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**INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW  
Pacific Civil Society Law Programme**

***Civil Society Organisations in the Small Island States: A  
Review of the Enabling Legal Framework in the Cook Islands  
and Niue***

**Country Report**

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## **I INTRODUCTION**

### **A Brief Country Facts**

#### **1 Niue**

The country is a parliamentary democracy with a unicameral Parliament made up of 20 members – 14 as village representatives and 6 from the common roll. The Queen in Right of New Zealand is the Head of State represented by the Governor General of New Zealand. This reflects the self-governing status of the country in free association with New Zealand. Executive powers are exercised by the country's Government headed by a Premier assisted by a cabinet. The island was first declared a British Protectorate in 1900, and later annexed by New Zealand in 1901. An act of self-determination was held under UN auspices in 1974 which led to adoption of the current Constitution and definition of the status of the country. Its historical links with New Zealand have since been maintained, with all Niueans now holding New Zealand citizenship. New Zealand is responsible for the country's defence and external affairs, as well as providing necessary economic and administrative assistance under its bilateral aid programme.

As per the 2006 census, Niue has a resident population of just around 1,600 people compared to the approximately 20,000 Niueans currently living in New Zealand. Its land area is 260km<sup>2</sup> with an EEZ of 390,000km<sup>2</sup>. The country's economy is one of the smallest and most fragile in the South Pacific, constrained by numerous factors including limited land and soil fertility, and limited access to regular transportation services. This situation is often exacerbated by natural disasters and a declining population.

#### **2 Cook Islands**

The country shares a similar political history with Niue, and currently enjoys self-governing status in free association with New Zealand pursuant to the 1965 act of self-determination. It is a parliamentary democracy with a unicameral

Parliament of 24 members elected every four (4) years. Executive power is exercised by the Government headed by a Prime Minister. In relation to all matters governing land use and *kastom*, the Government is advised by a 15-member House of Ariki (Chiefs) appointed by the Queen's Representative.

Given the political history it shares with Niue whilst under New Zealand annexation, all or most benefits enjoyed by Niueans under current legal, political and economic arrangements with New Zealand also apply to Cook Islanders. As such, the latter also hold New Zealand citizenship. The Cook Islands has a land area of 240km<sup>2</sup>, an EEZ of 1.8 million km<sup>2</sup> and a population of approximately 19,000 people. Further, the country enjoys relative economic stability with a GDP that is high compared to other Pacific economies. The largest export earner is the marine resources sector whilst tourism is similarly vital having accounted for approximately 40% of GDP. It is important to note that the Cook Islands, as in Niue, uses the New Zealand dollar as its currency.

## **B Scope of Report**

This report presents a scoping review of the laws affecting the functions and operation of CSOs in the Pacific Island countries of the Cook Islands and Niue. An underlying objective is to bring to the attention of law and policy makers legal and related issues that impinge on the present and future operation of CSOs in the above countries. It is anticipated that this report presents baseline information that makes an appreciable contribution to future *law reform exercises* pursued in the countries the subject of this review.

## **C Nature and Types of CSOs**

Given the small population size of both countries, the types and nature of CSOs found in the Cook Islands and Niue are, among others, less complex, not diverse, and characterised by low subscription in the case of membership organisations. The few CSOs operating in both the Cook Islands and Niue are both public and mutual benefit organisations which are incorporated either by

way of special legislation or under general enabling legislation. Whilst some organisations are faith and rights-based, others are centred on traditional structures that were maintained and allowed to evolve over the years. The latter group nourished owing to the homogenous culture of their respective societies.

## **II ENABLING LEGISLATIVE & OPERATIONAL FRAMEWORK**

### **A Constitutional Guarantees**

No constitutional guarantee for the formation and operation of CSOs is found in the *Constitution Act 1974* of Niue. Thus, no freedoms of assembly, association, expression and speech are found in the country's supreme law. The position is different in the Cook Islands which adopts a similar approach to those of most independent Pacific Island countries. The freedoms of peaceful assembly and association, and speech and expression are guaranteed in the country's supreme law. The exercise of such freedoms is however not absolute as conventional exceptions that can be found in most other Pacific constitutions also apply in the Cook Islands. Thus, Article 64(2) of the Constitution provides for the application of limitations either by '*enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands*'.

### **B Purposes and Roles of Civil Society Organisations**

This section sets out the statutory objects recognised in law as the principal qualifying criteria for incorporation under the laws of both countries. The principal legislation in the Cook Islands is the *Incorporated Societies Act 1994*. However, discussion will also focus on the *Cooperative Societies Regulations 1953*, *Cook Islands Christian Church Incorporation Act 1968*, and the *Red Cross Society Act 2002*. The latter two statutes fall under the special category of legislation. Niue has two principal statutes: the *Incorporated Societies Act 1908*, and the *Charitable Trusts Act 1957*. Despite the relatively small size of each country, it appears both the Cook Islands and Niue have comparatively

adequate enabling legislative frameworks compared to bigger Pacific jurisdictions such as Fiji, Solomon Islands and Vanuatu.

## 1. Statutory Objects

### (a) *Incorporated Societies*

The provisions of incorporated societies' legislation in both countries are identical at least in substance. By virtue of s.4 of the *Incorporated Societies Act 1908* of Niue, '[a]ny society consisting of not less than 15 persons associated for any lawful purposes but not for pecuniary gain' qualifies for registration under the Act. The corresponding provision in the *Incorporated Societies Act 1994* of the Cook Islands is s.3 which also sets minimum membership at 15 persons. In general therefore, any object which does not promote pecuniary gain will, subject to its legality, be deemed to qualify as one for a lawful purpose. Whilst s.3 of the *Cook Islands Act* and s.4 of the Niue Act appear wide and providing room for potential ambiguity, this possibility is pre-accommodated by latter provisions which require societies to specify in their rules the objects for which they are established and incorporated.<sup>1</sup>

### (b) *Cooperative Societies*

Compared with Western societies, the cooperative movement in Pacific Island countries is often seen as part of the civil society sector. For one reason, cooperatives play a key role, thus, being agents for realising the socioeconomic interest of local communities. The gradual integration of once traditional institutions into the cash economy has signalled the importance of strengthening the cooperative movement as a tool for advancing rural development to render local communities more adaptable to changing socioeconomic circumstances.

