. But it should not be so long that it may exacerbate a bad situation for a society in a distressed state or that is insolvent.
- 11.29 We recommend a statutory minimum notice period of 30 days for a meeting called to discuss a proposal to appoint a liquidator. The statute should also require that the notice sets out the reasons for the proposal so that members are fully informed by the time the general meeting is held. The statutory notice period should be subject to society constitutions, so that a society can decide on a longer notice period, but not a shorter one. The notice requirement should not apply to other restructuring or insolvency proposals. This is because it may be impractical and counterproductive for a corporate rescue proposal, such as instituting voluntary administration, to wait 30 days while creditors and other stakeholders are taking steps to protect their own interests.
- 11.30 We considered whether the statute should also expressly enable use of proxy, postal or electronic voting on any proposal to appoint a liquidator. We decided against recommending that the statute provide for these aids. Such facilities may be effective ways of ensuring that as many members as possible take part in a decision. That is most likely where the society already has such systems in place. Therefore, we consider that the method of notification and the method for conducting any meeting and vote should be left to the society, subject to its constitution.

Ordinary or special resolution

- 11.31 We have considered whether the removal of the two meeting requirement justifies raising the level of approval required for a liquidation resolution. If liquidation can be approved and a liquidator appointed at a single meeting, should a 75 per cent majority or special resolution be required, as is currently the case with shareholders voting to put a company into liquidation?
- 11.32 Unlike the Companies Act, special resolutions are not provided for in the 1908 Act.³⁸⁵ At present, a majority of the valid votes cast is sufficient to appoint a liquidator for a society.³⁸⁶

385 Under s 106(1) of the Companies Act 1993, a special resolution of shareholders is required to: adopt, alter or revoke a constitution; approve a major transaction; approve an amalgamation; or put a company into liquidation.

386 Incorporated Societies Act 1908, s 24(2).

At the other end of the life cycle, registration and incorporation require confirmation of the consent of the majority of members.³⁸⁷ The only statutory provision requiring anything more than either a bare majority of votes, or an absolute majority of members is the more modern power to agree a compromise with creditors, in s 23A of the Act. Depending on the type of compromise proposed, s 23A(2) requires a proposal to have the support of a majority in number of creditors comprising not less than three-fourths in value of the creditors, or not less than three-fourths of the members or class of members, as the case may be.

- 11.33 Members of a society facing liquidation do not necessarily need protection by a special resolution requirement in the same way that shareholders in a company may. Voting power in companies is typically distributed by share value and may be concentrated in one or several major shareholders' hands, with or without a number of minor shareholders with smaller holdings. The requirement for a special resolution gives evidence of reasonably broad shareholder support for a proposal, even where a bare majority is controlled by a handful of shareholders or by a single shareholder. By contrast, societies are typically comprised of individual members, normally with only a single, equal vote. Even corporate members, who count as three for registration-related purposes, may only have a single vote regarding any liquidation proposal.³⁸⁸ There is a fair argument that a simple majority of members should be able to decide a society's fate, just as they had to consent to its incorporation. Of course, this is subject to any higher voting threshold that a society may set in its own constitution.
- 11.34 On balance, we do not recommend the statute require a special resolution for liquidations. Formal liquidations of societies are already rare. We do not expect removing the double meeting requirement to change that. Members usually manage to bring a society to an end without a formal liquidation.
- 11.35 Logically, the same requirement for a simple majority should apply for a resolution to request that the Registrar remove the society from the register.

R94 The statute should provide that unless a society's constitution requires a greater majority or some further steps or both, a resolution of the majority of members voting at a single general meeting is required for any decision to appoint a liquidator, or to request the Registrar to remove the society from the register.

R95 The statute should provide that notice of a proposal to appoint a liquidator or to request the Registrar to remove the society from the register must be given to members in accordance with the constitution, and not less than 30 days in advance of the meeting to consider the proposal. The purpose of the meeting and a copy of the proposed resolution must be included in the notification.

OTHER POSSIBILITIES FOR RESTRUCTURING

- 11.36 Liquidation or dissolution are currently the only options available under the Act for a society if it needs to effect major change. These possibilities are adequate if it is clear that the society has reached its end. But modernisations of companies and insolvency laws over the last 20 years mean that other bodies corporate have other options available, especially for changes short of

³⁸⁷ Incorporated Societies Act 1908, s 7(1)(b)(i).

³⁸⁸ Incorporated Societies Act 1908, s 31, which allows corporate members to count as three members when estimating member numbers, contains nothing to bestow additional voting power. A society's rules might allow extra votes to corporate for ordinary matters. But it is doubtful that such voting strength can extend to a liquidation vote under s 24, given that s 24(2) expressly defines the majority requirement.

complete termination of either an entity or its work. We consider that some of these options are likely to be suitable for use by societies when change is desired or required.

