

SETTING UP A LEGAL STRUCTURE



Another Community Resource for the Not for Profit Sector



ACKNOWLEDGEMENT

The North Shore Community and Social Services Inc. was formed in 1975 and incorporated in 1979. Our organisation, which is a co-ordinating council for community groups, enhances or promotes the community development process on the North Shore and empowers community groups to serve their communities.

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North Shore Community and Social Services Inc. continues to publish resources that have helped many Not-for-Profit organisations in their day-to-day management.

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North Shore Community and Social Services Inc.
PO Box 33-284 Takapuna, Auckland 9
Phone: (09) 486-4820 Fax: (09) 486-4823
Email: admin@nscss.org.nz

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Can You Manage?

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Running Time 27 minutes

“It helped when our new Board members were elected – we found it humourous and very useful”

“Our meetings are much more focused”

“It helped us when we were formulating policy”

“It is humourous, not at all threatening and promoted good discussion”

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LEGAL STRUCTURES

Why have a legal structure?

- Provides group with its own unique legal name
- To provide limited liability protection: members can't be held personally liable for the debts or actions of the group
- Gives much greater access to funding and grants; groups with no legal status are often required to apply through an umbrella group, and/or are ineligible for larger grants
- Provides a formal structure, including a process of winding up
- Gives the organisation credibility and recognition
- Group can open bank accounts, own property, sue, be sued, take out loans
- Can enter contracts under its own name
- Has a structured means of surviving its initiating members

What should be considered when setting up a legal structure?

- Is the project long term?
- Do we want a membership?
- Liability - who will be liable if things go wrong?
- Should it be controlled by a small group of people without external involvement?
- Do we want to have public accountability measures?
- What involvement will members have?
- Who will be responsible for what?
- What is the purpose of the organisation?

Use of umbrella groups

If your project is short term e.g. an annual gala day, you may consider using an umbrella group. An umbrella group needs to have a legal structure, but it receives and manages money on your behalf. Funding applications can be made naming the umbrella agency, and if funding is approved that agency will receive and disburse money on your behalf.

Things to check if using an umbrella agency:

1. Do they charge for their service?
2. Do they have an agreement form?
3. Be very clear about the roles and responsibilities in relation to this project.
4. On whose authorisation will the money be disbursed?
5. Will the audited accounts show this income and expenditure as separate

WHAT IS AN INCORPORATED SOCIETY?

It is a group or organisation that has been registered under the Incorporated Societies Act 1908 and is authorised by law to run its affairs as a separate legal entity distinct from its members. This means the members are not personally liable for the society's debts or other obligations.

There is a wide range of groups and organisations which have become incorporated societies. These include sports clubs, social clubs, musical and cultural groups, special interest and activist organisations.

Key features

- Set up under a Constitution with rules
- Have a minimum of 15 Members
- Members make the decisions, usually elect management committee
- Annual financial statement to the Registrar is required plus maintain contact details
- Any profit beyond wages must be put in to charitable activities
- Easy for people to join or leave

Prescribed forms and information about how to incorporate your society and how to run your society can be obtained from the Ministry of Economic Development, website at <http://www.societies.govt.nz> or phone 0508 726 438

WHAT IS A TRUST?

It is an obligation on the part of the trustees to deal with the property in the manner in which they have been directed, for the benefit of the beneficiaries or the objectives of the trust. An organisation can only create a trust if its own rules contain the power to dispose of its property in that manner. The language used in setting up a trust must make it clear that a trust is intended, so it is best to use the words 'on trust for', plain English should be used to state the intention of the organisation as simply and as clearly as possible.

Key features of a trust

- It has a board of at least two trustees
- It must be for charitable aims - not for private profit
- Trustees make decisions
- There is often limited community or members involvement

CHARITABLE TRUSTS

To be registered, a trust must exist principally or exclusively for a charitable purpose according to the law of New Zealand, or for any purpose that is religious or educational. In this area of the law 'charitable' has a special legal meaning, different from the meaning in common usage. A list of charitable purposes was drawn up in 1601 which is still used by the Courts today, although they are not regarded as the only charitable purposes possible. That list includes the relief of aged, afflicted or poor people; the aid of young tradesmen and handicraftsmen; the relief or rehabilitation of prisoners and captives.