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<sup>1</sup> s.5 (Cook Is); s.6 (Niue)

The *Cooperative Societies Regulations 1953*, whilst promulgated for the Cook Islands, is also extendable to Niue. Whether it does and is applied is another matter that will not be considered in this report. Reverting to its application to the Cook Islands, a society must have as its principal object the promotion of the economic interests of its members in accordance with cooperative principles so as to be eligible for registration under the Regulations.<sup>2</sup> Similarly, a society<sup>3</sup>

which has as its principal object the investment of its funds in any existing corporation or company carrying on business exclusively in the Cook Islands, or any corporation or company to be formed with the purpose of carrying on business exclusively in the Cook Islands may be registered under these Regulations as a special society with limited liability.

Note that the specific objects of a society are required to be specified in its bylaws and need to conform however to the statutory objects set out in the Act.<sup>4</sup>

(c) *Charitable Trusts*

The *Charitable Trusts Act 1957* of New Zealand applies to charitable organisations operating in Niue. In essence, the Act is now part of the laws of Niue by virtue of the *Niue Amendment Act 1968*. For purposes of registration, the trustees of a trust or a society which exists exclusively for charitable purposes may apply for incorporation under the Act.<sup>5</sup> The term ‘charitable purpose’ is defined twice in the Act to cater for the different circumstances purportedly addressed within its provisions. Section 2 defines it as including ‘*every purpose that is religious or educational, whether or not it is charitable according to the law of New Zealand*’. Section 38 adopts an approach that is commonly found within charitable trusts legislation of other South Pacific jurisdictions.

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<sup>2</sup> Cooperative Societies Regulations 1953, r.5

<sup>3</sup> r.9A

<sup>4</sup> r.5

<sup>5</sup> ss.7 & 8



Further, an international trust for charitable purposes can also be registered in the Cook Islands under the *International Trusts Act 1984*. Thus, any trust which operates for the relief of poverty, the advancement of education and religion, and for other purposes beneficial to the community will qualify for incorporation as an international trust.

## **2 Determination of Charitable, etc. Status**

None of the two countries has a body or independent institution the functions of which include the determination and conferment of charitable or other status on an incorporated CSO. Note that the qualification of a CSO as either a public or mutual benefit organisation matters most when it comes to taxation and related purposes. The absence of any such body does not leave this issue in suspense as inference may be drawn from the objects of an organisation or provisions of the enabling legislation. A classic example of the latter is the *Charitable Trust Act*<sup>6</sup> which prescribes objects that are charitable per se. Thus, registration under the Act and subscription to those objects is a first step towards achieving charitable status. In this connection, note the effect of s.12 of the Act which adopts a subjective test vis-à-vis evidence of incorporation under the same. In other words, incorporation under the Act is not full and conclusive evidence ‘*that the purposes of the trust or society are exclusively or principally charitable*’.<sup>7</sup> As highlighted above, the attainment of charitable status is a significant criterion for the enjoyment of certain benefits offered by the state and donor agencies.

## **3 Media Access and Exercise of Related Freedoms**

Media freedom and access is generally guaranteed in both countries. However, media laws are in place to regulate media and communications services in the countries, viz. the *Broadcasting Act 1989* of Cook Islands, the *Communications Act 1989* and *Broadcasting Act 1989* of Niue. Whilst regulating the right to set

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<sup>6</sup> Niue

<sup>7</sup> s.12

up communications infrastructure, the above legislations are facilitative than otherwise of media access and the freedom of expression. The legitimate controls that may be imposed by a government relate to the quality of content. Thus, guidelines may be put in place to regulate matters including material that is offensive to community standards of behaviour, the depiction of sexual activities, violence and the use of drugs, observance of standards of good taste and decency, recognised standards of objective journalism, maintenance of law and order, and the privacy of the individual.<sup>8</sup>

## **C Establishment and Incorporation**

This section will briefly set out the process and requirements for registration under the *Cooperative Societies Regulations 1953(CI)*, *Incorporated Societies Act 1994(CI)*, *Charitable Trusts Act 1957(Nu)*, and the *Incorporated Societies Act 1908 (Nu)*.

### **1 Registration**

#### *(i) Incorporated Societies*

Incorporated societies legislation in both countries is similar, having traced their foundation to the original legislation of New Zealand. In terms of registration in Cook Islands, s.3 of the Act makes provision for any 15 or more persons associating for a lawful purpose to apply for registration under the Act.<sup>9</sup> A fundamental requirement is that such application must be made with the consent of the majority of members of the society. Section 8 of the Act requires two copies of the rules of the applicant society to be sent together with the application for registration. Such copies are to be signed by at least 15 members, or in the case of a body corporate, the affixing of the resolution of that body's board or members. Note however that each signature of a subscriber is to be attested by an independent witness who is not a subscriber.

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<sup>8</sup> *Broadcasting Act 1989 (CI)*, s.40(3)(4), *Communications Act 1989 (Nu)* s.13(3), *Broadcasting Act 1989 (Nu)* s.35.

<sup>9</sup> s.4, *Incorporated Societies Act (Nu)*

Section 8(b) further requires such application to be accompanied by the prescribed fee *‘together with a statutory declaration made by an officer of the society or a solicitor to the effect that a majority of the members of the society have consented to the application, and that the rules so signed or sealed are the rules of the society’*. The corresponding provision in the *Niue Incorporated Societies Act 1908* is s.7. Registration is deemed complete with the issuance of a certificate of registration by the Registrar of Incorporated Societies.<sup>10</sup>

(ii) *Cooperative Societies*

The relatively small populations of both countries raises question as to the practicality of having functioning cooperative societies within their communities. But this fact alone does not deter the adoption of legislation to pre-accommodate the possibilities of growing interest within the islands in establishing cooperatives. Whilst Niue may have relied on cooperative legislation of New Zealand, the Cook Islands has its own – the *Cooperative Societies Regulations 1953*. Minimum membership that qualifies a society for registration in the country is 10, each of whom must be qualified for membership of the society.<sup>11</sup> In terms of the latter, the two factors are majority age (which is 18 years) and requirement for the same to be resident *‘within or a titleholder by Cook Islands customs within the society’s area of operations as described by the by-laws’*.<sup>12</sup> Note however that, except with permission of the Registrar, s.24 prohibits membership of more than one society whose primary object is the granting of loans to members. This mechanism is made on good policy reasons, one of which is to protect a member from being overburdened with loan repayment to more than one loan-making society.