Amalgamation and merger

- 11.37 A new Act should facilitate amalgamations and mergers. It is important for societies to be able to come together and form new or revised societies when they choose. Societies may decide to combine for a variety of reasons, including the inevitable pressures or difficulties they face over time to maintain activities or property, maintain and renew membership, and provide for the society's good governance. A number of societies may have similar or overlapping purposes and will be pursuing similar funding sources and the same pool of new members. Amalgamation or merger may be the sensible choice to make the most of scarce membership and resources.
- 11.38 Amalgamation involves two or more societies joining together to form one new society. A merger occurs where one or more societies join and become part of an existing society. There is currently no statutory provision to facilitate amalgamation or merger of societies. Societies do amalgamate or merge from time to time, to better pursue their purposes, more efficiently manage their costs and resources, or because one or more parties to the restructure are in danger of not surviving if they do not take action. Because of the lack of a statutory process, most mergers or amalgamations occur by one or more societies going into liquidation or being dissolved, most likely after their assets have been transferred either to the new society in an amalgamation, or to the recipient society in a merger. The question of what happens to any current contracts or outstanding liabilities of a society that is not continuing must be determined under contract law as part of a liquidation process.
- 11.39 By contrast, most modern equivalent statutes in other jurisdictions include a simple amalgamation process.³⁸⁹ These allow for two or more societies to elect, usually by separate special resolutions, to form one new society and have each of the participant societies absorbed into that new society. Importantly, the procedures usually provide for transmission of assets to the new society without normal formalities, considerably simplifying for example the transmission of real property.³⁹⁰ The provisions also provide that the new society is automatically deemed to take on the contractual rights and obligations of the former societies, again simplifying the amalgamation process.
- 11.40 All of the examples from other jurisdictions referred to above provide for an amalgamation process but not a merger process. By contrast, in New Zealand, Part 13 of the Companies Act, which deals with amalgamations, allows what is effectively a merger of one company into another:³⁹¹
- Two or more companies may amalgamate, and continue as 1 company, which may be one of the amalgamating companies, or may be a new company.
- 11.41 The new Act should include an amalgamation process. We recommend that it contain similar features to other jurisdictions and allows for the “merger” option, as in s 219 of the Companies Act, where the amalgamated or new society is one of the amalgamating societies. We see this as practical and realistic, especially where, for example, a relatively small society agrees to amalgamate with a much larger or possibly nationally-based society. So long as members of both societies are provided with adequate and accurate information on an amalgamation proposal,

389 See for example: Associations Incorporation Reform Act 2012 (Vic); Associations Incorporation Act 2009 (NSW); Society Act RSBC 1996 c 433.

390 Incorporated Societies Act 1908, s 27 contains useful machinery for efficient transmission of property in the case of dissolution. Similar provisions should be included for use in amalgamations, particularly for transmission of real property.

391 Companies Act 1993, s 219.

there should be no barrier to one society being merged or “amalgamated into” another existing society.

- 11.42 Amalgamations of companies under Part 13 must be approved by each company, by special resolutions. For the reasons given above with respect to liquidations, we are not convinced that the statute need specify special resolutions for societies. We recommend that the level of approvals should be as for other major decisions in societies. This means that an amalgamation should be approved by a majority of the members of each society, but must also satisfy any further requirements in the society’s constitution.

R96 The statute should include provisions to facilitate amalgamations and mergers of societies, with the following features:

- Subject to any further constitutional requirements, any two or more societies can amalgamate into a new society, so long as each society agrees to the proposed amalgamation by separate majority resolutions and the new society meets all the requirements for incorporation and registration.
- Two or more societies may merge, by one or more former societies merging into an existing society, so long as similar requirements as for an amalgamation, adjusted as required, are satisfied.
- The constitution of the new society must provide that all members of the former societies are automatically members of the new society.
- All the property and all the obligations of each society are deemed transferred to the new society upon its registration without any further formality.
- Where any real property is to be transmitted and registered in the name of the new society or it is otherwise convenient to do so, the new society may request the Registrar to give directions under the provisions applying to transmission of property on the distribution of the assets of a society (Incorporated Societies Act 1908, s 27(3) refers).
- An amalgamation or merger of societies does not adversely affect the rights of creditors of any former society, and the new or continuing society as the case may be is liable for all debts and obligations of each former society.

Other corporate rescue options: compromises with creditors and voluntary administration

- 11.43 The current statute already makes use of other Acts to provide detailed processes for liquidations of societies. This provides the 1908 Act with a modern set of procedures for liquidations, without the need to write them directly into the Act. The drafting also means that amendments and improvements become available whenever the relevant Parts of the Companies Act are amended.
- 11.44 This is a satisfactory arrangement for liquidations, but there are now further provisions in other Parts of the Companies Act, especially with respect to corporate rescues, that societies could benefit from. We recommend that Part 14, Compromises with Creditors, and Part 15A, Voluntary Administration, be included by reference in the new Act in the same manner.
- 11.45 The compromises with creditors provisions are less important than the voluntary administration provisions because the current 1908 Act already includes provisions for compromises, and compromises remain relatively unpopular. This is probably because secured or major creditors, warned by a compromise proposal, can take recovery and enforcement action before a compromise can be agreed to. Nevertheless, the Part 14 process is still preferable

to the 1908 Act provision, which requires court approval before a compromise can be effective. We recommend that ss 23A and 23B are not carried over into a new statute and instead the new statute incorporate Part 14 of the Companies Act 1993 by reference, with any necessary modifications.

