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The development of incorporated structures for charities: A 100-year comparison of England and New Zealand

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Abstract

This article contrasts the emergence of two specific incorporated structures for non-profit organizations which came into being more than a century apart. We compare the ability for charities to form as “incorporated societies” under the *New Zealand Incorporated Societies Act* 1908 (effective from 1909), and to form as “charitable incorporated organizations” (CIOs), which were enacted in England and Wales under the *Charities Act* 2006 (effective from 2013). The article emphasizes the need for charitable non-profit organizations to incorporate for effective operation. This issue is rarely discussed, but the chosen legal form brings specific financial accounting obligations, affecting organizations' accountability to third parties. Taking a comparative international history approach and drawing on a range of sources, we explore the socio-legal processes which led to the relevant legislation in each country. In particular, this diffusion study investigates why a specific corporate form for charitable non-profit organizations came into effect more than 100 years later in England as compared to New Zealand, with “place” emerging as the most significant comparative dimension.

Keywords

accounting and accountability, charitable incorporated organizations (CIOs), charities, incorporated societies

1. Introduction

Non-profit organizations (NPOs) by definition require formal structures. But within the extensive literature on governance in the third sector, few authors provide more than a brief discussion (if any) of these entities' legal structures and the coincident accounting. In choosing the legal structure for an NPO critical issues must be considered, including whether it will hold assets, enter into contracts or borrow in its own name, and the trustees'/ members' legal liability. Different legal forms engender specific accounting and financial reporting obligations and dissimilar protection of creditors if the organization fails. We redress the paucity of examination of these important issues and undertake a historical analysis contrasting the emergence of two specific incorporated structures for NPOs which came into being more than a century apart in two different jurisdictions. Our focus is on one NPO sub-sector: charities, and their legal form and regulation in England and Wales (hereinafter, England) and its former colony, New Zealand. In addition to highlighting the drawbacks and benefits of incorporation, this article asks what has motivated the passing of an Act to allow associations with charitable aims to incorporate in each jurisdiction? Taking a comparative international history approach, we compare the ability for charities to form as “incorporated societies” under the *Incorporated Societies Act* 1908 of New Zealand, which came into effect from 1909 and “charitable incorporated organizations” (CIOs), which were enacted in England under the *Charities Act* 2006, and finally came into being in 2013. While the English solution is a recent phenomenon in that jurisdiction, in contrast, New Zealand's *Incorporated Societies Act* 1908 “has been a New Zealand success story. When it was enacted it was regarded as world leading and innovative” (New Zealand Law Commission, 2013: iv).

From an accounting viewpoint, a comparative international history is the “transnational study of the advent, development and influence of accounting bodies, conventions, ideas, practices and rules” (Carnegie and Napier, 2002: 694). Carnegie and Napier (2012) note that there remains a lack of comparative accounting international history. Using this approach, we focus on the development of charity-related incorporated structures, the diffusion of accounting and the associated implications of these structures in two countries at different points in time. Accounting, auditing and

accountability requirements for charities in England and New Zealand depend not just on an organization's charitable status but also on its legal form. Therefore, in addition to tracing socio-legal processes and accounting obligations, this article provides an important analysis of the balancing of charitable regulation and corporate legal forms in the two jurisdictions.

In focusing specifically on NPOs which are granted charitable recognition, this article does not consider other types of NPOs such as private clubs (e.g. social clubs or sports clubs whose facilities are limited to a private membership and do not have charity status), nor trade unions, nor political parties. The term "charity" has a slightly different meaning between England and New Zealand, but this is not significant for the analysis in the article. In both cases, the term refers to an entity established for specific purposes which are recognized as charitable in law and meet a public benefit requirement;¹ both definitions are rooted in the English 1601 *Statute of Charitable Uses* (O'Halloran et al., 2010: 13). We focus particularly on charities which have a membership beyond the trustees or board members.

It is recognized that other jurisdictions make available specific incorporated structures for charitable and other NPOs; in particular most countries of continental Europe have offered legal recognition to associations since the first half of the twentieth century. In some instances, such as the 1901 French law,² these provisions pre-date the legislation in New Zealand. Even within the UK, Scotland implemented a form of CIO in 2011, slightly ahead of England.³ However, the focus of this article is specifically on charitable NPOs, and with their similar antecedents in charity law, England and New Zealand offer a sharply focused lens for exploring the temporal and spatial differences in the emergence of specific incorporated structures.

Whilst historically most charities in England and in NZ were unincorporated, the article argues that charitable NPOs need a corporate legal form in order to operate effectively. Drawing on a wide range of legal and policy primary and secondary sources, including records of parliamentary debates, legislation, and regulatory and policy documents, the article explores the socio-legal processes which led to the relevant legislation in each jurisdiction. In particular, it asks why a specific corporate form for charitable NPOs only came into effect more than 100 years later in England as compared to New Zealand. This diffusion analysis (see section 5) utilizes the seven dimensions proposed by Carnegie and Napier's (2002) comparative international history approach to analyse what drove the implementation of incorporated structures in both jurisdictions. The dimensions are: place, period, people, propagation, products, profession and practices.

Five further sections comprise this article. The next section reviews arguments for and against incorporation in charities. Sections 3 and 4 present the situations and socio-legal processes which led to the respective legislation in New Zealand and England. In section 5 the comparative data is analysed and a final section provides conclusions and indicates opportunities for further research.

2. Why should charities incorporate?

2.1 Charities' structures

A basic human desire is to associate with others (Atkin, 1976; New Zealand Law Commission, 2013). White (1972) notes that, in some jurisdictions it is illegal to associate; however, our discussion in this article concerns "modern democracies" where this is not typically so.⁴ In exercising their right to associate, formal associations develop their own culture and rules to govern members' behaviour. However, the legal environment is an important component in determining social groups' behaviour, and "the principal device through which the law has developed to deal with associations is that of incorporation" (Atkin, 1976: IX). Incorporation provides a legal personality for the association allowing it to act as an entity in its own right (French et al., 2008).⁵ In business, the most common association is the limited liability company, with companies' activities and transactions being defined by the boundaries of the legal entity. A number of benefits ensue, including the corporate veil and the ability to raise funds through shares and to define the reporting entity for accounting purposes. Incorporation separates the "personality" of the entity from its members/shareholders, with the corporate veil protecting them from personal liability for its debts and other obligations. Further, following incorporation, shares in the company can be sold to investors in order for the company to garner sufficient financial resources to operate and to grow. In addition, shareholders can use the financial accounts of a company to make decisions about supplying further resources to the organization, and also to ascertain whether the directors (or board members) have discharged accountability adequately.

In England and New Zealand it is possible to establish a company with a non-profit objective. In England this is normally as a company limited by guarantee (CLG) – whose members give a small financial guarantee (rather than taking shares). However, in New Zealand such a company will have shareholders.⁶ In both countries charities and other NPOs may use a company structure,⁷ however, they will be regulated by all the apparatus of company law and the consequent onerous and complex accounting and assurance requirements.

Despite the benefits of the company form, charities seldom have owners in the legal sense. Charities' members do not belong to the organization because they seek a financial return; rather they want to achieve goals not achievable as individuals. In this respect, member-based charities are classic non-owned organizations. Charities can be thought of as being “organic”; established to deal with particular issues. As a majority of those involved in the governance and the operation of these charities are volunteers, they may eschew formal organization of their efforts. Members may also desire flexibility to enable charities to grow, or to reduce without the need to encounter complicated legal processes.

Yet, while charities may be organic and flexible, members will not want their personal property or reputations to be negatively impacted by charities' operations and liabilities. Incorporation limits members' liability, thus minimizing this risk. It is unsurprising therefore, that where incorporation is available, many associations take the opportunity to incorporate and provide protection to their members. An incorporated body can:

- hold property;
- sue and be sued;
- enter into contracts; and
- continue to exist until brought to an end as the relevant Act provides.