An application is to be signed by at least 10 persons qualified to be members.<sup>13</sup> Note that in the case of a registered society being a corporate member of the applicant society, s.7(2)(b) requires the signature of a duly authorised person on

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<sup>10</sup> The Registrar of the High Court is appointed as Registrar by virtue of s.34 of the *Incorporated Societies Act (CI)*

<sup>11</sup> s.6

<sup>12</sup> s.22

<sup>13</sup> s.7(2)

behalf of such society, ‘and where all the members of the society are not registered societies, by each of the other societies’. The application for registration needs to be accompanied by copies of the proposed bylaws of the society.<sup>14</sup> In the course of processing of the application, the persons submitting the application are obliged to furnish such further information as may be required by the Registrar. Registration is complete with the issuance of a certificate of registration by the Registrar.<sup>15</sup>

(iii) *Charitable Trusts*

Trustees or a society may apply for registration under the Charitable Trusts Act as a Board. However, eligibility for registration will be denied if a society for instance is already incorporated under another statute. The process for incorporation is commenced by an application in the prescribed form (Forms 1 & 2 of the Schedule) lodged with the Registrar. Application is to be made by the trustees of a trust or an unincorporated society, and must be signed by at least five (5) members of the society or a majority of the trustees.<sup>16</sup> Note however that such registration is also contingent upon evidence of authorisation through internal processes of the applicant which includes a resolution passed by the majority in accordance with the rules of the trust or society.<sup>17</sup> A fundamental requirement for a society therefore is that the application for registration is authorised by the rules of the same.

Documents to be furnished to the Registrar before registration can be effected includes (i) a certified copy of a document (will, trust declaration, etc) evidencing the general purposes of the applicant trustees or society, (ii) a statutory declaration by one subscriber to such application setting out details of any trusts property not specified under (i) above, (iii) a copy of the society’s rules providing for constitution of the same, and (iv) a statutory declaration by a subscriber to the application showing proof that such application is made

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<sup>14</sup> s.6(3)

<sup>15</sup> s.8

<sup>16</sup> ss.7&8

<sup>17</sup> s.9.

pursuant to a resolution passed in accordance with rules of the applicant society.<sup>18</sup> Upon being satisfied the purpose of the applicant is principally charitable, and procedural requirements of the Act being complied with, the Registrar will then issue under his seal a certificate of incorporation of the board of the trust or society.<sup>19</sup>

For purposes of the *International Trusts Act* of the Cook Islands, application for incorporation is to be made to the Registrar of International Trusts<sup>20</sup> appointed under the *International Companies Act 1981*. No application for registration will be actioned and given effect by the Registrar unless the applicant furnishes to the Registrar ‘a certificate from a trustee company certifying that the trust upon registration will be an international trust and a notice of the name and registered office of the trust’.<sup>21</sup> Note however that a certificate of registration is only valid for a 12-month period and has to be renewed for every subsequent year.

## **2 Administering Authority**

Whilst s.32 of the *Incorporated Societies Act 1908* provides for the appointment of a Registrar, this provision must now be read together with s.60 of the *Public Service Act 1912* which, by construction, supersedes the former in terms of appointment of the Registrar. The appointment of the Registrar under the *Public Service Act* renders the same a public officer. What is material, however, is that the Registrar of incorporated societies also assumes statutory authority and responsibility for the registration of trusts boards under the *Charitable Trusts Act*.

Registration in the Cook Islands is administered respectively by a Registrar of cooperative societies appointed under the *Finance Act 1931*,<sup>22</sup> and a Registrar of incorporated societies appointed under the *Incorporated Societies Act 1994*. The latter may not be a fulltime dedicated officer as it is permissible for the same to

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<sup>18</sup> s.10

<sup>19</sup> s.11

<sup>20</sup> s.14

<sup>21</sup> s.15

<sup>22</sup> s.19

hold other office which the appointing Minister considers not incompatible with the roles and functions of the Registrar.

### **3 Management of Registers, Content & Accessibility**

Public registers are managed by Registrars whilst internal registers are kept and maintained by incorporated societies and trust boards. And whilst registers are required to be kept and maintained for incorporated societies<sup>23</sup> and trust boards,<sup>24</sup> there is absence of corresponding provision in the *Cooperative Societies Regulations* of the Cook Islands. The latter is ambiguous as to the operation of a public registry, but provides nonetheless for the operation of internal registers for cooperative societies which contain the names of members and their dates of commencement or ceasing to be a member. In the case of incorporated societies, particulars to be entered by the Registrar include all ‘*matters required by [the] Act or by any regulations to be recorded by the Registrar*’.<sup>25</sup> In this connection, Societies are required to furnish to the Registrar from time to time the ‘*names, addresses, and occupations of those members, and the dates at which they became members*’.<sup>26</sup>

Public access to the registers maintained by respective Registrars is guaranteed under the *Incorporated Societies Act 1908 (Nu)*, *Charitable Trusts Act (Nu)*, *Cooperative Societies Regulations* and the *Incorporated Societies Act 1994 (CI)*. Whilst a nominal fee may be charged for the inspection of the register and documents relating to incorporated societies<sup>27</sup> and trust boards,<sup>28</sup> no fee may be charged for the inspection of the register of cooperative societies. A fundamental issue which is critical to building public confidence and trust in CSOs is not however clearly addressed in the reviewed legislation. In this contention, financial statements of organisations are, contrary to public desire, excluded from public registers accessible to the public.

