

CONSULTATION PAPER

**LIABILITY OF CLUBS,
SOCIETIES AND OTHER
UNINCORPORATED
ASSOCIATIONS**

(LRC CP 68 – 2022)

Consultation Paper

Liability of Clubs, Societies and Other Unincorporated Associations

LRC CP 68 - 2022

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ISSN 1393-3140

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EXECUTIVE SUMMARY

1. This Consultation Paper forms part of the Commission's Fifth Programme of Law Reform.¹ This project examines the law on civil and criminal liability as it applies to clubs, societies and other unincorporated associations. Many voluntary non-profit associations, clubs, societies and other groups that gather in pursuit of shared religious, sporting or other recreational interests are unincorporated associations. Such associations do not have a legal existence separate and distinct from their members: the association is simply the group of members.
2. Many clubs, societies, associations and religious orders see no benefit in incorporating as a company. They rely on voluntarism and wish to avoid the costs and bureaucracy of more formal legal structures to organise their affairs. However, this has a number of important legal consequences. It means that:
 - (a) members can be exposed to personal liability for the wrongdoing of other members, in which they played no active part.
 - (b) members of unincorporated clubs, societies and associations who are injured cannot sue their own association, as doing so is treated by the law as suing oneself.
 - (c) suing unincorporated associations can be very difficult, as unincorporated associations cannot sue or be sued in their own name; rather individual members at the time of the relevant wrongdoing have to be identified.
 - (d) because unincorporated associations have no legal identity of their own, they require trusts to be established, through which property is held for the benefit of the association. This may mean that assets held by an unincorporated association are beyond the reach of litigants and regulators.
3. In this Consultation Paper, the Law Reform Commission highlights an existing means of achieving legal protection from individual liability: the company limited by guarantee (CLG). It also proposes a number of possible reforms to try to make the law on the liability of unincorporated associations clearer, fairer and more enforceable.

¹ Law Reform Commission, *Report: Fifth Programme of Law Reform* (LRC 120-2019), Project 12.

1. Background and Context

4. This project was partly prompted by the 2017 decision of the Supreme Court in *Hickey v McGowan*.² In that case, the plaintiff alleged that he had been sexually abused between 1969 and 1972 by a member of an unincorporated body called the Marist Order of Religious Brothers. The Supreme Court held that while the plaintiff was entitled to seek and obtain judgment against individuals who were members of the Order between 1969 and 1972 on the grounds of their vicarious liability as a group, he could not obtain judgment against the Order itself.
5. In simple terms, the judgment in *Hickey v McGowan* means that unincorporated associations cannot be held liable for wrongful acts committed by their representatives while acting on behalf of the unincorporated association. Liability potentially falls upon the individual personally responsible and, depending on the circumstances, on the other members, who may be found to be vicariously liable.
6. Even determining who is or was a member at a particular time can be difficult, and that is one of many barriers that face persons who wish to deal with or litigate against unincorporated associations.
7. The most striking feature of the law in relation to unincorporated associations is that it is unclear. That lack of clarity has consequences in every area of legal activity in which an unincorporated association might be involved:
 - (a) **Contract law:** unincorporated associations cannot be a party to a contract. Contracts will usually be concluded either by trustees or by club officers or by other members who enter contracts on a club or association's behalf. This may be unsatisfactory for those who enter into such contracts on behalf of the association; equally it is unsatisfactory for third parties trying to contract with unincorporated associations because it is often unclear who is liable for breaches of contract. While suppliers and contractors may believe that they are contracting with a club, that is not the legal reality.
 - (b) **Statutory compliance:** legislation often purports to apply to unincorporated associations, but it does not specify how in practical terms laws designed for individuals and corporate entities apply to an association that is the sum of its members and has no separate legal existence. Further, legislation does not specify exactly how an unincorporated association is to be held liable - whether liability is

² [2017] IESC 6, [2017] 2 IR 196.

imposed on the unincorporated association, on all the members of the unincorporated association, or the person responsible.

- (c) **Ownership of property:** unincorporated associations cannot own property. Instead, legal title to property must be held by a trustee for and on behalf of an unincorporated association, or in the name of individual members or office-holders of an unincorporated association who act as trustees for and on behalf of an unincorporated association. This may pose difficulties in accessing association funds and assets to meet liabilities.
- (d) **Criminal and regulatory enforcement:** little consideration has been given to adapting criminal and regulatory law to expressly include unincorporated bodies and to set out how fines will be met. It may be desirable to provide for criminal responsibility for associations as distinct from their members in certain circumstances, for example in health and safety law. Rules relating to criminal procedure are also under-developed in relation to unincorporated associations.

2. Law Reform Objectives

- 8. The Commission has set out a number of key objectives of law reform in this area:
 - (a) The objective of bringing clarity to the law on unincorporated associations
 - (b) The objective of protecting the interests of third parties dealing with unincorporated associations
 - (c) The objective of providing that the assets of an unincorporated association are available to meet its responsibilities
 - (d) The objective of providing that unincorporated associations can be sued in their own names
 - (e) The objective of clarifying the law on personal liability of members
 - (f) The objective of clarifying the applicability of existing legislation to unincorporated associations
 - (g) The objective of ensuring that existing legislation is enforceable in respect of unincorporated associations

- (h) The objective of removing the impediment to suing a club of which you are a member
- (i) The objective of minimising regulatory burdens.

3. An Existing Solution: The Company Limited by Guarantee (CLG)

9. The Commission has emphasised that the company limited by guarantee (CLG), provided for by the Companies Act 2014, is an existing mechanism that can be used to protect members of unincorporated associations and the third parties that deal with them. A CLG does not have share capital. It gives the protection of limited liability and the advantages of separate legal personality, which means that bodies organised as CLGs can own assets without the use of trustees, can enter contracts and can sue or be sued without the exposure of individual members to personal liability.
10. For smaller, more casual unincorporated bodies involved in low-risk activities, incorporation is often seen as unnecessary and a drain on resources. However, for larger bodies that own assets, enter contracts and operate with employees or volunteers similar to employees, the CLG is an available and sensible solution to many of the problems of unincorporation.

4. Law Reform Proposals

11. However, the Commission acknowledges that there are costs and regulatory burdens associated with incorporation as a CLG. The Commission has therefore given consideration to other means of achieving protection for both members and third parties dealing with unincorporated associations for groups that may wish not to incorporate. The Commission has presented three broad models for law reform:

Model 1: Legislate to create a “non-profit registered association”, by which separate legal personality could be gained by registration;

Model 2: Confer separate legal personality on unincorporated associations that fulfil specified criteria; and

Model 3: Do not confer separate legal personality, but specify how unincorporated associations are to be held liable in contract, tort and for offences, with a series of focused reforms that do not alter the legal status of unincorporated bodies.

Accessing association property to meet liabilities

12. Regardless of the legal form that a club, association or other unincorporated body takes, the use of trusts to hold funds and assets can put those funds and assets beyond the reach of litigants.
13. This is problematic from the perspectives of both members and third parties. In the Supreme Court case of *Hickey v McGowan*, O'Donnell J noted the need for reform, saying that if a defendant succeeded in having a judgment awarded in their favour against members of an unincorporated association:

“... the judgments are individual and whether or not such judgments will be met by insurance, or from assets which may be held for the benefit of the order more generally, may depend on the terms of the insurance, and indeed the terms upon which such assets are held, and perhaps the willingness and ability, of the order to make funds available to satisfy any judgment against an individual. Whether this is a desirable position as a matter of law and whether further changes should or could be made, is a matter which might usefully be considered by those charged with law reform.”³

14. While trust property held for the general purposes of the unincorporated association could be accessed by trustees for such purposes including liabilities, charitable trusts may be out of the reach of the trustees without statutory intervention.
15. In Australia this issue arose in the case of *Trustees of the Roman Catholic Church v Ellis and Anor*,⁴ where the New South Wales Court of Appeal found that an unincorporated association (the Church in this case) cannot sue or be sued because it does not have a legal existence or personality. The Court also held that the fact that the trustees held property for and on behalf of “the Church”, did not mean that trust property could be used to meet all legal claims associated with Church activities.
16. Following recommendations made by a Royal Commission into Institutional Responses to Child Sexual Abuse, and to address what was perceived to be an injustice, legislation was introduced in a number of Australian jurisdictions to compel the nomination of an appropriate defendant in such cases, addressing

³ [2017] IESC 6 at para 57, [2017] 2 IR 196 at para 58.