An empowering Act may also specify accounting and auditing obligations, and, if it cannot meet its obligations, an incorporated body will be subject to a specific dissolution or insolvency framework. Nevertheless, in England, the vast majority of charitable trusts are unincorporated, and trust property is therefore held by individual trustees with unlimited personal liability. Sometimes a corporate trustee is appointed for this purpose. Since the English *Charities Act* 1960, the trustees of a charitable trust have been able to apply to the Charity Commission for a Certificate of Incorporation (*Charities Act*, 2011: s.251), but the legislation is specific that the incorporation does not affect the trustees' liability, so it is not widely used (Morgan, 2013: 52–54). Indeed the Charity Commission will grant incorporation of trustees on this basis only if it is satisfied that other options (such as a charitable company or CIO) are inappropriate.

However, in New Zealand, charitable trusts are routinely incorporated under the current *Charitable Trusts Act* 1957, and the insolvency framework for these Trusts follows company law. Even prior to the 1957 Act, a charity's board of trustees was deemed to have perpetual succession under the *Religious, Charitable and Educational Trust Boards Incorporation Act* 1884 (see below). Therefore, since the late nineteenth century, charitable trustees in New Zealand that incorporate as a board, have been relieved of some of the problems of unincorporated status experienced by their English counterparts. The next sub-section highlights the pitfalls of a lack of incorporation in contrast to the benefits, highlighting the general issues, whilst recognizing that different jurisdictions may have structures or tools to overcome these.

2.2 Issues arising from being an unincorporated charity

A number of issues arise when charities do not incorporate, particularly when they are memberbased. Unincorporated organizations have no legal existence apart from their members, with the relationship between members and the unincorporated association being conceived as a series of (unwritten) contracts between each individual member and all of the other members of the association (White, 1972; Atkin, 1976). There are five key issues arising for unincorporated charities: holding of property, members' issues, stakeholders (in respect of debts and obligations), public policy, and accounting and accountability.

As is it is a legal “nonentity”, an unincorporated association cannot hold property. Accordingly, many charities in New Zealand form trusts to do so, separating the trust from its members, with the property and income of these trusts being deemed to be for the benefit of the current members of the association (see above) (Sherry, 1970; Atkin, 1976). But in England, having trustees hold land

in trust is “extremely problematical” (Huntly, 2000), due to the need to change trustees when these people end their association with the charity. If the legal recording of the trustees is not changed, and the old trustees cannot be contacted, it makes it very difficult for the new trustees to sell the property. In contrast, an incorporated charity will not be affected by retirements and appointments, as it can hold property in its name, enter into obligations and can be sued in the event of default. Member-related issues also cause difficulties in unincorporated charities. A dispute may occur when a member is aggrieved after being expelled from a society (Brooks, 1968; Atkin, 1976). Alternatively, dissatisfied individuals may seek to terminate or dissolve the society; yet other members may not agree to such a move, if they feel “they have not yet recouped sufficient benefits from the society or because they believe that the society still has an important function to perform” (Atkin, 1976: XIV). In these cases, the courts could be called upon to mediate between members, although Sherry (1970) notes that courts do so reluctantly. When courts do broker a solution, for this or issues related to poor governance, members must pay the not-insignificant costs. Without a cost-effective means for members to bring a complaint, governors (board members) may act outside of any rules that the members have developed, notwithstanding conflicts of interest. They could even distribute surplus assets in whichever manner they prefer, rather than for the charity’s objectives.

Fundamental issues of accountability also arise for other stakeholders of unincorporated charities, particularly in relation to debts and obligations. When the charity authorizes a member to enter into a contract, the charity’s member acts as both its agent and its principal because the charity cannot be bound due to a lack of separate legal personality (Atkin, 1976). The member may be held jointly and severally liable for such a contract (Sherry, 1970), but in practice it is extremely difficult for a creditor to pursue actions against individual trustees or members, due to the complex practicalities of identifying the relevant individuals, and deciding which ones have sufficient personal assets to be worth pursuing. In respect of creditors, the unincorporated charity’s liability should be limited to the value of the common fund and any unpaid member subscriptions (Atkin, 1976). The challenges of recouping a debt means creditors may not wish to deal with unincorporated charities, and we note that the New Zealand Government is extremely reluctant to enter into contracts with unincorporated associations (The Treasury, 2009).⁸ The unincorporated structure restricts the types of funds that can be raised, making it unlikely that the charity could borrow or enter into a lease and meaning that it cannot provide a guarantee as it does not have a separate legal personality (Sherry, 1970; Atkin, 1976).

Public policy-makers are also a stakeholder for which unincorporated charities may be problematic. These charities are more likely to operate under the radar of the public gaze, meaning any support that these charities offer in the public good could be unnoticed in policy-making. In addition, in some countries it appears that taxation authorities are concerned that unincorporated charities may be (inappropriately) benefiting from tax concessions and there may be a lack of accountability to members and the public for those tax concessions. For example, in developing the Australian Charities and Not-for-profits Commission as a regulator, there was concern that “unincorporated associations, were unregulated despite access to public donations, government grants and/or tax concessions” (Council of Australian Governments, 2013: 13).

These various stakeholders are also interested in unincorporated charities’ accounting and accountability. Charities’ regulators require registered charities to meet specific accounting, auditing and accountability arrangements (see sections 3 and 4 below) however, the lack of specific legal form may mean that the resultant financial reports are less than optimal. An unincorporated charity must assume certain boundaries to comprise the reporting entity. Which transactions are undertaken within the entity and which are between members operating in their personal capacity? The manner in which these questions are addressed will directly affect the quality of the financial reporting of an unincorporated entity and, thus, its discharge of accountability to various stakeholders.

Major problems arise for an unincorporated charity which is unable to meet its obligations. An unincorporated organization cannot technically be insolvent, because there is no entity that can be declared bankrupt or insolvent. Rather, the members or trustees have a personal liability to third parties where they have entered into binding obligations. Further, for a public sector body, the reputational damage from pursuing voluntary charity trustees can make action impossible in practice. By contrast, if the charity is incorporated, a statutory insolvency framework will apply, and whilst creditors will take losses due to the corporate entity having insufficient assets, they have the benefit of clear processes – including the right to seek a compulsory liquidation if the members do

not co-operate. In summary, unincorporated charities enjoy flexibility, not least in that no formal process is needed to dissolve an unincorporated charity when its funds are fully spent, as there is no “body” to dissolve. But they may face operating difficulties; for instance in withstanding members’ grievances or requests to wind-up, to prove corporate (rather than individual) responsibility for debt, providing financial statements, and in the owning of property. One answer to these problems argued for by Atkin (1976) is that the law could be amended to reflect the needs of creditors and members of unincorporated charities; however, this does not seem to have occurred. Another option is for the charity to incorporate, if the law allows. In England, unless a charity wished to incorporate as a company (with all its associated costs) or through a Royal Charter, no effective form of incorporation with limited liability was available until 2013. However in New Zealand, this option became available in 1908 with the *Incorporated Societies Act* which was considered to be “world leading and innovative” at the time (New Zealand, Law Commission, 2013: iv).⁹

3. History and rationale of incorporated charities in New Zealand

As at April 2014, of the 27,000 charities registered with the New Zealand Charities registrar, 26 per cent are Incorporated Societies, 35 per cent are Charitable Trust Boards, 0.03 per cent are Companies and the remaining 39 per cent are unincorporated (Shields, 2014). The *Incorporated Societies Act* of 1908 provided a means for charities’ members to enjoy the corporate veil with formal registration for public purposes (even before the *Charities Act* 2005). In return for registration, incorporated societies were required to meet legislated accounting and accountability requirements, such as needing to file financial accounts with a Registrar. This Act, in part, was based on the *Unclassified Societies Registration Act* of 1895 and the *Companies Act* of 1903. Prior to the *Incorporated Societies Act* 1908, charities could also incorporate under the *Companies Acts* (1882, 1903), although this was considered to be a costly and complex option. Alternatively, as noted below, they could operate under the various charitable trust acts. However, these Acts did not provide the advantages of incorporation.

