

# **Incorporated Societies Bill – Exposure Draft**



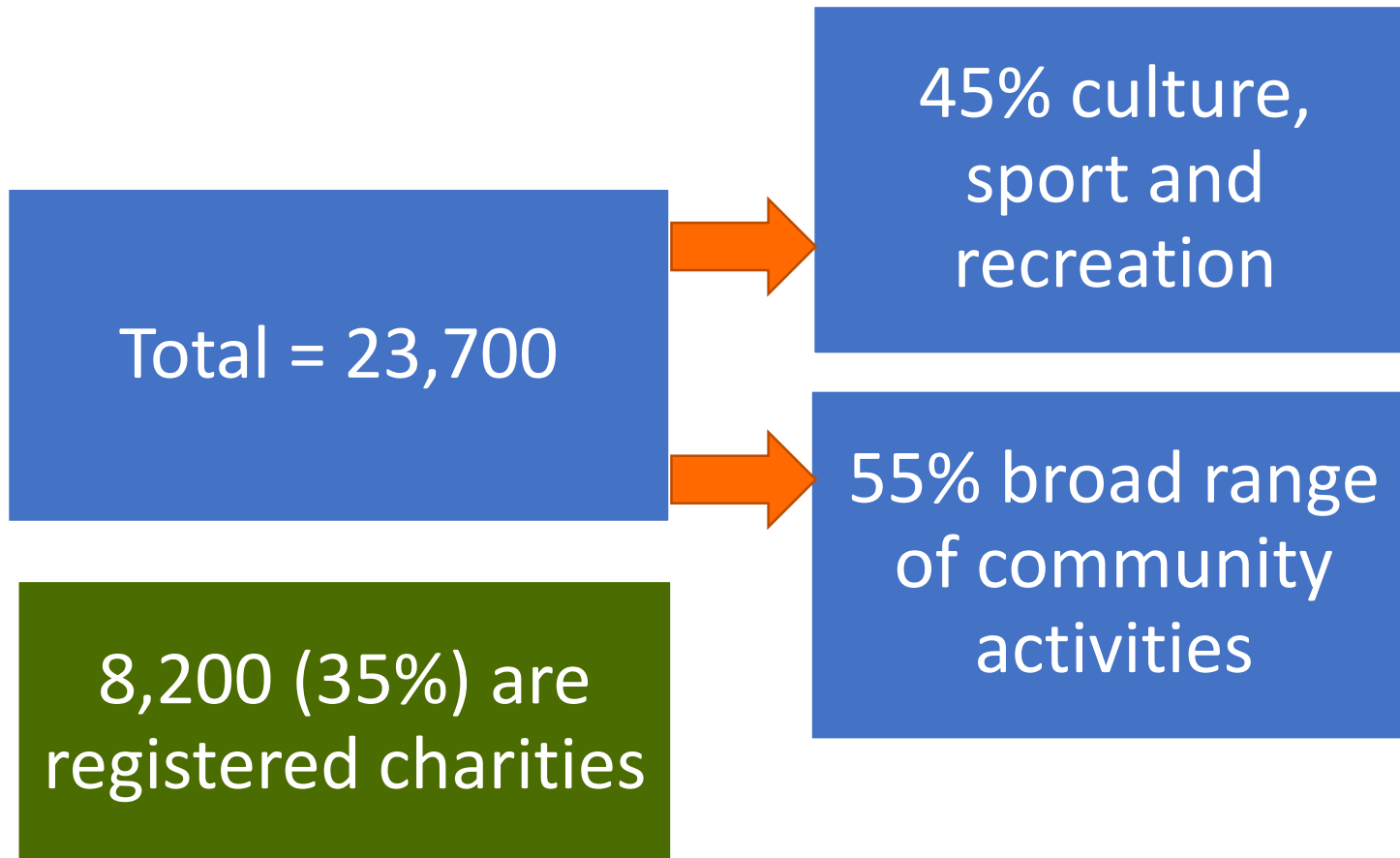
**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
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# What will be covered today

- Overview of incorporated societies in New Zealand
- The problems with the Incorporated Societies Act 1908
- Goals for the replacement Act
- The Exposure Draft of the Incorporated Societies Bill
  - Provisions that reflect the main characteristics of an incorporated society
  - Officers' duties and conflicts of interest
  - What a constitution must contain
  - Enforcement
- Transition – how societies will move from the 1908 Act to the new Act