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<sup>23</sup> *Incorporated Societies Act*: s.36 (CI); s.33 (Nu)

<sup>24</sup> *Charitable Trusts Act 1957 (CI)*, s.28

<sup>25</sup> s.36 (CI), s.33 (Nu)

<sup>26</sup> s.24 (CI), s.22 (Nu)

<sup>27</sup> s.34 (CI), s.34 (Nu)

<sup>28</sup> s.29

## **D Termination of Incorporation and Operation**

This section will consider in brief the processes and grounds of winding up or liquidation of an incorporated or cooperative society, and trust board. The types of remedies available to societies and trust boards aggrieved by acts or decisions taken in the course of winding up or liquidation will form part of the discussions. In general, three mechanisms are available for the liquidation or termination of registration of a society or trust board: (i) voluntary winding up, (ii) winding up by court, or (iii) dissolution and cancellation by the Registrar.

### **1 Cancellation, Dissolution & Winding Up**

#### *(i) Incorporated Societies*

An incorporated society can be wound up either voluntarily by resolution of its members with such resolution confirmed at a subsequent meeting<sup>29</sup> or by petition to the Court<sup>30</sup> with such action to be instituted by the society or a member thereof, a creditor or the Registrar.<sup>31</sup> The grounds for winding up by Court include the suspension of operations by a society for a period of one year, reduction of membership below the prescribed minimum,<sup>32</sup> inability to satisfy debts, obtaining pecuniary gain contrary to law, and the need for attaining justice and equitability through liquidation of a society.<sup>33</sup>

Moreover, in the event a society is no longer carrying on its operations or has been registered by reason of a mistake of fact or law, the Registrar may exercise discretion in dissolving the society.<sup>34</sup> Other Pacific jurisdictions, such as Kiribati, also include the failure to provide financial statements within a specified period as an additional ground for unilateral dissolution by the Registrar. Note that a power of rectification is vested in the Registrar for

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<sup>29</sup> s.24, *Incorporated Societies Act* (Nu); s.26, *Incorporated Societies Act* (CI)

<sup>30</sup> Supreme Court for Niue, whilst High Court for the Cook Islands

<sup>31</sup> s.28 (CI), s.26 (Nu)

<sup>32</sup> The prescribed minimum is 15 persons in both countries

<sup>33</sup> s.25(Nu), s.27 (Cook Islands)

<sup>34</sup> s.30 (CI), s.28 (Nu)

purposes of reviving a society to the register where dissolution is made on the basis of error or mistake.<sup>35</sup> A declaration of dissolution is required to be published by a Registrar in the Gazette.<sup>36</sup>

(ii) *Cooperative Societies*<sup>37</sup>

Dissolution may be given effect by the Registrar upon application by at least three-fourths of members of a cooperative society.<sup>38</sup> Similarly, dissolution may be taken after an inquiry by the Registrar into the constitution, working and financial condition of a registered society. Such inquiry may be taken by the Registrar either of his own motion, upon application of the majority of a society's committee or at least a third of its members.<sup>39</sup> Further note that the Registrar is also empowered to cancel the registration of a society in the event its total membership is proved to be less than 10 '*or in the case of a society of which at least one member is a registered society, to less than two*'.<sup>40</sup> The *Cooperative Societies Regulations* does not contain any provision for rectifying any errors or mistakes caused by the Registrar in the cancellation of a society's registration.

(iii) *Charitable Trusts*

A trust board incorporated in Niue under the *Charitable Trusts Act 1957* '*may be wound up voluntarily if at a general meeting of its members it passes a resolution requiring the Board to be wound up....*' Such resolution has to be confirmed at a subsequent meeting which must be held in compliance with prescribed time requirements.<sup>41</sup>

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<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

<sup>37</sup> Cook Islands

<sup>38</sup> r.40

<sup>39</sup> r.38

<sup>40</sup> r.41

<sup>41</sup> The meeting should be held not sooner than the 28<sup>th</sup> day or later than the 42<sup>nd</sup> day after the original date of the resolution, s.24



Further, an application for winding up of a board by the High Court may be made by either the Attorney General, board or a member thereof, creditor of the board, Registrar or ‘*any other person who adduces proof of circumstances which in the opinion of the Court make it proper that he should make the application*’.<sup>42</sup> Section 26 further empowers the Registrar to dissolve a board upon being satisfied that such board ‘*is no longer carrying on its operations or has been registered by reason of a mistake of fact or law...*’ As a safeguard, the Registrar is also empowered to revoke such notice of dissolution, thereby restoring the dissolved board to the register.<sup>43</sup>

## **2 Asset & Liabilities Upon Winding Up & Liquidation**

Liquidation processes are prescribed in the *Incorporated Societies Act 1908 (Nu)*, *Charitable Trusts Act 1957*, *Incorporated Societies Act 1994 (CI)*, and the *Cooperative Societies Regulations*. Liquidation processes are facilitated by either an appointed liquidators or as per directions of the Registrar or Court respectively. This section provides in brief the process involved in the disposal and distribution of assets of a liquidated society or trust.

### *(i) Incorporated Societies Act*

Upon dissolution of a society by the Registrar, the surplus assets of the same will be disposed of according to such society’s rules or in the absence of any such rules, as directed by the Registrar.<sup>44</sup> *Surplus assets* refer to the remainder of the total assets of the society after the payment of costs, debts and liabilities. Any assets affected by a trust will be disposed of as directed by the Court in the case of winding up by the latter or as directed by the Registrar in all cases of voluntary winding up or dissolution by the same.<sup>45</sup>

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<sup>42</sup> s.25(2)

<sup>43</sup> s.26(3)

<sup>44</sup> s.29 (CI), s.27 (Nu)

<sup>45</sup> *ibid*

(ii) *Cooperative Societies*

Upon the issuance of an order for winding up a cooperative society, the Registrar may appoint a liquidator to undertake liquidation of a dissolved society. The liquidator's powers are broad, albeit subject to the controlling powers of the Registrar who can, *inter alia*, remove the liquidator.<sup>46</sup> Such powers and roles of the liquidator include determining the question of priority arising between creditors, taking possession of the books and documents of the society, determining the contribution of past and present members towards assets of the society, and determining the extent of liability of members. One of the most crucial roles of the liquidator is to arrange for the distribution of assets of the society in accordance with a scheme of distribution approved by the Registrar.