⁴ [2007] NSWCA 117, (2007) 70 New South Wales Law Reports 565.

difficulties with vicarious liability, and to provide that liabilities could be met from trust assets.

Outline of this Consultation Paper

In **Chapter 1**, the Commission gives an overview of unincorporated associations and comparable bodies.

In **Chapter 2**, the Commission examines the issue of the civil liability of unincorporated associations.

In **Chapter 3**, the Commission examines legal and practical issues concerning the purported attribution of criminal liability on unincorporated associations in respect of certain offences.

In **Chapter 4**, the Commission looks at the approaches adopted in other jurisdictions and identifies potential law reform options to remedy the issues presented by the lack of clarity concerning the extent of civil and criminal liability of unincorporated associations in Ireland, including possible reform of the law relating to trusts.

This Consultation Paper differs slightly from the format of other Consultation Papers published by the Commission, in that questions are not asked at the conclusion of every chapter. This is because the various issues – civil, criminal and regulatory – are interconnected, as are the potential solutions. Accordingly, proposals for reform are considered comprehensively in the final chapter, which sets out a variety of approaches adopted in other jurisdictions before asking what approaches should be adopted in Ireland.

Seeking your views

A Consultation Paper contains an analysis of issues that the Commission considers arise in a particular law reform project, together with a series of questions intended to assist consultees. A Consultation Paper does not usually contain any settled view of the Commission. It is therefore intended to provide consultees with an opportunity to express their views and to make any related submissions on the questions that arise in the Consultation Paper.

Consultees need not answer all questions and are also invited to add any additional comments they consider relevant.

Consultees should note that submissions are, in principle, subject to the possibility of disclosure under the Freedom of Information Act 2014 (FOI). Any person may make a submission saying that they are making it on a confidential basis, especially if it contains personal information, and we would then treat it as confidential as far as possible. In the event that we receive a request for any material to be disclosed under FOI, we will, before releasing the information, contact the person concerned for their views.

Submissions can be sent in either of the following ways:

(a) You can email your submission—in whichever format is most convenient to you—to the Commission at UnincorporatedAssociations@lawreform.ie.

or

(b) You can post your submission to:

Law Reform Commission,
Styne House,
Upper Hatch Street,
Dublin 2,
Ireland.

We would like to receive submissions on this Consultation Paper no later than close of business on Wednesday **15 March 2023** if possible.

CHAPTER 1

OVERVIEW OF UNINCORPORATED ASSOCIATIONS AND COMPARABLE BODIES IN IRELAND

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1. The nature of unincorporated associations

(a) Defining “unincorporated association”

- [1.1] In this Consultation Paper, the term “unincorporated association” is used to describe a category of voluntary non-profit associations, clubs, societies and groups of persons who associate together in pursuit of one or more stated, lawful, non-commercial purpose, and that the common law does not regard as having a legal personality separate and distinct from its members. The scope of this Consultation Paper is confined to the civil and criminal liability (including regulatory liability and compliance) of unincorporated associations, as defined above.
- [1.2] In Ireland, as in other jurisdictions, it is difficult to define the key characteristics of an unincorporated association. It has been said that:
- “[u]nincorporated associations have been a problem for the law. They are analogous to partnerships, and yet not partnerships; analogous to corporations, and yet not corporations; analogous to joint tenancies, and yet not joint tenancies; analogous to mutual agencies, and yet not mutual agencies.”¹
- [1.3] This is what has been described as “a quandary to the courts and the legislatures. [Unincorporated associations] existed before law and have persisted despite their nonrecognition.”² The result is that the law has grown and developed around them and, while they have been treated in some respects as though they have a separate and distinct legal personality and as though they are corporate in character, on a fundamental basis the law is clear: they do not have a legal personality separate and distinct from their members and they are not corporate in character. That, as will be seen, has a number of important legal consequences, including causing difficulties for those who wish to recover damages against them in the event of injury. Claims are effectively taken against the membership as a whole, and so, from an individual member’s perspective the legal consequences and financial risks of being a member of an unincorporated association are often underappreciated. If a club or association is incorporated,

¹ *Cox v Thee Evergreen Church*, 836 SW2d 167 169 n3 (Tex 1992) (Gonzalez J) at para 3. See also Oleck, *Nonprofit Corporations, Organizations, and Associations* 4th ed (1980) 320.

² Payne, “Unincorporated Associations Trends” in “Trends in Nonprofit Organization Law: A Wake Forest University Law Seminar” 31 (Oleck, Chairman, 1977), cited in Davison, “Cox v. Thee Evergreen Church: Liability Issues of the Unincorporated Association, Is It Time for the Legislature to Step in?” (1994) 46 *Baylor Law Review* 231.

such as by means of establishing a limited liability company, members can be insulated from such personal legal risks.

- [1.4] It is tempting to ascribe a status distinct from the membership on these entities that for all intents and purpose do seem to exist, in reality if not in law, in the way a corporate entity does. As Dicey put it:

"[w]hen a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted."³

- [1.5] However, existence in the eyes of the public is a different concept to existence (or inexistence) in law and the two cannot be readily conflated.

- [1.6] A central feature of unincorporated associations is their non-profit-making nature. In *Dunne v Mahon*,⁴ the Supreme Court drew a distinction between partnerships (which are governed by the Partnership Act 1890 and the Companies Act 2014)⁵ and unincorporated associations by emphasising that unincorporated associations are non-profit making, whereas partnerships are usually profit-making:

"Precisely because partnerships were about making profit and acquiring assets, it is unsurprising that disputes concerning partnerships appeared before the courts on a much more frequent basis than disputes involving unincorporated associations which did not have business at their heart."⁶

Unincorporated associations are a separate and distinct type of entity from an incorporated body or company.⁷

- [1.7] There are very few clear definitions of an "unincorporated association" in law. This may be because unincorporated associations tend to be defined by what they are not, rather than what they are. As Clarke J commented in *Sandymount & Merrion Residents Association v An Bord Pleanála*, an unincorporated association is "simply the sum of its individual members with no independent legal personality."⁸ In

³ Dicey, "The Combination Laws as Illustrating the Relation Between Law and Public Opinion in England During the 19th Century" (1903-4) 17 *Harvard Law Review* 511.

⁴ [2014] IESC 24, [2014] 2 IR 337.

⁵ See Sievers, *Associations and Clubs Law* 3rd ed (The Federation Press 2010) at page 5.

⁶ [2014] IESC 24 at para 5.2, [2014] 2 IR 337 at para 28.

⁷ See "Overview of Comparable Bodies" in section 2 of this Chapter below.

⁸ [2013] IESC 51 at para 5.2, [2013] 2 IR 578 at para 38.