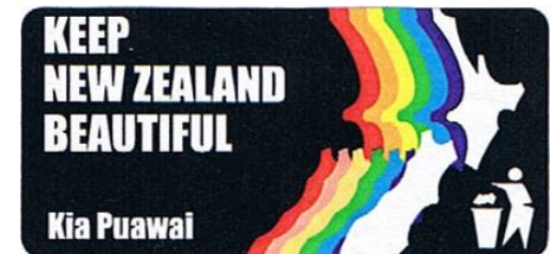


# Incorporated societies in New Zealand





## The fabric of our community



# Problem # 1 – Lack of clarity about officers' obligations



- What are my duties as an officer of a society?
- To whom do I owe those duties?
- How do I know whether I have a conflict of interest?
- If I do have a conflict, what do I do about it?

## Problem # 2

### Dispute resolution



- What should our committee do if we receive a complaint from a member?
- What if a member feels aggrieved about a decision our committee has made, or the actions of another member?

## Problem # 3

### Other lack of guidance



- What are the consequences if our society acts outside its capacities and powers?
- What rights do our members have to access the society's records?
- How do we amalgamate our society with another society?
- What happens to the society's surplus assets if we wind it up?



# Goal 1 – helpful

The [1908] Act falls significantly short when questions are raised about governance, rights and obligations...

Case law in New Zealand is limited and what does exist is old and not necessarily appropriate for today's conditions...

In our experience, members generally want to do their best for their society, are happy to follow rules, and would welcome greater certainty both in terms of internal processes and rights of recourse outside the society





## Goal 2 – principled

### Retain principles of societies

Societies are private bodies that are operated by their members

Societies must not distribute profits or financial benefits to members

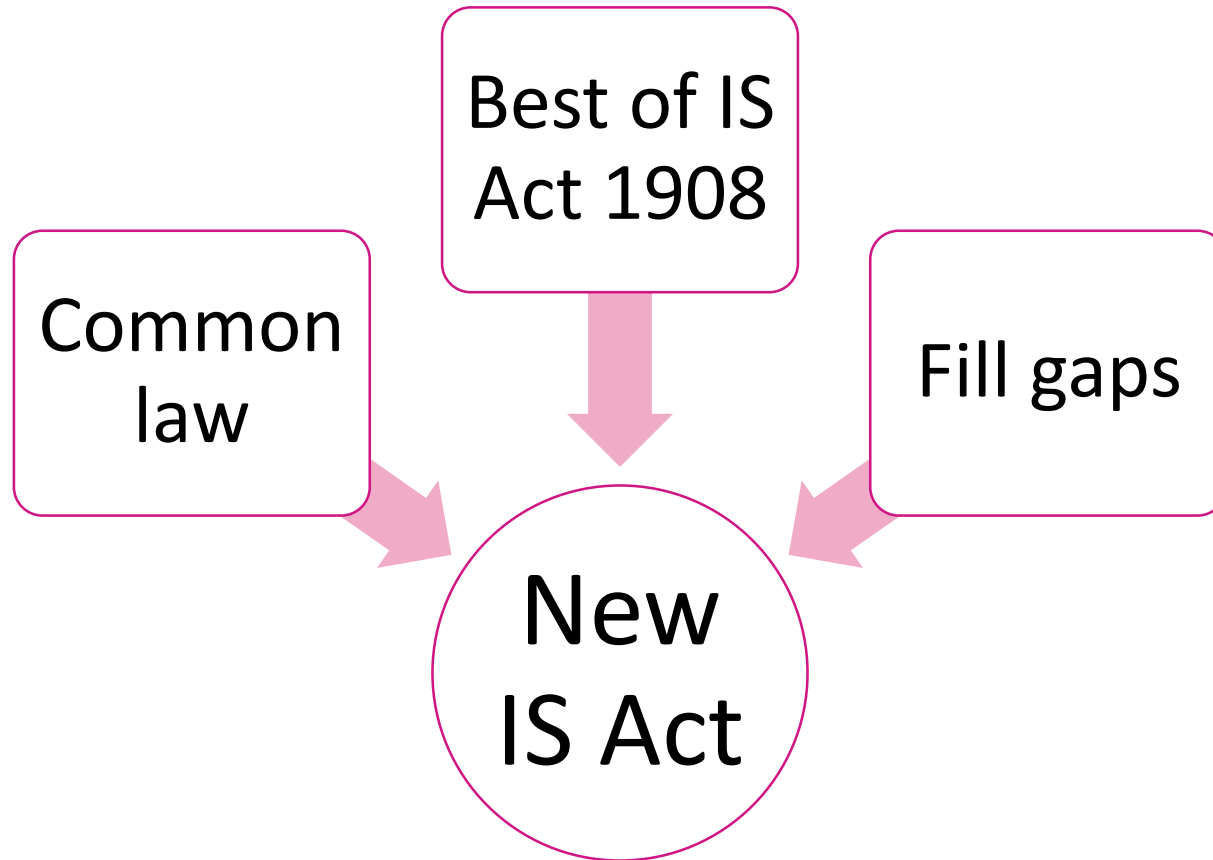
Societies should be free from inappropriate government interference