This section examines the historical factors and antecedents leading to the *New Zealand Incorporated Societies Act* 1908. First, it presents the early background to charities’ enactments in New Zealand; the Religious, Charitable and Educational Trusts and associated Acts (1856, 1865, 1884 & 1886), and the *Charitable Funds Appropriation Act* 1871. This is followed by the consideration of the *Companies Acts* (1882, 1903). It then examines the first milestone in general voluntary organization legislation – the *Unclassified Societies Registration Act* 1895 – and the context for that legislation, which ultimately led, 13 years later, to the *Incorporated Societies Act* 1908.

3.1 Charities trust legislation

British common law based on the English 1601 *Statute of Charitable Uses* provided the antecedents of the early New Zealand charities law following the 1840 Treaty of Waitangi (Cordery and Baskerville, 2007). However, the law was adapted to reflect the New Zealand colonial experience and the need for the settlers to be self-reliant and look after themselves in this new country (O’Halloran et al., 2008).

New Zealand’s Religious, Charitable and Educational Trusts Acts (1856, 1865) were a series of statutes recognizing and encouraging charitable trusts that were established for public benefit purposes (*Religious, Charitable and Educational Trusts Act*, 1856 & 1865; O’Halloran et al., 2008). The 1856 Act was designed to make “more simple and effectual the titles by which property was held for charitable purposes” (Tennant et al., 2008: 17). Trust properties were to vest in the trustees and their successors (*Religious, Charitable and Educational Trusts Act*, 1856, s.1) and the required deed of trustee appointment could be used as evidence in court (s.2 and schedule). In 1884, the Act was amended to enable a trust to incorporate through registering, as set out in the first schedule of the Act (O’Halloran et al., 2008; *Religious, Charitable and Educational Trust Boards Incorporation Act*, 1884). As per sections 5 and 12, it was the trust board that had perpetual succession so the trustees could hold real and personal property and deal with this property – that is, sell, exchange or mortgage it. The property remained vested in the trustees, with the trust itself being in effect a separate legal entity.

The *Charitable Funds Appropriation Act* 1871 was a further addition to charities’ legislative history. It specified 11 categories of charitable purposes in section 2, such as educational services for the poor or otherwise disadvantaged, reformation of criminal prostitutes or drunkards, employment

services, provision of public service utilities (e.g. libraries), religious activities, promotion of sports, and insurance schemes (*Charitable Funds Appropriation Act*, 1871, s.2; O'Halloran et al., 2008). It also marked the first statutory provision of the cy-pra doctrine, where funds that were intended to be applied to one charitable purpose could be applied to another charitable purpose if the original purpose was "impossible, impracticable or inexpedient" – effectively giving charities wider asset management power (*Charitable Funds Appropriation Act*, 1871, s.4). The *Charitable Trust Extension Act* of 1886 reaffirmed this cy-pra doctrine and provided a "statutory procedure to enable charities to redirect assets to other charitable ends when original purposes had become impossible, impractical, uncertain or illegal" (O'Halloran et al., 2008).

None of this charities' legislation contained any accounting, auditing or other accountability or transparency requirements, neither did it treat the trust as a separate legal entity, which, among other things, limited its ability to borrow (O'Halloran et al., 2008). Charities, however, could create rules related to the keeping of accounting records, as well as the provision and publication of an aggregated form of these records to members and others (Fowler, 2010; Fowler and Cordery, 2015).

Nonetheless, no study has broadly analysed individual rules to ascertain the extent of comparability of such accounting and accountability requirements. Further, as the legislation did not limit the liability of the trustees or other members (O'Halloran et al., 2008), charities seeking this benefit needed to become companies under the *Companies Act*, or incorporate under the *Incorporated Societies Act* 1908.

3.2 Charities under the New Zealand Companies Acts

In its review of the *Incorporated Societies Act*, the New Zealand Law Commission notes that "there is nothing inherent in the limited liability company model that requires companies to be run for profit or to provide a return to their shareholders" (New Zealand Law Commission, 2013: s.2.6, see also *Companies Act*, 1903: s.322; *Companies Act*, 1882: s.21). The *New Zealand Companies Act* of 1860 was a replication of the *Joint Stock Companies Act* 1856 (UK), allowing a company to register as an entity separate from its shareholders. This Act limited shareholder liability to the amount of capital the shareholder had invested. These principles were confirmed in the House of Lords case *Salomon v A Salomon & Co Ltd* [1897] AC, where it was held that a company is a separate person, and thus distinct from the owners.

The *New Zealand Companies Act* of 1860 underwent several amendments between 1860 and 1900, including the incorporation of changes in the equivalent English Companies Acts. The concepts of the company as a separate entity able to sell and mortgage property and with limited liability for shareholders/owners remained. The amendments were consolidated into one comprehensive statute – *The Companies Act* 1903 (Williams, 2011). White (1972: 14) suggests that most NPOs did not incorporate under the *Companies Act* as the process was "complex and costly" and the registration fees were expensive (NZPD, 1908: 155).

Charities, if registered as a company under the *Companies Act* 1903, were required to keep "true accounts" and provide financial statements for the annual general meeting of shareholders. These statements were to include a statement of income and expenditure and a balance sheet containing a summary of the company's property and liabilities. Under capital and liabilities they were to report: the amount of capital; the entity's debts and liabilities including loans, debenture bonds and other debts owing; amounts set aside from profits as reserve funds; the profit/loss figure; and contingent liabilities. For assets, they were required to report: property including freehold land, and freehold and leasehold buildings; debts owing to the entity; and cash and investments including the nature of the investment, interest rate and where it was lodged. The statements were to be accompanied by a report on the state and condition of the company (*Companies Act*, 1882: First Schedule, Clauses 79 and 81; *Companies Act*, 1903: Clause 113, 116, and 117, First Schedule, Form B). In addition, the accounts were to be audited by a person or audit committee of five members who were not directors or officers of the company, and the auditor(s) were required to state whether the balance sheet exhibited a true and correct view (*Companies Act*, 1903: s.133 and Form B: ss.29–33). The *Companies Act* 1903 was consolidated in 1908 with minimal change due to the Government embarking on a clean-up of New Zealand law (Williams, 2011). Numerous other Acts were also treated in this way (Hawke, 2014). However, the predecessor of the *Incorporated Societies Act* 1908, the *Unclassified Societies Registration Act* 1895, was not one of them.

3.3 A different approach – unclassified societies (1895–1908)

Not all New Zealand Acts were direct copies of English legislation. The New Zealand Parliament did not use any existing non-profit British legislation or common law, nor the *South Australian Associations Incorporation Act* of 1858 to model the unclassified society's legislation in 1895 (White, 1972).

The *Unclassified Societies Registration Act* 1895 was the first formal legislative response for voluntary organizations not associated with a pecuniary purpose in New Zealand. As outlined above, Parliament had identified certain categories of societies deemed worthy of legislation (e.g. religious, educational and charitable trusts), but had not addressed with specific legislation the need for rules or registration of associations in general. Nevertheless, many voluntary associations had difficulties incorporating under other statutes, and with property management (New Zealand Law Commission, 2013: ss1.5–1.8). These NPOs were important; as noted by Tennant et al. (2008: 8), there was a noticeable passion for sport, voluntary and charitable societies and clubs “very early in the founding of the new settlements where one might normally expect other requirements of colonial life to have taken priority”.