Dunne v Mahon, Clarke J pointed to the legal existence of a club as being based on a contract between the members:

“It is clear that the principal legal basis for the existence of a club is a contract between all of the members for the time being (see *Walsh v Butler* [1997] 2 ILRM 81; *Conservative and Unionist Central Office v Burrell* [1982] 1 WLR 522). As an unincorporated association of individuals, a club has no separate legal personality (*Sandymount and Merrion Residents Association v An Bord Pleanála & ors* [2013] IESC 51, *Feeney v MacManus* [1937] IR 23). However, that is not to say that a club does not have some form of legal existence. So long as the contract between its members stays in being, then it can reasonably be said that a club continues to exist.”⁹

- [1.8] He referred to the courts having “a type of jurisdiction over unincorporated bodies which gives a form of *quasi* recognition to the existence of those bodies even though they do not enjoy separate legal personality.”¹⁰
- [1.9] In *Dunne v Mahon*,¹¹ a case which concerned the dissolution of an unincorporated association, Hogan J quoted the following passage from the High Court decision of Johnston J in *Feeney v McManus*:

“A club is the most anomalous group of human beings that is known to the law. It is [a] union of persons for social intercourse or for the promotion of certain pursuits, which are closely allied to social intercourse, and the members usually regulate their conduct in accordance with bye-laws or regulations to which they subscribe. A club has no existence apart from its members. It differs from a corporation in that respect. It differs from those statutory bodies like Friendly Societies which have a sort of pseudo-corporate existence by virtue of the statute-law which regulates their activities, and even a trading partnership, regulated by the [Partnership Act 1890] has a position and an existence which is superior to those of a club.”¹²

⁹ [2014] IESC 24 at para 5.1, [2014] 2 IR 337 at para 27.

¹⁰ *Ibid.*

¹¹ [2012] IEHC 412.

¹² [1937] IR 23 at paras 31 - 32.

[1.10] While the term “unincorporated association” has no precise legal definition, in the English Court of Appeal case of *Conservative and Unionist Central Office v Burrell*, Lawton LJ defined an unincorporated association as:

“... two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will.”¹³

[1.11] This passage usefully describes many of the key aspects of an unincorporated association, such as their contractual foundation and the voluntary nature of their membership. It was suggested in *Burrell* that an unincorporated association is a “creature of contract” in which the contract in question is made between the members of the association.¹⁴ A similar definition appears in *Re Koepler’s Will Trust*¹⁵ where Slade LJ defined an unincorporated association as “... an association of persons bound together by identifiable rules and having an identifiable membership”.¹⁶

[1.12] The term “unincorporated associations” is therefore simply the collective name given to associations that do not come within the accepted legal categories of organisations, such as partnerships and companies. In this Consultation Paper, the Commission often uses the term “club” interchangeably with “unincorporated association”, however it should be noted that a club is simply one of the most commonly encountered unincorporated associations, and clubs can come in both incorporated and unincorporated forms.

(b) What kinds of activities do unincorporated associations engage in?

[1.13] Unincorporated associations facilitate an extensive range of non-profit activities and include small clubs, neighbourhood groups and political associations. The social importance of unincorporated associations in Ireland is significant because many sporting and social clubs in local communities in Ireland are organised as unincorporated associations. Such associations contribute a large amount of public good in culture, recreation, social justice, civil and human rights. In June 2021, Benefacts published statistics on the Irish non-profit sector, identifying

¹³ [1982] 1 WLR 522.

¹⁴ *Ibid.*

¹⁵ [1985] 2 All ER 869, [1985] 3 WLR 765, [1986] Ch 423.

¹⁶ [1985] 2 All ER 869 at para 874.

34,331 organisations in Ireland's non-profit sector.¹⁷ About 10,225 of those non-profits were incorporated as companies. 3,965 non-profits were primary or secondary schools. 731 non-profits were incorporated as friendly societies, cooperatives, industrial societies, political parties or charter bodies.¹⁸ The remaining non-profits, including thousands of local, religious and sport organisations, were unincorporated associations.¹⁹ As of June 2021, there were 19,410 unincorporated entities. 2,684 of these unincorporated entities were charities.²⁰

- [1.14] Unincorporated associations were originally established primarily for social purposes, mutual support and recreation. The variety of cases in which unincorporated associations have featured illustrates the varied nature of their interests and pursuits, from small-scale charities,²¹ clubs²² and neighbourhood groups,²³ to larger bodies with members and affiliated associations throughout Ireland, such as political parties,²⁴ religious organisations²⁵ and sports leagues.²⁶

(i) *Charities*

- [1.15] According to the 2020 Annual Report of the Charities Regulator, there were 11,426 registered charities, of which 2,476 were unincorporated bodies registered as charities as of 31 December 2020.²⁷ According to the 2021 Annual Report of the Charities Regulator, there remained 11,426 registered charities,²⁸ of which

¹⁷ Benefacts, "Sector Analysis Report - Ireland's Non-Profit Sector 2021" (June 2021) at page 4. There is no sector analysis for 2022 because on 31 March 2022, Benefacts ceased trading.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Sandymount & Merrion Residents Association v An Bord Pleanála* [2013] IESC 51 at para 5.2, [2013] 2 IR 578 at para 38.

²² *Dunne v Mahon* [2014] IESC 24, [2014] 2 IR 337.

²³ *Ladies of the Sacred Heart of Jesus (Covenant of the Sacred Heart) v Armstrong's Point Association* [1961] 29 DLR.

²⁴ *Buckley v The Attorney General* [1950] IR 67; *Mohan v Ireland* [2019] IESC 18 at para 29, [2021] 1 IR 293 at para 29.

²⁵ *Hickey v McGowan* [2017] IESC 6, [2017] 2 IR 196.

²⁶ *Murphy v Roche* [1987] IR 106.

²⁷ This figure consists of 1,638 unincorporated associations and 838 unincorporated entities classified as "other". See Charities Regulator, *Annual Report 2020* at page 12 <https://www.charitiesregulator.ie/media/2211/final_charities-regulator-annual-report-2020.pdf> accessed 16 November 2022.

²⁸ The Charities Regulator registered 282 new charities in 2021 and deregistered 282, so the number of registered charities (11,426) did not change from 2020 to 2021. See Charities Regulator, *Annual Report 2021* at pages 5, 10 and 11.

1,622 were unincorporated associations registered as charities as of 31 December 2021.²⁹

- [1.16] A charitable organisation is defined by section 2 of the Charities Act 2009 as either:
- (1) The trustees of a charitable trust, which is a trust established:
 - (a) for charitable purposes only; or
 - (b) under a deed of trust that requires the trustees to apply all the property of the trust in furtherance of its charitable purposes except for monies spent in the management of the trust; or
 - (2) Bodies (corporate or unincorporated) that promote a charitable purpose only.³⁰
- [1.17] "Charitable purpose" is defined in section 3(1) of the Charities Act 2009. These purposes are:
- (a) the prevention or relief of poverty or economic hardship;
 - (b) the advancement of education;
 - (c) the advancement of religion; and
 - (d) any other purpose that is of benefit to the community.
- [1.18] An officer of a charitable unincorporated association may fall within the definition of a "charity trustee" for the purposes of the Charities Act 2009 and will therefore be subject to the statutory obligations contained in the Charities Act 2009. Charity trustees control and manage charitable organisations. Charity trustees have statutory obligations which include registering the unincorporated association with the Charities Regulator, keeping proper books of account, preparing an annual statement of accounts and an annual financial report for submission to the Charities Regulator.

<<https://www.charitiesregulator.ie/media/4492/charities-regulator-annual-report-2021-en.pdf>> accessed 16 November 2022.

²⁹ See Charities Regulator, *Annual Report 2021* at page 6 <<https://www.charitiesregulator.ie/media/4492/charities-regulator-annual-report-2021-en.pdf>> accessed 16 November 2022.

³⁰ This definition has applied since 1 September 2009, when the Charities Act 2009 was commenced by article 2 of the Charities Act 2009 (Commencement) Order 2009 (SI No 284 of 2009).

