To: Christian Renford, CEO Swimming New Zealand (**SNZ**)
Brent Leyton, SNZ Board Chair

From: Board of Swimming Auckland (**ASA**) (prepared by an appointed ASA Working Group including representatives from ASA Clubs, ASA Board, other personnel selected for their skills, and Brian Palmer, Executive Officer)

Date: 12 June 2013

RE: REVIEW OF THE PROPOSED DRAFT REGIONAL CONSTITUTION (PRC)

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SECTION ONE - Introduction

The ASA made extensive submissions[1] relating to the Draft SNZ Constitution prior to its adoption at the 2012 SNZ SGM.

These concerns raised at that time were neither addressed nor responded to, and notwithstanding the commitment that a further Working Group would be recommended and appointed to review those legitimate concerns following the adoption of the Draft SNZ Constitution (**SNZC**), no such Working Group has been established under the direction of the new SNZ Board.

It is well known that the concerns which the ASA held were such that the ASA abstained from voting to endorse the adoption of a document which we felt, based on advice, was flawed.

We consider that it is obvious that with the presentation of this Proposed Draft Regional Constitution (**PRC**) that it is now not intended to undertake the review of the SNZC which was committed. As such this submission is based upon a presumption that the SNZC, as adopted, is now the foundation document to work from.

We do not seek to re-litigate the issues that existed (and to some extent still exist) relating to the SNZC, but must make reference to those issues which remain unaddressed and which still provide difficulty (real and/or anticipated) for ongoing governance at both a regional and club level of delivery. We do however feel obliged to re-emphasize the same level of concern with regard to the adoption of a new constitution as we did prior to last year's SGM and which caused Auckland to abstain from endorsing the motion laid at the SGM.

Specifically we wish to note that the adoption or otherwise of this PRC in whatever form it is finally presented is a decision for our clubs alone. This is not withstanding the imposition of a constitutional obligation to *adopt the form of Regional Association constitution prescribed by SNZ* (SNZC 8.3.b). That cannot supersede the obligations which exist under our own constitution (ASA 2.02.1) which makes clear that our own rules *shall not be added to, rescinded or amended nor shall any new Rule be enacted save at the Annual General Meeting of the Association or at a Special Meeting called for that purpose.*

[1] Appended here for reference

For the avoidance of all doubt, we wish to make it very clear that no such meeting has yet been held by our association and that therefore our association remains as it was established as an independent and sovereign Incorporated Society, subject to the requirements of our own rules and subject to the requirements of the Incorporated Societies Act. Section 21 of that Act requires *that an incorporated society can only alter rules in the manner provided for in it's rules.* This piece of legislation and its requirements must be adhered to.

With a view to the above issues of lawfulness we would urge that all efforts are made to ensure that the document which is presented to our clubs for adoption, as and when that occurs, is a document that is acceptable and which addresses the legitimate concerns which are raised as a part of this submission process.

In this submission we have approached the process recognizing the need to have a document which is acceptable to our membership and with the following considerations in mind:

I. Identifying and establishing obvious conflicts between the SNZC and the PRC.

In addition to matters of form this also involves identification of obvious errata which have been carried forward in a draft. To this end there is a 'marked up' version of the PRC accompanying this submission.

II. Establishing areas of operational and functional difficulty for the governance and management of a region under the PRC.

While these issues are drawn from our own ASA experience we would extrapolate that in most cases they are likely to be common to other regions. We acknowledge that each region deals with its own set conditions. Our intent is not to identify simply areas that represent points of discomfort or differences to our present functions but to establish where genuine challenges will arise under the adoption of the PRC.

III. Establishing implications for the governance and management of the member clubs under the PRC.

It appears obvious to us that the changes intended under this document carry significant implications not just for the governance of a region, but also for the member clubs of a region. Arguably, the largest impact for each region has

already occurred with the adoption of the SNZC last year. While not all of those impacts have yet been crystallised, they are nonetheless real.

The real level of impact in terms of the day-to-day delivery of the sport are yet to be felt and will be realised for clubs when this PRC (or its variants) are adopted. We do not see how it will be possible to consider this work complete until a similar uniform document is imposed on each club. The requirements imposed under both the SNZC and the PRC are such that, given the sport's delivery through clubs, each club will need to adapt their own constitution in multiple areas to conform to the requirements of both documents.

We have therefore examined the likely impact areas which member clubs will face when the PRC is adopted and consider the reality of its impact as being greater for each member club than for a region.

A. FORM OF THE DOCUMENT

We are extremely concerned that the PRC is presented as a document strong in legal form. We have benefited from having some legal input available within our community, but must state that this cannot be considered to be normal, or necessarily desirable.

We believe it is regrettable that more effort has not been placed into ensuring that a governing document is created which is more suitable to the requirements of the volunteer workforce which leads the sport at a regional and club level.

One of the PRC's objects is to *"minimis[e] as much as practical the administrative complexity of competitive swimming"*[2], and yet we find a level of complexity within the PRC itself which will almost certainly necessitate future reference to legal advice (and consequent cost) to resolve conflicting interpretations.

We deliver the sport through incorporated societies, largely by volunteers with minimal *professional assistance*. The intention and nature of an incorporated society requires transparency and public scrutiny similar to that required of a public company, and yet our member clubs and regional organisations are not public companies and do not have access to the same resources. We do not have access to the breadth of governance and professional resource which public corporations have, therefore, it is vital that the structures which govern us are simplified to meet the capacity of those who volunteer their time and talents to deliver the sport. It is unreasonable to expect that regional and

[2] PRC 4.f.iii

club boards will be manned by the equivalent of what has been drawn into the current SNZ Board.