- 11.46 The new Act should contain an enabling provision, to allow societies to be put into voluntary administration under Part 15A. The introduction of voluntary administration was the most significant innovation from the 2006 insolvency reforms with respect to corporate insolvency and restructuring. Unlike liquidation, voluntary administration allows at least the possibility of a corporate rescue and restructuring, rather than just a decent burial. The administrator appointed under voluntary administration has a wider brief than a receiver, whose principal concern must be the interests of the secured creditor who appoints them.
- 11.47 It will often be important when a body corporate is insolvent or nearly insolvent, for swift action to be taken to preserve assets, review the potential for recovery and develop a plan either for such recovery or where this is not possible, for the most effective realisation of assets and repayment of debts. Section 239I of the Companies Act enables a company to be put into voluntary administration, without any shareholder approval, if:
- the board of the company has resolved that,—
 - a. in the opinion of the directors voting for the resolution, the company is insolvent or may become insolvent; and
 - b. an administrator of the company should be appointed.
- 11.48 The decision to enter voluntary administration places the running of the business in the hands of the administrator and takes the option to act to recover debts away from creditors for four weeks. However, the administrator is required to call an initial creditors meeting; facilitate the forming of a creditors committee if they so decide; and report to creditors within 20 working days at a “Watershed Meeting”. At that meeting creditors decide based on the administrator’s recommendation, whether it is worth trying to save the business. If so, they will execute a longer term deed of administration. If not they will proceed promptly to liquidation. The model is intended to allow salvage of businesses that are worth saving, or to a prompt winding up where this is not realistic, hopefully at a better rate of recovery to creditors than would otherwise have been achieved if the business drifted towards liquidation. Therefore, any initial loss of creditor control is compensated for by better recovery prospects and a more orderly process, whether or not the original society survives.
- 11.49 It is desirable that someone should be able to take similar steps if necessary, for a society. The obvious choice to exercise these powers for a society is its committee. To avoid any question whether a committee has the same powers as a company board does, we recommend that the statute provide that for the purposes of giving effect to Part 15A, references to “the Board” may be read as references to the committee or other governing body of the society; and that where no such governing body exists or its members are absent, unable or decline to act, the statutory officer may act. The Registrar should also be able to apply to place a society in voluntary administration. This would give the Registrar the same power as he or she has in the equivalent role as Registrar of Companies, under the Companies Act.³⁹²
- 11.50 We do not anticipate that societies will choose this option very frequently, and it is likely that it will only suit societies with quite substantial operations, assets or potential business cash flow. We considered whether access to voluntary administration could or should be restricted

³⁹² Companies Act 1993, s 239L.

to larger societies with significant commercial operations. However we concluded that societies are most likely to continue to adopt procedures that they can afford, as they do now when choosing between liquidation and dissolution. We consider that voluntary administration should be one of those options for societies in distress, even if most such societies conclude that it is not right for their situation.

R97 The new statute should provide, by reference to Part 15A of the Companies Act 1993, that financially distressed societies may be placed into voluntary administration in accordance with that Part, modified as required.

R98 The decision to place the society into administration may be taken by the society's committee or other governing body; by the society's statutory officer if there is no committee or it cannot or will not act; by a secured creditor as provided in Part 15A; or by the Registrar applying to a court to appoint an administrator.

DISTRIBUTION OF SOCIETY PROPERTY ON TERMINATION

The issues

- 11.51 Currently the 1908 Act requires societies to provide a rule as to the disposition of the property of the society in the event of the society being put into liquidation.³⁹³ The Act does not place any limits upon the content of the rule, however, other statutes may do for particular types of societies. For example, incorporated societies that are registered as charities under the Charities Act 2005 must have charitable purposes and must include a rule that assets will be distributed on dissolution for that charitable purpose.³⁹⁴ Incorporated societies that are subject to the Racing Act 2003 must dispose of the surplus assets for “racing, public, charitable, or other purposes in the manner that the club, with the approval of the racing code with which it is registered, determines”.³⁹⁵
- 11.52 In many other cases, societies are free to draft the rule as they wish. In practice, societies have covered this rule in a wide variety of ways, including specifying the name of an organisation or type of organisation to receive any surplus property; providing that a decision will be made at a final general meeting; or providing for the property to be divided between members.
- 11.53 The potential for a distribution to members either through a specific provision or a decision at an annual general meeting produces a tension with the prohibition on monetary gain for members.³⁹⁶ A distribution to members may also be inappropriate or seen as unfair where the assets have been built up over years through the efforts of previous members, public donations, grants from local authorities or philanthropic entities, or where the current membership has contributed little. In addition, there is currently nothing in the statute to prevent an incorporated society that is a charity under the Charities Act from choosing to leave that regime and change its rules merely to allow distribution to members.
- 11.54 In *Issues Paper 24* we suggested a solution to this tension whereby, at the time of incorporation societies nominated whether they would be a member-benefit society or a public-benefit society.³⁹⁷ Those that chose to be public-benefit could not have a rule that permitted distribution of assets to members upon dissolution. Those that chose to be member-benefit could distribute

393 Incorporated Societies Act 1908, s 6(1)(k).

394 Charities Act 2005, s 13.

395 Racing Act 2003, s 27.

396 Incorporated Societies Act 1908, s 4(1).

397 *Issues Paper 24*, above at n 384, at [6.7].

assets to members on dissolution. We suggested that member-benefit societies could change their status to be public-benefit societies, but public-benefit societies could only become member-benefit societies with the permission of the Registrar, who would have to be satisfied that money received for the public benefit had been appropriately applied in the public benefit.

The submissions

11.55 As we have discussed in chapter 3, the submissions on this question were divided on whether the suggested member-benefit and public-benefit split was a workable solution. Nearly a third of submissions supported the suggestion, but just over one half did not support it, and the remainder did not express a clear view. However, there was strong support across the submissions for the concept that members should not personally benefit from the earlier contribution of funds for public purposes. There was also acknowledgement that in some member-benefit societies, members have made substantial financial contributions in the expectation that any unused portions of those funds would be returned upon dissolution.

Discussion

11.56 We concluded in chapter 3 that incorporated societies should not be divided into member-benefit or public-benefit societies. We accept that the member-benefit and public-benefit classifications are not discrete categories and that it would be difficult to make or enforce such a distinction.

