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Thank you for the opportunity to provide comments on the Law Commission's Issues Paper.

Attached are our responses to the discussion questions however we also provide the following comments.

We recognise the important part that this sector plays in New Zealand society. Grant Thornton has significant experience in dealing with Not for Profit (NFP) organisations in New Zealand, including incorporated societies. Many of our clients fall in the NFP sector so we appreciate many of the practical issues that they face.

We recognise that with so many entities in this sector there are quite diverse perspectives on changes that should be made to the legislation.

Time for change

As is noted in the foreword of the Issues Paper the legislation for incorporated societies is over 100 years old and does not adequately address contemporary concerns or expectations. It is definitely time for review and change. A lot has changed in that time and most other framework legislation has been updated in that time to reflect current rather than historic expectations but this has not been done for incorporated societies.

With changes that are likely to occur within the public sector over the next few years it is also likely that incorporated societies along with other NFPs are likely to take on increased responsibilities. This is another reason to review the statutory framework for these organisations.

Great care needs to be exercised in making any changes to ensure the right balance is achieved in reflecting the necessary modern disciplines within the legislation but in a way that does not choke the energy that exists in the sector. Any policy intervention must have regard to the doctrine of proportionality which means that, 'an official measure must not have any greater effect on private interests than is necessary for the attainment of its objective'. Extensive consultation on draft legislation will provide further opportunity for affected parties to express their views on whether the right balance has been struck.

External financial reporting requirements

External financial reporting is a particular area for which most sectors have experienced significant changes over the last 100 years and more particularly huge changes have occurred in the last 30 years. Yet nothing has changed in the incorporated societies sector in that time. This has to change. However, in implementing change great care should be taken not to create another regime specifically for incorporated societies.

Proposals for change to New Zealand's financial reporting framework have just been released by the External Reporting Board (XRB). Yet there are no proposed changes for incorporated societies that are not charities. Our view is that the same financial reporting and audit regime that is being proposed for charities should also be applied to other non-charity organisations such as incorporated societies. This would ensure that there is appropriate transparency and comparability in the NFP sector.

The XRB proposal for charities, if applied, to incorporated societies would introduce a three tier differential regime that has regard to e.g. size of entity. It would also ensure that the financial reporting terms and definitions that are applied in this sector are the same as those used in other sectors in New Zealand. For example, the control definition that is used to determine what is consolidated in group financial statements is consistent.

Finally

Given the nature of this sector we believe that accompanying any legislative change there should be more external support available to incorporated societies, for example:

- an incorporated societies helpdesk that they can call, and
- availability of guidance documents for the sector.

To prevent another 100 year review period for incorporated societies legislation we suggest that there be a commitment to review of the legislative arrangements for the sector every 10 years.

Please do not hesitate to contact me on any aspect of this submission and if required would be delighted if we could meet with the Law Commission in person if that would be helpful.

Yours sincerely



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Partner and National Service Line Leader, Not For Profit Sector

Reforming the Incorporated Societies Act 1908

Submission from Grant Thornton New Zealand

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Chapter 1 - Introduction		
<ul style="list-style-type: none"> • <i>Why review the 1908 Act: An Act showing its age</i> 	Q1	<p>Do you agree that a review of the legal structure for incorporation of non-profits, and the requirements on those running such societies, would be a useful step in strengthening the non-profit sector?</p>
		<p>Yes.</p> <p>Most sectors in New Zealand have faced relatively frequent change in their legislation over the last 100 years and more so in the last 20-30 years. It seems anomalous that the legislation for incorporated societies is only been reviewed now.</p> <p>Legislation for this sector does need to reflect contemporary expectations on governance and also needs to be sufficiently future proofed to cope with anticipated change.</p>
<ul style="list-style-type: none"> • <i>General principles</i> • <i>The Incorporated Societies Act 1908</i> 	Q2	<p>Is the current limitation of liability sufficient?</p>
		<p>We are not aware of issues with the current limitation of liability.</p>
<ul style="list-style-type: none"> • <i>Other forms of incorporation</i> • <i>Should there be one statute for the incorporation of not-for-profits in New Zealand?</i> • <i>What about unincorporated associations?</i> 	Q3	<p>Do you agree that there should only be one statute for the incorporation of not for-profits in New Zealand? If not, why not?</p>
	Q4	<p>Yes.</p> <p>We believe that it is easier for people that often work across this sector to be operating within one statute. If there are important legislative matters relating to parts of the sector then this can be reflected in separate sections of the statute.</p> <p>Do you think that for some purposes it might be advisable to divide societies between members' benefit and public benefit societies? If so, in what circumstances?</p> <p>We are not certain about the workability of this proposal.</p>

