

Q&A regarding the new Incorporated Societies act 2022 (keep the questions coming!)

*Thank you Robert Clarke, Acting Principal Policy Advisor at MBIE, for your input on questions 2, 8, 12, 19 and 22 - we really appreciate it.*

**Q1:** I'm particularly interested to understand your thoughts/concerns about the operation of the new act in relation to Residents Society's arranging insurance for their properties.

**A:** In short the Incorporated Societies Act 2022 (the "new Act") is silent on insurance - it just talks about indemnity insurance and so forth for officers, as you can see [here](#).

**Q2:** Does the new Act also affect charitable trusts?

**A:** No, only incorporated societies.

For charitable societies incorporated under the Charitable Trusts Act 1957, they may choose to either continue to be incorporated under the Charitable Trusts Act 1957 or reregister under the new Act, per [section 261](#). When the new Act comes into force, societies will no longer be able to incorporate under the Charitable Trusts Act 1957.

**Q3:** Is there a template "model constitution"?

**A:** Not yet, as Companies Office had a [constitution builder](#) under the Incorporated Societies Act 1908 (the "old Act") we suspect they will do the same with the new Act.

**Q4:** Do you think (as part of the updating process) that the first step should actually be to determine what the best structure is?

**A:** Yes! As we discussed in our talk now is a great time to determine whether the incorporated society model is the right legal vehicle for your entity. Steven Moe and Craig Fisher have written a great article on this point, which you can find [here](#).

**Q5:** If you are already registered, and are asserting compliance with the Incorporated Societies Act at today's date, would you say 1908 or 2022?

**A:** We are in an unusual limbo period, where the old Act is still in force but the new Act is coming into force in stages. So, as your society is already complying with the old Act, we recommend you also comply with the new Act.

**Q6:** Do they have to be paying members or could they be life members?

**A:** [Subpart 5 of Part 3](#) of the new Act sets out the law around members. It is up to the society whether their members are paying members, however under [section 26\(1\)\(d\)](#) a society's constitution must include "how a person ceases to be a member of the society". So a society can have life members, but there will still need to be a way for a person to stop being a member of that society.

**Q7:** Where do 'boards' fit? As different to a committee?

**A:** A “committee” is defined in [section 5](#) of the new Act as meaning “in relation to a society, means the governing body of the society, however described (for example, a board)”. So as long as a board is the governing body of the society, it has the same meaning as a committee.

**Q8:** When drawing up the new rules/constitution by the committee, is it best to ask members to review this before finalising and registering the updated under the new Act i.e. do we need special meetings to pass this new constitution?

**A:** [Clause 9 of schedule 1](#) of the new Act explains the procedure for societies amending their constitution to allow them to reregister under the new Act. The amendments must be:

- (a) in writing; and
- (b) either—
  - (i) approved at a general meeting of the existing society by a majority vote of those members entitled to vote and voting on the question; or
  - (ii) approved in the manner prescribed by the regulations; and
- (c) signed by at least 2 members of the society.

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

**Q9:** I’ve heard that there are higher personal liabilities on officers of a society if e.g. a building we own burns down for example. Could you tell us a bit more about this?

**A:** The new Act has not radically changed liability - it depends on the situation and the insurance cover that the society has in place. The new Act explicitly mentions an officer is liable where they act in contravention of a banning order that disqualifies the person from being an officer (see [subpart 7 of part 4](#) of the new Act), and when a society is deregistered the liability of officers for any act or omission while the society was registered ([section 183](#) of the new Act). [Sections 54-61](#) of the new Act also sets out existing officers’ duties - these were already enforced by the court but not written in legislation.

**Q10:** When can we start an amalgamation? Is this part in effect before the regulations are released?

**A:** As the amalgamation procedures are in the new Act, our understanding is that you will need to be registered under the new Act before an amalgamation can begin. The amalgamation procedures are set out in [subpart 2 of part 5](#) of the new Act.

**Q11:** Will part of the re-registration of an incorporated society allow for an organisational name change?

**A:** As long as the society’s rules allow for a name change, and the new name complies with the requirements set out in [section 11](#) of the new Act, then a society will be able to change its name on re-registration.

**Q12:** Can an Incorporated Society submit new rules now that do not comply with the new Act with a view to submit compliant rules in the future when it intends to re-register?

**A:** Yes - up until [clause 4 of schedule 1](#) of the new Act comes into force ([Companies Office Guidance](#) suggests this will be October 2023) a society can submit rules under the old Act, meaning those rules do not need to comply with the new Act. However, for the sake of efficiency, we suggest societies looking to update their rules do so in light of the new Act.