The governing documents must therefore be simplified to meet the capacity of those who serve. Our experience, especially at a club level, is where the societies' rules are too complex, the governing body will simply ignore the rules and will therefore frequently find themselves acting *ultra-vires*. This in our opinion reflects a failure of drafting rather than a failure of the volunteer.

We would therefore request very strongly that greater consideration should be given to *de-legalising* the PRC and any subsequent master club document which may result.

B. DEFINITIONS

We find a number of terms used within the PRC which are intended to have a unique meaning within the context of their use.

We consider it a flaw that these terms are not defined within the Definitions. We consider that to omit clear definitions with regard to these terms will lead to future capacity for ambiguous interpretation, in some cases on subjects fundamental to both the PRC and the SNZC.

Omissions include (but are not necessarily limited to) the following terms:

- Competitive Swimmer (perhaps this may be better considered as 'competing swimmer')
- Interested Members
- Key Role in the Sport
- Member Club * (we note that the definition used is not consistent with that used in the SNZC)
- Performance Culture
- Previous Governance Experience
- Region (we note there is no starting point to define existing regional boundaries)
- Regional Designate

- Swimming New Zealand's Standards
- Swimmer capacity

C. Regional Definition

We understand that there is some view that this does not need to be defined, as boundaries are to be set by agreement with the regions and approved by SNZ. (SNZC 8.2)

It is our view that the foundation boundary must be established as the definition within each regional constitution, and then changes (subsequent to the foundation and as agreed from time to time) should be recorded as an appendix or journal by the regional associations and SNZ.

We remain concerned now as we were last year when the SNZC was proposed that the definition provided in the SNZC[3] determined that regional boundaries must be defined by territorial authority boundaries. We commented thus in an earlier submission:

> 1.1.1 Section 8.2. If in Auckland's case it were to agree a change of boundary with its neighbours it could not do so within this rule, given that under the Proposed Draft Constitution new boundaries must be defined by local territorial authorities.
>
> 1.1.1.1. The Auckland Territorial Authority is the entire area encompassing all 21 local board areas. Therefore Auckland (and presumably Counties Manukau) must retain their existing boundaries without change as there is no territorial authority which relates to either the current boundary or to any conceivable combination of how Auckland and Counties might adjust their boundaries in the future.
>
> 1.1.1.2. Even amalgamation would not succeed because the new boundaries created via amalgamation still would not align with the territorial authority boundary.

[3] SNZC 8.2 (b)

Our concerns on this subject remain. In effect, both Auckland and Counties-Manukau, at the very least and probably other regions as well, are effectively functioning ultra-vires with boundaries that do not correspond with territorial authority boundaries.

We are further concerned that there is a lack of clarity in PRC with regard to the requirement that a region *work within its Region*[4], and equally for a club under SNZC[5] *operating within a region*, or under PRC[6], *A member club may only be a member of one Regional Association at a time*.

We realize in writing this that it sounds obtuse, but sadly these documents, as prescribed are themselves obtuse.

We have an example which functions on our boundaries between two clubs, one Auckland and one Counties Manukau. Both have established a pattern (which incidentally we support) of sharing pool space and resource from time to time. That shared resource certainly under any lay definition would constitute not *working within* or not *operating within* a regional boundary.

We believe that where common sense dictates a better way to function, that our members should not be placed into a position where the common sense solution cannot be found because it would place the member in contravention of the rules. If the rules do not make sense then lay people will simply ignore the rules, which is not desirable.

D. COMPATIBILITY BETWEEN SNZC AND PRC

There are several examples where there are subtle (sometimes) but distinct differences between the two documents. We are unsure if this is intended which if so, carries some important considerations, or if these differences are simply differences which occur from drafting. Either way, it is important for clarity that they are resolved. Our document mark-up highlights some of those variances. However, by way of example we raise variances in the Objects as detailed between the two documents.

1. SNZC requires that a region must *support(ing) the development of member clubs and the relevant training, education and development of athletes* etc.[7] The PRC does not contain an equivalent Object, so therefore does not meet the requirements prescribed by the SNZ document. We appreciate this is likely

[4] PRC 5.1.o
[5] SNZC 9.1
[6] PRC 7.5
[7] SNZC 8.4.e

an oversight, but it is not unique in being an isolated variation and we would expect in a final form document that all such variations will be remedied.

2. Other variations also give rise to differences in interpretation. For example, SNZC 4.2(a) which states for SNZ to *encourage people to choose to participate in the sport of competitive swimming*. Now, in PRC there is no such similar object for a region.

   Logic would suggest that this is a simple oversight of drafting, however it may also be that it is specifically intended that this is a variation in the objects of the two respective organizations and that it is not intended for a region to *encourage people to choose…* as this may be a power to be jealously guarded by the national sporting organisation (**NSO**). While we would hope not, we concede that is possible, and so therefore must request that all such variations are identified and either be confirmed and corrected as errata, or be confirmed as being an intentional reflection of differing powers.

3. Under the PRC a region is required to include within its objects (PRC 4.2.e) *support [for] the development and running of inter-zonal competitions in accordance with Swimming NZ's standards*. We note with concern that neither document (PRC or SNZC) defines *Competition Zone*,– the term used in SNZC 8.4.c even though an entire section is dedicated to the concept (SNZC 10) nor the term *inter-zonal competition* – the term used in PRC 4.2.e which is, one might assume, intended as the equivalent of SNZC 8.4.c.