		<p>There are some benefits in doing this – for example where an entity wants to make it clear that they are full public benefit orientated. The practical difficulty in some situations will be trying to determine whether an entity is predominantly member benefit or public benefit oriented. What happens when they have aspects of both public benefit and private benefit? How should they be categorised?</p> <p>Although this distinction is made in some jurisdictions overseas the issue is whether there is sufficient decision precedent available to assist with practical implementation in New Zealand.</p>
	Q5	<p>Should Agricultural and Pastoral Societies be incorporated under the new statute?</p> <p>We do not have any experience relating to Agricultural and Pastoral Societies. However, ideally there should only be one statute for the incorporation of not-for-profits in New Zealand. We would support bringing Agricultural and Pastoral Societies within the scope of the new statute. This should be the starting position that can then be refined following further consultation.</p> <p>Presumably there will be common elements of legislation that should apply to all incorporated societies and if there are specific aspects for eg Agricultural and Pastoral Societies these can be reflected in a separate section of legislation.</p>
	Q6	<p>Can Industrial and Provident Societies that are conducted for business purposes be incorporated under the new statute?</p> <p>Ideally there should only be one statute for the incorporation of not-for-profits in New Zealand so we would suggest that consideration also be given to bringing Industrial and Provident Societies within the new statute. This should be the starting position that can then be refined with further consultation.</p> <p>Presumably there will be common elements of legislation that should apply to all incorporated societies and if there are specific aspects for eg Industrial and Provident Societies these can be reflected in a separate section of legislation.</p>

Chapter 2 – The constitution of societies		
<ul style="list-style-type: none"> <i>What must be in the constitution?</i> 	Q7	<p>Do the New South Wales’ requirements for matters that must be dealt with by a constitution offer a good starting point for New Zealand legislation? Have you any other suggestions about other types of rules that might be required?</p>
		<p>Yes, this seems sensible if there is current evidence that indicates this is still operating well.</p>
<ul style="list-style-type: none"> <i>Providing for model constitutions for societies</i> 	Q8	<p>Australian jurisdictions provide for model rules that an incorporated association is deemed to have accepted unless it expressly decides to derogate from a rule by providing its own version. Do you agree that New Zealand should adopt this approach?</p>
		<p>Yes - we agree with this approach.</p>
		Q9
<p>Yes consideration may need to be given to this.</p>		
Q10	<p>If model rules are implemented, when a rule has been superseded by a new rule, should the society to be deemed to be governed by the new rule as opposed to the old one?</p>	
<p>Yes.</p>		
<ul style="list-style-type: none"> <i>Rules for disciplining members</i> 	Q11	<p>Whereas, in New South Wales, rules are merely required that govern discipline, the Victorian legislation explicitly sets out certain natural justice aspects (for example, the disciplinary procedure is handled by an unbiased decision maker).</p> <p>Do you agree that the Victorian approach is the preferable one for New Zealand? If not, why not?</p>
		<p>Yes – it is desirable that rules of natural justice are laid out.</p>