**Q13:** In terms of the offences - I tend to do a lot of this sort of filing paperwork without discretion from the Board as it won’t otherwise get done. In terms of the offences - should

employees get specific instructions in writing from the Board when filing paperwork with the Registrar?

**A:** We suggest it is best practice to have the Board sign off on documents before they are filed with the Registrar.

**Q14:** Can a charitable company be formed following a formal conventional company for the purpose of community housing or cooperative housing?

**A:** To become a charitable company, the company will need to adopt a constitution including a charitable purpose. We have written a helpful article on charitable purposes (which you can find [here](#)) and would be happy to discuss your structure with you.

**Q15:** would be interested in more detail on section 94 of the new Act - cannot indemnify officers. What about D&O liability insurance?

**A:** [Section 94](#) of the new Act sets out that a society can only effect insurance for “an officer, a member, or an employee of the society for—

- (a) liability for any act or omission in their capacity as an officer, a member, or an employee of that society; or
- (b) costs incurred by the officer, member, or employee of that society in defending or settling any claim or proceeding relating to that liability.”

[Section 97](#) of the new Act sets out the types of insurance permitted for certain liability or costs.

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

**Q16:** The new Act is clear on what small societies need to do, and small societies are also clearly defined (less than \$50k in assets and expenses), but what about societies that don’t meet the definition of a small society?

**A:** To provide the answer, we contacted the XRB (where Steven is on the XRB Advisory Panel) and received this response - “I have jumped through the trail of definitions in legislation, provided below for your information:

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

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

Legislation trail:

Reporting requirements per the new Act

## **102 Annual financial statements must be prepared and registered**

- (1) Every society must ensure that, within 6 months after the balance date of the society, financial statements are—
  - (a) completed in relation to the society and that balance date; and
  - (b) dated and signed by or on behalf of the society by 2 members of the committee.
- (2) The financial statements must be prepared in accordance with,—
  - (a) in the case of a specified not-for-profit entity, generally accepted accounting practice; or
  - (b) in the case of a small society, any of the following:
    - (i) generally accepted accounting practice; or
    - (ii) a non-GAAP standard that applies for the purposes of this section; or
    - (iii) the requirements set out in section 104; or
  - (c) in any other case, either of the following:
    - (i) generally accepted accounting practice;
    - (ii) a non-GAAP standard that applies for the purposes of this section.

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

**non-GAAP standard** has the same meaning as in section 5(1) of the Financial Reporting Act 2013

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

## **8 Meaning of generally accepted accounting practice**

In this Act, financial statements, group financial statements, a report, or other information complies with **generally accepted accounting practice** only if the report, statements, or information comply with—

- (a) applicable financial reporting standards; and
- (b) in relation to matters for which no provision is made in applicable financial reporting standards, an authoritative notice.

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

**financial reporting standard** means a financial reporting standard issued by the Board under [section 12](#); and includes an amendment to a financial reporting standard that is issued by the Board

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

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

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

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

It is assumed that the majority of incorporated societies will meet this definition. But if for any reason, a society cannot, they will be required to report in accordance with XRB's Tier 2 For-Profit Standards - NZ IFRS with reduced disclosures.

**Q17:** For financial statements does this mean that the charities services 4 tier system of reporting will still be used and then another set of financial statements per the new Act?

**A:** See the answer above.

**Q18:** Will there be a model/sample rules published to guide societies in creating new rules?

**A:** Most likely - as Companies Office had a [constitution builder](#) under the old Act we suspect they will do the same with the new Act.

**Q19:** Do you have templates for dispute resolutions?

**A:** Not yet - we are working alongside our litigation team to develop a well-rounded template for dispute resolutions. Societies can also use [schedule 2](#) of the new Act as a template for dispute resolution clauses.

**Q20:** Date became a member - is this the historical date which may not be known?

**A:** Yes - [section 79](#) of the new Act says that the register must contain the date on which the person became a member. You could ask members what date they became a member, or ask them to approximate the date. The regulations have not come out yet, but they may include some more detail around this. Another option would be to say "member at reregistration date" or something similar.

**Q21:** Is there any part of the Act about where the members need to reside (in NZ only)?

**A:** No - the Act does not specify where members need to reside. However, the new Act says a society must have its registered office in New Zealand ([section 110](#)) and the society's contact person must ordinarily reside in New Zealand ([section 114](#)). The regulations have not come out yet, but they may include some more detail around this.