   Unfortunately, while it may be intended that this term is the equivalent of that used in the SNZC, we must point out that at no stage in Section 10 (SNZC) does the term inter-zonal competition appear or, it would seem, have been contemplated. What seems apparent is that the entirety of SNZC 10 is referring to what might more correctly be referred to as an *intra-zonal* competition structure – specifically, competition *within* a zone.

   We wonder then at the apparent contradiction of content between the two documents on this subject (or possibly subjects!) and would highlight this as another example of inconsistencies between the two documents. In this case this appears to be more than a simple oversight of drafting. It would seem to us that the intent of the PRC is to require the support of a region for a completely different form of competition to that which the SNZC requires under its provisions. Further, there is a complete absence in the PRC of an

object equivalent to that required by the SNZC for a region to support in its objects the competition which is contemplated in the SNZC. This would lead us to a view that the author of the PRC was clearly contemplating a competition of different form to that being discussed in the SNZC.

Once again, the subjects we have highlighted above do not form a comprehensive list of every contradiction between the two documents, but we hope serve to highlight the reality of the conflicts and the need for considerably more work to ensure that such examples of conflict are completely eliminated.

As the SNZC has been adopted through SGM vote and would now require a similar level of authority to change (SNZC 20) we would anticipate it is going to be easier to make corrections to the PRC to eliminate conflicts than to return to a re-draft of the SNZC, although once again we would highlight that such a re-draft/work of the SNZC was committed at the 2012 SNZ SGM.

E. WHOLE OF SPORT

We identify the Whole of Sport (**WOS**) process as being a fundamental cornerstone in the foundation relationship between the NSO, regional sporting organisation (**RSO**) and clubs as the grass roots delivery agents.

We are concerned that some references to the WOS infer a unilateral aspect to the relationship, but equally welcome a tone of suggested collegiality where it exists.[8]

We are also concerned that there are future obligations which will arise from WOS which are not presently clearly understood, but would highlight for the benefit of our member clubs that the WOS process will fundamentally determine the future of how the sport is both funded and delivered.

F. MEMBERSHIP

We probably carry more concerns under the area of membership than any other portion of the PRC.

There are critical variations which exist here which, unless clearly resolved, will provide opportunity for endless future conflict, debate and dispute. We ask that effort is placed

[8] PRC 5.2.g

into resolving and ensuring that the Membership area of the PRC is clarified in plainness and simplicity.

We would note for the benefit of SNZ, but most especially our member clubs, that the membership requirements will require fundamental changes to the governing documents of almost every member club. That does mean that in signing up to the PRC our member clubs are in effect also signing up to a requirement that they will change their own constitution to comply.

We would urge our member clubs to understand their obligations and powers under their own constitutions in this regard, as most constitutions can only be changed with and under the express instruction of a General Meeting called for that purpose (in the case of incorporated societies) or by some other method for those clubs which are special character clubs.

SECTION TWO - ANALYSIS

In this section we will make constant reference to both the PRC and the SNZC, and will refer to various clauses either in the body of text or as footers. For a more complete analysis, the reader should refer to these documents. For additional reference we have attached our marked up version of the PRC, and also the ASA's 2012 submission to the Draft SNZC.

Let us start from the beginning:

1. **Regional Membership** – It is clear that a region can only have members who are clubs, who in turn are members of SNZ, and who also have individual members.

    1.1. In order for a club to be a member of SNZ then it must meet certain criteria under Clause 9.1 of SNZC and also under Section 6 of PRC.

    1.2. Some of our current member clubs do not currently comply with those requirements. As all clubs (including, it would seem, existing clubs) need to apply to become members (PRC 6.6) this raises some issues after adoption of the PRC.

    1.3. If a club currently a member, does not comply at the time the PRC is adopted, do they then not qualify for continuing affiliation?

        1.3.1. For example, PRC Clause 6.6.b. requires a member club *to have objects which include attracting, developing and retaining [Competitive?] members in the sport*.

        1.3.2. We would have several of our member clubs who do not currently have those objects, and would thus on adoption of the PRC not then qualify for membership.

        1.3.3. Recognising this, we believe that there must be suitable transition regulations applied relating to existing affiliated clubs.

    1.4. Certain (verbal) assurances were given by the former Governance Administrator of SNZ that the conditions for membership (SNZC 8.1) would be applied to new member clubs rather than existing clubs.

1.5. Clearly that cannot be so as PRC 6.7 requires the region to annually determine continuing compliance in addition to the requirements of PRC 6.6 as noted above.

1.6. We would therefore like a clear understanding of what transitional regulations will apply as it relates to existing clubs being able to place themselves in a position of compliance in order to apply for and be granted membership.

1.7. We note that there are clubs of various types within our community, including some we would describe as being special character clubs. This includes RNZAF (currently affiliated), Devonport (not currently affiliated but operational) and possibly others in our community which because of their special nature will never be able to meet all matters of compliance as detailed.

1.7.1. Those military clubs are established under the Defence Act and are subject to individual service orders. This means there will be areas contained in the requirements of the SNZC and the PRC which they simply will never be able to adhere to.

1.7.2. With that in mind as these are valued members of our community we seek clarification as to what formal exceptions will be granted to allow their continued participation and as to whether those exceptions will be established through specific amendment of the PRC or by way of special irrevocable undertakings by SNZ.

1.8. **Approval of New Clubs –** We note that under the SNZC that this is a regional function. We welcome that position.