	Q12	How should the requirement be phrased?
		We have no comments to make on this matter.
<ul style="list-style-type: none"> <i>Number of members needed to incorporate a society</i> 	Q13	<p>Should a society require a minimum number of members, to be incorporated? If yes, what minimum number of members do you consider would be appropriate?</p> <p>The current number is 15. Australian statutes require five.</p> <p>Given that there does not seem to be a good reason for the minimum of 15 and given that in some cases starting with less members for a start-up organisation would be easier we would support the setting of a minimum of 5 people. That said, there may be merit in making this 10 members on the basis that this is the number of shareholders required to opt-in and opt-out of having an audit. If that number is seen sufficient to trigger an audit, then that number should also be sufficient to form an incorporated society.</p>
<ul style="list-style-type: none"> <i>Requirement for committee and particular officers</i> 	Q14	<p>Do you have views on whether it might be advantageous to require societies to form governance committees, or appoint any particular type of officer?</p> <p>We suggest that there should be a minimum governance requirement so there is some form of governance arrangement in operation for all incorporated societies.</p>
<ul style="list-style-type: none"> <i>Names of societies</i> 	Q15	<p>Is it appropriate to move towards a name regime similar to that in the Companies Act?</p> <p>We are not certain that the current Act requirement is broken.</p> <p>We have not reviewed the law but if a Companies Act type regime applied we cannot see how eg the Fair Trading Act would apply in a non-commercial situation.</p>
<ul style="list-style-type: none"> <i>A non-profit enforcement agency or regulator</i> 	Q16	Does your experience suggest that there is a greater role for a regulator of this sector, beyond the role currently played by the Charities Commission, or the Registrar of Incorporated Societies? If so, what should that role be?

		<p>Greater regulation would require evidence of failure with the existing arrangements. We are not aware of issues that would support increased regulatory scrutiny beyond the role currently played by the Charities Commission, or the Registrar of Incorporated Societies.</p> <p>To prevent another 100 year review period for incorporated societies legislation we suggest that there be a required reviews of the legislative arrangements for the sector at least once every 10 years.</p>
<ul style="list-style-type: none"> • <i>A general power to fix the rules</i> 	Q17	<p>Is a general variation power justified? Who would appropriately exercise it and what safeguards ought to exist to prevent its misuse?</p>
		<p>Yes.</p> <p>There needs to be some check over changes to rules. Ideally a third party should vet such changes or else parties should have the ability to have recourse to the Court system.</p>
Chapter 3 – Good governance		
<ul style="list-style-type: none"> • <i>Introduction</i> • <i>A code of committee members' duties</i> 	Q18	<p>Do you agree that the new Act should provide a 'code' of duties that committee members must observe in their decisions?</p>
		<p>Yes.</p>
	Q19	<p>If so, what duties ought to be included in the code?</p>
		<p>The Companies Act 1993 would provide a good starting point for a list of duties to be included in the code, as these are well understood and are actively designed to promote good governance.</p>
Q20	<p>In what respects might the Companies Act obligations need to be altered if included in a new Incorporated Societies Act?</p>	
	<p>We will leave it to incorporated societies to comment on this.</p>	

<ul style="list-style-type: none"> <i>Conflict of Interest rules</i> 	Q21	Our preliminary view is that some minimum standards of conflict of interest rules ought to be part of the new statutory regime, as they are in the Companies Act. Do you agree?
		Yes. Being able to readily demonstrate the pursuit of independence through the presence of conflict of interest rules has always been important, so we support this proposal.
	Q22	Do you agree that there should be a requirement for the disclosure of financial interests? Do you agree there should be a further requirement to disclose other material personal interest?
		Yes we think that there should be a requirement for the disclosure of financial interests. We also think that a requirement to disclose other material personal interest should be included.
	Q23	What should be the consequences of a disclosure of either financial or other material personal interest? The Companies Act requires disclosure only, but there are other options: recusal from voting, or recusal from the meeting. Which do you consider appropriate, and why? Should there be different types of consequences, depending on whether the matter disclosed is financial, or other material personal interest?
		Going beyond the Companies Act approach would seem harsh on this sector. An alternative solution is a differential regime whereby the obligations increase based on size of entity. So perhaps for the very large incorporated societies there should be recusal from voting, or recusal from the meeting, with size criteria aligning with financial reporting requirements.
	Q24	What are your views on the criminalisation of failure to disclose a conflict of interest? Might civil penalties be preferable, for failures under the Act that do not amount to deliberate dishonesty?
		Great care should be exercised in implementing criminal or civil penalties given that many participants in this sector will be volunteers. If the legislation creates a “fear of involvement” then that would be a tragedy. Accountability yes, but structured in a positive rather than a negative way.