The unclassified societies legislative process was begun when a deputation, representing sporting and other associations (such as charities) to the then Premier (the Rt Hon Richard Seddon), advised him of their issues. Some NPOs held a sizeable proportion of assets, but wielded little management control, due to a lack of legal status (White, 1972; NZ Yearbook, 2002). The outcome of the lobbying was highlighted in the parliamentary debates (PD), where it was noted that there was little regulation on the conduct of trustees of NPO funds. As Hon Sir Patrick Buckley (MLC, Attorney-General, Colonial Secretary) stated, “some of these associations had acquired very large sums of money, which was placed in the hands of trustees who could do what they liked with it, the members of the association having no voice in the matter” (NZPD, 1895: 303). The Rt Hon Richard Seddon (Premier, 1893–1906) further observed that there was no security of funds as there was no avenue for registration (NZPD, 1895: 303) and therefore no government oversight.

The parliamentary debates surrounding the passing of the *Unclassified Societies Registration Act* 1895 record that other Members of Parliament also noted that football, boating and other non-profit/voluntary associations were holding large amounts of funds. For example, the “Star Boating Club” was used as justification for the 1895 Act. The Star Boating Club is a Wellington rowing club and was formed in 1866, and is still in existence today. During the debates on the 1895 Act, Members of Parliament cited issues around management and the control of the financial assets for the Star Boating Club – which were approximately £2,000.¹⁰ The parliamentary debates mentioned also that other societies had issues regarding their funds' management, and that the 1895 Bill was necessary to remedy similar governance issues. Hon William Jennings (MLC, Labour Representative) observed that the Colonial Secretary (Buckley) reported on “two or three instances that had occurred, where sums of money belonging to athletic associations had gone in the wrong direction, and the societies themselves had suffered” (NZPD, 1895, Hon William Jennings (LC): 303).

The structure of the legislation was “a simple one” (NZPD, 1895, Hon Sir Patrick Buckley (LC): 303). Societies registering under the Bill were entitled “unclassified societies”. Unclassified societies were designated as any society of not fewer than “fifteen persons associated for any lawful purpose (not being for pecuniary gain), and not registered or incorporated under any other enactment”. They could register with the Registrar of Friendly Associations who now become the Registrar of Unclassified Societies as well, and thus be incorporated.¹¹ The winning of trophies or prize money was allowed as it was not deemed to be pecuniary gain (*Unclassified Societies Registration Act*, 1895: s.2; *Wanganui Chronicle*, 1895). A statutory declaration was required to be completed and filed with the Registrar, with the fee being one pound. The Act also required societies to have a registered office (*Unclassified Societies Registration Act*, 1895: ss.5 and 17). Further, it allowed a society to become a body corporate with legal status and therefore hold real and personal property in its own right, to sell and mortgage that property, and also to sue and be sued (section 8; *Wanganui Chronicle*, 1895; *Evening Post*, 1904). Section 8 was modelled on the *Companies Act* 1882, section 25. White (1972: 17) suggests that the Act “also provided a general immunity from liability for members of registered societies” however, nothing in the Act itself supports this suggestion. Section 12 seems to indicate the opposite, whereby a member that has resigned is not freed from any liabilities incurred prior to their resignation or expulsion. Further, the Act provides for both the involuntary cancelling of registration and the

voluntary dissolution by members (O'Halloran et al., 2008; *Unclassified Societies Registration Act*, 1895: ss.13 and 16).

This enactment gave many societies formed for purposes other than pecuniary gain (such as charities) an avenue to gain legal form and improve their governance and management. An amendment was made in 1906 where an association could not register under the Act unless it filed a set of rules when it made its application for incorporation (NZ Yearbook, 2002). These rules were to include the society's objectives, member qualifications and annual subscriptions, processes for election of new members, meeting rules, the control and investment of society funds, member expulsion and voluntary dissolution and the disposition of society property (Schedule, *Unclassified Societies Registration Act* 1906 Amendment). Like the charity-specific legislation of the time, other than the need to have rules relating to the control and investment of society funds, the *Unclassified Societies Registration Act* 1895 did not contain any accounting, auditing or other accountability requirements (s.10(4)). The *Unclassified Societies Registration Act* 1895 and its 1906 amendment were combined to form the *Unclassified Societies Registration Act* 1908 – again they contained no accounting requirements. Nevertheless, as mentioned above, many charities reported their financial results publicly, as can be seen in Fowler (2010), for example.

Yet, it became apparent by 1900 that the number of voluntary organizations in New Zealand had continued to grow. This was because as urban centres grew, the emerging culture encouraged interaction and the formation of societies. This fact was noted by Members of Parliament, and it led to the *Unclassified Societies Registration Act* 1908 being repealed and replaced by the *Incorporated Societies Act* 1908.

3.4 The need for the Incorporated Societies Act 1908

Similar to the 1895 Act, the 1908 Act was driven by problems with voluntary associations that could not register and seek legal incorporation. The New Zealand Law Commission observes, in quoting John Salmond (Solicitor-General and Judge of the Supreme Court), that the *Unclassified Societies Registration Act* 1895 was being used by societies of a much more complex and important character than those for which it was primarily designed (White, 1972; New Zealand Law Commission, 2013: 1.6). The *Incorporated Societies Act* 1908 was an “attempt to make a more adequate provision for the incorporation, management, control, and dissolution of societies to which it relates” (New Zealand Government, 1908; White, 1972). The 1908 Act expanded the features for non-pecuniary interest societies that were contained in the *Unclassified Societies Registration Acts* (New Zealand Law Commission, 2013) by adding accounting and accountability requirements and addressing member liability to render it similar to that contained in the *Companies Act* 1903.

The main purpose of the *Incorporated Societies* 1908 Act was to “enable the creation and registration of a body corporate that is separate from its members and which can incur obligations and hold property in its own right” (New Zealand Law Commission, 2013: 2.1; *Incorporated Societies Act*, 1908: s.10). Section 4 of the Act states that “any society consisting of not less than 15 persons associated for any lawful purpose but not pecuniary gain may, on application being made to the Registrar in accordance with this Act, become incorporated as a society under this Act”. This is similar to the definition in the *Unclassified Societies Registration Act* 1895 (s.2). The Act enabled the creation and registration of a body corporate that is separate from its members and which can incur obligations and hold property in its own right (New Zealand Law Commission, 2013: 2.1–2.5). Its aim was to achieve “corporate form” – the corporate veil that separates the personality of a corporation from the personality of shareholders – in this case, NPO members. Incorporation, in the context of the 1908 Act, signals to creditors of the society that in the event of default or dispute over payment, the members themselves are not liable, rather liability ends with the particular society. The Act was seen as a simple and inexpensive way for voluntary associations to incorporate, so cost did not act as a barrier to registration (NZPD, 1908).

A further issue resolved by the 1908 Act was to simplify the governance of NPOs. NPOs had often considered whether they should apply for incorporation as a company with its costly and complex requirements. In the Legislative Council debates, Hon John Callan (MLC) stated (referring to a lawn-bowls club meeting), “there was considerable discussion as to whether [the club] should be incorporated as a company or under the *Unclassified Societies Act*” (NZPD, 1908, Legislative Council: 58).