The following purposes have been deemed charitable by the Courts themselves. They are:

- a. the relief of poverty;
- b. the advancement of education;
- c. the advancement of religion;
- d. other purposes beneficial to the community

In order to be charitable, every trust falling under one of those four categories, must also:

- a. be in some way for a public purpose;
- b. be for the public benefit;
- c. be able to be controlled by the courts if necessary.

It is also charitable to establish facilities for recreation and leisure activities if those facilities are provided in the interests of social welfare are of public benefit.

There are a few advantages in a charitable trust e.g., income tax is not payable, and the gift can be perpetuated, with any interest or monetary return being paid out each year, but the capital of the gift remaining.

In New Zealand there is a Charitable Trusts Act 1957, which provides for the Court to approve schemes to be set up when it is impracticable or impossible to carry out the purpose of an obsolescent charitable trust, or when there are more assets held than the stated purpose requires. Such schemes can also be set up (using the procedures in that Act) in respect of money raised by public contributions for charitable purposes, (when it is impractical or impossible to carry out the purpose), or more money was raised than was necessary, to carry out the publicly-stated objectives.

NON-CHARITABLE TRUSTS

All other trusts are called private trusts. These are usually for the benefit of a few people e.g. Family Trust. These will not normally concern clubs or organisations.

Duties of trustees

Basically the trustees must follow the terms of the trust, and be guided in that duty by the Trustee Act, 1956. In general some of the trustee's duties are:

- a. to be fair as between the beneficiaries or objectives;
- b. not to delegate his job except where absolutely necessary;
- c. act together, when more than one trustee;
- d. not to expect payment for contributions except where express provision is made;
- e. to keep proper accounts and be prepared to make information available; and to be scrupulously honest - which means no direct or indirect profit or advantage can be obtained during his role as trustee.

Similarities between Charitable Trusts and Incorporated Societies

- Can have almost identical powers, objectives and rules
- Both can be charitable
- Both give the benefits of being a legal entity and allows you to employ people, receive grants and enter into contracts

See the table on page 7 for the difference between Charitable Trusts and Incorporated Societies

MAORI TRUST STRUCTURES

There are five Trusts described in Te Ture Whenua Maori Land Act 1993 and each has different purpose and different rules. All are for Maori land owners and have the primary purpose of keeping Maori land in Maori ownership while allowing it to be used for the benefit of the people.

The five trusts are:

Putea Trust - this aims to prevent further fragmentation of the land title by preventing future succession to the interest in the land.

Whanau Trust - this brings whanau land interest and share holdings together to preserve the turangawaewae of the whanau.

Ahu Whenua Trust - this promotes and helps the use and administration of the land in the beneficial owner's interests.

Whenua Topu Trust - "iwi" trust for all or part of the land owned by members of an iwi or hapu.

Kai Tiaki Trust - this is for people who need help to manage their affairs because of disability, youth or imprisonment.

OTHER STRUCTURES

Industrial and Provident Society (Co-Operative)

The key features are:

- at least seven members at least 16 years old who want to set up a genuine co-operative
- it is designed for groups wanting to work together co-operatively and make profits
- rules must be registered
- it allows profit to go to members
- group assets can be owned individually
- the liability of individuals is limited.

Many people will be familiar with vegetable co-ops run in neighbourhoods.

A Company

Groups intending to register as a company should seek legal advice.

The key features are:

- limited liability
- there must be at least one shareholder and one director
- it can be community owned and have charitable status otherwise it is taxed on profit.

Partnerships

Groups intending to register as a partnership should seek legal advice.