		However, failure to disclose should be grounds for dismissal from a governing body.
<ul style="list-style-type: none"> <i>A general offence for the dishonest use of position?</i> 	Q25	Does there need to be a general prohibition on the “dishonest use of position”?
		Yes – however there would also need to be a consequence for breach of this. We are not sure as to the type of consequence that should apply if there is a breach.
<ul style="list-style-type: none"> <i>Banning orders for persistent infringement</i> 	Q26	Would it be useful to allow courts to consider banning individuals from being committee members of incorporated societies in the same way as individuals can be barred from being directors?
		Yes. A key part of any regulatory regime (for example, as per Braithwaite's Pyramid ¹ is the ability to remove certain “actors” from an environment.)
<ul style="list-style-type: none"> <i>A role for registrar in seeking compensation and other sanctions</i> 	Q27	Would enabling the Registrar to take actions on behalf of the society to recover compensation or seek an account of profits be appropriate?
		Yes.
<ul style="list-style-type: none"> <i>Financial reporting</i> 	Q28	Does there need to be greater rigour than currently, around requirements for auditing and appropriate accounting standards? If not, why not?
		Do you agree that the new Act should provide for the imposition of audit and accounting standards by regulation that might be varied in accordance with the size on the society, and how ought that size be judged?
		Yes. External financial reporting is a particular area for which most sectors have experienced significant changes over the last 100 years and more particularly huge changes have occurred in the last 30 years. The

¹ http://www.med.govt.nz/templates/MultipageDocumentPage_30005.aspx

		<p>requirements for incorporated societies are woeful so there needs to be change but it should not be another regime created specifically for incorporated societies.</p> <p>Proposals for change to New Zealand’s financial reporting framework have just been released by the External Reporting Board (XRB). Yet there are no proposed changes for incorporated societies that are not charities. Our view is that the same financial reporting and audit regime that is being proposed for charities should also be applied to other non-charity organisations such as incorporated societies. This would ensure that there is appropriate transparency.</p> <p>The XRB proposal for charities, if applied, to incorporated societies would introduce a three tier differential regime that has regard to eg size of entity. It would also ensure that the financial reporting terms and definitions that are applied in this sector are the same as those used in other sectors in New Zealand. For example, the control definition that is used to determine what is consolidated in group financial statements should be consistent.</p>
Chapter 4 – The legal dealings of an incorporated society		
<ul style="list-style-type: none"> <i>Clarifying legal personality</i> 	Q29	<p>Should the new Act grant incorporated societies the powers and privileges of a natural person, in the same way as is done in the Companies Act?</p> <p>We can see some benefit in granting incorporated societies the powers and privileges of a natural person but take the view that any proposed change needs to be actively supported by the sector.</p>
<ul style="list-style-type: none"> <i>Limiting the application of the ultra vires doctrine</i> 	Q30	<p>Do you agree that the new statute should limit the ultra vires doctrine, and if so, how? Which model is preferred, the Companies Act one, or the New South Wales’ one?</p> <p>Yes.</p> <p>For consistency purposes we would support the Companies Act version.</p>
Chapter 5 – Resolving disputes between members and their societies		