Other features of the *Incorporated Societies Act* 1908 include:

- limited liability of members as modelled on the *Companies Act 1903* (s.14);
- members having no right to the property of the society (s.14);
- creation of a Registrar of Incorporated Societies to enter the names of societies into the register, issue certificates and register the rules of the society (s.8);
- provisions for how a society's property is to be disposed of if it is wound up or dissolved (s.27);
- the requirement to file an annual return with the Registrar to "enable him to ensure that every society was acting within its legal objects" (NZPD, 1908: 155; White 1972: 18). This return is to consist of the following (s.23):
 1. The income and expenditure of the society for the last financial year,
 2. The assets and liabilities of the society at the close of the financial year,
 3. All mortgages, charges and securities affecting the property of the society at the close of the financial year,
 4. A statement that the above return has been submitted to and approved by the members at a general meeting.
- Note that failure to file accounts could result in a fine of 1 shilling on officers (s.23(c)(3)).

It should be noted that the requirements of section 23 are similar to those required by the First Schedule of the 1903 *Companies Act* (clauses 113, 116 and 117). Yet, unlike the *Companies Act 1903* there is no requirement for the accounts to be audited nor any detailed schedule or form provided as to what the financial accounts were to contain.

Whilst an unincorporated association may merely stop operating, an incorporated association needs to be wound up voluntarily by its members, or by application to the Court by a member, creditor or by the society itself, or by the Registrar (*Incorporated Societies Act, 1908: ss.24 and 25*). In the case of dissolution, the net assets may be distributed in the manner provided for in the association's rules or as the Court suggests (*Incorporated Societies Act, 1908: s.27(1)*). Generally the rules of almost all incorporated associations specify that, on dissolution, the assets should be transferred to an association with similar "objects". Similar dissolution processes are outlined for charities registered under the *Charitable Trusts Act 1957*.

When considering the development of the concepts and requirements contained in the *Incorporated Societies Act 1908*, it can be seen that the key influencers were already within the antecedent New Zealand legislation. Registration had been part of the Companies Acts, the various charities' trusts legislation and the Unclassified Societies Registration Acts. The ability to hold and dispose of property as a separate legal entity distinct from its members was a key feature of the Unclassified Societies Registration Acts and also the Companies Acts. The concept of limited liability for members and the need for accounting statements and accountability to members and others (e.g. a Registrar) are clearly borrowed from the Companies Acts. This indicates a desire by the New Zealand Parliament to reflect within its legislative programme the social and economic fabric of New Zealand at that time and to extend the corporate veil to the non-profit sector, including those organizations founded to provide charitable services.

The number of incorporated societies registered under the 1908 Act continued to grow steadily, and by 2013 stood at 24,476.¹² In 2010, the New Zealand Law Commission began a review of the *Incorporated Societies Act 1908*, publishing recommendations in 2013 (New Zealand Law Commission, 2013; von Dadelszen, 2013). This was to address its age and silence on particular issues of governance, rights and obligations, as well as financial reporting. A revised Bill and draft model constitution are expected later in 2015 (Foss, 2015).

4. History and rationale of incorporated charities in England

4.1 Background

The history of charity law in England is normally traced to the 1601 *Statute of Charitable Uses*, although the concept of charity goes back long before that date. The oldest charity on the Register of Charities maintained by the Charity Commission for England and Wales (CEW) was formed

in the year 597 (Hodgson, 2012: 8).

In English law the understanding of charity is inherently linked with trust law: charities emerged as a special type of trust which could exist in perpetuity because of the benefit they offered to the wider public. From their earliest establishment, therefore, all English charities were trusts of some kind, with property normally vested in individual trustees, although some charities were incorporated through Royal Charters (Luxton, 2001). Subsequently it became clear that an association of members governed by rules (a constitution) could be recognized as a charity if established for exclusively charitable purposes.

However, as previously noted, English charitable trusts and associations lack corporate personality, making it impossible to hold property or enter into contracts in the name of the charity itself. In practice there are many instances of contracts drawn up in the name of unincorporated bodies as though the charity was a legal entity, but in the event of a dispute the courts must first seek to construe the identity(ies) of the actual contracting party(ies), which can be problematic.

This limitation can be remedied to some extent by establishing a charitable trust with a corporate body as the sole trustee, which was a popular structure for much of the mid-twentieth century, but the charity itself remains a trust. In due course, English law provided a means in the *Charities Act 1960*¹³ for the trustees to apply to the Charity Commissioners for a Certificate of Incorporation, with the vesting of all trust property in the corporate body. But such arrangements lacked the benefits of limited liability.

In the last two to three decades, therefore, the majority of larger English charities have adopted the form of a charitable company – that is, a company limited by guarantee formed under the *Companies Act 2006* or its predecessors, where the company has exclusively charitable purposes. A company of this kind, once formed, can then apply to the CCEW to be registered as a charity. However, until the CIO became available in 2013, fewer than 20 per cent of charities registered with the CCEW were companies: so apart from a small number of specialist bodies incorporated by Royal Charter or under other legislation,¹⁴ all the rest were unincorporated (as opposed to 61% in New Zealand that are incorporated as Incorporated Societies, Charitable Trust Boards, or Companies).

However, taking the company form in England means the charity is subject to dual regulation under company law and charity law, which can amount to a significant burden, particularly in relation to accounting requirements. For example, accounts must be filed and annual returns submitted both to Companies House and to the CCEW, with any changes of board members having to be notified to both regulators. Charitable companies, particularly those with up to £250,000 income, are subject to much more demanding accounting requirements than other charities, as, under company law, the accounts must give a “true and fair” view which means complying with relevant accounting standards including the *Statement of Recommended Practice on Accounting and Reporting by Charities* (the “Charities SORP” – Charity Commission, 2005). This means that even a small charitable company must prepare a statement of financial activities and balance sheet, and provide extensive disclosures in the notes to the accounts. A charitable company cannot therefore take advantage of the provisions in the *Charities Act 2011* available to other small charities with up to £250,000 income to prepare simplified receipts and payments accounts (Morgan, 2014). The board members of a charitable company are both directors under company law and charity trustees under charity law: extensive training is needed if they are to understand their full responsibilities.

4.2 A new approach and government interest

For some years in the second half of the twentieth century, motivated by these difficulties, charity lawyers had expressed concerns about the lack of a specific legal form in England for charities – bearing in mind that many other countries (particularly civil law jurisdictions) had various legal structures for NPOs and some lawyers were familiar with the options in other countries in the British Commonwealth, such as New Zealand. Proposals gradually emerged suggesting that the way forward would be a new kind of corporate body, specific to charities, which would provide corporate status and the protection of limited liability, but where charities would be registered and regulated solely under charity law.

However, whilst there is anecdotal evidence of earlier debates, the first written source calling for a specific form of incorporation for charities appears to be an article by Warburton (1990) which suggested the term “charity corporation”. It is worth noting that by then incorporated societies

had already been available as a structure for New Zealand charities for more than 80 years, but in the UK the notion of a specific legal form for charities (or other NPOs) was somewhat new and controversial, and it took a further 23 years before CIOs became a reality.

Since this was a proposal for a fundamentally new legal entity, it could be implemented only by primary legislation. The limitations of existing structures – particularly the lack of a legal entity and no limitation to liability – were raised in Parliament as early as 1991 in the House of Lords debates on the Bill which became the *Charities Act* 1992 in England. Nevertheless, it was deemed there was insufficient time to progress the issue. This concern was taken up from the mid-1990s onwards from within the charity sector, with leading voluntary sector practitioners expressing concerns at the structures available to them. In particular, there was considerable lobbying of government by bodies such as the National Council for Voluntary Organisations (NCVO) which established a commission under Professor Nicholas Deakin to review the legal framework of charities.