- [1.19] Charity trustees can be held liable for failure to comply with the statutory obligations set out in the Charities Act 2009, punishment for which can result in a fine or imprisonment.³¹
- [1.20] All charities, regardless of income, size, structure or incorporation status, must apply to the Charities Regulator to be registered on the Register of Charities.³² Section 39 of the Charities Act 2009 sets out the requirements that charities must adhere to and the information that must be provided by each charity when making an application for registration.³³ For example, a charitable organisation must submit with its application, record of any bank accounts associated with the charitable organisation and details of how the charitable organisation plans to raise funds.
- [1.21] All registered charities must submit annual reports to the Charities Regulator. Annual reports include details of a charity's gross income and expenditure and its charitable activities. Charitable companies must file returns with the Companies Registration Office in addition to the Charities Regulator. The Charities Regulator publishes the annual reports of all charities registered with it, unless the charity is considered a private charitable trust, which is one that is not publicly funded and is not required to publicly publish details of its funds.
- [1.22] Different reporting thresholds apply depending on the charities' type, size, and activity.³⁴ Many charities choose to incorporate, but a great deal remain unincorporated.

(ii) Recreation, sports

- [1.23] This category comprises of sporting associations such as local GAA, soccer, golf, tennis and rugby clubs. Bigger sporting associations can also have a hybrid or mixed structure, which is sometimes made up of unincorporated associations at the grassroots level and another element of the association that is incorporated as a company. An example of an entity with mixed structure that combines incorporated and unincorporated elements is Scouting Ireland.³⁵ It is comprised of both a company limited by guarantee and not having a share capital and an unincorporated association governed by its constitution and rules.³⁶ There are

³¹ See section 10 of the Charities Act 2009.

³² Section 39(3) of the Charities Act 2009.

³³ Practical Law, "Charitable organisations in Ireland: Overview" (UK) 2018.

³⁴ Sections 48(6)(c), 50(2) and 50(3)(a) of the Charities Act 2009.

³⁵ Scouting Ireland is incorporated as Scouting Ireland Services CLG with company registration number 397094 and charity registration number CHY3507.

³⁶ Scouting Ireland, "Report on the Decision of the National Management Committee to Amend the Legal Structures of Scouting Ireland."

almost 50,000 individuals involved in Scouting in Ireland, across more than 500 Scout Groups.³⁷

(iii) Religion

- [1.24] Religious associations promote and follow a religion. A Christian Church, for example, may consist of a voluntary and unincorporated association of Christians, united on the basis of agreement in certain religious tenets and principles of worship, discipline, and church government, or on the basis of religious beliefs expressed in a common form. Religious Orders – societies or communities of people living under the same religious regulations and discipline – may also be unincorporated associations.

(iv) Politics

- [1.25] Political associations may be local or national. Political parties and sub-units of political parties may be organised as unincorporated associations. Political parties must be registered on the Register of Political Parties.

(v) Social services

- [1.26] Social services associations comprise youth services, as well as services for older people and for people with disabilities.

(vi) Philanthropy, voluntarism

- [1.27] Philanthropic and voluntary associations advance community interests, promote community welfare, and recruit, train and place volunteers.

(vii) Community associations

- [1.28] Community associations are associations of participating members of a community, such as a neighbourhood, village, cooperative or group of property owners in a geographical area.

(viii) Residents' associations

- [1.29] Residents' associations are groups of local people who live in a housing estate or apartment complex in a particular area and who come together to promote and enhance the living environment of the area. Residents associations may be linked to an incorporated management company for the same purpose.

(ix) International

- [1.30] This category encompasses development assistance associations that promote social and economic development abroad, international disaster relief, and

³⁷ Minister for Children and Youth Affairs, "Review of Scouting Ireland" (2018) at page 7.

international human rights and peace organisations, such as Africa Aware or the Children of Russia Fund.

(x) Animal welfare

- [1.31] Unincorporated associations in this category deal with pollution abatement and control (such as promoting clean air and water), conservation and protection of natural resources, environmental beautification, open spaces (such as botanical gardens), animal protection and welfare, and veterinary services, for example, The North Dublin Cat Rescue and New Ross Society for the Prevention of Cruelty to Animals.

(xi) Agricultural associations

- [1.32] Agricultural associations³⁸ are established for the purposes of promoting the interests of agriculture, horticulture, livestock breeding and/or forestry. The Royal Dublin Society (RDS) was originally an unincorporated association prior to it being granted Royal Patronage in 1820. Unincorporated agricultural associations differ from cooperatives.

(c) Advantages and disadvantages

- [1.33] The legal elements of unincorporated associations will be considered in detail throughout this Consultation Paper, but it is worth setting out briefly the advantages and disadvantages here, many of which were identified in the Commission's Consultation Paper on the *Legal Structures for Charities* in 2005.³⁹ Some of the advantages of unincorporated associations are as follows:
- (a) an unincorporated association is relatively easy and inexpensive to create;
 - (b) an unincorporated association is suitable for smaller clubs or charities;
 - (c) an unincorporated association is suitable for clubs or charities whose activities are to be carried out in the short term; and
 - (d) the regulatory requirements or upkeep for an unincorporated association are minimal.⁴⁰
- [1.34] Some of the disadvantages of unincorporated associations are as follows:
- (a) the members of an unincorporated association do not have limited liability and may therefore find themselves personally liable for acts of the

³⁸ See section 215 of the Taxes Consolidation Act 1997.

³⁹ Law Reform Commission, *Consultation Paper on Legal Structures for Charities* (LRC CP 38-2005) Chapter 1C.

⁴⁰ *Ibid* at para 1.26.

association, that is to say for their own actions and the actions of other members;

- (b) where the committee members of an unincorporated association enter contracts, they may be treated as contracting on behalf of all the members of the unincorporated association or personally, either as trustees or otherwise, depending on the circumstances;
- (c) even where members do not explicitly enter into contracts, liability under contracts may potentially fall on members of the committee of the unincorporated association, individual members of the unincorporated association, or individual members personally depending on the contracting parties and the general laws of agency;
- (d) an unincorporated association may be unsuitable for larger organisations that hold significant assets and engage employees; and
- (e) on the death of a member of an unincorporated association in whose name property is held, it may be necessary to extract a grant of probate to administer the assets of the unincorporated association.

[1.35] Avoiding unnecessary bureaucracy and the expense of registering as a company makes operating as an unincorporated association appealing, particularly for smaller clubs and associations.

[1.36] However, if an unincorporated association is registered as a charity, it will have significant administrative obligations. An unincorporated association may register with the Charities Regulator without the need to incorporate as a company.

(d) Contracts, rules and constitutions

[1.37] An unincorporated association usually arises by private arrangement, such as through amateur circles and clubs. They are said to be “creatures of contract” – they are created by a contract that exists between the members of the association. The terms on which they contract with each other are the association’s rules. The unincorporated association’s contractual basis raises the association to something more than, for example, a group who regularly meet to play games: some level of formality and organisation is required.

[1.38] In *Fitzharris v O’Keefe*, Laffoy J held that:

“Whether there was a contractual relationship between the plaintiff and the National Association turns on whether, by reference to its Constitution and Rules and as a matter of fact, the plaintiff was a member of the National Association. The nature of the contractual

liability is a matter of the construction of the Constitution and Rules."⁴¹

- [1.39] When two or more persons come together with a non-business purpose and intend to form an unincorporated association, an unincorporated association might be said to come into existence.⁴² Those who come together for unlawful purposes will not, however, create an unincorporated association. For example, persons who conspire together to burn religious paintings will not create an unincorporated association because the agreement between them will be void on the basis of illegality.⁴³
- [1.40] Unlike companies, unincorporated associations are not generally subject to external legal control. For example, there is no central register, nor a central regulator of unincorporated associations. Also, the statutory requirements (and indeed protections) that apply to incorporated companies do not apply to unincorporated associations.
- [1.41] Some unincorporated associations could previously have been registered as Friendly Societies and regulated by the Registrar of Friendly Societies.⁴⁴ It is no longer possible to form new friendly societies.⁴⁵ A statutory restriction on their establishment was enacted because it was considered that there was insufficient oversight of Friendly Societies by public authorities, with a potential risk to members of the public.