<ul style="list-style-type: none"> • <i>Introduction</i> • <i>Current mechanisms for dealing with complaints and disputes</i> • <i>Providing a way for members to resolve disputes with societies</i> 	Q31	Do you agree that the Victorian model should be adopted, which gives wide powers to the court to make orders, plus the ability to decline to make an order on the grounds that the application was trivial, or the matter could have been more reasonably resolved in other ways?
		We agree that it is far better for all incorporated societies to be able to resolve disputes without having to invoke the courts. But we agree that consideration should be given to adopting the Victorian model provided there is current evidence that it is operating well.
	Q32	Do you agree that the Act should provide for disciplinary procedures to be kept separate from those designed to resolve disputes between members, with members being prevented from taking a grievance procedure until any disciplinary procedures have been concluded?
		Yes.
	Q33	Should there be any limits on the types of cases with which a court can deal? If so, what types, and why?
		We have no comments to make on this matter.
<ul style="list-style-type: none"> • <i>Derivative actions</i> 	Q34	Should the new legislation include provision for derivative actions by society members, similar to section 165 of the Companies Act?
		This should be subject to further consultation as part of the release of draft legislation. We have no particular comments to make on the suitability of this.
	Q35	Do you agree that a general remedial power should be given to the court to do what is “just and equitable”?
		Yes.
<ul style="list-style-type: none"> • <i>Branch societies</i> 	Q36	Have the current provisions about branches created any problems, and how might the provisions be altered to avoid those problems?

		Great care will be needed to ensure that branches of an incorporated society operating in New Zealand work well for the benefit of organisation as a whole. If an organisation has to create a new incorporated society in each region of New Zealand, unnecessary compliance costs will be incurred.
	Q37	Is there still a need for branch societies?
		No.
Chapter 6 – The liquidation and dissolution of societies		
<ul style="list-style-type: none"> <i>How incorporated societies are liquidated or dissolved</i> 	Q38	Have you experienced problems with the liquidation or dissolution provisions?
		As a firm we have no direct experience with this and therefore are unable to provide further insight on this. That said, if there are hundreds of incorporated societies that have gone dormant and are no longer active – there should be a process to readily change this.
	Q39	In what ways can the procedure for liquidation and dissolution be improved?
		We would encourage the Law Commission to directly consult with individuals who have been through this process to comment on ways they believe the current procedures can be improved.
	Q40	In particular, should the double meeting requirement for members' liquidation be altered?
		We do not think that the double meeting requirement should be altered. It provides additional opportunity for members to be aware of proposed changes and to be involved in the process.
<ul style="list-style-type: none"> <i>The distribution of assets to members liquidation</i> 	Q41	What are your views on the division of incorporated societies into two types, requiring them to register for either members' benefit or public benefit? If this is not supported, how should the distribution of assets on dissolution be dealt with? Should it never be permitted?

<ul style="list-style-type: none"> • <i>Status of societies during dissolution by registrar</i> • <i>Distribution of unclaimed assets</i> 		<p><i>As per our response to question 4:</i></p> <p>We are not certain about the workability of this proposal.</p> <p>While we can see there are some benefits in doing this – for example where an entity wants to make it clear that they are full public benefit orientated. The practical difficulty in some situations will be trying to determine whether an entity is predominantly member benefit or public benefit oriented. What happens when they have aspects of both public benefit and private benefit? How should they be categorised?</p> <p>Although this distinction is made in some jurisdictions overseas the issue is whether there is sufficient decision precedent available to assist with practical implementation in New Zealand.</p> <p><i>Regarding distribution of assets</i></p> <p>We think that the key is: -the rules for dissolution are specified when a society is set up, and -the rules are outlined to all new members prior to them signing up as members.</p> <p>This leaves freedom for societies when set up to decide how they operate on possible dissolution.</p>
<ul style="list-style-type: none"> • <i>Merger of Societies</i> 	<p>Q42</p>	<p>Should there be a provision for mergers of societies?</p> <p>Yes.</p>
<p>Chapter 7 – Transitional issues</p>		
	<p>Q43</p>	<p>What are your views on workable transitional arrangements? Do you support the Companies Act approach, which enabled re-registration of existing companies, and provided that those that did not would be deemed to have done so? Should there be a longer transitional period relation to the adoption of model rules?</p> <p>We would support a Companies Act approach with sufficient transition time for societies to work in changes.</p> <p>Q44</p> <p>How can we minimise the costs for societies in the transitional period?</p> <p>Given the nature of this sector we believe that accompanying any legislative change there should be more external support available to</p>

		<p>incorporated societies, for example:</p> <ul style="list-style-type: none">- an incorporated societies helpdesk that they can call, and- availability of guidance documents for the sector.
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