1.8.1. We also note that there is ambiguity surrounding approval of a new club, a matter which we do not welcome.

1.8.2. SNZC 9.1.b requires a new applicant club (indeed any club, but in this case, we will consider firstly a new applicant club) to have 50 members. We are not satisfied that this criteria is sufficiently free from ambiguity to meet tests of robustness.

1.8.3. We would note for your consideration that the Incorporated Societies Act (**ICA**) requires a minimum of 15 members to incorporate a society.

1.8.3.1. While not all member clubs are Incorporated Societies this would be a number (15) if selected as a minimum that would have some inherent logic and reasoned basis for adoption.

1.8.4. Given that a club must have objects consistent with the development of swimming as a competitive sport (PRC 6.6.b) it is not unreasonable to extend that at some stage an interpretation of this rule will be that 50 members, means 50 *competing*, or 50 *vote eligible members*.

1.8.4.1. We appreciate some view that the capability of adding *other interested members* as being sufficient to support a position where to have 50 members from any class meets this requirement. We note also that as presently constituted neither the SNZC nor the PRC contains a definition for *interested members*. We would argue that in the absence of a definition no such class of member can therefore be created or counted.

1.8.4.2. Equally we have had others who have argued the other way. What we seek is clarity.

1.8.5. We are concerned as it relates to new applicant clubs, that if the membership criteria is related to *competing* (or other vote eligible) members that it will in effect become impossible for a new entity to ever become a member club.

1.8.5.1. This is because one cannot become a member until one *competes* – one cannot *compete* until one is a part of a club. That 'chicken & egg' position is covered and anticipated for intending members of existing clubs under provision SNZC 6.3.b, but no such provision exists as it relates to a new member club.

1.8.6. We would therefore ask how a society who has no *competing* members could become a club with 50 members, if the eligibility is directed toward *vote eligible* members.

1.8.6.1. Once again, we seek clarity and do not believe such a fundamental issue should become the subject of varying interpretation.

1.8.7. The number of 50 members is a given, and indeed, formed a part of the Moller Report. We note that there are aspects of the Moller Report where SNZ has now considered events have overtaken. We wonder if this maybe a further aspect which is about to become another.

1.8.7.1. In that same spirit we would ask that further consideration be given to clarification surrounding the 50 member requirement. This has the potential to, in our opinion, create needless anxiety and future *system fiddling* to meet a standard without really making any real difference to delivery capability.

1.8.8. If the number 50 is intended to apply to competing members and support groups as indicated by voting representation (as we believe is a sound interpretation), then we would question the relevance of a threshold having been set at 50, and will detail by example subsequently.

1.8.8.1. If the intention is to allow 50 members comprised of any number or ratio of *interested members* (however that maybe defined) then we would quite simply question the relevance of the threshold at all.

1.8.9. Of our 16 currently affiliated and operating clubs, at least 7 would either currently, or may regularly, fall short of the numeric threshold if measured in competing number terms. Each of these clubs are extremely valued members of our community, but of course, if so required could meet a general number of 50 when considering *interested members*.

1.8.9.1. An example of the value that these clubs provide is Kowhai Swim Club, which is based remotely in Warkworth. We assume this example will be repeated many times over throughout the country. Kowhai currently has approximately 100 actively participating swimmers, only 7 of whom are *competing members*. The reasons why others do not compete are sound and reflect circumstances of distance, cost etc. To rigidly enforce a numeric compliance in this circumstance will not result in another 43 competing members, but in the loss of 7 who currently participate, and also the effective loss of another valuable aquatic facility to our sport.

1.8.10. We already have several 'clubs' (non-affiliated) in Auckland who have previous historical affiliation, but who now do not because it is easier for them to ignore a competing element. These non-aligned clubs control waterspace in Massey, Helensville, Devonport, Youth Town and Northcote, to name a few.

1.8.11. It is our opinion that our community will be better served as we seek to find ways to encourage rather than restricting alignment.

2. **Swimming XYZ Designates** – The standing of designates is contradictory as presented.

2.1. PRC 5.1.f clearly grants to the region the power to determine who it will accept as a Regional Designate and yet SNZC 6.3.b grants (seemingly) the power to a putative designate to align with a region without the region itself having any particular power of acceptance or veto.

2.1.1. Is it intended that there should be an application process to a region for a designate or is the region required to accept all who would wish to become designates?

2.2. Once a designate has aligned with a region we would ask as to who is responsible for managing the designates application for SNZ membership and ongoing membership details including database participation etc, as it would appear that the PRC intends that this function generally is managed by clubs?

2.3. If the region is required to deal with the membership administration of designates then we fail to understand why the region is unable to charge a fee of each member designate as required in PRC 6.5? This, when presently a fee is intended to cover the costs of 'membership style' activities and recording.

3. **Life Membership** – We endorse the principle of a region having powers to recognise service and especially long-standing service of an outstanding nature which might result in the award of a traditional *Life Membership* award.

3.1. However, we do not believe the method proposed in the PRC is satisfactory. Clearly the intent of the SNZC was to restrict regional membership to clubs alone. To propose the granting of an effective *non-member* life membership as proposed does not disguise the fact that such *life memberships* do not constitute *membership* at all.

3.2. We would propose that such achievements for service be re-designated as *Lifetime Achievement Awards*, or such other designation, but without the ambiguous reference of *membership* when no such attachment is intended.

3.3. If the ability to name an award of this nature *life membership* is amended then we could support other aspects of the proposed handling of these candidates under the regional designate classification.

4. **Club Membership** – This will be an area with profound impact for each of our member clubs.