**Q22:** What is the procedure to change to a charitable trust?

**A:** As we discussed in the talk you are setting up a new entity, which means you would need to set up a charitable trust deed and get trustees. The new charitable trust will also need to get a new IRD number, transfer contracts and employees over to the new entity. Charities Services will let you keep your charities registration number and you will keep your tax status (as long as your rules are charitable) if you also update the IRD. We have helped several societies with this so feel free to reach out if you have any more questions.

**Q23:** Is an incorporated society that has charitable status actually a charitable trust?

**A:** No, it is an incorporated society with charitable status.

**Q24:** Do all registered charities need to also be an incorporated society?

**A:** No - an incorporated society can choose to register as a charity.

**Q25:** How do we define a member? We have an AGM every year and invite everyone on our email list. Different people turn up every year. Our constitution does not require members to be financial members by way of annual subs, donations are voluntary.

**A:** This depends on how your constitution defines a member. Under the new Act members will need to consent to becoming a member and the society will need to keep a register of members, which may make it clear who is an actual member of the society.

**Q26:** Is Community Networks Aotearoa a good source of resources?

**A:** Yes - Community Networks Aotearoa has some great governance resources, which you can find [here](#). The first module on governance is free! They also are linking to our resources, and we had the CE Ros Rice share on a recent Impact Call here: <https://www.parryfield.com/aotearoa-impact-sector-updates/>

**Q27:** Do you have any resources that discuss whether a charitable trust or an incorporated society is better?

**A:** Yes - we have an article on [Charitable Trusts vs Incorporated Societies: Which is best?](#) Additionally, Steven Moe and Craig Fisher (from RSM) wrote an article for the Auckland District Law Society on this topic which you can find [here](#).

**Q28:** Do members have to be financial members?

**A:** No - it is up to the society whether they are paying members.

**Q29:** When will the regulations come out?

**A:** Companies Office has indicated the regulations will come out late next year. You can find out more on their [law changes for incorporated societies page](#).

**Q30:** Is it a challenge to convert from an incorporated society to another entity e.g. a charitable trust?

**A:** It is a relatively straightforward process, with the key stages being the drafting of your new Trust Deed and moving everything from the Society to the Trust. We have done this many times and would be happy to support you at every step of this transition.

**Q31:** Is it \$50,000 profit or turnover to be a small society under the new Act?

**A:** [Section 103\(2\)\(b\)](#) of the new Act explains a society is, in respect of an accounting period, a small society if, -

(i) in each of the 2 preceding accounting periods of the society, the total operating payments of the society are less than \$50,000; and

(ii) as at the balance date of each of the 2 preceding accounting periods, the total current assets of the society are less than \$50,000; and

(iii) at the balance date of the accounting period, the society is not an entity described in section LD 3(2) of the Income Tax Act 2007 (a donee organisation).

**Q32:** Do we need to ask existing members whether they agree to being a member?

**A:** [Section 76](#) of the new Act explains that a person must consent to become a member of a society, so we interpret this as meaning existing members do not need to consent. However, under [section 79](#) of the new Act you will need to record the date on which each person became

a member, so when asking current members for this date you could always check in to make sure they agree to being a member of the society.

**Q33:** In regards to disputes resolution, does this refer to disputes within members/Committee members or within the wider delivery of the organisation (e.g. client complaints etc)?

**A:** [Section 38](#) of the new Act explains it refers to internal disputes, which could be disputes between members, officers and the society.

**Q34:** We've had the same seven members since inception - we are non-compliant with the 10 member minimum and so what do we do?

**A:** To register under the new Act you will need 10 members, so you could ask friends and family whether they are interested in becoming members. Now would also be a great opportunity to consider whether a society structure is right for your entity - please feel free to get in touch with us and we would be happy to talk this through with you.

**Q35:** Presumably new regulations could impact how we might write up our constitutional changes?

**A:** Yes, they could. However, it is still worth considering now what changes you will need to make under the new Act and then considering the changes under regulation when they come out.

**Q36:** Do members need to renew each year at AGM?

**A:** They don't need to under the new Act. However, your society's constitution may have specific requirements for membership renewal that you need to check.

**Q37:** Members have to be natural persons? So members cannot be other charities?

**A:** It is officers who need to be natural persons. Members can be natural persons or bodies corporate. So yes, another charity could be a member.

**Q38:** Can the members of the Governance board be personally and financially liable?

**A:** The short answer is yes they can, but shouldn't be if they keep to the straight and narrow. For example, the offences in [section 154](#), [section 155](#), [section 156](#) and [section 157](#) of the new Act apply directly to officers.