### Governance principles

Trust  
and  
integrity



# Goal 3 – complete



# Incorporated Societies Bill – exposure draft

Part	Clauses		Page nos.
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6	170-214	Register, regulations, amendments, and other miscellaneous provisions	72-85

The ED of the Bill can be found at <http://www.mbie.govt.nz/info-services/business/business-law/incorporated-societies/incorporated-societies-bill-exposure-draft>

# Exposure Draft of the Incorporated Societies Bill

Schedule no.	Title	Page nos.
1	Transitional, savings, and related provisions	86-94
2	Complaints and grievances provisions	95-96
3	Amendments to other Acts	97-100

# Provisions that reflect the main characteristics of an incorporated society

Clauses  
15 & 21-22

An incorporated society is a separate legal entity that operates for purposes other than the financial gain of its members

A society continues in existence unaffected by the comings and goings of its members or office holders

Clauses 17-18

Incorporation means that a society can enter into contracts and hold assets in its own name

Clause 69

Members of a society are not personally liable for any obligation or liability that the society incurs in its own name



Characteristic 1 – An incorporated society is a separate legal entity

Characteristic 2 – An incorporated society continues in existence unaffected by the comings and goings of its members or office holders

**15 Society is body corporate**

- (1) A society is, from the date of incorporation set out in the certificate of incorporation, a body corporate—
- (a) having perpetual succession; and
  - (b) having the capacity, rights, powers, and privileges provided for in **sub-part 1 of Part 3**.
- (2) A society continues in existence until it is removed from the register.

Compare: 1908 No 212 s 10; 1993 No 105 s 15



# Characteristic 3 – A society can enter into contracts and hold assets in its own name

## 17 Capacity and powers

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

A society can do things a natural person can do...

but is limited by its own constitution



# Characteristic 4 – Members are not personally liable

## 69 Liability of members

- (1) A member is not liable for an obligation of the society by reason only of being a member.
- (2) The liability of a member to the society is limited to—
  - (a) ~~any amount unpaid on the membership of the member:~~
  - (b) any liability expressly provided for in the society's constitution.





# Characteristic 5 – no financial gain for members

## 21 Society must not operate for financial gain

- (1) A society must not be carried on for the financial gain of any of its members.
- (2) An officer of a society commits an offence and is liable on conviction to a fine not exceeding \$50,000 if—
  - (a) the society contravenes **subsection (1)**; and
  - (b) the contravention took place with the officer's authority, permission, or consent.

21(1) Prohibition

21(2) Offence



- 21(2)(b) – a knowledge test
- aimed only at serious contraventions



# Meaning of “financial gain”

(i.e., your society cannot do any of these things)

## 22 Financial gain

- (1) A society (or proposed society) must be treated as having a purpose of financial gain if—
  - (a) it distributes, or may distribute, any gain, profit, dividend, or other financial benefit to any of its members (whether in money or in kind); or
  - (b) it has, or may have, capital that is divided into shares or stock held by its members; or
  - (c) it holds, or may hold, property in which its members have a disposable interest (whether directly, or in the form of shares or stock in the capital of the society or otherwise).
- (2) A society must be treated as being carried on for the financial gain of any of its members if it acts as referred to in any of **paragraphs (a) to (c) of subsection (1)**.