(i) Rules of unincorporated associations

- [1.42] Most associations adopt written rules and a committee structure, but there is no legal requirement for an unincorporated association to have a formal constitution or a set of written rules. The rules or constitution of an unincorporated association are a matter of agreement between the individual members. It is possible for a group of persons to form an unincorporated association for an agreed purpose or object, and that group may operate for many years by mutual agreement amongst the members on a collective basis without any formal rules,

⁴¹ [2008] IEHC 438.

⁴² Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at para 1.042.

⁴³ Warburton, *Unincorporated Associations: Law and Practice* 2nd ed (Sweet & Maxwell 1992) at page 1.

⁴⁴ Friendly Societies are societies that were established for the purpose of providing, by voluntary subscription of their members, for the relief or maintenance of their members and their families during sickness or other infirmity, or in old age or in widowhood, or for the relief or maintenance of their orphan children during minority: Friendly Society Act 1896 section 8. See Hunt, *Murdoch and Hunt's Dictionary of Irish Law* 6th ed (Bloomsbury Professional 2016) at page 740.

⁴⁵ Section 5 of the Friendly Societies and Industrial and Provident Societies (Miscellaneous Provisions) Act 2014.

in particular if the association has a small and stable membership. As stated above, unincorporated associations are based on contract, and it is important to note that a verbal contract is sufficient.⁴⁶

[1.43] Medium and large-sized unincorporated associations usually operate with a greater level of formal organisation: they make rules to govern the relations between the members; they elect committees and officers, and appoint trustees to hold and manage the property of the club, society or association. Larger entities can have a 'hybrid' or 'mixed' structure of unincorporated associations at grassroots level and an incorporated head office at managerial level. This makes determining the legal status of such entities unclear.

[1.44] In *Dunne v Mahon*, the Supreme Court provided the following guidance as to how the rules of a club are to be interpreted:

"While a club is, therefore, in one sense, no more than a set of interlocking mutual contractual relations between its members, it does not have a form of existence which goes beyond that and which is subject to the jurisdiction of the courts. Also, those contractual terms or rules need to be viewed against the background that they are not to be found in a carefully drafted legal document but rather represent the view of the members of the club as to the rules by which they are to be bound."⁴⁷

[1.45] The founding members of an association determine the form and content of the rules of an unincorporated association. The members acting unanimously, or according to whatever procedure is prescribed in the rules of the unincorporated association, may make any alteration to the name, purposes, objects, or rules of the unincorporated association.

[1.46] At a minimum, the following ought to be included in the rules of an unincorporated association:

- (a) the name and objects of the unincorporated association;
- (b) a procedure for amending the rules;
- (c) any qualifications for membership;
- (d) the subscription fee and other fees to be paid;
- (e) the management of the unincorporated association;

⁴⁶ Warburton, *Unincorporated Associations: Law and Practice* 2nd ed (Sweet & Maxwell 1992) at page 11.

⁴⁷ [2014] IESC 24 at para 5.7, [2014] 2 IR 337 at para 33.

- (f) the frequency and rules of meetings;
- (g) control of funds and other financial and accounting matters;
- (h) the procedure to be followed if the unincorporated association is dissolved; and
- (i) the distribution of any surplus property after dissolution.⁴⁸

[1.47] The American Uniform Law Commission researches, drafts and promotes the enactment of uniform state laws in areas of American state law where uniformity is desirable and practical. It has examined the law relating to unincorporated associations and produced a Uniform Unincorporated Non-profit Association Act ("UUNAA") that has been enacted in a number of States.⁴⁹ Section 2(11) of UUNAA provides the following definition of "unincorporated non-profit association":

""Unincorporated non-profit association" means an unincorporated organization consisting of [two] or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, non-profit purposes.

The term ['unincorporated association'] does not include:

- (A) a trust;
- (B) a marriage, domestic partnership, common law domestic relationship, civil union, or other domestic living arrangement;
- (C) an organization formed under any other statute that governs the organization and operation of unincorporated associations;
- (D) a joint tenancy, tenancy in common, or tenancy by the entirety even if the co-owners share use of the property for a non-profit purpose; or
- (E) a relationship in an agreement in a record that expressly provides that the relationship between the parties does not create an unincorporated non-profit association."

[1.48] It is also worth noting that the UUNAA suggested uniform legislation provides for separate legal personality for unincorporated non-profit associations, so that they

⁴⁸ See, for example, the rules of the Public Service Friendly Society <<http://www.psfs.ie/images/stories/generaldocuments/RulesWithIndex2004.pdf>> accessed 19 November 2021.

⁴⁹ Kentucky, Pennsylvania, District of Columbia, Arkansas, Iowa, Nevada.

can own and convey interests in property and can sue and be sued in their own name.⁵⁰ It also provides the same personal liability protection that a company offers.⁵¹

[1.49] In England and Wales unincorporated associations are not statutorily defined. The Scottish Law Commission examined the law relating to unincorporated associations in that jurisdiction, and ultimately recommended attribution of separate legal personality for unincorporated associations that fulfil certain statutory requirements.⁵² The definition proposed by the Scottish Law Commission is worthy of examination:

“Scottish Association with Legal Personality (“SALP”)

1. (1) An unincorporated body has legal personality separate from that of its members if the conditions mentioned in subsection (2) are satisfied.

(2) The conditions are that—

(a) the body has two or more members,

(b) it has an official address in Scotland (“official address” being construed in accordance with section 3(1)),

(c) its management is carried on wholly or mainly in Scotland,

⁵⁰ Section 9 of the UUNAA provides:

“(a) An unincorporated non-profit association may sue or be sued in its own name.

(b) A member or manager may assert a claim the member or manager has against the unincorporated non-profit association. An association may assert a claim it has against a member or manager.”

Section 10 provides: “A judgment or order against an unincorporated non-profit association is not by itself a judgment or order against a member or manager.”

⁵¹ Section 8 of the UUNAA provides:

“(a) A debt, obligation, or other liability of an unincorporated non-profit association is solely the debt, obligation, or other liability of the association. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise for a debt, obligation, or other liability of the association solely by reason of being or acting as a member or manager. This subsection applies regardless of the dissolution of the association.

(b) A person’s status as a member or manager does not prevent or restrict law other than this [act] from imposing liability on the person or the association because of the person’s conduct.

(c) The failure of an unincorporated non-profit association to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a member or manager of the association for a debt, obligation, or other liability of the association.”

⁵² Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217).

- (d) it has a constitutive document,
 - (e) in the constitutive document there are set out matters which include those mentioned in subsection (4),
 - (f) its objects (as set out in the constitutive document) do not include the making of a profit for its members, and
 - (g) there is no resolution of its members that it is not to have legal personality separate from that of its members.
- (3) To have effect for the purposes of subsection (2), any such resolution as is mentioned in paragraph (g) of that subsection must be a resolution recorded in writing.
- (4) The matters are—
- (a) the name of the body,
 - (b) the objects for which the body exists,
 - (c) the criteria for membership of the body,
 - (d) procedures for the election or appointment of those managing the body (including procedures for the election or appointment of its office-bearers, if any),
 - (e) the powers and duties of the office-bearers (if any),
 - (f) provision for the distribution of the assets of the body in the event of its dissolution, and
 - (g) procedures for amending the constitutive document.
- (5) An unincorporated body which, by virtue of subsection (1), has legal personality is to be known as a Scottish Association with Legal Personality (any body so known being in this Act referred to as a "SALP").
- (6) The Secretary of State may, by order made by statutory instrument, amend subsection (4) so as to make further or different provision as to matters required to be set out in the constitutive document of a SALP.⁵³

⁵³ Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217).

