

MARIA CLARKE
MARIA CLARKE LAWYERS
P O Box 32 487
Devonport
Auckland

MARK VON DADELSZEN
BANNISTER VON DADELSZEN
P O Box 745
Hastings 4156

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Commercial, Consumers & Communications Branch
Ministry of Business, Innovation & Employment
P O Box 1473
Wellington

Withheld

Email: societies@mbie.govt.nz

Incorporated Societies Bill – Exposure Draft

This is a private submission from two lawyers who are both deeply involved in advising societies and their members. Mark von Dadelszen drafted the New Zealand Law Society submissions to the Law Commission when the Commission embarked on its review of the Incorporated Societies Act 1908, and we were both members of the Reference Group assisting the Law Commission in preparing its Report 129. We initially drafted the New Zealand Law Society Submissions on the Exposure Draft Incorporated Societies Bill, and while we agree with much of those Submissions we differ from the Society on some issues.

Background

- 1 Lawyers advise incorporated societies in many capacities, as both paid and as *pro bono* advisers. As members of many incorporated societies, most lawyers can expect to be asked to advise them on the proposed reforms, whether or not they have had prior experience in the law relating to incorporated societies. We are very aware of the almost infinite variety of the societies that enrich and serve our communities; the vast majority governed and managed by volunteers with minimal resources. We therefore consider that we are in a somewhat unique position to comment on the proposals contained in the Exposure Draft of the Incorporated Societies Bill.
- 2 We strongly support the need for reform of the present law, and strongly supports the general approach taken by, and most of the recommendations of, the Commission in its Report 129, and, therefore, the general thrust of the proposals in the Exposure Draft of the Incorporated Societies Bill. However, there are a number of key issues about which concerns have been expressed which are the subject of more detailed discussion in this Submission, particularly:
 - (a) Standard provisions for society constitutions – purpose and application unclear,

- (b) Society Officers – scope too wide, so implications for application of obligations on officers in the Bill (and consequential offences),
- (c) Committees of societies – definition and clarity of role,
- (d) Society Contact Officer – whether the Contact Officer has to be a member of the committee,
- (e) Access to society information – too wide and burdensome, and
- (f) Grievance and complaint procedures – intent is good but concerns about the application of them.

3 We consider that the principles that guided the Law Commission in making its Recommendations (set out at paragraphs 1.22-1.31 of its Report 129) provide a sound philosophical and policy background to the reform and replacement of the Incorporated Societies Act 1908.

4 As a preliminary and general comment, we consider that the Exposure Draft of the Incorporated Societies Bill is a good example of how effectively law reform processes can work in New Zealand, and we commend the Law Commission and the Ministry of Business, Innovation and Employment for the work both have done culminating in the Exposure Draft of the Bill.

5 ***Model constitution for societies or standard provisions:***

- (a) While the Law Commission recommended that a model constitution for societies be provided in any new statute, we agree with the explanation for not doing so as set out in the Ministry's Request for Submissions on the Exposure Draft Bill (paragraphs 50-55).
- (b) Specifically, we agree that the concept of a "model constitution" promises much which is, in reality, unrealistic. Lawyers use template documents all the time and a lawyer's template constitution would always need adaptation to meet the needs and requirements of each society. In particular, the name and purposes of a society are unique to each society (although similar societies may have similar or identical purposes), and, as the Request for Submissions on the Exposure Draft Bill points out, societies choose different names for officers and their governance group, and will also choose different options for the distribution of surplus assets on winding up.
- (c) However, we question the value of the proposed "standard provisions" when they will not provide a sufficient basis or framework for a society constitution. We note that any such "standard provisions" are intended to be supplemented by "practical guidance material on the Registrar's website," and we suggest that such practical guidance material could be provided, and could include suggested standard provisions, without the need for any statutory authority.
- (d) We can foresee some potential difficulties arising where a standard provision is adopted by a society in its constitution but the standard provision used may in

some way conflict with other parts of the constitution. This will raise issues as to the status or potential primacy of the adopted standard provision and give rise to other interpretative problems, and this will inevitably require reference to the Courts for resolution. There are also specific concerns about these provisions as, if standard provisions are to be provided for, the role of such standard provisions is unclear:

- (i) It appears that they are intended to be merely default provisions to be declared by the Registrar if a society has a non-compliant constitution in the transition from the 1908 regime to the new statute's regime (Schedule 1, paragraph 2(1)(g), noting that Clause 12(1) does not permit the Registrar to deem the incorporation of these provisions if a proposed constitution, other than in transition, does not comply with the Act).
- (ii) Notwithstanding the point just made, are the standard provisions ones from which a society may pick and choose? This appears to be suggested by sub-clause 33(1) which states that they "may be used when preparing a constitution," but it does not say how (while it is noted that sub-clause 33(6) states this may be in the Minister's notice in the Gazette).
- (iii) If a society can "pick and choose," would the society's constitution need to "copy and paste" the actual provision or simply quote the provision number?
- (e) In summary, we do not consider standard provisions should be part of the Bill but that resources and guidance be provided. However if they are to be included in the Bill, there is a need to clarify whether the standard provisions are only default provisions during the transition period or whether they can be referred to in any constitution. If the latter is permitted, then there is a need to specify how they may be incorporated into a society's constitution.

6 *Effect of constitution*

- (a) We consider that a society constitution should be expressly stated to be binding not just on members but also on officers (including committee members), who may or may not be society members. That is provided for in Clause 50, but it would be better if the binding effect of the society constitution and the Act were found in just one place within the new Act.
- (b) Consideration should be given to the relationship between Clauses 26 and 50, and to amendment to Clause 26 to provide that the constitution is binding on "officers," possibly by adding a new sub-clause (3) that mirrors sub-clause (2), with the word "officer" replacing "member" in two places.

7 *Society may amend constitution*

Sub-clause 27(2)(b) states that an amendment to a constitution must be “approved at a general meeting by a majority vote of members participating and voting.” There are three issues with this paragraph:

- (a) Some societies have a higher threshold of votes required to alter their constitution than a simple majority; for example, a 2/3rds or 3/4s majority. This Clause should permit a higher majority threshold if stated in the constitution. The phrase referred to could be amended to read (with or without the phrase “and voting”) “approved at a general meeting of the society by a majority vote of those members present in person or by proxy and voting, or such higher percentage as may be specified in the society’s constitution.”
- (b) The words “participating and voting” are unclear and clarification is required:
 - (i) Is a member present by proxy regarded as being “present,”¹ and
 - (ii) Is voting by proxy regarded as participating, and
 - (iii) Does “voting” include abstaining?
- (c) Clause 27(2)(b) fails to provide for amendments to constitutions to be amended by means other than at general meetings. Authorising other means would save the cost of members having to gather for SGMs or the delay until the next AGM, and avoid difficulties associated with getting a quorum (difficult enough for even the most common business, let alone something as usually mundane as changing a constitution). Especially where membership of a society is spread geographically, it is increasing common to provide in constitutions for polls to be taken by mail or by some electronic means. The Clause needs, therefore, to provide for constitutional amendments to be made either at general meetings or by some form of poll conducted by mail, email, or electronically (or a combination of those methods as not all society members use email or have computers).

8 *Definition of “officers”*

- (a) The Law Commission discussed the issue of society officers at paragraphs 6.71-6.80 of its Report. Feedback from our clients and our experience indicates significant concern that the scope of the term “officers” under Clause 36 is too wide and unclear. The consequence of being an “officer” under the Bill as proposed is that there will be significant new obligations imposed on society officers, such as conflict disclosures, and also specific offences by officers. In essence, for the vast majority of societies extending the definition of those potentially liable as “officers” beyond the committee seems to be unjustified even

1 Subject to any express contrary provisions in a society constitution, under general common law rules a member is not present at a meeting when represented by the holder of a proxy – see *Wall v The Maori Land Court – Tauhara Middle 15 Trust and Tauhara Middle 4A2A Trust*, Maori Appellate Court MB 55 A20090002091 2010 Appeal 55, 29 March 2010, paragraph [59], and *Body Corporate 199883 v Clarke Family Associates Ltd* (2005) 5 NZ ConvC 194,087.

if it is justified in the case of companies. We believe it is wrong to assume that what may be appropriate in a commercial context where the vast majority of companies exist to make a profit for members (and most directors are paid for their services) is similarly appropriate in the not-for-profit community context (where most society committee members are not paid anything other than, in a minority of cases, a relatively modest honorarium).²

(b) Following are examples of some of the problems arising from the present definition in Clause 36:

- (i)** Clause 36(2)(a) and (b) will cover people who direct or instruct a society officer (or the committee) or on whose directions or instructions an officer (or committee) is accustomed to act. This could include people outside of the official structure of a society such as a tribal chief (for example, in a Māori or Pacific Island context), or patron or other person over whom the society has no legal control who is not acting in a “professional capacity” in terms of Clause 36(2)(3) (assuming that means being paid to do so, which may not always be the case).
- (ii)** Clause 36(2)(d) will cover people within the society such as Chief Executives, employees and volunteers who are directly delegated a power or duty that would otherwise fall to the committee either by statute (e.g. a privacy officer) or by a society’s constitution. While that may be appropriate in a company context we suggest that for the majority of societies that may be unreasonable.
- (iii)** There seems little difference between Clause 36(2)(c) and (d) and the second paragraph could therefore be omitted.
- (iv)** The definitions in Clause 36(1) and (2) could capture (presumably unintentionally, but unnecessarily) a wide group of people in or associated with a society including:
 - People in roles outside of the committee such as treasurer, secretary, club captain, President, technical officials, event officials,
 - People on subcommittees and groups appointed by the committee,
 - Patrons and ambassadors, and
 - Judicial officers.

There are both legal and practical implications for such a wide group of people to have the new duties that officers will have under the Act. For example:

2 See, also, paragraph 10(a) below.

- The disclosure register requirements for conflicts will be difficult to administer,
 - Judicial officers must be impartial which may not always be in the best interests of the society, and which would potentially put them in conflict with the duties of officers, and
 - The cost of liability insurance cover for this wide group of people that societies may need to provide, in order to retain them as officers, could be considerable.
- (c) In addition to the points already made, there are further complications when, as is common in societies with a “federal” structure, there may be at least two committees in a “hierarchical” structure (such as an “Executive Council” and an “Executive Committee” – where the “Executive Council” contains representatives of the regional/local members and the “Executive Committee” conforms to the more usual type of society committee with a president, vice-president/s, secretary, treasurer and a few other committee members). In that type of structure it would be hard to ascertain who the officers are.
- (d) We suggest that Clause 36 should be modified to limit it to elected or appointed committee members only, and also we suggest that the above issues be considered.

9 *Management of a society*

- (a) The role of the committee of a society is unclear in the Exposure Draft Bill. To “govern” is usually understood to mean to set policies and strategies, while to “manage” is usually understood to put those policies and strategies into effect and to deal with day-to-day issues.
- (b) The definition of “committee” in Clause 5(1) is “the governing body of the society however described. This is consistent with one of the purposes of the proposed Act which is to “promote high quality governance.” However Clause 38(1) refers to the “operations and affairs of a society” being “managed by, or under the direction or supervision of the committee.” The reference to “management” and “operations and affairs” is mirrored in sub-clause (2). However, Clauses 5 and 38 are inconsistent as the definition of committee in Clause 5(1) is inconsistent the description of the functions of the committee in Clause 38, with Clause 5(1) referring to governance and Clause 38 referring to operations and management.
- (c) In smaller societies the committee usually both governs and manages the society between AGMs. In societies with employees or in regional and national societies the committee may only govern.
- (d) In some larger societies the committee will only have a governance role, and in some other societies both a governance and management role, depending on the size and scope of the society’s affairs. However the inconsistencies between Clauses 5 and 38 leaves the position unclear.

- (e) In addition to the role of the committee, for similar reasons to those set out in paragraph 9(c) above, it may also not be clear which body in a society would be the committee (noting that Clause 37 refers to “a” committee, singular). For example, in some societies operating at a national level, there may be a “council” (comprising representatives from regions or areas) and also a “board” or “committee.” Those two bodies usually share (or are responsible for different) governance and management functions, so which one would be the committee? Would one of them need to be designated as such in its constitution?
- (f) In addition, in some societies, some of the governance and management functions rest with the members at a general meeting, such as authority to enter into major transactions, while in smaller societies all members might constitute the committee. A better definition is needed to be clear as to which body is the “committee.”
- (g) We suggest that the committee might be defined in Clause 5(1) as being three or more members who together as a body/committee govern and/or manage the society on a day to day basis between general meetings of the society. That change would require consequential changes in, for instance, Clause 38.