# Financial gain “safe harbours”

(but you can do these things)

- (3) However, a society (or proposed society) does not have a purpose of financial gain, and is not being carried on for the financial gain of any of its members, merely because it will or may—
  - (a) engage in trade:
  - (b) pay a not-for-profit member for matters that are incidental to the purposes of the society (*see* **subsection (4)**):
  - (c) reimburse a member for reasonable expenses legitimately incurred on behalf of the society or while pursuing the society’s purposes:
  - (d) provide benefits to members of the public or of a class of the public and those persons include members of the society or their families:
  - (e) pay a member a salary or wages or other payments for services on arm’s length terms (*see* **subsection (5)**):
  - (f) enter into any other transaction with a member on arm’s length terms (*see* **subsection (5)**):
  - (g) provide a member with incidental benefits (for example, trophies, prizes, or discounts on products or services) in accordance with the purposes of the society.



# Officers' duties



“People are often elected onto committees without a clear understanding of the responsibilities that being an officer of a society entails.”



## Officers' duties and conflicts of interest

“The current [Act] lacks any guidance as to the obligations of those running societies, although case law provides some help.

The new statute should contain both a list of officers' duties along the lines of directors' duties in the Companies Act, and a set of rules governing the disclosure and management of conflicts of interest”

*A New Act for Incorporated Societies, 2013 (p. 6)*

# Officers' duties (clauses 48-53)

- 48. To act in good faith and in what the officer believes to be the best interests of the society
- 49. To exercise a power for a proper purpose
- 50. To not act, or agree to the society acting, in a manner that contravenes the Act or the constitution of the society
- 51. To exercise the care and diligence that a reasonable person with the same responsibilities would exercise in the same circumstances
- 52. To not agree to the activities of the society being carried on in a manner likely to create a substantial risk of serious loss to the society's creditors
- 53. To not agree to the society incurring an obligation unless the officer believes at the time on reasonable grounds that the society will be able to perform the obligation when it is required to do so



# Officers' duties owed to society

## 55 Duties owed to society

The duties in **sections 48 to 53** are owed to the society (rather than to members).

Compare: 1993 No 105 s 169(3)

An incorporated society is a legal person that has perpetual succession, which has:

- rights, powers and privileges
- obligations

Human beings are needed to exercise the rights, powers and privileges, and discharge the obligations



# Court orders enforcing officers' duties – clause 98

A court may make one or more orders against an officer or former officer if it is satisfied that the person has breached or is likely to breach a duty:

- (a) An order declaring and enforcing the duty
- (b) ...
- (c) ...
- (d) An order for the officer to compensate the society (in whole or in part) for the loss or damage suffered by the society because of the breach
- (e) ...
- (f) ...



# Indemnities or insurance for officers, members or employees – clauses 77-80

## Clause 78

- For an officer, an indemnity is a commitment by the society:
  - To assume liability to any person other than the society for an act or omission in their capacity as an officer
  - To meet the costs the officer incurs in defending or settling a claim or proceeding relating to that liability
- An officer cannot be indemnified:
  - For criminal acts
  - For breaching the duties to the society itself

## Clause 80

- An indemnification can only be given if the society's constitution expressly authorises it

# Qualifications of officers

## Disqualifications (clause 39(2))

- A person under 16 years of age
- An undischarged bankrupt
- A person disqualified, banned or subject to certain other types of orders under various Acts (e.g. Companies Act, Charities Act)
- A person convicted of certain offences (e.g. crimes involving dishonesty, tax evasion, money laundering) and sentenced within the last 7 years

## Exceptions (clause 40)

- Registrar may waive disqualifying factors in relation to a particular person and society

## Officers' duties and conflicts of interest

“The current legislation lacks any guidance as to the obligations of those running societies, although case law provides some help.

The new statute should contain both a list of officers' duties along the lines of directors' duties in the Companies Act, and a set of rules governing the disclosure and management of conflicts of interest”

*A New Act for Incorporated Societies, 2013 (p. 6)*

# **Conflicts of interest**

## **(clauses 56-65)**

### **The main question**

What should happen when a person is in a position to derive personal benefit from actions or decisions made in their official capacity?