[1.50] The proposed definition in Scotland (where the recommendations of the Scottish Law Commission have not yet been implemented by legislation) is heavily reliant on a “constitutive document” or constitution, the rationale being that:

- (a) adopting a constitution with suitable terms is desirable;
- (b) a constitution demonstrates the intention of members to create an association that merits treatment as a separate entity;
- (c) a loose grouping of individuals who carry on an activity together but do not require rules to regulate their relationship would not be captured within the definition.

[1.51] Of course, even where rules and constitutions have been adopted, they are not always uniformly complied with (see for example, *Walsh v Butler*,⁵⁴ discussed in Chapter 2, section 1). Non-compliance does not deprive the club of its character as an association, although it can certainly have negative consequences in the event of a legal dispute.

2. Overview of comparable bodies

[1.52] Larger unincorporated associations may, for all intents and purposes, look like a variety of other types of entities. However, there are important distinctions. To appreciate those distinctions and their consequences, a number of comparable bodies are described below. The description of those comparable bodies is helpful in defining the boundaries between the unincorporated associations with which the Commission is specifically dealing, and other bodies which may look similar to the outsider, but which are not within the scope of this project because they are incorporated in one way or another or have characteristics of incorporation. Analysis of comparable bodies also helps in identifying the problems that can be encountered in relation to unincorporated associations, which do not have some of the advantages that those comparable bodies enjoy because of their status and the legal personality that flows from it.

[1.53] In Ireland associations may be incorporated as companies under the Companies Act 2014 or incorporated as societies under the Industrial and Provident Societies Acts 1893 to 2021. Companies are incorporated by charter, by statute and by registration.

[1.54] There are many benefits to incorporation. An incorporated entity is able to acquire, hold and dispose of property in its own name, has capacity to enter into contracts with members and third parties, can be liable in tort law to members and third parties, can sue and be sued in its own name, and is liable for its own tax. Specified registration procedures are required for incorporation.

⁵⁴ [1997] IEHC 9, [1997] 2 ILRM 81.

(a) Industrial and provident societies

- [1.55] Industrial and provident societies are societies for carrying on any industry, business or trade specified in or authorised by their rules, whether wholesale or retail, and including dealings of any description with land and banking.⁵⁵
- [1.56] In Ireland, industrial and provident societies are regulated by the Industrial and Provident Societies Acts 1893 to 2021. Although these societies tend to be confined to certain sectors, they can exist in all sectors of the economy. The Industrial and Provident Societies Acts 1893 to 2021 allow persons who are carrying on any industries, businesses or trades specified in or authorised by their rules (whether wholesale or retail and including dealings of any description with lands) to register under the Acts.⁵⁶
- [1.57] Registration under the 1893 Act renders a society a body corporate. The registering authority is the Registry of Friendly Societies.
- [1.58] The biggest and best-known types of industrial and provident societies in Ireland are in the rural and food sectors and comprise:
- (1) agricultural co-operatives, such as agricultural supply societies and dairy societies;⁵⁷ and
 - (2) group water schemes.⁵⁸
- [1.59] In *Kerry Co-operative Ltd v An Bórd Bainne Co-operative Ltd*,⁵⁹ McCarthy J said that a co-operative may be contrasted with a company of limited liability:
- “... in that [a co-operative’s] shareholders invest their efforts in the betterment of activity in co-operation with each other being persons of a like interest, rather than their seeking a return on investment capital, which is the role of the investor in a company of limited liability; the latter is indifferent to the operation of the company so long as he is assured of an adequate return on his investment.”

⁵⁵ See Hunt, *Murdoch and Hunt’s Dictionary of Irish Law* 6th ed (Bloomsbury Professional 2016) at page 849.

⁵⁶ Section 4 of the Industrial and Provident Societies Act 1893.

⁵⁷ For example, the Avonmore Creameries Federation was founded in 1966 when 36 smaller co-operatives joined forces to form what is now known as Avonmore: <<https://www.avonmore.ie/our-story/our-heritage>> accessed 6 September 2022.

⁵⁸ See [Registry of Friendly Societies Report 2017](#): accessed 6 September 2022.

⁵⁹ [1991] ILRM 851 at page 863.

- [1.60] The formation and continuation of societies therefore pre-supposes a genuine community interest amongst the members, based on something other than the amount of capital they may have placed in the society.
- [1.61] The involvement of such societies in business distinguished them from the kinds of non-profit clubs, societies and associations with which this project is chiefly concerned.

(b) Friendly societies

- [1.62] Friendly Societies⁶⁰ were established for a variety of purposes, for example, to provide small life assurance benefits, sick benefits, and death benefits to members, to provide benefits to non-members, or to promote particular activities or interests.⁶¹ Friendly Societies have declined in popularity in recent years. Section 5 of the Friendly Societies and Industrial and Provident Societies (Miscellaneous Provisions) Act 2014 amended the Friendly Societies Act 1896 by inserting section 8B into the 1896 Act which provides that no society shall be registered under the 1896 Act after the commencement of section 5 of the 2014 Act on 28 July 2014.⁶² To register a friendly society, at least seven people were required to create a set of rules governing its operation. Like a club or other unincorporated association, a friendly society does not have a separate legal personality and must hold property through trustees.
- [1.63] Friendly Societies are registered on the Register of Friendly Societies. The 2021 Annual Report of the Register of Friendly Societies includes a full list of the 46 Friendly Societies registered at the end of 2021.⁶³ From the start of 2018 to the end of 2019, there were 46 Friendly Societies on the Register of Friendly Societies.⁶⁴

(c) Entities granted quasi-corporate character by statute

- [1.64] Some statutes allow associations established or recognised by that specific statute to have a quasi-corporate character. These bodies are then known as bodies corporate. This quasi-corporate character allows specified associations to sue and be sued, hold property and have proceedings taken against them in their own name. Associations which register under specific statutes that grant an

⁶⁰ Also called Benevolent Societies.

⁶¹ Friendly Societies Acts 1896 to 2018; Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at para 1.043.

⁶² See Friendly Societies and Industrial and Provident Societies (Miscellaneous Provisions) Act 2014 (Parts 1, 2 and 3) (Commencement) Order 2014, SI No 356 of 2014, article 2.

⁶³ Register of Friendly Societies, "Annual Report 2021" at page 5.

⁶⁴ *Ibid.*

incorporated character to an association are no longer unincorporated associations.⁶⁵ Trade unions are an example of this.

- [1.65] The Trade Union Acts 1871 to 1990 regulate the rules of trade unions and provide for a system of registration of trade unions in Ireland. The legal definition of trade unions was first laid down by the Trade Union Act 1871 and refined by the Trade Union Act Amendment Act 1876 and the Trade Union Act 1913.
- [1.66] The expression “trade union” for the purpose of the Trade Union Acts means any combination, either temporary or permanent, as defined in its constitution, to regulate: employee and employer relations, employee and employee relations, or employer and employer relations, or to impose conditions on the conduct of any trade or business, and also the provision of benefits to members.⁶⁶
- [1.67] Unregistered trade unions are unincorporated voluntary associations of individuals similar in legal nature to a social club.⁶⁷ Unregistered trade unions therefore have no legal personality and any legal action taken by or against them must be taken by way of representative action.
- [1.68] Registered trade unions are different from unincorporated associations because they are regarded as quasi-corporations with legal personality that is separate and distinct from their members.⁶⁸ There are several advantages⁶⁹ to being a registered trade union. 53 trade unions operating in Ireland were registered with the Registrar of Friendly Societies at the end of 2021.⁷⁰

⁶⁵ Stewart, Campbell, Baughen, *The Law of Unincorporated Associations*, (Oxford 2011) at para 1.25.