10 *Dealings between society and other persons*

- (a) It is, we believe, necessary to appreciate that the vast majority of incorporated societies are established for reasons that clearly distinguish them from for-profit, commercial entities (indeed, this is emphasised by Clauses 3(a), 8, 21 and 22 of the Exposure Draft Bill). While realising the mission, purposes or objects of an organisation are the key drivers for both for-profits and not-for-profits, there are also key differences, as illustrated by the following comparison:³

For-profit entity	Not-for-profit society
<ul style="list-style-type: none"> ▫ Realising the entity’s purposes or mission produces cash ▫ Success in realising the entity’s purposes or mission is measured in cash earned, and retaining and growing the customer base ▫ Without cash the entity fails 	<ul style="list-style-type: none"> ▫ Realising the society’s purposes or mission consumes cash ▫ Success in realising the society’s purposes or mission is measured in services provided and numbers of members or “clients” served ▫ Without cash the society fails

The comparison is put slightly differently in the following table:⁴

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- 3 See Seminar Booklet, *Not-for-Profits – Changing Needs*, Mark von Dadelszen, New Zealand Law Society, February 2016, and, generally, *Joining a Nonprofit Board – What You Need to Know*, Epstein and McFarlan, Jossey-Bass, 2011.
- 4 *Joining a Nonprofit Board – What You Need to Know*, Epstein and McFarlan, Jossey-Bass, 2011, page 7.

Table 1.2 Key Differences of For-Profit Versus Nonprofit Governance

For-Profits	Nonprofits
<i>Mission</i>	
Mission important	Mission very important
Financial results	Cash loss generator may be key service
Nonfinancial metrics important	Nonfinancial metrics of mission performance very important
<i>Finance</i>	
Financial metrics of performance P&L, stock price, and cash flow very important	Financial metrics of meeting budget and cash flow projections also important
Funds come from operations and financial capital markets	Funds come from operations, debt, grants, and philanthropy
Short-term goals very important	Deep focus on long-term goals (as long as cash is there)
<i>Executive</i>	
Small board—paid governance	Often large board—volunteer governance
Few board committees	Often many board committees
Combined chair/CEO plus lead director	Nonexecutive volunteer chair, plus CEO

In essence, there is a distinction between an entity formed for the purposes of making profits for the owners of the entity and an entity formed to provide benefits to the community, and we believe it is wrong to impose potentially punitive burdens on not-for-profit societies.

- (b) In an incorporated society context dealings with third parties are sometimes undertaken by people who do not have proper authority from the society to be making them. This can arise because of a failure to hold general meetings, or because vacancies have not been filled, or because of doubts about the validity of elections, or where people who were in office continue to act as if they are, or (less commonly) as a result of fraud.
- (c) Clause 19 is, as the note beneath the Clause indicates, based on section 18, Companies Act 1993 and, in fact, dates back to 1983 Amendments to the Companies Act 1955. While those provisions may work in a company context, as pointed out above, societies perform differently from companies and operate in different contexts.⁵ The Clause would allow a third party to sue a society notwithstanding that lack of authority, which may put the society in a very difficult position, particularly if the dealing cannot be performed by the society, and inappropriate if the society genuinely did not authorise the transaction and the

⁵ We are aware of the argument that in the company context there is a good understanding of the meaning and effect of section 18, Companies Act 1993.

incurring of the obligation. This is of particular concern if the dealing arises from a fraudulent act (specifically addressed in Clause 19(3)) as this could be fatal to the society's continued existence, depending on the nature of that fraudulent act and the extent of the liability. Societies generally do not have the means to resort to the Courts to protect themselves from such dealings.

- (d) While we agree that third parties should be able to rely on transactions with a society being valid, equally the society should not be burdened by a loss suffered due to a person acting outside of their authority or acting fraudulently.
- (e) We suggest that the Bill should be amended to allow an act or transfer of property by a society to be declared by a Court to be invalid where that act or transfer was undertaken by a person purporting to have authority when they did not have that authority, or where they acted fraudulently. Such a declaration could be made either on an originating application by a society or as a consequence of a society's defence to a claim by a third party, but with the onus being on the society to prove that the person who committed the society to the transaction was unauthorised.

11 *Disputes, grievances and complaints*

- (a) We are strongly in favour of the Bill providing for the resolution of societal disputes and disciplinary issues, because we have experience in advising societies and members where proper processes have not been followed. However, we believe that the draft provisions could be improved
- (b) We have several concerns about the wording in Clause 24(1)(j) and also Clauses 31-32.
 - (i) The terms "disputes", "complaints" and "grievances" are not defined. Further, there needs to be clarity as to whether or not the terms "dispute," "complaint," or "grievance" include an "appeal" from a decision on a "dispute," "complaint," or "grievance." While it may be argued that a "dispute" remains a dispute until it is resolved that is not entirely clear, and, because the new statute will frequently be considered by lay people, greater clarity is required.
 - (ii) It is not clear whether Clause 24(1)(j) is intended to include disciplinary action by a society against a member (for breach of rules, or an offence, or inappropriate behaviour), as this may not be a "dispute," and may not arise by way of a complaint (unless the committee's initiative to address the matter was deemed to be a complaint), yet Clause 24(j)(ii) seems, appropriately, to contemplate disciplinary action by a society against a member being included.