**Q39:** Our incorporated society is also a registered charity. Currently any changes to our constitution and rules needs to be approved by Charities Services. How will this be handled when our new constitution is put together?

**A:** Companies Office hold your rules, so you will have to fill in a form and upload them there as part of the reregistration process. If you are a registered charity (not all incorporated societies are), you will need to upload your rules there as well.

**Q40:** Is it appropriate for a person employed by the incorporated society to be part of the governance body? Would this be a conflict of interest under the new rules?

**A:** It would be possible for the person to be employed, but they shouldn't be the ones making a decision about their own employment. The key is that as long the person employed is declaring conflicts and are not the one making decisions, it will be fine. Your rules may say something about paying officers, too.

**Q41:** What if an organisation thinks being an incorporated society is not for them, so look into being a charitable trust - but do not meet the requirements of being a charitable trust?

**A:** Come and have a chat to us - if you're a registered charity and a society then you will likely be able to meet the requirements under the charitable trust format. When it comes to structure, you want to adopt the tool that will have the maximum impact and cause the least amount of stress. You can also build membership into the charitable trust structure.

**Q42:** Is there a distinction between a member of an incorporated society and a volunteer for an incorporated society?

**A:** They are different because a member is someone who consents to being a member. You may want to clarify with volunteers what they are allowed to say if there is an issue with some of them representing the society - for example, in an agreement for volunteers.

**Q43:** Can membership of incorporated societies be free, if the person consents to being a member?

**A:** Yes - it is up to each society whether membership is free or paid.

**Q44:** If you are a charitable trust then do you need to update your rules?

**A:** You do not need to update your rules under the new Act. However, it may be wise to review your trust deed because of changes to the law brought in by the Trusts Act 2019.

**Q45:** Do you need a common seal under the new Act?

**A:** No - under [section 123](#) of the new Act a common seal is optional.

**Q46:** The register of members that has to be kept, do you have to have a specific/exact start date or can you just say a year?

**A:** Our view is that putting an approximate year will be fine, particularly for people who have been members for a very long time. The regulations have not come out yet, but they may include some more detail around this. Another option would be to say "member at reregistration date" or something similar.

**Q47:** If we adopt new rules, will this affect our charity registration status?

**A:** No it will not, because the new rules will mirror/be similar to your previous rules. The only way it would affect your registration is if you adopted new rules that did not advance charitable purposes.

**Q48:** Do you include life members on the membership register? What about honorary members?

**A:** The new Act doesn't differentiate between different types of members, but only talks about members of the society. For example, the new Act defines a "member" in [section 5](#) as meaning a member of the society. If, for example, your honorary members act more as patrons of the society or your life members hold more of a life membership award, then it may be worth removing the term "member" from the role to avoid confusion.

**Q49:** Is the offences section just codifying what exists in current practice or is it adding new liability?

**A:** Offences under the old Act were the generic offences set out in the Crimes Act 1961. Rather than introducing brand new liability, the new Act has six serious offences that supplement the dishonesty provisions in the Crimes Act. These offences are set out in [subpart 6](#) of the new Act and are more targeted towards societies than those in the Crimes Act.

**Q50:** Can an incorporated society own a company?

**A:** Yes, as long as the society's rules allow for it.

**Q51:** Can you explain the essential differences between an incorporated society and charitable trust?

**A:** One of the key differences is an incorporated society is more of a democracy - it is a member based organisation. By contrast, in a charitable trust the trustees are not elected. However, you can build members into your charitable trust model. We have an article comparing incorporated societies and charitable trusts which you can find [here](#), and are working on a table that illustrates the differences. Charities services also has an article on incorporated societies and charitable trusts, which you can find [here](#).

**Q52:** What, if any, is the requirement to have an audit or a review? The cost for some entities can be heavy in relation to their income or assets.

**A:** We are not accountants, but the requirements for auditing or review depend on whether the society is a small society under [section 103\(2\)\(b\)](#) of the new Act or which [Charities Services Reporting Standard](#) the society falls under.

**Q53:** Are organisations required to include a clause on the act of borrowing in their constitution or is it optional?

**A:** [Section 46](#) of the new Act sets out the committee has all the powers necessary for managing, and for directing and supervising the management of, the operation and affairs of the society. The act of borrowing is caught by these powers and therefore doesn't need to be specified in a society's constitution.

**Q54:** For church groups - are they automatically classified as a charitable trust?

**A:** Stepping back, it's important to remember there are two registrations for charities: the first is with Companies Office, the second is with Charities Services.