### **The answer**

The interests of the society trump the private interests of the officer



# If you are an officer and have a conflict of interest

Clause 57 states that:

- You must disclose the conflict to the committee in a timely manner
- The conflict must be noted in an interests register

Clause 58 says:

- Don't vote or take part in the decision
- Don't sign any documents relating to the transaction
- You may take part in the discussion, unless the committee decides otherwise

Clause 65 says the interests register must be available for inspection by officers of the society

# What constitution must contain (clause 24(1))

- a. Name
- b. Purposes
- c. Becoming a member
- d. Ceasing to be a member
- e. Keeping register up to date
- f. Access to register
- g. Committee's composition, roles and functions
- h. Entering into legal obligations
- i. Control and use of common seal (if it has one)
- j. Procedures for resolving internal disputes**
- k. Arrangements and requirements for general meetings
- l. Method for amending constitution
- m. Nomination of a NFP entity or class of NFPs for distributing surplus assets**



## Distribution of surplus assets

Clause 161(2) states that the surplus assets of a society that is liquidated or deregistered must be given to one or more other not-for-profit entities



# The requirement to nominate a NFP entity to receive surplus assets is included because...

## Principles of societies

Societies are private bodies that are operated by their members

Societies should not distribute profits or financial benefits to members

Societies should be free from inappropriate government interference





## Clause 24(4)

### Definition of “not-for-profit entity”



- (4) In this Act, **not-for-profit entity** means any of the following:
- (a) a society incorporated under this Act;
  - (b) a charitable entity within the meaning of the Charities Act 2005;
  - (c) a society, institution, association, organisation, or trust that is not carried on for the private benefit of an individual, and whose funds are applied entirely or mainly for benevolent, philanthropic, cultural, or public purposes in New Zealand.



# Internal disputes

Under case law, societies have obligations to resolve or participate in the resolution of disputes or grievances that may arise in their society



# WYNNWILLIAMS

## LAWYERS

“It is very common for disputes to arise between members of societies. It is also quite common for a society’s rules to be inadequate to properly deal with those disputes. This creates uncertainty as to how the dispute can be properly resolved both from the society and a member’s point of view. The consequence is numerous complaints by members that they haven’t been treated fairly or been properly heard.”



# Resolving internal disputes

## 24 What constitution must contain

- (1) The constitution must contain rules regarding the following:
  - (j) procedures for resolving disputes between members (in their capacity as members) and between members and the society, including procedures for investigating and dealing with—
    - (i) the grievances of members relating to their rights and interests as members; and
    - (ii) complaints concerning the misconduct or discipline of members;



# Procedures for resolving internal disputes

- reasonable opportunity to be heard
- no bias

## **31 Procedures in constitution for grievances and complaints**

- (1) The procedures referred to in **section 24(1)(i)** must—
  - (a) be consistent with the rules of natural justice; and
  - (b) at a minimum, comply with the requirements of **Schedule 2**.
- (2) See **subpart 1 of Part 4** (which provides for a court to make orders enforcing a society's constitution, including the procedures in the constitution for grievances and complaints).



## Schedule 2 – Complaints and grievances

see pages 95-96 of the Exposure Draft

Clause	Title of clause
1	Complaints: member's right to be heard
2	Grievances: member's right to be heard
3	Investigating and determining complaint or grievance
4	Society may decide not to progress complaint or grievance
5	Society may refer complaint to subcommittee or other investigator
6	Decision makers



# Schedule 2 – Member’s right to be heard

## 1 Complaints: member’s right to be heard

- (1) If a society considers a complaint, or institutes a disciplinary procedure, regarding alleged misconduct of a member, the member has a right to be heard before the complaint or procedure is resolved or any outcome is determined.
- (2) Without limiting the manner in which a member may be given a right to be heard, a member must be taken to have been given the right if—
  - (a) the member is fairly advised of all allegations concerning the member, with sufficient details and time given to enable the member to prepare a response; and
  - (b) the member has a reasonable opportunity to be heard in writing or at an oral hearing (if one is held); and
  - (c) an oral hearing is held if the decision maker considers that an oral hearing is needed to ensure an adequate hearing; and
  - (d) an oral hearing (if any) is held before the decision maker and the member’s written statement or submissions are considered by the decision maker.



# Part 4

## Enforcement through the courts



Ideally societies will resolve their internal disputes through the new dispute resolution system, but...