- (iii) Paragraph 1 of Schedule 2 expressly refers to the right of a member to be heard where "... a society ... institutes a disciplinary procedure," yet the situation where "... a society ... institutes a disciplinary procedure" is not reflected or adequately provided for in Clauses 24, 31, 32 and the balance of Schedule 2.
- (iv) The draft provisions are also limited to disputes "between members" and "between members and the society," and it is therefore unclear if any of the following disputes would be included:
 - Between officers and a member, or
 - Between one officer and another officer, or
 - Between one officer or several officers and the committee.
- (c) Some disputes between members and a society may also be governed by other statutes, such as the Employment Relations Act, or, in a sporting context, the Sports Anti-Doping Act, and there is potential for inconsistencies between statutes to cause difficulties.
- (d) The Schedule does not provide for, or explicitly permit, mediation or facilitated agreement in the context of a dispute, complaint or grievance, and that should be expressly permitted.
- (e) In summary, we suggest that the scope, terminology and application of this whole section is less prescriptive and simply requires societies to have a process in place for dealing with "disputes" (widely defined) and that such process comply with the principles of natural justice. Those principles could then be specified in the Schedule.

12 *Smaller community societies*

- (a) We have had some feedback on the question of whether the rigour of all of the proposals should be visited on all societies. In that context, we draw attention to paragraphs 1.30-1.31 of the Law Commission's Report 129 as we are aware of concern amongst smaller community organisations that the proposed reforms may be unduly burdensome on some small societies:

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.

- 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.

The points made by the Law Commission are well-justified as we are both aware that many community societies find it hard to get people to serve on their committees (and the recent enactment of the Health and Safety at Work Act 2015 and the Vulnerable Children Act 2014 have caused additional concerns – whether or not those concerns are actually justified). For instance, there is a world of difference between getting a committee for a local rugby club and the New Zealand Rugby Union.

- (b) We suspect that many societies may find it difficult to prepare constitutions complying with all the requirements of the proposed new statute, and then will find it difficult to comply with those requirements. In particular, such requirements include:
- (i) Drafting procedures for resolving disputes as are proposed to be required under Clause 24(1)(j), and then complying with those procedures (although lawyers' experiences suggest that major problems arise in societies of all sizes and types when disputes arise between members, and between members and their societies, and we therefore consider that it is important that society constitutions spell out the standard requirements of natural justice as contemplated in Clause 31 and Schedule 2),
 - (ii) Maintaining the register of members as is proposed under Clause 70 (noting that the requirements under the 1908 Act relating to registers of members are currently probably more honoured in the breach than the observance),
 - (iii) Complying with the requirement to file annual financial statements (Clause 83) and an annual return to the Registrar (Clause 85), noting that the requirement to prepare financial statements under the Companies Act only applies to large companies, companies that are public entities, and large overseas companies (section 200, Companies Act 1993), and that every other company with 10 or more shareholders which does not fall within the previous categories under the Companies Act may opt out of the obligation to prepare financial statements (section 207I, Companies Act 1993), and
 - (iv) Complying with the proposals concerning the provision of information to members in Clause 71.

Those appear to be the major issues, but some might argue that many societies may find it difficult to comply with other requirements that are more onerous than are required at present under the present Incorporated Societies Act 1908.

- (c) Given the points just made we suggest that consideration should be given to whether societies with fewer than (say) 50 members and/or with an income or turnover of less than (say) \$50,000 per annum might be exempted from at least the following requirements contained in the Exposure Draft Bill:
 - (i) Filing annual financial statements (clause 83(3), Exposure Draft Bill), and
 - (ii) Filing an annual return (clause 85, Exposure Draft Bill).

These are modest suggestions, but relieving smaller societies of those obligations may facilitate the ongoing registration of many smaller societies and the incorporation of new smaller societies. While the Registrar may need to undertake "spot checks" to ascertain whether some societies are abusing the exemption proposed, overall we suggest that the suggested exemptions may also reduce some of the additional costs that will be imposed on the Registrar as a result of the proposed reforms.

There is, of course, the contrary view held by many (including some lawyers) which we acknowledge, namely, that if people wish to have the benefit of personal protection from a society's liabilities then they must be accountable to the public. Societies all source or hold funds belonging to other people (be it members' or third parties' funds, including the Government) so accountability at a basic level should be the minimum.