11.57 We have also formed the view that the assets of incorporated societies should not generally be permitted to be distributed to a member or former member (or another person on trust for a member or former member). Distributions to members are inconsistent with the basic prohibition against association of members for their monetary gain and there is potential for final members to benefit unfairly. We consider that the absence of an unambiguous prohibition of this type of monetary gain in the current legislation is an anomaly.

11.58 There are however two exceptions to this principle which would not offend the general “no monetary gain” principle. First, the statute should allow the distribution of surplus assets to members or former members that are a body corporate or a society (whether incorporated or not) and that, at the time of the distribution are prevented by their rules or otherwise from distributing the surplus assets to individual members. Second, and similarly, the statute should allow the distribution of surplus assets to a trustee of a charitable trust who holds membership of the society and will receive any assets on behalf of the trust.

11.59 We propose that societies wishing to distribute surplus assets to members in the future should be required to form some other kind of entity or arrangement that can legally make such a distribution. Given that the new body would not be subject to a statutory rule banning monetary gain by members, members or owners of the new body could also decide whether to allow other dividends and distributions during the life of the body.

11.60 Further, we think that upon dissolution of a society, surplus assets must not be distributed to individuals even if they are not members. The general scheme is for any distribution to be in furtherance of the terminating society’s objectives, either by the society’s own direction or by the Registrar if necessary. Rather, the statute will require that any surplus assets on dissolution be distributed in accordance with the society’s constitution, or if not, by the Registrar to another incorporated society, charitable trust or other not-for-profit entity that does not have capacity to distribute profits or assets to individual members.

11.61 Consequently, the statute should require every constitution to provide a rule nominating a not-for-profit entity or entities to which the assets should be distributed on dissolution.

It is important that the constitution provides a specific indication of the particular entity or class of entity (for example, incorporated sports clubs) that should receive the surplus assets in the event that they must be distributed by the Registrar. In case an intended gift fails, societies should also be allowed, but not compelled, to designate subordinate recipients, including recipients identified by class or description (for example, sports groups catering for children, young people or both, in the xyz district). Where the designation is by class or description, the proposed final allocation should be approved by the final meeting of the society.

- 11.62 It is still possible for a society to override its previous intended distribution, if the society is still functioning and the final meeting has a quorum. A change would need to be achieved by a formal alteration to the constitution but there is no reason for a valid amendment not to be registered prior to the Registrar granting a request for a removal from the register. The amendment would of course need to be clear and name one or more valid recipients.

Transitional arrangements for existing societies

- 11.63 We acknowledge the potential unfairness to members of existing societies that currently provide for distribution to members on termination. The possibility of sharing in a final distribution may have been an incentive to join a society or to help the society build up its assets. On the other hand final distributions have always been uncertain at best, given the continuing nature of societies, and the ambiguity in the existing statute as to whether final distribution of a financial gain would even be permitted.
- 11.64 On balance we accept that it would be unreasonable to simply prohibit final distribution of property to members under a new statute, where a society already has an express rule providing for distribution to members. We have considered how members can preserve their option of a distribution to members without undermining the core policy of the Act. The options we considered were:
- a grandparenting clause, which continues to permit a distribution on termination to members for societies which have an express rule; or
 - a transition clause, which gives such societies adequate time to switch to regulation under the companies, or some other, regime of the members' choosing.
- 11.65 We do not favour grandparenting in this situation. Grandparenting would preserve a potential monetary gain for some members in some societies on an effectively open-ended but uncertain basis. Such an arrangement would damage the new statute's clear prohibition of monetary gain for members, and could also require a court to determine, potentially decades into the future, whether a proposed or completed distribution is permissible under the provisions of the 1908 Act.³⁹⁸
- 11.66 A transitional clause would protect a society's ability to distribute to members under its rules in the short term, and allow members time to decide whether they prefer to give up the prospect of a final distribution and remain registered as an incorporated society, or pursue a change of status so they can preserve the prospect of distribution.
- 11.67 We therefore favour including a transition clause. It should provide that where a society has a rule in place at the date the Act comes into force that provides for distribution of surplus assets to members on termination, that rule is not invalid and the society may exercise it until the end of the transition period as if the 1908 Act had not been repealed and to the extent

³⁹⁸ This is because the question of whether the exception in s 5(b) of the Incorporated Societies Act 1908 validates a particular "division of property" would fall to be determined on the facts of the particular case. It cannot be said that s 5(b) validates any such division; the statutory language is unhelpful and ambiguous.

permitted by that Act. From the expiry of the transitional period the new Act will apply in full; any distribution rule that could cause monetary gain to members will be invalid and must be amended. In accordance with the process recommended in chapter 8, if a society does not amend its rule despite appropriate notice, the Registrar may declare that a suitable model rule will apply.

- 11.68 The transitional period should not be too short. An affected society will need to consult thoroughly with all its members, probably at more than one general meeting. If members decide to move to a different corporate form or some other form, it will take more time to develop and implement suitable structures. We recommend a transitional period of not less than four years.

Transmission of property

- 11.69 A distribution of the property of a society will often require the transfer or transmission of substantial real and other property. Such transfers could be cumbersome and expensive without some statutory assistance. The 1908 Act contains useful machinery that enables the Registrar or a court to give directions for vesting of any or all of the assets of a society “without transfer, conveyance or assignment” to any specified persons.³⁹⁹ The relevant provisions are ss 27(3) to 27(7) and are working well in terms of benefits to societies and administrative efficiency. We recommend these or provisions to similar effect be included in the new statute.