One of the “Deakin Report’s” recommendations (Commission on the Future of the Voluntary Sector in England, 1996: 99, recommendation 3) was to legislate for a new incorporated form for charities. Such arguments were also taken up by leading charity lawyers (e.g. Quint, 2000). However, concerns about legal structures were not just raised by charities – there was also pressure to create new forms of business for social enterprises (Snaith, 2007).

Detailed work on a new structure can be traced to a 1996/97 project (shortly after the Deakin Report) established jointly by the Charity Law Association, NCVO, and the University of Liverpool Charity Law Unit (where Warburton works). Their report (Charity Law Association et al., 1997) suggested the term “charitable incorporated institution” (CII) and proposed many features which subsequently found their way into the legislation for charitable incorporated organizations (CIOs). The first formal interest by government came from the Department of Trade and Industry (DTI) as part of a wide-ranging review of company law which was to lead, eventually, to the *Companies Act* 2006. The review documents included a substantial chapter on “Alternative Vehicles and Access to Limited Liability”, focusing mainly on NPOs (DTI, 2000a: Ch 9). There was considerable support for “a separate corporate vehicle for charities” – a CII – as proposed by the Charity Law Association et al. (1997) report. The DTI recognized that this would be best implemented purely under charity law rather than as an extension of company law, with the CCEW acting as registrar and regulator for CII established in England. It also suggested the CII structure should be specific to charities, and not extended to other NPOs. The DTI even published skeleton instructions for the drafting of legislation.

Responses submitted to this consultation in 2000 by a wide range of parties (DTI, 2000b: Ch.9) were for the most part extremely positive regarding the CII concept, though refinements were suggested. In the light of the DTI proposals, the CCEW appointed an Advisory Group to examine the now renamed CIO in more detail and published the group’s report on its website (Charity Commission, 2001). It provided specific recommendations on how CIOs should be defined and the legislative detail needed, much of which was subsequently enacted in the *Charities Act* 2006. It was clear that the CCEW had no major concerns about the concept of the CIO and could see many potential advantages.

Table 1: Main features of a Charitable Incorporated Organisation (CIO)

A corporate body	<ul style="list-style-type: none"> • Can hold its own property • Can sue and be sued in the name of the charity (rather than trustees personally)
Limited liability	<ul style="list-style-type: none"> • Members are not liable for the debts of the CIO
Governing document	<ul style="list-style-type: none"> • Constitution
Registration	<ul style="list-style-type: none"> • Entirely by the CCEW. The registration <i>creates</i> the CIO and <i>confirms</i> its charitable status, as every CIO is a registered charity
Governance	<ul style="list-style-type: none"> • Charity trustees similar to trustees/directors of a charitable company, but with no obligations under company law
Accounting	<ul style="list-style-type: none"> • As for other non-company charities (a CIO up to £250,000 income can prepare receipts and payments accounts, above this the

	accounts must follow the Charities SORP). However the special rules for charitable companies <i>do not</i> apply
External scrutiny of accounts	<ul style="list-style-type: none"> As for other charities – minimum requirements: up to £250,000 income approval by trustees with no external review required; up to £500,000 income review by independent examiner; over £500,000 income, an audit by a firm of registered auditors
Filing of accounts	<ul style="list-style-type: none"> Accounts must <i>always</i> be filed with the CCEW and are available on CCEW's website. Unlike other charities, there is no exception for those under £25,000 income
Name	<ul style="list-style-type: none"> Normally ends with 'CIO' unless the status is otherwise disclosed on documents
Members	<ul style="list-style-type: none"> A CIO always has a membership but it may have a two-level structure of members electing trustees or a single level where the only members are the trustees
Insolvency	<ul style="list-style-type: none"> Regulations in England create a similar framework to the insolvency arrangements for limited companies

4.3 The charity sector and delivery of public policy

Meanwhile, the UK government had been increasingly focused on the role of the charity and voluntary sectors in the delivery of public policy. Following the re-election of Tony Blair's New Labour Government in 2001, one of Blair's first announcements was to institute "a comprehensive review of the legal framework for charities and the voluntary sector" (Cabinet Office, 2001).

The outcome of this review was the report *Private Action, Public Benefit* in which the Government first formally recognized the benefits which CIOs could offer. This contained a discussion of "the legal forms taken by charities and other not-for-profit organisations". Drawing on the earlier DTI consultation, it pointed out that England had no specific corporate form for charities, and listed five reasons why companies limited by guarantee were less than ideal (Cabinet Office 2002, 57–58). The report set out the basic features of a CIO, which corresponded almost exactly to the final reality (see Table 1).

4.4 CIO legislation

The next stage was the publication of a white paper (Home Office, 2003) setting out proposals for a new Charities Bill which would include the primary legislation for CIOs in England, as well as many other reforms to charity law. The Bill appeared in draft in May 2004 and was considered by a joint committee of both Houses of Parliament. This led to a formal Charities Bill introduced at the end of 2004, but although it was extensively debated in the House of Lords, with positive comments from all parties on the CIO provisions, it did not complete its passage before the 2005 General Election. A further Bill introduced in May 2005 after the election finally became law on 8 November 2006 as the *Charities Act 2006* (for further discussion, see Cross [2008]). This was an exceptionally long time for a Bill to complete its passage through Parliament, and during this time responsibility for charity law moved from the Home Office to the Cabinet Office. A new Companies Bill was progressing through Parliament on a similar timescale, implementing the company law reforms from the DTI Consultation discussed above. It was enacted as the *Companies Act 2006* on the same day as the *Charities Act 2006*.

The CIO legislation introduced two new and unique features:

- Every CIO is a charity.¹⁵ Unlike all the other forms such as trusts, associations and companies, which can be used by charitable and by non-charitable entities, there is no such body as a non-charitable CIO. When applying to register, a CIO is denied any existence unless the charity regulator (the CCEW) is satisfied that the proposed body will be a charity (*Charities Act 2011*: s.208(1)).

- The CCEW is given the power to create a new corporate entity by being the registrar of CIOs. In the case of other charity registrations, the CCEW is required to decide on the charitable status of an *existing* entity. But in the case of CIOs, the entity is actually formed by the decision of the CCEW. So, for a CIO, the date of incorporation and the date of charity registration are identical.

The long passage of the Charities Bill for England was not due to controversies about CIOs; the CIO form itself received relatively little debate. The main controversy was a removal of the presumption of public benefit – requiring all charities to be explicit about meeting the public benefit requirements – which many interpreted as an attack on independent schools (see Morgan, 2012). All English CIOs were formed after the main provisions of the 2006 Act took effect in 2008, meaning they met this tighter public benefit regime.

Following the passing of the primary legislation, there were considerable delays in finalizing secondary regulations. Due mainly to other pressures in the Cabinet Office, the essential secondary legislation for CIOs in England was only finalized in autumn 2012, six years after the primary legislation. Registration of CIOs was possible from January 2013. However, the delays were also caused by the inability of Government Ministers (both Labour Ministers before the 2010 election, and Conservatives after that date) to see the importance of CIOs in simplifying the administration of charities. Accordingly, even though they had all-party support, other initiatives concerning the non-profit sector took priority. By the time English CIOs were implemented, the *Charities Act* 2006 had been consolidated into a much more readable *Charities Act* 2011. Accordingly, the primary legislation for CIOs is now in the 2011 Act and the CIO Regulations are made under that Act.

4.5 Adoption of the CIO form

Very soon after their implementation, CIOs became popular for those establishing new charities. NPO advisors had seen the benefits of the CIO from the earliest days and were keen to help new groups establish themselves as charities using this form. In June 2013, 304 CIOs were registered, by December 2013, 1,030 and, by June 2014 – only 18 months after CIOs became law in England – almost 2,000 CIOs had been registered in England.¹⁶ At present these figures account for 1.3 per cent of the 164,000 registered charities in England. However, it is perhaps more relevant to look at the choice of legal form by those registering new charities. CCEW data shows that 40 per cent of all new charities registered in the first six months of 2014 were CIOs. Thus, the CIO form has taken off extremely rapidly, gaining widespread acceptance for new registrations. Indeed a number of these include existing charities which have been re-established as CIOs.