Incorporated societies are one legal vehicle that can be used and registered with Companies Office. The others include charitable trusts and companies.

Churches are not automatically registered with Charities Services, you have to apply. There are two key reasons to apply: firstly for the reputation and standing in the community that charities have, secondly for the tax benefits.

**Q55:** Does the new Act have any effect on unincorporated societies?

**A:** No, the new Act only effects incorporated societies. We encourage unincorporated societies to incorporate, as it protects the individuals involved. This is because members are potentially liable in unincorporated societies.

**Q56:** Can members that "count" be non-financial members?

**A:** The new Act doesn't differentiate between different types of members, but only talks about members of the society. For example, the new Act defines a "member" in [section 5](#) as

meaning a member of the society. So a member can be a non-financial member or a financial member - it is up to you!

**Q57:** What options are available under the new Act for a society that has branches of varying sizes and financial means?

**A:** There are several options available that really depend on the individual situation of each society - we have given a general answer below but please get in touch if you want to talk about your situation further.

**A:** Some societies may have incorporated branches under the Incorporated Societies Amendment Act 1920, in which case [clause 17 of schedule 1](#) of the new Act applies.

Option 1: A society with branches may decide for each local branch to be an incorporated society, with all local branches being overseen by the national branch (which is also an incorporated society). The national branch could roll out a standardised template constitution for the new Act that the local branches then tweak, adopt and reregister with. This would ensure each branch has the same processes and procedures in place and they all comply with the new Act. The template constitution could refer back to their affiliation with the national branch and procedures that help concrete the relationship between the entities. An option for smaller branches would be to have the national branch as a member, which for the purpose of counting members would be the equivalent of 3 members.

Option 2: The organisation could be a single incorporated society that operates all of the branches under the same society. This would mean there would be one entity that does all of the accounts, one AGM, one committee etc. The committee would be able to delegate out some of its powers so it is only directing or supervising the management of certain aspects of the society. This would streamline the affairs of the society, but creates more work and liability for the single society.

Option 3: a hybrid approach, where the option 1 approach is taken but there are fewer local branches, so that some of the branches (which are their own legal entity) end up including several of the local branches as they are today (operating like option 2).

**Q58:** What are the risks to current societies moving into one of the new structure options? i.e. are there new risks to property ownership under a society?

**A:** There are several risks/considerations to take into account if a society is moving to a new structure.

It is important to take everyone on the journey with you. That way people understand why the entity structure is changing, feel a part of the process, and makes voting on the issue easier.

You need to do your due diligence and transfer all assets/contracts across to the new entity. This could include property, employment agreements insurance and so forth.

**Q59:** The reporting standards are yet to be defined, right?

**A:** We aren't accountants, but understand that under the new Act societies will use the XRB accounting standards in their financial statements, unless they qualify as a "small society". Companies Office has provided some useful guidance on these standards, including links to other resources, which you can find [here](#).

**Q60:** Are there ways for the charitable trust model to involve membership in a meaningful way but without the implications of incorporated societies?

**A:** Yes, because charitable trusts are very flexible. We're working with incorporated societies who want to maintain aspects of their incorporated society membership model but within a charitable trust structure. We do this by setting out the definition of members and powers of members in the charitable trust deed. We often see membership included in a charitable trust in a religious context. The question to ask yourself is: how much power do you want to give to members?

**Q61:** Please clarify that/if the "old" protections of members and officers from financial liabilities is still in place and unchanged by the new Act and new provisions?

**A:** Yes, the same protections are in place for members and officers under the new Act. The new Act does include officers' duties which exposes them to some liability if they fail to comply with these duties. We discuss officer liability in some detail in **Q9**.

It is important to remember there is a difference between incorporated societies and unincorporated societies. Incorporated societies are a separate legal entity, whereas unincorporated societies are not. This means officers and members of unincorporated societies are exposed to personal liability for the activities of that society.

**Q62:** Any update on the audit requirements or are these in the regulations yet to come?

**A:** Companies Office guidance, which you can find [here](#), explains that the auditing requirements for societies not registered as charities will be set by the regulations (likely coming out in September 2023).

**Q63:** Have the rules for unincorporated societies changed?

**A:** No - they are not covered by the incorporated societies act. They remain unincorporated - BUT it raises a bigger question - is that legal entity type the best because of the personal liability that sits with members of such groups? We think a lot of people would be very surprised to learn that they are potentially personally liable by being part of such a group so we would encourage some questions to be asked e.g. should we set up some charitable trusts to better house what it is we do? Incorporating provides legal protection. Feel free to get in touch if you would like to have a chat about this further.