R99 The statute should provide that the constitution of an incorporated society must contain a rule nominating a particular incorporated society, other not-for-profit entity or charitable trust, or a class or description of not-for-profit entity to which any surplus assets should be distributed, on liquidation or prior to the society being removed from the register.

R100 The statute should provide that the final meeting of the society may approve a different distribution to a different entity from that proposed in the constitution. If it complies with the constitution in all other respects, but cannot otherwise change the allocation provided for in the constitution except by a valid constitutional amendment.

R101 The statute should provide that:

- a. for a transitional period of not less than four years, any society’s rule that expressly provides for distribution of the society’s assets to individual members on dissolution or liquidation of the society, and which existed when the transition period comes into effect, is not invalid;
- b. for the duration of the transitional period, any dissolution or liquidation by an affected society will be dealt with for the purposes of distribution of assets as if the 1908 Act had not been repealed.

R102 The statute should retain or adapt similar provisions to the machinery provisions for transmission of property contained in s 27(3)-(7) of the 1908 Act.

³⁹⁹ Incorporated Societies Act 1908, s 27(3). Introduced in Incorporated Societies Amendment Act 1976, s 2(2).

APPENDIX A:

Rules that must be included in constitutions

The following table lists each of the rules we recommend should be mandatory for every constitution. It also lists other recommendations that should be considered when drafting a model constitution, or a society's own constitution, under the new statute.

| rules for every constitution – (recommendation 56) | related recommendations |
|---|---|
| The name of the society. | <p>R7 The name of the society:</p> <ul style="list-style-type: none"> • must not contravene any enactment; • cannot be the identical or nearly identical to the name of any other incorporated society; • must not, in the opinion of the Registrar, be offensive; • must end with the word 'Incorporated' or 'Manatōpu', or both. |
| The purposes of the society. | R4 No society may operate for the monetary gain of members. |
| How the registered office of the society will be determined. | <p>R57 Every incorporated society must have a registered office and notify the Registrar of the address of the registered office and any changes to it.</p> <p>R58 Any amendment to the registered office takes effect from the date stated in the notice of amendment to the Registrar, or five working days after the notice is registered, whichever is the later.</p> <p>R87 The society may be liable to an infringement offence if it operates without a current registered office.</p> |
| How people become members of the society and cease to be members. | <p>R5 The minimum membership requirement for incorporation of a society under the new statute is 10 members.</p> <p>R6 The minimum membership requirement continues after incorporation.</p> <p>R60 Members must consent to being members.</p> |
| Arrangements for keeping the society's register of members up to date, and whether and how the society will provide access for members to the register of members. | <p>R59 Every society must maintain a register that specifically identifies all members.</p> <p>R87 Failure to maintain a register of members in accordance with the statute may make the society liable to an infringement offence.</p> |
| <p>The composition, roles and functions of committees, including:</p> <ul style="list-style-type: none"> • the number of members that may be on the committee; • the election or appointment of committee members; • the terms of office of the committee members; • qualifications for appointment of committee members; | <p>Committees</p> <p>R19 Every society must have a committee of at least three members to have responsibility for the affairs of the society.</p> <p>R23 A committee member must be a natural person. A person is disqualified from being appointed or holding office as a committee member if he or she is:</p> <ol style="list-style-type: none"> an undischarged bankrupt; prohibited from being an officer of an incorporated society under the new Incorporated Societies Act; |

- the functions and powers of the committee;
- grounds for removal from office of committee members; and
- how the statutory officer will be elected or appointed.

- c. prohibited from being a director or taking part in the management of an incorporated or unincorporated body under the Companies Act 1993, Securities Act 1978, the Securities Markets Act 1988, or the Takeovers Act 1993 (or their successors);
- d. an individual who is subject to a property order made under the Protection of Personal and Property Rights Act 1988; or
- e. an individual who does not comply with any qualifications for officers contained in the rules of the society.

Statutory officer

R21 Every society must have a statutory officer at all times.

R22 The statutory officer must be a member of the committee, and may hold any other office in the society.

R21 The name and address of the statutory officer, and any changes, must be notified to the Registrar.

R24 In addition to fulfilling the qualifications for a committee member, the statutory officer must be at least 18 years of age and resident in New Zealand.

R25 The statutory officer of a society must retire if he or she becomes disqualified.

Statutory duties

R28 Officers owe the following duties to the society:

- to act in good faith and in the best interests of the society and use his or her powers for a proper purpose;
- to comply with the Incorporated Societies Act and with the society's constitution, except where the constitution contravenes the Act;
- To exercise the degree of care and diligence that a reasonable person with the same responsibilities within the society would exercise in the circumstances applying at the time;
- to not allow the activities of the society to be carried on recklessly or in a manner that is likely to create a substantial risk of serious loss to the society's creditors; and
- to not allow the society to incur obligations that the officer does not reasonably believe will be fulfilled.

R29 The duties are mandatory and may not be excluded by any rule or provision in a society's constitution. Any rule or provision in a constitution that attempts to exclude any of the duties will have no effect.

R30 For the purposes of the duties of officers an "officer" should be defined as:

- the statutory officer of a society;
- all other members of the society's committee;
- any other office holder provided for in a society's constitution;
- a person, including any member of the society or employee of the society, who makes, or participates in making, decisions that affect the whole, or a substantial part, of the operations of the society;
- a person who has the capacity to significantly affect the society's financial standing; and
- a person whose instructions or wishes the statutory officer, the committee of the society or other office holders are accustomed to acting in accordance with.