(iii) *Charitable Trusts*

Section 27 of the *Charitable Trust Act* of Niue provides for the Court to give directions as to the disposal of all surplus assets of a board being wound up or dissolved. Such disposal of assets is to be undertaken after the payment of all debts, costs and liabilities of the Society.

### **3 Appeals & Remedies**

(i) *Cooperative Societies*

Aggrieved parties are not without remedy under the enabling legislation of both countries. Thus, appeals can be lodged against the decisions or actions of the Registrar, liquidator or Court respectively in relation to certain matters including winding up processes. As an overview, appeals can be lodged by members of a cooperative society to the Resident Commissioner<sup>47</sup> within one

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<sup>46</sup> s.43

<sup>47</sup> The Resident Commissioner is now replaced by the Queen's Representative as per Part I of the *Constitution of the Cook Islands*. For purposes of appeals under legislation, the statutory reference is 'Her Majesty in Council'.

month against refusal of the Registrar to register a society<sup>48</sup> or within two months against the cancellation of registration by the Registrar.<sup>49</sup> Moreover, an appeal may be made within 21 days against an order of the Registrar for repayment or restoration of property or money in cases of alleged misapplication, retainer, dishonestly or breach of trust.<sup>50</sup> The decision of Her Majesty in Council in respect thereof is final and conclusive. Reverting to the liquidation process, an appeal can be made against a decision or order of the liquidator<sup>51</sup> or a decision of the Registrar to vary or rescind an order of the liquidator. Any such appeal lies to the High Court but is subject to written consent of Her Majesty in Council. Interestingly, Her Majesty in Council's consent is the ultimate authority in prescribing the time limit for appeal.

Dispute settlement is an important mechanism in the Regulations for the settlement of debts and claims between members, members and the society, or between two different societies. Section 51 therefore provides for a party aggrieved by the award of an arbitrator<sup>52</sup> to appeal such award to the High Court.<sup>53</sup> No time period is specified for such appeals. However, the Registrar or Minister (whichever is the case) do have the discretion under s.53 to refer a question of law for the court's opinion, with such opinion to be final and conclusive.

(ii) *Incorporated Societies*

An appeal can be made to the High Court<sup>54</sup> or the Governor-General in Council<sup>55</sup> challenging the Registrar's decision in refusing to register a society or any amendment of the rules of a society.<sup>56</sup> Similarly, an appeal can be lodged within 21 days of the Registrar's decision relating to the division or disposition

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<sup>48</sup> s.8(1)

<sup>49</sup> s.40(2)

<sup>50</sup> s.48

<sup>51</sup> In the exercise of powers under s.43

<sup>52</sup> The arbitrator is appointed by the Register under s.50 for the settlement disputes

<sup>53</sup> s.51

<sup>54</sup> Cook Islands

<sup>55</sup> Niue

<sup>56</sup> s.14 (CI.); s.12 (Nu)

of surplus assets of a dissolved or wound up society that are subject to a trust.<sup>57</sup> Note that any such appeal can be instituted at the suit of any interested person.<sup>58</sup>

(iii) *Charitable Trust*<sup>59</sup>

Matters the decisions to which are subject to appeal include the refusal of the Registrar to register trustees or societies, or the failure of the same to approve a name or name change of a board.<sup>60</sup> Any such appeal must be lodged within 28 days of the date on which the decision appealed was made. Note that the Registrar may apply to the Court to strike out an appeal with costs in the event the appellant fails to prosecute the appeal with due diligence. This mechanism operates to deter, among others, the abuse of court process. There is absence however of provisions granting rights of appeal in processes involving winding up, dissolution and disposition of property.

### **III GOVERNANCE & MANAGEMENT**

#### **A Governing Bodies**

This section will briefly set out the types and forms of governing and management bodies that exercise executive and management functions over the affairs of societies and bodies registered under the *Cooperative Societies Regulations, Incorporated Societies Act (CI), Charitable Trust Act* and *Incorporated Societies Act (Nu)*.

(i) *Incorporated Societies*<sup>61</sup>

An incorporated society is governed principally by its rules registered with the Registrar. Management and executive functions are exercised by a committee or

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<sup>57</sup> s.29(2) (CI); s.27(2) (Nu)

<sup>58</sup> *ibid*

<sup>59</sup> *Charitable Trusts Act 1957* (Nu)

<sup>60</sup> s.17

<sup>61</sup> 1908 (Nu); 1994 (CI)

number of sub-committees as per a society's rules. The organisational and governing structure of a society is a matter left to be specified within the rules of such society. A degree of flexibility is thus present within enabling legislation as regards the types of governing bodies that can be defined for a society to reflect, for instance, its nature and operating environment.

(ii) *Cooperative Societies*

The highest governing and decision-making body of a cooperative society is the annual general meeting<sup>62</sup> of members, which normally appoints the management committee. Any other governing or management body additional to that is left to be determined in the bylaws of a society.

(iii) *Charitable Trusts*

The Board of Trustees is the highest governing body of a trust incorporated under the *Charitable Trusts Act 1957* (Nu). A trustee is normally appointed as per the rules of a society or trust. In practice, trust boards often delegate most functions to management committees or officers responsible for the day to day administration of the trust.

## **B Powers & Duties**

This section discusses the prescribed powers of incorporated bodies which are or may be exercised by their governing and management bodies. At this juncture, it is worth noting that the exercise of powers is often an area of contention, thus, a breeding ground for conflicts and disputes that are normally the subject of costly litigation. This could be attributed, among others, to the intricacies of laws that are more or less based on Western legal traditions and norms alien to the cultural circumstances of Pacific societies. In other words, most mechanisms that traced their origin to Western legal traditions do not reflect the practical situations on the grounds. Pacific circumstances are thus

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<sup>62</sup> *Cooperative Societies Regulations*, r.21

dictated by factors such as unique nature and types of organisations, traditional institutions and hierarchical structures, the supremacy of communalism over individualism, small populations and landmass, and closely knitted societies, to identify but a few.

Whilst the powers prescribed in legislation are general, detailed powers and functions as recognised by law are tailored in the rules, bylaws or constitutions of registered societies and trust boards. These will be briefly discussed below.