The key features are:

- a minimum of two partners (but there can be many).
- All partners have an equal say in the running of the partnership
- it is a profit making structure set up to run business activities
- it has annual reporting requirements.

Adapted from - Setting up a Community Group Internal Affairs

BEWARE THE LEGAL CONSEQUENCES

With an increasing number of voluntary organisations preferring to incorporate as Charitable Trusts groups should be aware that unlike the situation in incorporated as a means to reduce liability for tax groups should be aware that unlike the situation in incorporated societies where the liability of elected officers is limited, trustees do not enjoy the same protection. The Charitable Trusts Act apportions liability jointly and severally meaning that the actions of one can bind all trustees.

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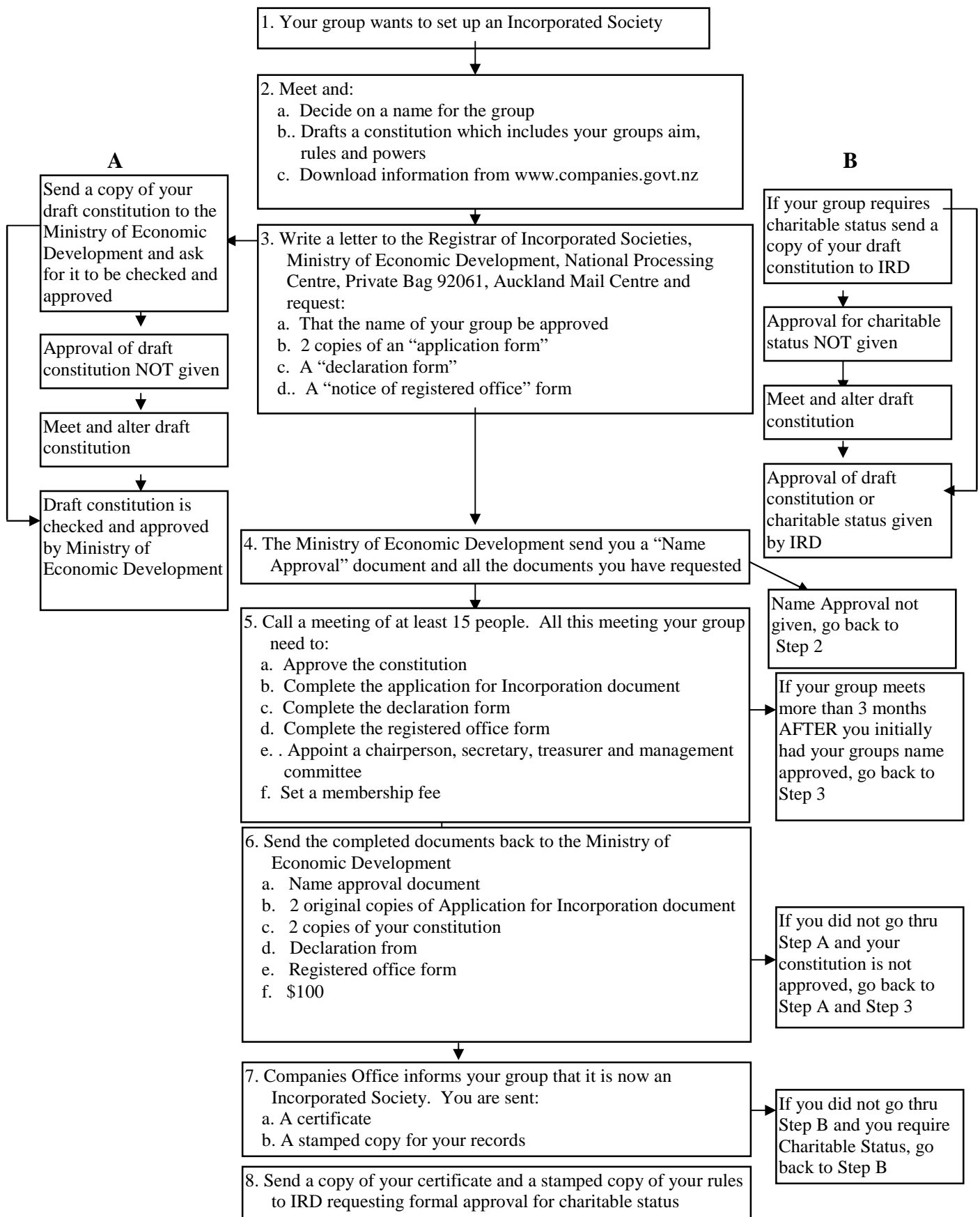
The most common structures are Incorporated Societies or Charitable Trusts. Many people consider an incorporated society as the most appropriate structure due to the increased involvement of the membership and public accountability requirements. However it is a very individual choice which should be made after weighing up all the reasons why you are becoming a legal entity.