4.1. Each of our member clubs currently have their own established rules associated with membership which will not comply directly with those required under SNZC 6 generally, nor PRC 6.

4.2. This will create the inevitable position where each club will need to amend their existing constitution to comply with these requirements.

4.3. We would note that for many of our clubs it may be considered that to adopt a new constitution amounts to a costly impost. We are therefore not recommending that a new constitution is the way to go for each club, but equally we must recognize the implications inherent in the adoption of this PRC.

4.4. In order to comply and be consistent with the SNZC and PRC that the adoption of new Club Constitution maybe the only practical option available.

5. Competitive Members

5.1. We would note the requirement for a member to have competed in a recognized event *prior* to becoming a member.

5.1.1. We would also note that the authors of SNZC have recognized the difficulty this provision provides for an applicant to become a member when they have not yet competed. They have provided for this in SNZC 6.3.b.

5.2. We would also note the requirement for a competitive member to apply to become a member of SNZ in addition to being a member of their club. The direct responsibility for managing this process is a club, rather than a regional process.[10]

5.2.1. We wonder how this reconciles with the provisions of PRC 4.2.f.iii requiring a region to seek to minimize the administrative complexity of the sport?

5.2.2. Clubs, with their volunteer workforce, are the least well equipped to deal with this additional workload, in many cases well beyond what they are already managing.

6. **Interested Members –** We note this rather amorphous *hold all* classification and would express our concern at the lack of definition of what constitutes an *interested member*.[11]

6.1. We believe that an effort needs to be made to define the parameters of *interested member* and as previously noted, we wish to know whether it is intended that an *interested member* is capable of being counted for meeting club membership criteria.

[10] PRC 6.8 and others
[11] SNZC 9.1.b

6.1.1. We believe there are compelling arguments to suggest that they may not be counted, and that as such, their inclusion in membership numbers should only be seen as a point of temporary compliance.

6.2. When we submitted on the Draft SNZC in 2012 we raised the question relating to the contracted right of a region to charge a membership or affiliation fee of a club member, when under the then proposed SNZC there is no actual membership position or standing of that member with the region.

6.2.1. Once again we ask what the envisaged status of a member is, in the event that the regional portion of their fee or indeed any other amounts owing to a region may not be paid to the region, as those individuals and the region clearly do not have any commonality in their standing.

6.3. We also seek clarification of the rights of a region when issues such as the member (not of a region) holding regional property (i.e. a trophy) come into play. As the athlete is not a member of the region, what power or right of redress does the region hold to make claim or to secure regional property/assets?

6.3.1. May we suggest that this will need to be covered under the membership agreements with both clubs and SNZ with a provision that a member (of those two organizations) agrees as a condition of membership to become subject to all rules and conditions of the region to which their club belongs.

6.3.2. Failure to do this surely will mean that there is no primary relationship of claim which exists between member and region.

7. **Technical Officials** – Once again we find ourselves addressing the issue of a national timekeeper's qualification.

7.1. There is currently no such qualification, as there was not when the SNZC was approved.

7.2. Unless there is an intention to reintroduce that qualification we would respectfully suggest that item of redundancy be removed from both documents (SNZC and PRC) with immediate effect as to include an obviously redundant aspect clearly makes no continuing sense.

8. **Database –** We noted in our submission in 2012 relating to the SNZC as follows:

8.1. On the subject of the database requirements in the SNZC:

> (a) The Database We accept a need for a database but the current membership database simply cannot deal with the membership issues as defined both in the Proposed Draft Constitution and the Proposed Transitional arrangements. The Transitional regulations will require amending to compensate for the inability of the current system to deal with membership as defined. In the current form we could not accept this document as we simply cannot comply with the requirements for reasons beyond our control.

8.2. We further noted:

> **5.5 The requirement under Section 6.8 for members to furnish personal details for the national database is considered unlawful and to fall outside the laws pertaining to privacy in this country.**
>
> 5.5.1 Based on advice which we have received and the expectation of our members, no member should be required to forfeit their legal right to the provisions of the Privacy Act as a condition of membership.
>
> 5.5.2 We would expect that in accordance with best-practice, members are granted an assumption of privacy upon membership, with the right to 'opt-in' as opposed to the right to 'opt-out' of having their personal details made available to third parties.
>
> 5.5.3 Under the Proposed Draft Constitution there is neither a right to opt-in or opt-out granted. That is unacceptable.

8.3. Our position on this subject has not changed in the interim.

8.3.1. We are concerned especially as it relates to our special character clubs (RNZAF and Devonport) that the statutes under which they are established together, with the specific security requirements of Defence Force personnel mean that these clubs will simply never be able to meet the requirements imposed by both the SNZC and the PRC on the subject of the database and data collection.

8.3.2. We would consider it a tragedy if we were to lose the engagement of these valued and respected members of our swimming community over matters of administrative inflexibility.

8.3.3. While we have two examples of clubs who will simply be unable to comply, we equally expect that there are others who are members of our community as individuals and who for reasons of preference or security simply cannot comply with the data collection requirements.

8.4. Once again we ask that our legitimate concerns which reflect concerns expressed by many of our members on this subject be heard, considered and that the simple and rather obvious remedies be adopted.

9. **Club Administrative Requirements** – We endorse the sentiments contained in PRC 4.2.f relating to administrative simplicity.