(i) *Incorporated Societies*

Upon incorporation, the subscribers to the rules of the society<sup>63</sup> registered under the *Incorporated Societies Act*<sup>64</sup> will become ‘*a body corporate...having perpetual succession and a common seal, and capable forthwith...of exercising all the functions of a body corporate and of holding land*’.<sup>65</sup> The powers of an incorporated society are wide in scope and include the power to enter into contracts under its common seal. Note however that most powers and duties of incorporated societies are defined in their rules or constitutions, and the same are purportedly more reflective of and customised towards the objects of a society.

(ii) *Cooperative Societies*

By virtue of r.9 of the *Cooperative Societies Regulations*, the registration of a society renders it a body corporate ‘*with perpetual succession and with power to acquire hold and dispose of property, to enter into contracts, to institute and defend suits and other legal proceedings, and to do all things necessary for the purpose of its constitution*’. A registered society can similarly make loans to another society subject to consent of the Registrar,<sup>66</sup> receive deposits and loans

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<sup>63</sup> Including subsequent members

<sup>64</sup> 1908 of Niue; 1994 of the Cook Islands

<sup>65</sup> s.11 (Nu); s.10 (CI)

<sup>66</sup> r.31(1)

from non-members,<sup>67</sup> and invest its funds in approved schemes including securities.<sup>68</sup> Moreover, it can distribute its annual profit by way to dividend or bonus to members but only after transferring at least 25% of such profit to its reserve fund.

(iii) *Charitable Trusts*

The incorporation of a board under the *Charitable Trusts Act* of Niue renders it a body with '*perpetual succession...and (subject to this Act and to the rules and other documents providing for the constitution of the Board) shall be capable of holding real and personal property of whatsoever nature...and of suing and being sued, and of doing and suffering all such acts and things as bodies corporate may lawfully do and suffer*'.<sup>69</sup> A trust board is similarly empowered to dedicate trust property for any public purpose,<sup>70</sup> sell or exchange any part thereof,<sup>71</sup> and to purchase any property wherever situated.<sup>72</sup> In the event of a society being registered as a board, such powers also include the right to apply for a variation of the name under which the board is registered.<sup>73</sup>

## **C Audit and Inspection of Accounts & Related Matters**

The Registrar is empowered to conduct an annual audit of the accounts<sup>74</sup> of societies registered under the *Cooperative Societies Regulations* (CI), and may similarly inspect the accounts, books, papers, cash in hand or securities of the same as and whenever required.<sup>75</sup> Such auditing mandate also includes the power to conduct inquiries into the constitution, working, and financial condition of registered societies.<sup>76</sup> Note that any such inquiry may be instituted

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<sup>67</sup> r.32

<sup>68</sup> r.34

<sup>69</sup> s.13

<sup>70</sup> s.21(1)(a)

<sup>71</sup> s.21(1)(b)

<sup>72</sup> s.21(1)(c)

<sup>73</sup> s.16

<sup>74</sup> r.36

<sup>75</sup> r.37

<sup>76</sup> r.38

at the Registrar's own initiative or upon the application of a creditor who satisfies the prescribed requirements warranting action of the Registrar.<sup>77</sup>

Furthermore, for incorporated societies, the statements of a society's income and expenditure, assets and liabilities, mortgages, charges and securities are to be furnished annually to the Registrar.<sup>78</sup> Non-compliance by a society in failing to furnish the Registrar with the required information will render all officers of the same liable to a monetary fine.

No audit requirements are prescribed in the *Charitable Trusts Act* (Nu). In effect, trust boards operate under a veil of secrecy as no audited financial statement is required to be delivered annually to the Registrar. There is however some room for scrutiny of the affairs of trust boards, viz. the intervention of the Attorney General by virtue of s.58 of the Act which provides:

It shall be lawful for the Attorney-General from time to time, as he in his discretion may think fit, to examine and inquire into all or any charities in [Niue], including trusts for charitable purposes ... and to examine and inquire into the nature and objects, administration, management, and results thereof, and the value, condition, management, and application of the property and income belonging thereto.

The Attorney General's power to intervene operates as a mechanism for the protection and advancement of public interest and policy. This accountability and transparency mechanism is absent in the enabling legislation of most Pacific jurisdictions governing trust boards established for charitable and related purposes.

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<sup>77</sup> The Creditor must satisfy the following: (i) that a specific sum is due to him, (ii) that efforts seeking payment within a reasonable time fails, (iii) that a deposit be made with the Registrar for security of costs for the inspection.

<sup>78</sup> *Incorporated Societies Act 1908*, s.23 (Nu); *Incorporated Societies Act 1994*, s.25 (CI)



## **D Income & Profit of Organisations**

This section briefly discusses the legislative approach towards the income and profit of public and mutual benefit organisations that are registered under the foregoing legislation.

### *(i) Cooperative Societies*

By virtue of r.35 of the *Regulations*, any profit made in any financial year may be divided among members by way of dividend or bonus. However, such distribution can only be made if permitted by the constitution of a society and after a minimum of at least a quarter ( $\frac{1}{4}$ ) of the total profit made is carried to the society's reserve fund. A society is also given the option of contributing 'an amount not exceeding 10 per cent of the remaining net profit to any charitable purpose or to a fund established or maintained for the common good'.<sup>79</sup> What constitutes a 'common good' is however not defined in the Act or any other legislation.

### *(ii) Incorporated Societies*

Incorporated societies' legislation in both countries prohibits members from deriving financial benefit from the profit of a society as the objects of any registered society must not be one for pecuniary gain.<sup>80</sup> Private benefit by way of pecuniary gain is however defined as excluding pecuniary gain earned by a member of the society by way of salary as servant or officer of the same,<sup>81</sup> or a gain to which such member would be equally entitled if he or she were not a member.<sup>82</sup> Any pecuniary gain earned by such society is likewise excluded as gain for private benefit prohibited under the Act provided the same is not for distribution between members as dividend or bonus.<sup>83</sup> Associations and

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<sup>79</sup> s.36(2)

<sup>80</sup> s.3; s.4 (Nu)

<sup>81</sup> s.4(d); s.5(d) (Nu)

<sup>82</sup> s.4(e); s.5(e) (Nu)

<sup>83</sup> s.4(a); s.5(a) (Nu)

organisations registered as incorporated societies are therefore not mutual benefit organisations per se. This reiterates the need to have in any Pacific jurisdiction at least two sets of legislation one of which must be framed to accommodate community organisations established to promote the socioeconomic interest of members whilst similarly classified as civil society organisations.