R32 Except in the situations listed in R33 below, a society is not able to exclude the liability of an officer or indemnify an officer in respect of any liability for any action as an officer or the costs incurred by the officer in defending or settling any claim or proceedings against that officer. Any rule or provision in a constitution that attempts to exclude liability or any indemnity given by a society that does not comply with this rule will have no effect.

R33 A society may, if expressly authorised by its constitution:

| rules for every constitution – (recommendation 56) | related recommendations |
|---|---|
| | <ul style="list-style-type: none"> • indemnify an officer for the costs incurred in defending criminal or civil proceedings relating to liability for his or her actions as an officer where judgment is given in favour of the officer or he or she is acquitted; • indemnify an officer against liability to third parties for the officer's actions in his or her capacity as an officer (and for costs relating to any claim or proceedings relating to that liability), not including any criminal liability or any liability resulting from any breach of the duty to act in good faith and in the best interests of the society; or • effect insurance for an officer in respect of liability (except criminal liability) for any acts or omissions committed by the officer in his or her capacity as an officer. |
| How the society may enter into legal obligations. | <p>R15 A society has full capacity to carry on or undertake business or activity, do any act or enter any transaction.</p> <p>R16 No act of a society and no transfer of property to or by a society are invalid merely because the society did not have the capacity, the right, or the power to do the act or to transfer or take a transfer of the property.</p> <p>R17 The statute should protect third parties who are unaware of any incapacity when they deal with a society.</p> <p>R13 A member is not liable for an obligation of the society by reason only of being a member.</p> <p>R14 Societies may indemnify members and employees who act in good faith in pursuance of the society's activities, and they may take insurance, if they so wish, for the purposes of that indemnity.</p> |
| How the society will control and manage its financial resources and other assets, including how it will keep financial records, how it will pay expenses and how authority to make decisions will be given. | <p>R43 All societies must prepare and file with the Registrar, an annual financial report.</p> <p>R45 All societies must prepare and file with the Registrar any annual return required by regulations made under this Act.</p> |
| <p>Arrangements and requirements for general meetings, including:</p> <ul style="list-style-type: none"> • the intervals between general meetings; • the information that must be presented at general meetings; • when minutes are required to be kept; • the manner of calling meetings; • the time within which, and manner in which, notices of general meetings and notice of motion must be notified; • the quorum and procedure for general meetings; and • voting procedures for general meetings. | <p>R62 Incorporated societies must hold a general meeting not later than 15 months after the previous general meeting.</p> <p>R62 The following information must be presented at a general meeting at least once in every 15 months:</p> <ul style="list-style-type: none"> • an annual report reviewing the society's activities since the previous general meeting; • the financial reports, for the most recent financial year; and • a summary of the nature and extent of any disclosures made by officers of financial interest in matters being considered by or affecting the society, recorded during the year. <p>R62 Minutes must be kept of all general meetings.</p> <p>R63 A general meeting may be held at 2 or more venues using any technology that gives each member a reasonable opportunity to participate.</p> <p>R87 Failure to hold a general meeting at least every 15 months may make the society liable to an infringement offence.</p> <p>R87 Failure to keep minutes of general meetings may make a society liable to an infringement offence.</p> |
| What society information members can access and how that access will be provided. | R64 Every member has a right of access to the annual financial report of the society and to the minutes of general meetings. |
| The method by which the constitution may be altered. | R47 In addition to any other requirements in the constitution, every amendment to a constitution must be approved by a majority vote of members attending and voting at a general meeting of the incorporated society. |

| rules for every constitution – (recommendation 56) | related recommendations |
|--|--|
| | <p>R48 All alterations to constitutions must be notified to the Registrar within 30 days.</p> <p>R48 Every alteration to the constitution must be signed by at least three members of the society and delivered to the Registrar accompanied by a certificate by an officer of the society certifying that the alteration has been made in accordance with the constitution and Act.</p> <p>R48 The amendment will take effect from the time of registration or a later date that is specified in the amendment.</p> <p>R48 The Registrar may refuse to register an amendment to the purposes of a society if he or she believes that the amendment may prejudicially affect any existing creditor of the society and that all such creditors have not consented to the amendment.</p> <p>R48 The Registrar may refuse to register an amendment to the name of a society until the proposed amendment has been publicly advertised in such manner as the Registrar directs.</p> |
| <p>The nomination of a particular incorporated society, other not-for-profit body, entity or charitable trust, or a class or description of a not-for-profit entity to which any surplus assets should be distributed to, on liquidation or prior to removal of a society from the register.</p> | <p>R4 No society may operate for the monetary gain of members.</p> |
| <p>Procedures for dealing with disputes.</p> | <p>R66 Societies are free to continue, develop or adopt disputes procedures that meet their needs, so long as a society’s procedures and practice satisfy the requirements for natural justice defined in the statute.</p> <p>R67 Societies must maintain procedures for complaints concerning misconduct of members, or discipline of members, and for grievances brought by members concerning their rights or interests as members.</p> <p>R68 A society may elect not to consider or continue consideration of any complaint or grievance if it is satisfied that:</p> <ul style="list-style-type: none"> • the matter is trivial or does not appear to disclose material misconduct or material damage to members’ interests; • the complaint appears to be without foundation or there is no apparent evidence to support it; • the complainant has no sufficient interest in the matter or otherwise lacks standing to bring it; or • the relevant conduct, incident, event or issue has already been investigated and dealt with by the society. <p>The right to be heard</p> <p>R69 For misconduct complaints the minimum natural justice requirements protecting the right to be heard are:</p> <ul style="list-style-type: none"> • Where a society considers a complaint or institutes a disciplinary procedure regarding alleged misconduct of a member, and the outcome may affect the member’s rights or interests, the member has a right to be heard before the complaint or procedure is resolved or any outcome is determined; • The member’s right to be heard will be satisfied if, taking into account the circumstances of the case: <ul style="list-style-type: none"> i. the member is fairly advised of all allegations concerning them, with sufficient details and time given to enable the member to prepare a response; ii. the member has an adequate opportunity to be heard, either in writing, or at an oral hearing if the decision-maker considers that an oral hearing is needed to ensure an adequate hearing; and iii. any oral hearing is held before the decision-maker, or any written statement or submissions are considered by the decision-maker. <p>R71 For grievance procedures the minimum natural justice requirements protecting the right to be heard are:</p> |