Essentially, there is a policy issue to be resolved, and we recognise that there are arguable grounds for both points of view.

13 *Power for Registrar to prohibit activities beyond the scope of society's purposes*

- (a) We note that under section 19(1), Incorporated Societies Act 1908, the Registrar has the power to give written notice prohibiting activities beyond the scope of the purposes of a society. The Exposure Draft Bill contains no equivalent provision, and nor do the enforcement provisions in Part 4 of the Exposure Draft Bill include anything equivalent to the present section 19(1).
- (b) While it is proposed under Clause 17 that societies have "full capacity to carry on or undertake any activity, do any act, or enter into any transaction" and for those purposes to have "full rights, powers, and privileges," Clause 17(3) will permit a society's constitution to "contain a provision relating to the capacity, rights, powers, or privileges of the society only if the provision restricts the capacity of the society all those rights, powers, and privileges." However, it is clear that the Bill anticipates that the "purposes" of a society will be included in its Constitution (see Clauses 8 and 11), and we believe that there is no reason to require that a society spell out its "purposes" unless it is intended that those specified "purposes" mean something.

- (c) Accordingly, we believe that the new Act should make it clear that any activities outside of the specified purposes of a society would (or should) still be *ultra vires*. If that is correct, then it should be possible to hold a society to account under Part 4 of the proposed statute if it undertakes or proposes to undertake any activities which are not consistent with its specified purposes. That would require amendments to Clauses 94, 95 and 96, and conferring on the Registrar a power similar to that in the existing section 19(1) would be desirable.

14 Other specific drafting issues

There are some specific drafting issues relating to a number of clauses in the Exposure Draft of the Bill to which we draw attention and comment upon, as indicated in the attached table.

If our submission requires clarification or if we can assist the Ministry further we will, of course, be happy to do so.

Yours faithfully

Withheld

Mark von Dadelszen

Maria Clarke

Clause No.	Subject	Issue	Recommended Change
10	Proposed Name of Society	<p>The Registrar has no discretion to allow a name, by consent, which may be “almost identical.” For example, a society may also have interests in a trust or other corporate entity, which may have a very similar name; thus the “ABC Trust” or “ABC company” might form the “ABC Society.”</p> <p>Clauses 10(1)(b) and 89(1)(b) both require that “the word “Incorporated” or the word “Manatōpū” (or both)” be the last word or words of society name. In practice many society names end simply with “Inc.” and those Clauses might be interpreted as meaning that the abbreviation is not permitted.</p>	<p>The Registrar should be given explicit power to allow an almost identical name by consent of the entity which has an existing nearly identical name.</p> <p>We suggest that the abbreviation of “Incorporated” or to “Inc.” should be expressly permitted.</p>
15(2), 128 and 142	Society is Body Corporate	<p>It is not entirely clear, if “removal from the register” means the removed society is no longer an incorporated society and no longer a body corporate. This has been an issue with the current Act and the use by the Registrar of the words “struck off” on the website. The reference to “removal from the register” is set out in Subpart 1 of Part 5, but it does not expressly state this either. Restoration under clause 142 results in a society being treated as having continued to exist, so removal should mean that a society ceases to exist.</p> <p>The problems associated with the status of a society removed from the Register under the Incorporated Societies Act 1908 are discussed in <i>Law of Societies</i>, Mark von Dadelnszen, LexisNexis, 3rd Edition, 2013 at 12.2.4.</p>	<p>Aa a minimum, amend Clause 128 as follows:</p> <p>“A society is removed from the register, and is no longer an incorporated society under the Act and no longer a body corporate, when a notice is signed by the Registrar stating the society is removed from the register is no longer registered under the Act.”</p> <p>Consider whether the issues discussed in <i>Law of Societies</i>, Mark von Dadelnszen, LexisNexis, 3rd Edition, 2013 at 12.2.4 can or should be addressed.</p>