(iii) *Charitable Trusts*

As trust boards incorporated under the *Charitable Trusts Act* are deemed *charitable* or *benevolent* per se, their income including profits on investments will not be the subject of the same regime as that of mutual benefit organisations. Thus, the distribution of profit and gain among members or founders is, by virtue of law, out of the question.

## **E Conflict of Interest & Accountability**

Given the popular perception that CSOs are private organisations not subject to the same regime of public scrutiny applying to public institutions, the affairs of such organisations are often regulated in detail by internal rules that do not necessarily operate to serve public interest. Such rules nonetheless incorporate limited forms of transparency and accountability mechanisms that purport to protect and advance the interests of members, albeit rarely that of the public or non-members. It is rather unfortunate that current legislation operates to preserve the status quo by remaining silent on this vital issue. As earlier highlighted, matters of transparency, accountability and conflicts of interest are left to be dealt with in detail in the rules and bylaws of societies. In any event, such matters are more or less the subject of self-regulation systems that are applied voluntarily within the CSO sector of each country. The notable failure of existing legislation to give sanction to such self-regulation initiatives is itself a drawback

In general therefore, the existence of loopholes within the legislative framework being subject of this review leaves open room for manipulation or exploitation of organisations for personal gain. It is common knowledge that conflict of interest situations often undermine the effectiveness of CSOs and impinge on public confidence and trust in the CSO sector.

## **F Umbrella Organisations**

The *Cook Islands Association of Non-Governmental Organisations* (CIANGO) is recognised as the umbrella body for CSOs in the country. Its current membership is estimated at 58, comprising organisations with divergent focal areas including women, youth, culture and religion. CIANGO is a non-profit, voluntary, and non-statutory body established with the mission to pursue cooperation between members as well as promoting a good working relationship with the Government on behalf of CSOs. The current activities and strategic focal areas of CIANGO are (i) strengthening of the CSO sector, (ii) enhancing relationships, (iii) effective internal administration, and (iv) environmental conservation.

CIANGO's counterpart in Niue is the *Niue Island Umbrella Association of Non-Governmental Organisations* (NIUANGO). Its current membership is estimated at less than 20, but in general, the active CSO community is quite small in reflection of its small population size. Identifiable groups include the Youth Council, Growers Association, Council of Women, Sports Association, Village Council, and the Council of Churches. Dictated by its small population size, the activities and programs of the Government and CSO sector are almost interwoven. And as reflection of this close relationship, CSOs receive annual Government grants as base budget with which to carry out their objects and functions.

## **IV ECONOMIC ACTIVITIES & TAX INCENTIVES**

This part looks at the economic activities of CSOs and the tax incentives that they may enjoy as PBOs or MBOs. Discussion will focus on (i) the types of privileges, if any, to which a CSO may be entitled, thus, avoiding what are otherwise strict legal requirements for engagement in certain activities, and (ii) the types of taxes and exemptions applicable to CSOs.

### **A Public Entertainment**

No legislation for the regulation of public fundraising activities is identified for both countries. However, in terms of public entertainment for which a permit or licence is required, the *Films and Censorship Act 1985* (CI) and *Film and Public Entertainment Act 1992* (Nu) offers CSOs special treatment by way of exemptions and waiver of fees and compliance with certain requirements. Thus, a regulatory board may for instance waive the fee payable for film exhibitions held for charitable, education or public purposes.<sup>84</sup> Similarly, an exhibitor's license is not required for the exhibition of films '*by any charitable, philanthropic, religious, education, social or sporting body or organisation where the film is exhibited to further the bona fide objects or purposes of the body or organisation...*'<sup>85</sup> Additional privilege includes the exemption from censorship of films used for educational and instructional purposes,<sup>86</sup> a category that likely falls within objects and programs of some CSOs.

### **B Tax Deduction & Exemption**

#### *(i) Stamp Duty*

The Minister is empowered under s.54 of the *Cooperative Societies Regulations* to remit the stamp duty paid for any instrument executed on behalf of a cooperative society or in relation to the business thereof. Similarly, documents

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<sup>84</sup> *Films and Public Entertainment Act 1979*, s.4(5) (Niue); *Films and Censorship Act 1985*, s.7 (CI)

<sup>85</sup> s.4(7) (Nu); s.7 (CI)

<sup>86</sup> s.20 (CI)

statutorily required to be delivered to the Registrar by virtue of incorporated societies' legislation are exempt from stamp duty.<sup>87</sup> The *Stamp Duties Act 1971-72* (CI) exempts from stamp duty the '*conveyance of property to be held on a charitable trust in the Cook Islands (or elsewhere)*'.<sup>88</sup>

(ii) *Customs Duty*

The *Customs Tariff Act 1982* (CI), whilst falling short of expressly providing for the exemption of CSOs from paying duty or customs or excise, nonetheless empowers cabinet to '*determine activities for which duty exemptions may be granted and the conditions for granting exemptions.*'<sup>89</sup> Note that this Act is to be read together with the *Customs Act 1966*<sup>90</sup> of New Zealand which was already repealed by the *Customs and Tariff Act 1996* (NZ). Section 8 of the *Customs Tariff Act 1982* can therefore be invoked by CSOs that import or export goods and material for purposes of their charitable or related programs in the country.

(iii) *Income Tax*

Tax benefits by way of rebates and exemption are present in the income tax legislation of both countries.<sup>91</sup> By virtue of the *Income Tax Act* of the Cook Islands, exempted from tax will be<sup>92</sup>

income derived directly or indirectly from any business carried on by or on behalf of or for the benefit of trustees in trust for charitable purposes within the Cook Islands, or derived directly or indirectly from any business carried on by or on behalf of or for the benefit of any society or institution established exclusively for such purposes and not carried on for the private pecuniary profit of any individual....