| | |
|--|--|
| | <p>Where a society agrees to consider a grievance of a member alleging damage to the member's rights or interests as a member, or to members' rights and interests generally, caused by a decision, action or failure to act by the society or its officers, the member's right to be heard will be satisfied if :</p> <ol style="list-style-type: none">i. the member has an adequate opportunity to be heard, either in writing, or at an oral hearing if the decision-maker considers that an oral hearing is needed to ensure an adequate hearing; andii. any oral hearing is held before the decision-maker, or any written statement or submissions are considered by the decision-maker. <p>Bias</p> <p>R70 The statutory minimum natural justice requirements for dealing with bias in society disputes procedures are:</p> <ul style="list-style-type: none">• A member may not decide or participate as a decision-maker regarding a complaint if two or more members of the society's committee or any complaints sub-committee consider that there are reasonable grounds to infer that the person may not approach the complaint or grievance impartially or without a predetermined view; and• Such a decision must be made taking into account the context of the society and the particular case, and may include consideration of facts known by the other members about the decision-maker so long as the decision is reasonably based on evidence that supports or rejects an inference that the decision-maker might not act impartially. <p>Appeals</p> <p>R72 Constitutions may but are not required to include appeal rights in their procedures.</p> |
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APPENDIX B:

Current statutory obligations on societies, office holders and members

| Section | Obligation | Owed by who | Sanction |
|---------|--|---|--|
| 11A | Failure to comply with Registrar's requirement to change the society's name | Society | Summary conviction and a fine not exceeding \$10 for every day offence continues |
| 18 | Carrying on operations without having a registered office | Every officer and every member of the committee | Fine not exceeding 10c for every day offence continues |
| 19 | Failing to conform to a Registrar's notice to not carry on any operation which is beyond the scope of the objects of the society as defined in its rules | Every officer and every member of the committee | Fine not exceeding \$2 for every day offence continues |
| 20 | Operations involving pecuniary gain | Society | Fine not exceeding \$200 |
| 20 | Aiding, abetting, procuring, assisting, or taking part in operation for pecuniary gain | Every member | Fine not exceeding \$40 |
| 23 | Failing to file annual financial statement | Every officer of a society | Fine not exceeding 10c for every day offence continues |
| 23A | Failing to annex a compromise agreement with creditors to every copy of rules issued | The society and every officer of the society | Summary conviction to a fine not exceeding \$2 for each copy |
| 23B | Failing to provide statement of explanation of compromise agreement with creditors | The society and every officer | Summary conviction to a fine not exceeding \$1,000 |
| 34A | Failing to produce documents for Registrar's inspection | Society | Fine not exceeding \$1,000 |
| 34A | Failing to produce a document for Registrar's inspection | Officer of a society or other person | Fine not exceeding \$1,000 |
| 34A | Obstructing or hindering the Registrar's inspection | Any person | Fine not exceeding \$1,000 |

APPENDIX C:

List of Submitters

- Raewyn Adams
- Addison Residents Society Incorporated
- AFFCO New Zealand Limited
- Albany Students' Association Inc
- Jane Ashman
- Auckland Agricultural & Pastoral Association
- Auckland Agricultural Pastoral and Industrial Shows Board
- Auckland District Law Society Inc
- Auckland Tramping Club
- Dave Austin
- Autism New Zealand Inc
- Aviation Industry Association of NZ Inc
- Bell Block and District Residents Society Incorporated
- The Bishop's Action Foundation
- Bloksberg Information Technologies
- Ian Brown
- Roger Bryant
- Buddle Findlay
- Bruce Bulloch
- Burleigh Evatt Holdings Limited
- Business NZ
- Butler Pelvin & Associates
- Canterbury A&P Association
- Canterbury Botanical Society Incorporated
- Canterbury Secondary School Mountain Bike Club
- Canterbury Westland Kindergarten Association Inc
- Capital Property Investors Association
- Don Carson
- The Centennial Park Bush Society Incorporated
- Chapman Tripp
- Charities Commission
- EJ Child
- CIGRE New Zealand National Committee Incorporated
- Clubs New Zealand Incorporated
- Mark Coburn
- Community Law Canterbury
- Community Recycling Network
- Community Waikato
- Dr Carolyn Cordery
- John Coster
- Sue Cotter
- Allen Davies
- Department of Internal Affairs
- John Dewar
- Dietitians New Zealand
- Vivien Dostine
- Yvonne Dufaur
- PJ Duncan
- Dunedin Community Law Centre
- Electrical Contractors Association of New Zealand
- Environment & Conservation Organisations of NZ Inc
- Federated Farmers of New Zealand
- Federated Mountain Clubs of NZ Inc
- Fire Protection Association (New Zealand) Inc
- Heather Doreen Firth
- Foodstuffs (Wellington) Co-operative Society Limited