9.1. We have already established practices of reducing club compliance where there is no practical benefit.

9.2. One area where we have done this is in the provisioning of various reports.

9.2.1. PRC 7.4.a & b. require clubs to provide Annual Reports and Financial Statements to the region. We see this as being unnecessary. We would note that most clubs (not all we acknowledge) are Incorporated Societies. They are therefore required to lodge annual returns with the Registrar of Incorporated Societies. Why would we wish to add another layer of requirement for no apparent purpose or advantage? If the return is required for whatever reason by a region then they can obtain it as a matter of public record, this saving club volunteers yet another task of required compliance.

9.2.2. We have our special interest clubs who simply cannot provide a financial statement to us as their structure and accounting is covered under military orders and cannot, we understand, be made available to third parties.

9.2.3. Other clubs (i.e. we have one that is a subsidiary of a Charitable Trust) do not keep independent accounts for the club activities alone.

9.3. We simply do not see the need for this information to be provided to a region at all, other than perhaps for matters of reporting against KPIs.

9.4. We do note that clubs are required to be financially independent and would anticipate that an Annual Statement from the clubs committee to the effect that they meet that threshold would be adequate.

10. **Governance** – We consider the proposed appointment process, terms of office of regional board members etc, as being satisfactory to meet Auckland's conditions. We cannot answer for other regions. However, we express concerns in the following areas and request reconsideration:

10.1. PRC 8.1 Board membership restricted to 6 members.

10.1.1. This is limiting especially when considering the practical requirement for a regional board (even in Auckland where we run a full professional office) to be a working Board.

10.2. PRC 8.3 Provision that the six regional board members be elected

10.2.1. This is contradictory to the requirements of SNZC which insists[14] that the regional board must have *at least two persons appointed by, and to its governing board/committee because of their governance capability*.

10.2.2. We appreciate that appointment by election may be construed as *appointment*, but would not be contextual with the balance of the SNZC.

10.2.3. We draw attention to our recommendation below 10.3 relating to board size and our issues (already raised) surrounding the definition of *previous governance experience*, and would again note the inconsistency between the requirement of SNZC and the PRC on this subject.

[14] SNZC 8.3.d

10.2.4. We interpret, perhaps incorrectly, that the intention of the PRC is that all board members are appointed by election, but could not be sure that this is so.

10.2.5. We therefore seek greater clarity in the wording and definitions together with consistency between the SNZC and the PRC.

10.3. We would propose for your alternate consideration a model which allows the elected board to second two additional members for limited period terms to full membership of the Board.

10.3.1. With a full Board of 8 persons and a quorum of 4, we consider that to be workable and would likely reflect most regional capabilities.

10.4. PRC 8.2.b *A person who holds a governance role in … a member club*

10.4.1. We do not see this as being either necessary or desirable.

10.4.2. We genuinely believe that to place this restriction at a regional level would severely curtail our capacity to fill our Board with capable people.

10.4.3. We would infer that if we face that challenge in Auckland that other smaller regions would see that challenge magnified.

10.4.4. It is not just a case of having enough people. We believe that our governance is better because we retain a connection to the delivery of the sport. This allows our regional governance to remain connected to the pulse of what is happening and the issues our clubs generally are facing.

10.4.4.1. It is true that on (a very few) occasions that conflicts arise but these can be dealt with by a robust register of interests and suitable operational protocols.

10.4.4.2. On our current Auckland Board we have 4 current members whose service on the Regional Board has either presently, or does now, coincide with service on a Club Board.

10.4.4.3. We would unquestionably be poorer, as would the clubs from whom those members came, for not having had access to that joint service capability.

10.5. PR 8.2.c …*any other key role in the sport*

10.5.1. This provision concerns us. First, we anticipate that a phrase such as this should require definition.

10.5.2. Further, we are concerned at is implication.

10.5.3. Dependant on the definition engaged, every member of our ASA Board currently (and for several years past) would be construed to hold, or have held, key roles within the sport. Whether this restriction is either necessary or appropriate will come down to how it is defined.

10.5.4. We do however express our concerns about the application of corporate governance principles, which while having merit in another corporate environment, become excessively restrictive and counter-productive in an environment such as a region. This because we are so heavily reliant on a small pool of contributors, many of whom give as they do, and in such a way, that they almost of necessity hold key roles within the sport at some level or another.

10.5.5. Once again, if we in Auckland would be diminished through this and other similar restrictions we can only wonder at the impact which may occur in smaller regions.

10.6. PRC 8.2 Additional Areas of Ineligibility to Stand for Office

10.6.1. We would also note that PRC 8.2 should have a further eligibility requirement relating to individuals who have either in the past been found guilty of Child Protection violations or are presently the subject of investigation relating to Child Protection violations.

10.6.2. One might also wonder about the eligibility of someone who may be the subject of a criminal conviction who still has an

unserved/unspent portion of their sentence outstanding. We would suggest that this is sufficient cause to disqualify a candidate from eligibility to stand.

10.7. PRC 8.6.d *Notification of candidates details*

10.7.1. This provision conflicts with PRC 11.3.

10.7.2. We believe that PRC 11.6 is the correct approach as clubs/delegates will require sufficient notification of candidates and business on the AGM in order that they may establish their instructions to their delegates in a timely manner.

10.8. Requirement to vacate through violation or complaint under the Child Protection provisions

10.8.1. We believe that another exclusion[15] should be added to include Child Protection.

10.8.2. We acknowledge the risk that this may be used for political purposes at some stage, but consider our obligations as it relates to Child Protection to be such that any person who is under a cloud of allegation or question relating to Child Protection should be ineligible until such time as all process' of enquiry/natural justice have been served.