⁶⁶ Murphy, Regan, *Employment Law* 2nd ed (Bloomsbury Professional 2017) at para 21.22.

⁶⁷ Kerr, Whyte, *Irish Trade Union Law* 1st ed (Professional Books Ltd 1985) at page 62. See also *McLuskey v Cole* [1922] 1 Ch 7.

⁶⁸ See sections 12 and 13 of the Trade Union Act 1941 which distinguish registered and non-registered trade unions; see also *R (IUDWC) v Rathmines UDC* [1928] IR 260 where the Supreme Court unanimously held that a registered trade union was a legal entity distinct from its members. Kennedy CJ said: “... a trade union which has been registered with a name, an address, a constitution and rules is a legal persona, at least analogous to a statutory corporation, having an existence apart from the individuals aggregated in the combination.”

⁶⁹ For example, the responsibility of trustees being limited to monies actually received by them on account of the trade union, the ability for a registered trade union to sue in its registered name, and exemption from income tax. Registration also entails a number of obligations for trade unions. See Kerr, Whyte, *Irish Trade Union Law* 1st ed (Professional Books Ltd 1985) at pages 48-50.

⁷⁰ See Registrar of Friendly Societies, “[Registrar of Friendly Societies Annual Report 2021](#)” (2021) accessed 12 December 2022.

(d) Examples of entities granted body corporate status under statutes

[1.69] Whereas some entities such as trade unions have the ability to register to obtain quasi-corporate status, other entities are **created** under statute as bodies corporate with a quasi-corporate status. These entities are given the authority to sue and be sued in their own name, have perpetual succession and, in most cases, the power to hold land without the need to incorporate.

(i) The Law Reform Commission

[1.70] The Law Reform Commission was established under the Law Reform Commission Act 1975. Under section 3(6) of the Act:

“[t]he Commission shall be a body corporate with perpetual succession and power to sue and be sued in its corporate name and to acquire, hold and dispose of land”.

(ii) Boards of management of schools

[1.71] Under section 14(2) of the Education Act 1998:

“A board established in accordance with subsection (1) shall fulfil in respect of the school the functions assigned to that school by this Act, and, except in the case of a school established or maintained by a vocational education committee, each board shall be a body corporate with perpetual succession and power to sue and may be sued in its corporate name”.

[1.72] The Education Act also provides indemnity for members of the board under section 14(7):

“Except as provided by this Act, no action shall lie against a member of a board in respect of anything done by that member in good faith and in pursuance of this Act or any regulations ...”

(iii) Bord Bia

[1.73] Bord Bia was established under the An Bord Bia Act 1994. Section 6(2) of the Act states:

“The Board shall be a body corporate with perpetual succession and an official seal and power to sue and be sued in its corporate name and, with the consent of the Minister, to acquire, hold and dispose of land or an interest in land and to acquire, hold and dispose of any other property.”

(iv) Regulatory bodies

- [1.74] Regulatory bodies are established for regulating the membership of a profession, trade, or sport, either by the consensual submission of members or by the delegation of statutory authority. For instance, the Legal Services Regulatory Authority, responsible for regulating the provision of legal services by legal practitioners in Ireland, is a statutory body with the ability to sue and be sued in its own name,⁷¹ as is Sport Ireland,⁷² which is responsible for regulating sports activities. While Sport Ireland is a statutory body, it works in conjunction with many of the National Governing Bodies (NGBs) of various sports,⁷³ some of which are unincorporated associations, although many NGBs are set up as companies, such as the Irish Judo Association or Fencing Ireland, both of which are companies limited by guarantee.

(e) Companies

- [1.75] A company is a legal form of business organisation that is a separate legal entity from those who run the company.⁷⁴ The company, and not the individual shareholders, is the appropriate legal person to be sued in the event that the debts are incurred by the company remain unpaid, despite demand.⁷⁵ The shares in a company are owned by its shareholders. If the company is a limited liability company, the shareholders' liability, should the company fail, is limited to the amount, if any, remaining unpaid on the shares held by them.⁷⁶
- [1.76] Any non-profit organisation can become incorporated under the Companies Act 2014. Alternatively, a non-profit organisation can structure itself using a 'mixed' or 'hybrid' model where the non-profit organisation comprises of both unincorporated associations at the grassroots level and an incorporated company at the managerial level, for example, Scouting Ireland.
- [1.77] The GAA provides another example of a hybrid model. While the bulk of the activity of the GAA is based on the unincorporated association structure, more complex elements of the GAA's activity, primarily those that involve the management of staff and finances (such as the operation of Croke Park)⁷⁷ are

⁷¹ Legal Services Regulation Act 2005.

⁷² Sport Ireland Act 2015.

⁷³ See Sports Ireland, "National Governing Bodies Overview" <https://www.sportireland.ie/national-governing-bodies/ngb-overview> accessed 13 December 2022.

⁷⁴ Companies Registration Office, Company Registration <<https://www.cro.ie/Registration/Company>> accessed 13 December 2022.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

undertaken using incorporated companies. Páirc an Chrócaigh Cuideachta Faoi Theorainn Ráthaíochta⁷⁸ is an incorporated company limited by guarantee operating as Croke Park, the headquarters of the GAA and one of Ireland's premier sporting and events venues.

- [1.78] Under Irish law, an unincorporated association might choose to change the nature of its organisation to benefit from the advantages of incorporation. If a club or society chose to become a company, there are a number of options: an unlimited liability company, a company limited by shares, a company limited by guarantee or a designated activity company. A non-profit organisation that converts from an unincorporated association to an incorporated company under the Companies Act 2014 will be granted a legal personality that is separate and distinct from its members, with the result that the company enjoys limited liability.
- [1.79] The company limited by guarantee is perhaps the most suitable option for non-profit unincorporated associations wishing to incorporate, since such associations do not wish to raise capital (facilitated by companies limited by shares). Where a club is incorporated as a company limited by guarantee, the members of the company will be the members of the club. A new member will simply apply to the company for membership in whatever form is required by the company's governing documents.
- [1.80] However, there are disadvantages for an unincorporated association wishing to incorporate as a company. These include the cost of setting up the company, preparing and filing annual returns with the Companies Registration Office, the lack of privacy regarding certain registration requirements and information which must be disclosed, and the fact that there are onerous obligations placed on the persons selected as directors of the company under the Companies Act 2014.

3. Difficulties in applying and enforcing the law in respect of an entity without a legal identity

- [1.81] The common law treats an unincorporated association as an aggregate of its members.⁷⁹ This approach has been consistently confirmed by the jurisprudence of the Irish courts. This has several important consequences. As a general principle of common law, unincorporated associations cannot sue or be sued in their own names.⁸⁰ Furthermore, an unincorporated association is not able to

⁷⁸ Registered number 4192. See <<https://core.cro.ie/e-commerce/company/search/41727>> accessed 8 December 2022.

⁷⁹ Zakreski, "Reform of the Law Relating to Unincorporated Nonprofit Associations" (2008) 41 *University of British Columbia Law Review* 115.

⁸⁰ McMahon and Binchy *Law of Torts* 4th ed (Bloomsbury 2013) at para 39.10.

enter an enforceable contract. Any legal relationships must be entered into by all the members jointly, by a committee of the association, by trustees for the association or by individual members acting on behalf of the members of the unincorporated association. Members of an unincorporated association must nominate a person or persons to take legal proceedings on behalf of the unincorporated association. Where a third party seeks to sue an unincorporated association, it must identify the appropriate party to sue, for example committee members, trustees, or other members.