Table 2: Summary of the main features of CIOs and Incorporated Societies

Aspect	New Zealand Incorporated Societies	English Charitable Incorporated Organisations
Primary legislation	Incorporated Societies Act 1908	Charities Act 2006 ^a
Corporate body with separate legal personality?	Yes	Yes
Date when first available	1909	2013
Limited liability for members?	Yes	Yes
Charitable status	Widely used by charities but not necessarily charitable	Always a charity
Formation	Registration by Registrar of Incorporated Societies (separate application needed to Charities Commission or formerly to Inland Revenue	Registration by the CCEW at same time as charity recognition

	Department to grant charitable status)	
Minimum number of members	15	1
Accounting requirements	Return of Income and Expenditure, Assets and Liabilities (including mortgages, charges and security over property)	Essentially as for other charities under Charities Act 2011 – receipts and payments accounts allowed up to £250,000 income; above this, true and fair accounts complying with Charities SORP
Audit requirements	None unless in charity's constitution. But from 1 April 2015 for all registered charities with expenditure: <ul style="list-style-type: none"> • Up to NZ\$500,000: no external scrutiny required • Over NZ\$500,000: an audit or review by a qualified auditor • Over NZ\$1 million: an audit by a qualified auditor (Charities Act, 2005) 	As for other charities: <ul style="list-style-type: none"> • Up to £25,000 income: no external scrutiny required • Up to £500,000 income: independent examination • Over £500,000 income: professional audit
Filing of accounts	All Incorporated Societies must file the above accounts annually or they will be fined. Practice shows that continuing failure to file leads to being struck off the register	All CIOs must file accounts with the CCEW (unlike other forms of charity, there is no exception for those under £25,000 income)
Insolvency framework	Essentially as for companies	Regulations apply company insolvency framework with some differences of terminology and with certain powers to CCEW ^b

Notes: ^a Subsequently consolidated – now in *Charities Act 2011*, ss.204–250; ^b See Morgan (2013: chapter 12) for discussion of the application of the *Insolvency Act 1986* to English CIOs.

Reported problems have been few. There have been some instances of banks unfamiliar with the new form and asking questions of CIOs, but for the most part the clarity of the CIO form has been welcomed both by those running charities and by their funders and supporters. It is likely that most CIOs have been established for smaller and medium-sized charitable organizations: for larger charities the proven nature of the charitable company is sometimes seen as preferable. But the CIO form has certainly not been shunned by larger organizations – for example a major charitable trust with a £30m endowment fund has converted to become a CIO (Smithers, 2014).

5. English CIOs vs NZ incorporated societies: Why the differences?

In the light of the preceding sections we now consider the rationale for the difference of over a century between the emergence of the two incorporated forms considered in this article. Table 2 summarizes some of the key features and differences.

Carnegie and Napier (2002: 695–696) differentiate synchronic, parallel and diffusion studies as modes of comparison within comparative research. A diffusion study illustrates how accounting and related “techniques, institutions and concepts are transferred through a range of different mechanisms” (Carnegie and Napier, 2002: 696). This study on the incorporation of charities is thus a diffusion study as it illustrates the various accounting and legal techniques, and concepts that have been transferred in the charitable space. As such it focuses on the socio-legal factors that enabled the development of charity incorporation in the two countries – New Zealand and England (and Wales).

Based on a case study of agrarian accounting in Britain and Australia between 1830 and 1900, Carnegie and Napier (2002) identified seven comparative dimensions for conducting international

comparative historical research. These are: place, period, people, propagation, products, profession and practices. The analysis of our comparative historical study will also utilize these seven dimensions.

The most significant dimension for this study is *place* or the cultural space in which the mechanism under study takes place, in particular the effect of the development of these two different locations on the legislation allowing charities to incorporate. New Zealand in the late nineteenth century was a relatively small country, but full of societies. English associations “had undergone vast expansion ... since the late eighteenth century, [and these] provided models of associational life for the first colonists” (Tennant et al., 2008: 3). Augmenting this were the local (New Zealand) circumstances which provided fewer obstacles to establishing sport, recreation and cultural associations than there were in England at the same time. In addition to the cultural perspectives brought by the earlier settlers (Māori), another impact was the “relatively light-handed” government regulation of associations (Tennant et al., 2008). Further, the relative approachability of politicians and senior government officials meant that citizens’ concerns were more likely to be heard in New Zealand than England with its larger population, and state decentralization.¹⁷ This *place* dimension is an important element for the diffusion of the practice of incorporation in New Zealand. In addition, as can be seen from section 4, England did not respond to its “vast expansion” of associations and charities in the eighteenth century with a similar Act for charity incorporation. Nevertheless, England did prioritize a charities regulator, whereas New Zealand did not.

Period, the key turning point, or point in time in which the change occurred is also important. Given New Zealand’s small size and reputation for innovation, it is unsurprising that concerns as to governance and liability issues (for example with the Star Boating Club) were discussed by the New Zealand Parliament and that these discussions led to the forerunners of the *Incorporated Societies Act* 1908. However, passage of new legislation in England was much more lengthy, despite mounting lobbying by lawyers (including Charity Law Association et al., 1997), the nonprofit sector (e.g. the NCVO), and the 1996 Deakin Report. As company law was reformed, and the English government increasingly relied on the charity sector as a deliverer of public policy, the ground was set for the introduction of CIOs. The key turning points in each country are quite different, but appear to be closely related to government processes and how quickly citizens’ concerns could lead to a resolution.

The *people* or key players at that particular point in time and in that specific space, were also different. In New Zealand it appears that the change was brought from the ground up as individuals sought to incorporate their associations, and the Hansard reports suggest these individuals were influential and important. In England, on the other hand, numerous groups (academics, lawyers, and the non-profit sector) provided impetus, but various government departments (for example, the DTI, the Home Office and Cabinet Office) and the Prime Minister were instrumental in the eventual review of the legal framework for charities. Further analysis of the key players in these changes would be worthwhile.

Propagation or the spread of ideas across time and space is also worthy of analysis in this case. *The English Laws Act* 1848 mandated English Law existing at 1840 as applicable to the New Zealand colony (Cordery and Baskerville, 2007), and therefore it is commonly believed that English law continued to be the basis of future laws over quite a long period. For example, as noted, the New Zealand *Companies Act* of 1860 was a replication of the UK *Joint Stock Companies Act* 1856. Indeed, this Act set the foundation for the *Unclassified Societies Registration Act* 1895 and, some 13 years later, the *Incorporated Societies Act* 1908. The propagation link is clear as ideas between the Companies Acts were copied and adopted. What is interesting is that, even when New Zealand had resolved the particularly thorny issue of the drawbacks of unincorporated societies and the effect on their members, there was no re-propagation back to England.

Accounting *products* were expected as a result of the Acts that were passed. An accounting product can be both an artefact and the societal consequences of using that product. In particular, the *Incorporated Societies Act* 1908 requires a simple set of financial statements, although this is likely to be reviewed in the Bill expected later in 2015. Conversely in England, the CIO reduced the requirements on incorporated charities which had previously used the *Companies Act* 2006 to enjoy the benefits of incorporation. In this respect, a smaller CIO (up to £250,000 income) can opt to prepare accounts on a receipts and payments basis; above this a CIO must report according to the established financial reporting standard for charities (the SORP). Adopting the CIO structure

removes the need for these accounts to comply also with company law. We note there is no option of receipts and payments accounts for companies, so even the smallest charitable company must produce SORP accounts.