10.9. Requirement to vacate through conviction of a serious criminal offense

10.9.1. Once again we would suggest that, as obvious as it might seem to most, that this should be spelt out as it may not always be obvious to a person so convicted, especially if their sentencing involves a non-custodial sentence.

10.10. PRC 8.10.e

10.10.1. We consider that the restriction on unsuccessful candidates being ineligible for appointment to fill casual vacancies as being unnecessary.

[15] In PRC 8.9

10.10.2. Equally, if our recommendation to allow appointed directors to fill board potions is accepted[16] then this restriction should not apply either.

10.10.3. We have current membership of our board which has arisen from candidates who were unsuccessful in a contested election who then have been appointed and subsequently elected.

10.10.3.1. We would consider the proposed restriction appropriate where (as is the case of the SNZC) an appointment panel puts forward a single candidate for an effective coronation.

10.10.3.2. In that respect a rejection of the candidate amounts to a rejection of the appointment panel and hence there being logic to the restriction.

10.11. PRC 8.9.e Vacation through Dying

10.11.1. May we note that the more correct terminology would be *vacated the Board upon death*.

10.12. PRC 9.2.h Performance Culture

10.12.1. This term requires definition as it is ambiguous.

10.12.1.1. Does it refer to a corporate *performance culture* (logical), and if so, what does that mean?

10.12.1.2. If it is referring to a sporting performance culture (which may also be contextually logical) then that may be contradictory to the broader aims of delivering the sport at all levels of competition.

10.12.2. Tighter unambiguous definition is therefore required.

10.13. PRC 9.2.j and other references – Audit

[16] PRC 5.b.1

10.13.1. Audit has dual meanings. When used with a small '*a*' case law clarifies that *audit* means a set of accounts completed by a certified or public accountant acting independently of the organization.

10.13.2. When used with a large '*A*' then audit means a set of accounts which have been subject to full Audit by a correctly certified Auditor.

10.13.3. We feel the intention of this provision is likely to be the latter, and if so, then we would request that it be amended.

10.13.4. The increased levels of professional liability associated with Audits is such that the cost imposition on relatively small NFP's such as a regional association are significant. Issues of probity and accuracy can be established without a full audit. Our experience is that a full audit now carries so many caveats to protect the professional that very little added protection is provided to the society.

10.13.5. We would recommend that a single level of accounting by way of a set of accounts prepared by a member of a professional accounting body would be suitable.

10.13.6. For the avoidance of doubt we would suggest removal of the term *audit,* leaving the choice to the current prevailing practice for organisations of a similar size and nature.

10.14. <u>PRC 9.5 Member Protection Policy</u>

10.14.1. The terminology here needs to be consistent with that used elsewhere (notably PRC 5.2.m).

10.15. <u>PRC 10.2.c AGMs</u>

10.15.1. See note above relating to Audit.[17]

10.16. <u>PRC 10.2.d</u>

[17] PRC 5.b.xi

10.16.1. Surely this should read *election* (and maybe announcement) *of any new Board members*.

10.16.2. The PRC does contemplate *election* as opposed to *appointment*.[18]

10.17. PRC 10.2.f

10.17.1. See note above relating to Audit

10.17.2. If adopted, should therefore be *accountants* rather than *Auditors*.

10.18. PRC 10.3

10.18.1. We would consider that this should read as an either/or – being 1/3rd of voting capacity *or* 1/3rd of the number of clubs.

10.18.2. We would not consider it desirable to excessively limit the ability of member clubs to bring general items of business to an AGM.

10.18.3. As long as they are items requiring a normal majority for voting then the threshold should not be high as it relates to an AGM.

10.19. PRC 10.4.b SGMs

10.19.1. We believe that unlike an AGM there must be evidence when an SGM is called by the membership that there has been collaboration between member clubs.

10.19.2. We therefore believe that a collaboration between at least 1/3rd of member clubs is a more reasonable threshold than 1/3rd of voting capacity, which could quite conceivably be achieved in some cases without inter-club collaboration.

10.19.3. We link this thinking to PRC 10.4.e where all business of an SGM must be passed by special resolution.

10.20. PRC 10.5 Meeting Quorum

[18] PRC 8.7

10.20.1. We note that an application of this provision may then bring the meeting into conflict with the requirement in PRC 10.2 for a meeting to be held within 4 months of the end of the financial year.

10.20.2. The requirement to repost the meeting with at least 30 days delay may well (most likely) then mean that rescheduled meeting does not meet the requirements of PRC 10.2.

10.20.3. This provision for delay must either stipulate an exception to PRC 10.2 or provide for a delayed meeting to be opened without a quorum and adjourned for 30 days.

10.20.4. We believe this is what is contemplated but believe that the matter should be clarified for the avoidance of doubt.

10.20.5. We have faced such a circumstance in the recent past and greater clarity on the subject could and should have avoided the need for legal advice to be sought.

10.21. PRC 11.3 Notice of Meeting

10.21.1. See reference above to PRC 5.b.vi – the two provisions PRC 11.3 and PRC 8.6.d require synchronisation.

10.22. PRC 12.1.a Elections and Voting

10.22.1. We can envisage issues arising surrounding this provision.

10.22.2. There are issues surrounding responsibility for payments, collection of payments etc which are not immediately clear within this PRC.

10.22.3. What is clear is that there is not presently a database system which allows for payment detail to be integrated with membership numbers. Current practice requires membership and payment detail to be routed through the region. It is not clear that this process is intended to continue under this PRC.

10.22.4. If payment is to be routed directly to SNZ via the clubs then there are definite issues where it would be difficult for a region to reconcile that all payments from members (who are not members of the region!) have actually been made in due time.