- Franklin Agricultural & Pastoral Society
- Janet Franks
- Alistair Gillespie
- Roy Glass
- Glen Innes Housing Trust
- Gore A&P Association
- Richard Gourley
- Dr Michael Gousmett
- Grant Thornton New Zealand
- The Green Party of Aotearoa NZ
- Greyhound Racing New Zealand
- Harness Racing New Zealand
- Sandra G Hart
- Hawarden A&P Association
- Hawke's Bay Winegrowers Association Inc
- Hayes Knight
- Stuart Haymand
- Christine Hayter
- Headway Brain Injury Association BOP Incorporated
- Helensville Agricultural & Pastoral Association
- Hesketh Henry
- RG Hills
- Hospitality New Zealand
- Institute of Directors in New Zealand Inc
- Inter Church Working Group
- InternetNZ
- Dr Robert Joseph
- Kaikohe Agricultural, Pastoral & Horticultural Association Inc
- Kaitaia and Districts Agricultural and Pastoral Association Incorporated
- Lloyd Kane
- Chris Kelly
- Kenepuru & Central Sounds Residents Association Inc
- Kensington Swan's Māori Legal team
- Jan Kingett
- Korea/New Zealand Business Council Inc
- Kumeu District Agricultural & Horticultural Society
- The Lake Hayes A&P Show
- LEADR NZ Inc
- Literacy Aotearoa Inc
- Dean Machen
- MacKenzie A&P Society
- Malvern Agricultural & Pastoral Association
- Mangere Community Law Centre
- Maria Clarke Lawyers
- Marlborough District Council
- DL Mathieson, QC
- Paul Matthews
- Mayfield A&P Association
- Will McKenzie
- Susan McLean
- Meat Industry Association
- Dr Malcolm Menzies
- Metals New Zealand Incorporated
- MG Car Club (Auckland Centre)
- Ministry of Agriculture and Fisheries (Now known as the Ministry for Primary Industries)
- Ministry of Economic Development
- Tracy Ellen Molloy
- Motor Trade Association Inc
- National Association of Steel Framed Housing Inc
- National Council of Women of New Zealand
- National Council of YMCAs of New Zealand Inc
- Nelson Bays Community Law Service Inc
- Nelson Enterprise Loan Trust
- New Plymouth Surf Riders Club
- NZ Association of Optometrists
- New Zealand Association Resources Centre Trust
- The New Zealand Automobile Association Inc
- New Zealand Building Industry Federation
- New Zealand Cooperatives Association

- New Zealand Council of Trade Unions
- NZ Heavy Engineering Research Association (HERA)
- NZ Federation of Vocational and Support Services
- New Zealand Institute of Medical Radiation Technology Inc
- New Zealand Institute of Quantity Surveyors
- New Zealand Kindergarten Inc
- New Zealand Law Society
- NZ Organisation for Rare Disorders
- New Zealand Racing Board
- NZ Rugby Union
- New Zealand Society of Authors (PEN NZ Inc)
- NZ Specialist Trade Contractors Federation
- New Zealand Stainless Steel Development Association
- New Zealand Thoroughbred Racing Northern Agricultural & Pastoral Association
- North Hokianga A&P Association Inc
- North Otago Agricultural & Pastoral Association
- Joseph Stanley Nowak
- Peter O'Hara
- Monique Olivier
- Onetangi Residents Association Inc
- Otago Model Engineering Society Inc
- Otago Taieri Agricultural & Pastoral Society
- Rachel Ovens
- Packaging Council of New Zealand Inc
- Philanthropy New Zealand
- Pirimai Residents Association Incorporated
- Playhouse Parliamentary Childcare Centre
- Precast New Zealand Inc
- Pukekohe Golf Club Inc
- A Theva Rajan, QSM
- Retirement Villages Association
- Tom Roa
- Rotary International District 9920
- Rotorua A&P Association Inc
- Rotorua District Council
- The Royal Agricultural Society of NZ
- Royal New Zealand Air Force Association Inc
- Rural Women New Zealand
- Marion Sanson
- Science New Zealand Inc
- Scrap Metal Recycling Association of New Zealand Incorporated
- Senior Net Wellington Inc
- Sexual Abuse Centre (Rotorua) Inc
- AE Sharp
- WN Sheat
- Dr Rowena Sinclair
- Sirius Global Animal Organisation Trust
- Social Development Partners
- Shane Solomon
- Southland A&P Show
- Southland Interagency Forum Inc
- South Otago A&P Society
- SPARC ihi Aotearoa
- Ian Spencer
- Sports Tribunal of New Zealand
- Sport Waitakere
- Surfing Taranaki Inc
- Taupō Harrier Club
- Taupō Māori Wardens Inc
- Tauranga Region Free Kindergarten Association Inc
- Te Aroha AP&H Association
- Te Puna Community Library
- Te Puni Kōkiri
- Warwick Thorpe
- Tokomairiro A&P Association
- Tokoroa A&P Association
- Torchbearer Trust of NZ
- TRANX Drug and Alcohol Services Inc
- Trust Waikato
- Turoa Alpine Ski Club Inc

- Upper Clutha Agricultural & Pastoral Society
- The Vauxhall Car Owners Club of New Zealand Inc, Auckland
- Voice for Life Incorporated NZ
- Warkworth A&P Show Society
- Waste Management Institute NZ Incorporated
- Waverley A&P Association
- Wellington Community Law Centre
- Whangarei Agricultural & Pastoral Society
- Morley Williams
- Wilton Montessori Education Trust
- Young Workers' Resource Centre
- YouthLaw Tino Rangatiratanga Taitamariki Inc
- YWCA Auckland