Legal advice is always advised to ensure you are aware of all the obligations you face.

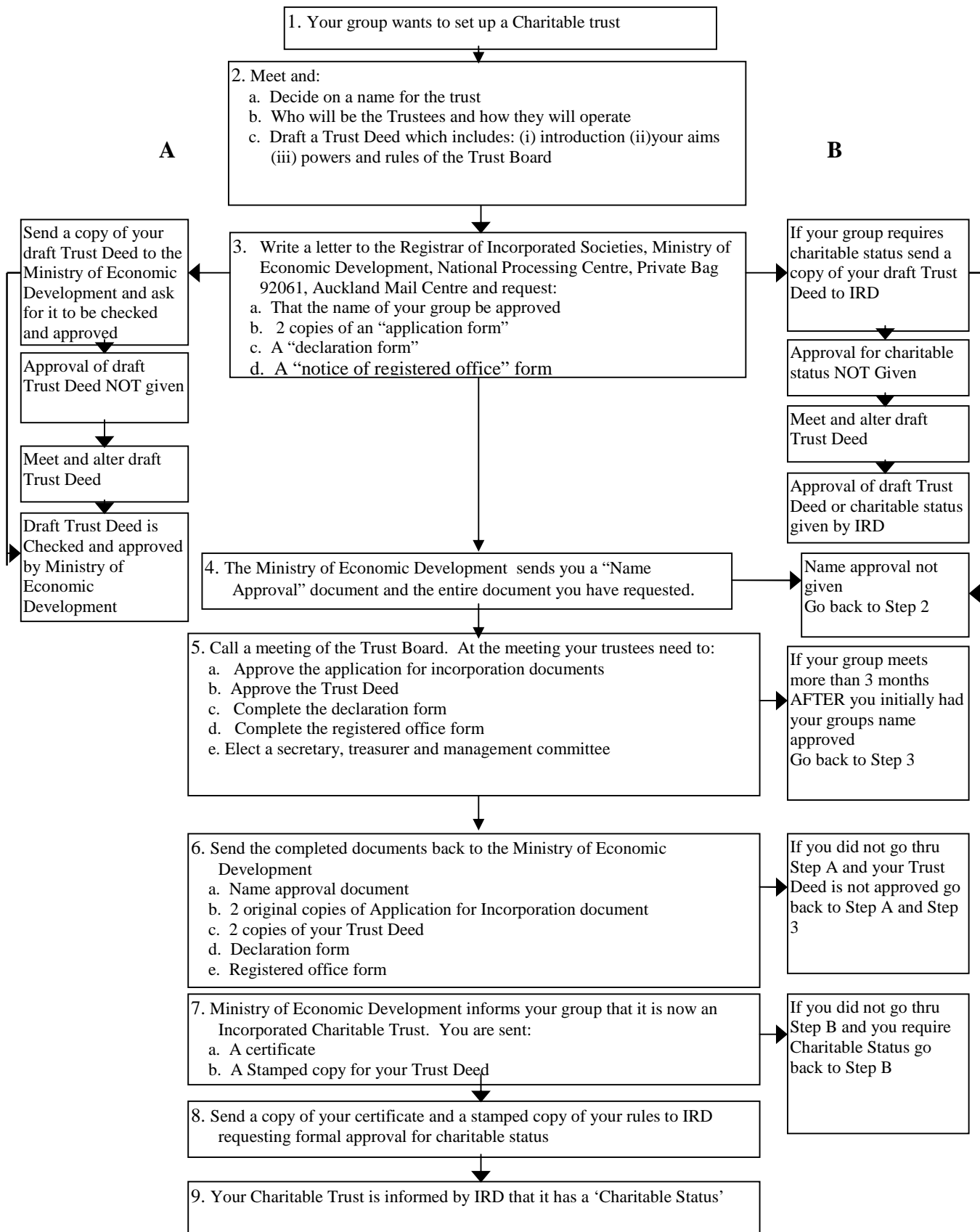
DIFFERENCE BETWEEN AN INCORPORATED SOCIETY AND A CHARITABLE TRUST

	Incorporated Society	Charitable Trust
Suited to	Not for profit organisations where members have a common interest (e.g. sport, hobby and community interests)	Not for profit organisations with a charitable purpose e.g. education, religion, relief of poverty and other purposes that benefit the community
Aims	Often charitable, but don't have to be	Must be charitable
Rules	Set up under Incorporated Society Act 1908. Has a constitution with rules, which must include: <ul style="list-style-type: none"> • name of group; • objects of group; • how people can become/stop being members; • meeting arrangements; • officers and their election; • handling of money; • use of common seal; • changing rules; • Winding up procedures. 	Set up under Charitable Trust Act 1957. Has a trust deed with rules, which must include: <ul style="list-style-type: none"> • introduction; date trust was set up; • why it is being set up; • occupations and addresses of all trustees; • aims; • power: can be as wide or narrow as group wants e.g. to employ staff • apply for grants, • buy or lease property; • rules board will operate under
Setting up costs	\$100	Free
Size	Minimum of 15 members	Minimum of two trustees
Charitable status	Can apply for charitable status	Can apply for charitable status
Members	Made up of members who may join or leave according to membership rules; must have up-to-date register of current members showing name, address, occupation, date they become a member	No members. Trustees run the trust for the benefit of others. Trustees remain on office until they retire or the term set out in trust deed expires