10.23. PRC 12.1

10.23.1. These are very wide powers indeed to be vested in a Board and are certainly wider than any board with which we have been associated has been granted.

10.23.2. We can envisage that the exercise of these powers in certain circumstances could occur for political purposes only and would therefore express strong caution in having such powers granted.

10.23.3. While we understand the sentiment we would be concerned that an elected Board has the power to prevent or stifle democratic participation for political purposes.

10.23.4. The powers granted should be limited to objective measures only.

10.24. PRC 12.2.c

10.24.1. With a single vote per delegate reflecting differing (and possibly very widely differing) vote capacities, how can a vote by voice correctly reflect the electoral college?

10.24.2. With widely differing vote capacities for each member club we would anticipate that, at a minimum, a show of hands is required.

10.24.3. We still hold to a view that where matters of personal election are involved that a secret ballot is appropriate.

11. **Finance** - PRC 13.1

11.1. We fail to understand the merits of a synchronized balance date between regions and NSO.

11.1.1. We would also note that to change a balance date will involve each region incurring added costs of compliance (as one off points of expenditure). As this requirement would be externally imposed we would ask if SNZ is proposing to meet the budgeted costs of the change of balance date for each region?

11.1.2. Indeed, in the context of various requirements to account for memberships we can see significant merits in the current process of staggered balance dates.

11.2. We believe that further discussion needs to ensue to ensure that this proposal does not create additional pressure point workloads for both volunteers and regional administrators who are always going to be working with limited resource.

11.3. Audit - PRC 13.2. & 13.4 - See previous notes on this subject.

12. **Alteration of Rules** - PRC 15.1 – we note that this provision needs to be read in conjunction with Rule PRC 5.1.h and also SNZC 8.3.b.

12.1. Ultimately when read in conjunction there is no effective power to make changes to a Regional Constitution unless these are agreed, or effectively imposed by SNZ.[19]

12.2. We anticipate that there should be greater clarity of purpose surrounding these three provisions to avoid wasted time and effort.

12.3. It is clear when read together that a region must adopt a Constitution provided for it by SNZ. To allow changes at a regional level not in accordance with SNZ's agreement will lead to each region having variations to their document which does not seem consistent with intent.

12.4. In our opinion therefore it would be better in all three clauses to be clear and consistent that no changes can be made to the constitution without the prior consent of SNZ.

13. Disputes/Appeals - In our opinion there is room for greater clarity on this subject.

[19] SNZC 8.3.b

13.1. In normal conditions a club should be the primary point for any member dispute/disciplinary/appeal matters to be held.

13.1.1. We would see the region as being the primary point of appeal by a member to decisions made by a club, and then principally on issues of process rather than content.

13.1.2. We would anticipate in most circumstances matters dealt with this way can avoid being escalated to the national body or the sports tribunal who should be seen as points or *courts* of last resort.

13.1.3. We believe there would be merit in having greater clarity on this subject/process.

13.2. We note the provision for the engagement of the President on matters of dispute, and that this PRC does not contemplate a regional President.

13.2.1. The president to whom this refers is the national President. We have no value judgment as to the merit of this approach but it is a matter of some change which our clubs need to be aware of.

14. **Liability**

14.1. We believe that PRC 19.1 line 3 is not correct in referring to an AP.

14.2. This is a likely errata which simply requires correction.

SECTION THREE - CONCLUSION

While this submission is large it is not intended in any sense other than to ensure that a more workable set of solutions are obtained.

The nature of a region, its work and its relationship with its members and participants in the sport, have already been effectively changed through the adoption of the SNZC in 2012. It is our belief that those changes could have been more effective through a greater effort to ensure that the governing constitution was better refined.

We considered at the time, and still maintain, that to have adopted a governing document such as the SNZC without any effective review, and containing obvious errata, was unwise. We simply seek to avoid that same situation with regard to this document.

Equally, and as noted in the introduction to this document and based on the sound advice which we received at the time, the effective unilateral replacement of our own Constitution at the SNZ SGM with one which had not even been presented to our membership as required by our own rules and the Incorporated Societies Act was, and remains so now, ultra-vires.

We are further concerned that the same motion which effectively imposed a change of our own regional constitution on this unlawful basis has now also, in effect, been laid aside with one of the recommendations that the SGM bound SNZ to accept and adopt having now been publicly over-ruled. Regardless of the practical reasoning which may have existed behind this decision of the SNZ Board it leads us to question the regard which is paid to the due process', including any submission process, which are established.

We wish to emphasize once again that the decision relating to the replacement of our existing Constitution with one proposed by SNZ is one for our member clubs alone to make. As an association we have therefore sought in this process to emphasise areas of difficulty. We should anticipate these will be addressed in order for a final form document which is acceptable to our membership is created.

While we have sought to outline areas of concern we have not endeavoured to redraft the document. We would however reiterate that in our opinion the document is far too legalistic and should be simplified through the use of common language which will make it a considerably more effective document for use by those who are charged with running the sport in each region.

It is obvious to us that this document will carry a flow on impact requiring each club to make amendments to their own constitutions, and therefore we believe the sport will be better served through seeking to establish a pattern which is adapted to the capacity of the lay people who run the sport.

We do not believe that our community is well served, if in order to clarify matters, frequent reference needs to be made for interpretation to lawyers, or for us to be functioning in the *grey zone* of differing interpretations. Our sport can better spend its resource in other places the time of our volunteers being better spent in more productive activities.

We trust therefore that our submission will be received with the same good faith with which it has been offered.