22(1)	Financial Gain	<p>If there is an amalgamation where one of the amalgamating societies is a body corporate and member (party "B") of the other body corporate (part "A"), and society "B" is being used as the entity into which the two are amalgamating, then, in this situation, it should be permissible for surplus assets of "A" to go to "B" which was the "member" as long as this does not infringe against the no financial gain principle.</p>	<p>As long as any distribution did not infringe against the "no financial gain" principles (as, for example, where the benefitting member may be a charity which would receive the vested assets for charitable purposes), amend clause 22 to permit distribution to a "member" in an amalgamation under section Part 5, subpart 2.</p>
24(3)	SGM	<p>The reference, in this sub-clause, to section 58(3) is unclear. Sub-clause (1)(l) refers to altering the constitution, whereas clause 58(3) is referring to holding an SGM where a conflict of interest cannot be resolved.</p>	<p>Amend the reference to sub-clause (1)(l) to sub-clause (1)(k), and remove the reference to section 58(3) since a society may have SGMs for various purposes not just section 58(3) circumstances.</p>
25	Bylaws	<p>The term "bylaw" is rather outdated and increasingly societies refer to rules, regulations or policies. However, the term "bylaw" is used in Clauses 25, 94, 95, 98, and Schedule 3, Part 1. Also, Schedule 3, Part 1 refers to the exclusion of bylaws from the Bylaws Act by stating "(but does not include a bylaw of a society within the meaning of the Incorporated Societies Act 2016)," but the Bill does include any definition of "bylaw."</p>	<p>The term "bylaw" should be defined to include bylaws, regulations, rules and policies, or other such documents formally adopted by a general meeting of by the committee of a society.</p>

27(2)(c)	Society may amend constitution	The signing of the amended constitution can be done by any 3 members, which could be members who were not present at the meeting, which is open to abuse.	Amend sub-clause (2)(c) as follows: "signed by at least 3 members of the society who were present at the meeting "
29(1)	Court may amend constitution	This Clause allows the Court to amend the constitution but not to revoke an amendment made to a constitution. In the event an application to the Court is made due to an amendment being by the society made contrary to the Act or the constitution, then the Court may also need the power to declare that amendment invalid or to modify it. This sub-clause does not currently permit either of these courses of action.	Amend sub-clause (1) as follows: "A court may, on the application of a society or a member of a society, make an order amending or revoking an amendment to the constitution of the society, if it is satisfied that—"
43	Contact Officer	<p>Despite paragraphs 6.15-6.18 of the Law Commission's report, we consider that there is no compelling reason why the Contact Officer must be a member of a committee. If the role is to provide the Registrar with information about the society, if requested, then that person should (a) have ready access to that information and (b) be reasonably available to do so.</p> <p>In many larger societies the best person to be the contact officer is likely to be the Chief Executive, general manager or and employee or volunteer managing the day to day activities of the society. It is not good governance practice to have such person on a committee, when that committee is effectively that person's "employer."</p> <p>Also requiring that person to be on the committee, may take up a seat on the committee that would otherwise be filled by a person with the necessary expertise and experience to govern the society.</p> <p>The role of the contact officer is not well defined, other than to be contacted "when needed." About what matters? And what</p>	<p>Define the role of the Contact Officer and his/her obligations more clearly.</p> <p>In sub-clause (3), remove (a) – the obligation to be a member of the society's committee.</p>

		<p>obligations do they have to disclose information to the Registrar?</p> <p>Sub-clause 2 requires the vacancy in the position of contact officer to be filled within 20 working days, however if that role is an elected one, this time period may be problematic under the time periods for elections for some societies, especially if there is no power to co-opt someone to fill vacancies.</p>	<p>Allow a society to appoint an interim contact officer if the constitution requires the person to be elected and the timeframe for electing a new contact officer exceeds 20 days.</p>
45	Officer ceasing to hold office	<p>Sub-clauses (2) and (3) set out a process for resignation from office. Some societies have additional requirements, such as giving a certain period of prior notice. While sub-clause 45(1) refers to the society's constitution for "vacating" office, sub-clauses (2) and (3) do not.</p>	<p>Amend sub-clauses (2) and (3) to allow a society to have additional requirements for resignations from office.</p>
71	Information for members	<p>This section is too wide in its scope and vague in its application, which may lead to a significant administrative burden on societies.</p> <p>Sub-clause (1) allows a member to ask for any information <u>held by</u> the society. This may include information which is not <u>about</u> the society or even related to its affairs.</p> <p>Although the grounds for refusal are unlimited under sub-clause (4), there are some obvious omissions from the list of those grounds including privileged information and other grounds such as those listed in section 29 Privacy Act.</p> <p>One ground of refusal is "likely prejudice [to] the commercial position of the <u>society</u>", but this would not exclude the commercial position of <u>third parties</u> or of <u>members</u>, in respect of which the society might hold information.</p>	<p>Reduce the right to access information to:</p> <ul style="list-style-type: none"> - Minutes of committee meetings/decisions - Financial information (as specified in section 82) - Contact details of officers.