# Part 4 – Enforcement

Subpart	Clauses	Subject
1	95-97	Court orders enforcing society's constitution or bylaws
2	98-103	Court orders enforcing officers' duties
3	104-105	Prejudiced members
4	106-108	Financial gain
5	109-112	Miscellaneous provisions relating to applications
6	113-124	Offences
7	125-127	Banning orders

- Subparts 1 to 4 – Overwhelmingly for societies, members and former members
- Subparts 6 to 7 – Registrar of Incorporated Societies



# **Registrar only has very limited powers to apply for court orders under subparts 1-4 & 7**

- Clause 109(1) states that the Registrar may only apply if she considers “that it is in the public interest to do so”
- Clause 109(2) lists matters the Registrar must consider in determining whether the public interest test is met
  - Will it be consistent with society principles?
    - self-governing
    - freedom from inappropriate government interference
  - Will it have an impact on conduct and governance of societies in general?
  - Is it a good use of the Registrar’s resources?
  - Does it involve matters of general significance?
  - How large is the society, what does it do, and does it receive public funding?

# Model constitution

The Law Commission recommended that:

- the Bill should enable a model constitution to be made in regulations
- the adoption of the model constitution should be deemed to be sufficient compliance with the requirements for the content of constitutions

➤ The Bill does not do it this way

# Standard provisions for constitutions

- To be used primarily as a backstop for existing societies that fail to lodge constitutions that comply with the new Act
- We want to encourage societies to think about their constitutions rather than adopt the standard provisions
- Guidance material will be placed on the Registrar's website

# Transition for societies and branches that are registered at the time the Bill is enacted

Type of entity	Royal Assent (2018 at earliest)	First transition date (2020 at earliest)	Second transition date (2022 at earliest)
Society registered under the 1908 Act	All transitioning entities remain under existing Acts	All transitioning entities deemed to be registered under New Act	New Act applies in full
Branch registered under the 1920 Amendment Act	Two years to review existing constitution	But some provisions will not apply, e.g.	Registrar can impose standard constitutional provisions if a society's constitution does not comply with the new Act
Charitable society registered under the Charitable Trusts Act 1957	Registrar will post guidance material on website	<ul style="list-style-type: none"> <li>• clause 24 – What a constitution must contain</li> <li>• clause 39 – Qualifications of officers</li> </ul>	



# What if a group of people want to register a new society during the four year transition?

When?	Permitted	Not permitted
For the first few months after Royal Assent <ul style="list-style-type: none"><li>perhaps 6 months</li><li>perhaps starting in 2018 or 2019</li></ul>	All new societies will need to register under the Incorporated Societies Act 1908	Societies will not be able to register under the <ul style="list-style-type: none"><li>Charitable Trusts Act 1957</li><li>new Incorporated Societies Act</li></ul>
Thereafter <ul style="list-style-type: none"><li>perhaps from a date in 2019</li></ul>	All new societies will need to register under the new Incorporated Societies Act	Societies will not be able to register under the <ul style="list-style-type: none"><li>Incorporated Societies Act 1908</li><li>Charitable Trusts Act 1957</li></ul>

# **Agricultural and Pastoral Societies Act 1908**

Public Act    1908 No 4  
Date of assent    4 August 1908

- Should A&P societies continue to operate under separate legislation, or should they be migrated to the new Incorporated Societies Act?
- Discussed in paragraphs 169-189 of MBIE's Request for Submissions

# Recap – goals

## Helpful

- Greater certainty about
  - internal processes
  - rights of recourse

## Principled

- Principles of societies
  - private/operated by members
  - no financial benefits for members
  - no inappropriate government interference
- Governance principles
  - trust
  - integrity

## Complete

- Best of 1908 Act
- Common law
- Fill gaps





# Matters to note and consider

- Further information is available on the MBIE website at:  
<http://www.mbie.govt.nz/info-services/business/business-law/incorporated-societies/incorporated-societies-bill-exposure-draft>
- Consider whether you wish to submit on the exposure draft of the Bill
  - Closing date is 30 June 2016
  - Send questions and submissions to [societies@mbie.govt.nz](mailto:societies@mbie.govt.nz)
- Revise your society's constitution by 2020
  - Focus particularly on:
    - dispute resolution
    - naming a NFP entity or class of entity for distribution of surplus assets
  - Consider reviewing the whole constitution. Some clauses may be out-of-date, e.g.
    - list of objects or purposes
  - You do not have to wait until the Bill is enacted
- The Registrar will place guidance material on her website closer to the time