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<sup>87</sup> *Incorporated Societies Act 1908*, s.35 (Nu); *Incorporated Societies Act 1994*, s.38 (CI)

<sup>88</sup> s.59

<sup>89</sup> s.8

<sup>90</sup> Only insofar as it applies to Niue

<sup>91</sup> *Income Tax Ordinance 1961* (Nu); *Income Tax 1997* (CI)

<sup>92</sup> s.42(1)(h); s.49 (Nu)

Exemption will similarly apply to the income derived by trustees in trust for a charitable purpose, or societies and associations established for the promotion of sports recreation entertainment or beautification of any island, village or district.<sup>93</sup> Additionally, the income of cooperative societies incorporated under the *Cooperative Societies Regulations* (CI) will also be exempted from tax.

In recognition of the generosity and interest of donors, a taxpayer making a donation or gift to a charitable organisation or church will be entitled to a tax deduction or rebate.<sup>94</sup> There is wide disparity however as to the prescribed ceiling or maximum deductible amount in each country with Cook Islands at \$5,000 whilst Niue at a meagre \$100. Mechanisms for verifying and authenticating such donations are prescribed and include the need to produce documentary evidence such as receipts.

### **C Commercial Undertaking**

There is no statutory prohibition that stops CSOs in both countries from engaging in purely commercial activities. This is implied from provisions of the income tax legislation of both countries which exempts from tax income derived directly or indirectly from businesses operated by or on behalf of trusts societies or associations established for charitable purposes.<sup>95</sup> Such businesses in terms of their incorporation and operation are subject to the legal regime governing companies and commercial ventures.

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<sup>93</sup> *ibid*

<sup>94</sup> s.47B (Nu); s.70 (CI)

<sup>95</sup> s.42 (CI); s.49 (Nu)

## V CONCLUSION

The enabling legal framework for CSOs of both countries is, in general, adequate and to some extent surpasses that of bigger Pacific jurisdictions such as Solomon Islands and Fiji. Issues commonly identified with the region are however found to exist in both countries. These include the need for more transparency and accountability, and outdated legislation deemed not reflective of the countries' socio-cultural circumstance.

Further, the two countries also share circumstances peculiar to the *micro-states* of the Pacific, viz. small populations and landmasses which contribute, among others, to an inevitable overlap between government, civil society and the business sector. Although appearing complicated in theory, the situation on the ground is however one of harmonious integration facilitated in part by cultural homogeneity. Attempting to draw a fine line between civil society and the other two sectors in the name of independence for the CSO community is thus an arduous task and simply impractical. The statement that everybody is everything in these small islands thus bears merit.

Additionally, the small population size of both countries impinges on two issues worth highlighting: conflicts of interest, and restrictive numerical requirements for incorporation. First, the current loopholes present within the law in failing to provide adequate, if at all, safeguards against the intricacies of small closely knitted societies is a breeding ground for conflict of interest situations. In such small societies the risk of conflicts of interest is ever present, compounded by culture, traditional hierarchies and obligations, and the tendency of aligning *ownership* of CSOs to family groupings or circles. Current law is framed and made in the context of Western standards and tradition dissimilar to that of Pacific Island countries. The wholesale adoption of New Zealand statutes by both countries is an act that has to be rectified by the legislatures of the same. An aim of any such review is to clearly define the situations that would give rise to conflicts of interest, bearing in mind the culture, nature and types of organisations in each country.

Secondly, the preoccupation with numerical factors as pre-requisite for certain matters such as incorporation questions the relevance of the laws when given some comparison with the approach in other Pacific jurisdictions. In this connection, minimum membership requirements when seen against the population size of each country appear to be too high. For instance, to be eligible for registration as an incorporated society in either country, the minimum membership must be 15 whilst only five (5) in Tonga, a country of almost five (5) times the population of Cook Islands and 60 times that of Niue.<sup>96</sup> Samoa, although having 15 as its minimum requirement, has a population of approximately 181,000 compared to Cook Islands' 19,569 and Niue's 1,600. But the crucial point is that with such small populations, the imposition of a minimum membership that is comparatively high is too restrictive and has implications for an expanding CSO sector.

Finally, the existing framework lacks provisions for ensuring that assets of liquidated or dissolved incorporated societies and trust boards established for charitable, benevolent or public benefit purposes are transferred to operating societies and trust boards with similar objects. The distribution of assets, in the absence of rules in the constitution of an organisation that provide otherwise, is generally left to the direction or discretion of the court or Registrar which, in any event, provides no guarantee of continual use of the same for charitable or public benefit purposes. This problem is however characteristic of the legislative approach in the region, thus, not necessarily confined to Cook Islands or Niue.

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***\*\*the author is solely responsible for any errors (including errors of omission) found in the content hereof.***

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<sup>96</sup> As for registration as a cooperative society, the minimum requirement in either the Cook Is. or Niue is 10, whilst only 7 in PNG, a country of approximately 5.8 million people!



## **Table of Legislation**

*Constitution Act 1974 (Nu)*  
*Constitution of the Cook Islands 1965*  
*Broadcasting Act 1989 (CI)*  
*Broadcasting Act 1989 (Nu)*  
*Broadcasting Amendment Act 1997 (CI)*  
*Broadcasting Amendment Act 1997 (Nu)*  
*Broadcasting Amendment (No.2) Act 1997 (CI)*  
*Charitable Trusts Act 1957 (Nu)*  
*Cook Islands Act 1915*  
*Cook Islands Christian Church Incorporation Act 1968*  
*Cooperative Societies Regulations 1953 (CI)*  
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*Communications Act 1989 (Nu)*  
*Customs Tariff Act 1982 (Nu)*  
*Films & Public Entertainment Act 1979 (Nu)*  
*Film & Public Entertainment Amendment Act 1992 (Nu)*  
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*Income Tax Act 1997 (CI)*  
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*International Trusts Act 1984 (CI)*  
*Niue Act 1966*  
*Niue Amendment Act 1968*  
*Niue General Laws Amendment Act 2004*  
*Red Cross Society Act 2002 (CI)*  
*Stamp Duties Act 1971-72 (CI)*  
*Value Added Tax Act 1997 (CI)*