		<p>For a society that refuses a request, it would need to make a decision (and probably provide a reason for that decision), and that decision is then potentially subject to judicial review. Not only does this require the society to find resources to process the request but it also opens societies up to greater potential challenge than if the right to access was limited to certain information.</p> <p>As previously noted, there is considerable concern about the administration of this right to access information, when many societies have few or no resources to undertake this, and, even if they do, it could become a significant administrative burden.</p> <p>The requirement to respond within a “reasonable time” creates uncertainty. While it may seem in the society’s interest for it to decide what is a reasonable timeframe, there is concern it will result in more questions and challenges. It would be preferable to specify a time period of say 20 working days.</p>	
75	Methods of Holding General Meetings	<p>Sub-clause (b) permits an annual general meeting (but, for some unknown reason, not a special general meeting) to be held by members “participating in the meeting by means of audio, audio and visual or electronic communication”.</p> <p>The term “electronic communication” is not defined and as such could include email communication, but this would not be within the legal meaning of a meeting, at which participants must, as a minimum, be able to hear each other at the same time.</p> <p>It should enable technology like Skype and other technological means that are and will become available but should still constitute a meeting.</p>	<p>Amend sub-clause (b) so that it refers to any other means of communication, including using technology, in which participants can effectively hear each other simultaneously.</p> <p>This provision should also apply to special general meetings and committee meetings.</p>

81	Balance date	<p>Sub-clause (2) states the balance date is 31 March or a date the committee adopts.</p> <p>Most society constitutions specify the balance date, which is not listed as an acceptable option. The balance date can be manipulated to conceal changes in a society's finances, and we consider that the options should be expanded to enable the membership to make the decision.</p>	<p>Amend sub-clause (2) to provide that the balance date is:</p> <ul style="list-style-type: none"> - The date specified in the constitution; or, - If it is not specified in the constitution, then a date specified by the committee; or, - If not specified by the committee, then 31 March.
85	Annual Return	<p>We have suggested in our letter that the requirement be modified for smaller societies.</p> <p>Irrespective of any modification made, the purpose and content of the annual return is unclear and is giving rise to concerns about the potential administrative burdens and disclosure requirements that might be imposed on societies.</p>	<p>Amend to specify the purpose of the return and the minimum information required in the return, with ability to add to that by way of prescribed information.</p>
129	Grounds for removal from register	<p>There is no ability for a member to notify the Registrar (with a view to removal) where a society is not operating or is in breach of its obligations under the Act (e.g. has failed to have an AGM, or fails to call general meetings etc.) in circumstances where there are insufficient members to obtain a quorum to call a general meeting to pass a resolution (as required under Clause 129(1)(b)(i)).</p>	<p>Insert new sub-clause (1)(e) permitting a member to make a request to remove on the basis of repeated breaches by the society of the Act or the constitution, or that it is no longer operating.</p>
144-145	Amalgamation	<p>The content of the "proposal" to amalgamate is not defined, and as a minimum the proposed new constitution should be required by statute to be included.</p>	<p>Define "proposal" to include the proposed constitution of the new society and any other prescribed information.</p>
146(3)	Approval of Amalgamation	<p>It is not clear how the approval "by the society" must be obtained but it should be by way of general meeting or remote voting (postal or electronic) process of each of the amalgamating societies (see the previous comments about Clause 27(2)(b)).</p>	<p>Amend sub-clause (3)(a) as follows:</p> <p>"by resolution that is approved by a simple majority or a higher percentage as specified in the society's constitution of the votes of those members entitled to vote and voting on the question at a general meeting of the society or by poll"</p>

152	Effect of Certificate	This Clause states that the amalgamated society takes on "all" the assets and liabilities of the pre-amalgamated societies, but it may be that it is agreed in the proposal that some are not taken into the new entity (for instance, some might be transferred to another entity). This sub-clause should refer to the proposal in terms of those assets and liabilities which are agreed to be taken into the new entity, and not "all" of them.	Amend Clause 152(d) and (e) so that it refers to the property (as per sub-clause (d)) and the liabilities (as per sub-clause (e)) as set out in the "proposal".
170	Register	Given the number of incorporated societies that are charitable entities and the similarity in reporting requirements, consideration should be given at some point to having a joint register for all not-for-profit entities registered under this Act, Charities Act, Charitable Trusts Act and possibly other Acts. This would also enable the supporting material and resources for not for profit entities to be located on one website, which would be most helpful for all societies.	
172	Contents of register	It is suggested that the name of the contact officer should be separately listed as being required on the register.	Amend sub-clause (1) by adding "the name of the contact officer"