Here we also observe the rationalization of accounting through *professional* links between accounting and legal requirements. In addition, the very act of incorporation is likely to result in fewer court cases and thus reduced legal professional assistance. Nevertheless, it also raises the need for professionals (lawyers and accountants) to guide charities that seek to incorporate in the first place.

This research has also found that the ability to incorporate has meant that the New Zealand Government's contracting *practices* are alert to issues arising from a lack of incorporation and will seek out an incorporated charity when contracting, rather than risking a contract with a legal nonentity.

In addition, incorporated charities (from 1908) were legally required to produce accounts that were to be filed annually with the Registrar, and now the Charities Registrar, this enabled government to access their annual reports more easily. The English Government has not reacted similarly, although the personal liability of members is an issue. While this specific research has not analysed the *practices* of accounting in the charities that chose to incorporate under either the *Incorporated Societies Act 1908* (New Zealand) or the *Charities Act 2011* (England), it has been grounded in the archive in that it has analysed Hansard transcripts, newspapers and legislation, as well as secondary data to inform the analysis of these new structures.

6. Conclusions

This research has taken a comparative international history approach to contrast the emergence of two specific incorporated structures of charities that came into being more than a century apart. In filling a lacuna in the literature, it highlighted the significant drawbacks of not incorporating, despite such a move allowing flexibility in organizational structure. It is unsurprising that New Zealand and England have developed legal structures for charities to incorporate.

This article has also contributed to the few comparative international history studies. Seven comparative dimensions of the different development of incorporation structures in New Zealand and England have been analysed in this diffusion study. The *Incorporated Societies Act 1908*, as a New Zealand innovation, is a reflection of the place in which it developed. New Zealand was a relatively new country and politicians and lawmakers were relatively approachable and willing to resolve NPOs' issues around governance and liability. On the contrary, the English Government was much slower to respond to similar concerns. Its increasing reliance on the charities sector to deliver its public policy became an important reason for the enabling CIO legislation. Further analysis of the linkages between and among the people responsible for driving legislation is required. Of particular interest would be analysis of the professions of those involved in making cases for change in each country. In addition, analysis of the diffusion and development of charity-specific NPO forms in other countries would also be useful.

New Zealand appears to have prioritized the corporate legal form rather than regulation of its charities, with the latter occurring only in 2005 (Cordery and Baskerville, 2007). On the contrary, England regulated its charities from 1853, but a specific legal form (CIOs) has only been available since 2013. Thus it prioritized regulation instead of legal form.

The periods analysed were more than 100 years apart, but the benefits of incorporation remain. In addition to the ability to purchase and hold assets and to raise funds (and loans), incorporation and the ensuing regulation has formalized accounting practices and more definitively defined the reporting entity than would be the case if incorporation was unavailable. Further historical analysis of these accounting practices (the production of financial reports) to analyse differences between incorporated and unincorporated charities in these and other jurisdictions would be useful. The analysis of propagation of the New Zealand innovation is a particular contribution of this research. While there was an initial dependence on English law in this colony, the unique environment allowed speedy resolution of the thorny issue of incorporation in the charity sphere, not just through specific entity Acts, but through a structure that could be used by any group of more than 15 people who wanted to associate. Due to the costlier and riskier options of either a company form or an unincorporated form, it is a matter of regret that this innovation took so long to be re-propagated in England.

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Notes

1. The current English definition of “charity” is in ss.1–5 of the *Charities Act 2011*: a charity must be established for exclusively charitable purposes and each purpose must fall within a list of 13 headings in s.3 and must be explicitly for the public benefit. However, this definition (first enacted in 2006) draws heavily on case law principles developed over the centuries from the 1601 Statute. The latest New Zealand legislation of a charitable purpose is in s.5 of the *Charities Act 2005* – which is also based heavily on New Zealand case law developed from the English 1601 Statute.
2. *Loi du 1er juillet 1901 relative au contrat d'association (Version consolidée au 02 août 2014)* – accessed from www.legifrance.gouv.fr. This was passed following the effective suppression of freedom of association from 1791 (French Revolution).
3. Scottish charitable incorporated organizations (SCIOs) were enacted by the *Charities and Trustee Investment (Scotland) Act 2005* and implemented from 2011 (see Cross, 2008; Morgan, 2015).
4. A relevant historical example is provided by White (1972) who notes that Trade Union growth was limited in England in the eighteenth and nineteenth centuries through the Combination Laws.
5. A small percentage of unincorporated organizations are recognized in New Zealand as quasi-corporations. This is due to the special legislation under which they register and which enables them to hold property, to sue or to be sued and to enter into contracts (Atkin, 1976). Examples of these quasi-corporations are Trade Unions (under the *Industrial Relations Act 1973*), Credit Unions and Friendly Societies (e.g. under the *Friendly Societies Act 1909*).
6. Under the *NZ Companies Reregistration Act 1993*, a member of a former company limited by guarantee is treated as the holder of a share with the same liability as the former guarantee.
7. For example, less than 1 per cent of the charities registered in New Zealand are incorporated as limited liability companies. In England around 20 per cent of registered charities are incorporated as companies – still a small proportion, even though charities needing to incorporate had little choice but to do so as companies until CIOs became available in 2013.
8. Further, Cartwright and Morris (2001) note that, in England, when an unincorporated charity which has a separate trust enters into a contract outside of its objects (such as a government contract), the contract will be enforceable against the trustees in their personal capacity.
9. As noted in section 3, in New Zealand, in addition to incorporation under the *Companies Act 1993* (with a not-for-profit purpose), and the *Incorporated Societies Act 1908*, groups may also be granted corporate status if they are eligible to register under the *Charitable Trusts Act 1957*, *Building Societies Act 1965*, *Industrial and Provident Societies Act 1908*, *Industrial Societies Act 1908*, *Agricultural and Pastoral Societies Act 1908*, or as a teachers' society under the *Education Act 1964* – Friendly Societies registering under the *Friendly Societies Act 1909* are not automatically granted legal status (White, 1972). In England (as can be seen in section 4), in addition to incorporation under the *Companies Act 2006* as a company limited by guarantee, since 2013, or the incorporation of a body of trustees under s.251 of the *Charities Act 2011*, charities can potentially be established with corporate status under various other legislation including as Community Benefit Societies (formerly Industrial and Provident Societies) under the *Co-operatives and Community Benefit Societies Act 2014*, under various Education Acts, under Measures of the Church of England, and a few charities are incorporated by Royal Charters or individual Acts for specific bodies.
10. In 2013 dollars, £2,000 equates to around NZ\$375,000 as calculated using the Reserve Bank of New Zealand's inflation calculator for Q1, 2013.
11. A comparison of the *Friendly Societies Act 1882* with the *Incorporated Societies Act 1908* indicates only minor similarities between the two Acts. Thus, it does not appear that the Friendly Societies legislation of the day acted as a model from which the Incorporated Societies Act was developed.
12. The number registered in 1978 was 16,099 (NZ Yearbook, 2002). Despite searching, no information prior to this year was located.
13. Subsequently updated and consolidated in s.50 of the *Charities Act 1993* and now to be found in s.251, *Charities Act 2011*.
14. See note 9.
15. See note 1 for the English definition of “charity” – this applies equally to CIOs and other charities.
16. Figures from www.charitycommission.gov.uk.
17. While earlier educational and charitable efforts had been taken up by citizens and churches (Fowler, 2010), by the late nineteenth century, the New Zealand government responded to citizens' demands for central funding and control of what might have previously been delivered by charities (Tennant et al., 2008).

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