Decision making	By members at General Meetings and by committee. Usually has an elected management committee	By trustees. AGM and ordinary meetings not automatically open to beneficiaries unless specified in trust deed
Accountability	Committee is accountable to its members	Trustees not accountable to the beneficiaries . Accountability through trust deed and Charitable Trust Act
Ministry of Economic Development requirements	Must send annual financial accounts to Registrar of Incorporated Societies, rule changes (including names), change of contact details	Rule changes (including names) and change of contact details
Profits	Can make profits and employ people but cannot distribute profits to members	Any profit has to be used for charitable aims
Liability	Members are not personally liable for debts	Trustees are not personally liable for debts unless they fail to comply with requirements of trust deed or Trustee Act
Winding up	Can be wound up, voluntarily by members, or by high court if society suspends operation for a year, has less than 15 members, is unable to pay debts, or if individual members profit. Surplus assets can be distributed among members	Can be wound up voluntarily by trustees at any time, unless stipulated in deed, or by High Court if it believes it is just and equitable to do so. Surplus assets must be distributed to other charitable organisations

SETTING UP AN INCORPORATED SOCIETY



SETTING UP A REGISTERED CHARITABLE TRUST



FURTHER READING

‘An overview of the Voluntary Sector’ Diana Suggate, 1995
Setting up a Community Group Internal Affairs
Fact Sheets – Legal Series – PO Box 33 284 Takapuna

Contact the following website

Prescribed forms and information about how to incorporate your society or charitable trust and how to run your society or charitable trust can be obtained from the Ministry of Economic Development website at <http://www.societies.govt.nz> or phone 0508 762-438