- [1.82] Problems may also arise in enforcing a judgment given by a court against an unincorporated association.
- [1.83] Confusion arises in relation to the legal liability of unincorporated associations and by extension their members, because while the traditional common law position is that the law does not recognise the existence of unincorporated associations as separate legal entities with rights and obligations, legislation sometimes disregards that position and purports to apply to unincorporated associations as though they do in fact have separate legal personality.
- [1.84] Despite unincorporated associations not having legal personality, as a matter of practice it appears that insurance companies are willing to permit the association to be identified as the policy holder. However, if there is no insurance, or the policy is non-responsive for any reason, officers and club members could potentially be found personally liable under the doctrine of vicarious liability, even if they have not themselves directly engaged in wrong-doing or caused harm to the plaintiff. If the association holds insurance, then that policy may respond to claims made against officers of the association or trustees, but that is by no means guaranteed, particularly if the injury giving rise to a claim arises from activities unrelated to the association's central purpose (in *Brady v Moore*,⁸¹ for example, the GAA club's insurance policy did not cover the construction work the plaintiff, himself a member, engaged in at the club on a voluntary basis).
- [1.85] Because an unincorporated association cannot hold assets itself, it is likely to hold property or other assets through a trust. That may make it difficult for a successful plaintiff to realise a judgment against those assets.⁸²
- [1.86] These obstacles to litigation and to enforcement of the law are problematic and counter-intuitive when unincorporated associations do in fact 'exist' in the eyes of

⁸¹ [2022] IEHC 420 at para 4.

⁸² Sievers, *Associations and Clubs Law* 3rd ed (The Federation Press 2010).

the public and have members, bank accounts and access to assets, and conduct activities that are often of real public value.⁸³

4. Conclusion

- [1.87] Unlike incorporated companies, unincorporated associations are not legal entities and they do not have a legal personality that is separate and distinct from their members. However, unincorporated associations may be perceived to be legal entities by some or all of their members or by the average person on the street.⁸⁴
- [1.88] According to the common law, an unincorporated association is nothing more than an aggregate of its individual members. The individual members are bound to each other by mutual contracts on the terms of the rules of the unincorporated association. Unincorporated associations have neither the privileges nor the liabilities of being a legal entity. For example, an unincorporated association cannot incur a liability in tort law or be found guilty of a crime unless specified by statute law (and even then, that is not straightforward), and contracts cannot be formed in the name of an unincorporated association.
- [1.89] Unincorporated associations tend to be defined by what they are not: they are not partnerships, nor do they have the characteristics of incorporated entities. Although it was stated in *Dunne v Mahon*⁸⁵ that while unincorporated associations have no legal personality, that is “not to say that a club does not have some form of legal existence”. There is no clear and illustrative definition of what exactly the legal existence of an unincorporated association is. While it is arguable that the meaning of “unincorporated non-profit association” should be defined under legislation in Ireland, the value and consequences of that definition would have to be defined.
- [1.90] Assessing the need for law reform from an end-user perspective means considering who is most likely to benefit from legislative change. The greater the level of organisation of a non-profit club or association, the greater the likelihood that the association and its members will have access to legal advice. Associations and members who have access to legal advice are more likely to understand the importance of having insurance and clear contractual and trustee arrangements in place.

⁸³ McGregor-Lowndes, Hannah, “Unincorporated associations as entities: A matter of balance between regulation and facilitation?” (2010) 28 *Company and Securities Law Journal* 197.

⁸⁴ *Worthington Rugby Football Club Trustees v Inland Revenue Commissioners* [1985] 1 WLR 409 (Ch) 413.

⁸⁵ [2014] IESC 24, [2014] 2 IR 337.

- [1.91] Many non-profit and charitable associations in Ireland are incorporated as companies. Incorporation greatly reduces the legal risks posed to those involved as members and officers of clubs and associations. Because of the regulatory and financial costs associated with incorporation, it is not always a suitable solution for all small and informal clubs and associations.
- [1.92] While clubs and associations of all types and sizes come within the scope of this law reform project, the Commission's primary focus must be on associations that are less likely to have access to legal advice, because it is the members of those associations to whom the greatest risk of personal liability applies. Equally, there is potential for injustice if at common law it is not possible for an individual or company to litigate against an entity (that is to say, an unincorporated association) that ought naturally to be the defendant.
- [1.93] However, in assessing what form regulation of the unincorporated association landscape should take, it should be emphasised that it is not desirable, nor indeed necessary, for every unincorporated association to be regulated. Some organisations deliberately choose not to incorporate to avoid the red tape, bureaucracy and expense associated with burdensome legal obligations and procedures. It has been argued that onerous registration requirements can operate to undermine non-governmental organisations, with a chilling effect on their activities and consequent attrition of freedom of association.⁸⁶ For these reasons, as well as the important objective of promoting voluntary, charitable, sporting and community activities, the emphasis in considering the correct approach to reform and regulation must not be on associations as such, but rather, at least principally, on the activities which certain associations may carry on.
- [1.94] There is already limited regulation of some activities: for example, a club or similar body that wishes to sell intoxicating liquor is required to be registered under the Registration of Clubs Acts 1904 to 2008. Registration carries with it an obligation to comply with the provisions of legislation in relation to the sale of alcohol. The registration of such bodies allows for a count of their numbers and for some oversight of their activities.
- [1.95] There may also be a quasi-public record of other types of clubs, associations or societies precisely because they form part of a recognised group such as sporting clubs within the ambit of recognised national sporting organisations.
- [1.96] There may be a further category of association that operates entirely outside what one might call public recognition. The activities of such an association may not require any form of registration in order to be lawful. The association may not be connected with any large body which would allow it to be counted in any

⁸⁶ Gilbert and Mohseni, "Disabling Dissent: the Colour Revolutions, Autocratic Linkages, and Civil Society Regulations in Hybrid Regimes" (2018) 24(4) *Contemporary Politics* 454.

numbers being compiled. It may nonetheless qualify as an unincorporated association, for there may be either an express (and perhaps written) contract between its members or, there might be a contract even though it may only be verbal. Ten people coming together in a small village to form an association, interested in some type of art, for example, may create a form of legal structure with simple rules and a committee. It would qualify as an unincorporated association, but it might well not be counted in any national figures and would not be subject to any form of regulation.

- [1.97] Therefore, while there are many ways in which one could characterise different types of unincorporated association, one method might be to distinguish between associations that (a) are completely outside any structure and (b) associations that are not subject to any legislative regulation, but which are part of a larger structure which may impose obligations on them for as long as they wish to remain part of that structure. For example, a sporting club affiliated to one of the major national sporting organisations would come into that category. It would not be subject to any formal legal public obligations or regulation but would, obviously, as long as it wished to remain in good standing with the relevant national sporting organisation, be required to comply with its rules and abide by its decisions. Then third and finally, there are those organisations which are subject to some form of public law obligations.
- [1.98] Different considerations arise in respect of each of these distinct categories of unincorporated association. In assessing the potential reform options set out in Chapter 4, consultees are invited to reflect on these distinctions.

CHAPTER 2

PROBLEMS WITH CIVIL LIABILITY ARISING FROM UNINCORPORATED STATUS

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1. Liability in tort – common law

(a) Liability in tort of unincorporated associations to third parties

- [2.1] In its 2017 decision in *Hickey v McGowan*,¹ the Supreme Court found that an unincorporated association could not be sued as if it were a body corporate, but that the collective membership of an unincorporated religious association at the time when tortious actions occurred could be vicariously liable for the actions of certain individuals who were members of the unincorporated association at that time.
- [2.2] As mentioned previously, because an unincorporated association is not a legal person separate from its members at common law, it cannot be the subject of an action in tort law. Instead, the plaintiff will have to seek compensation from others.
- [2.3] The most likely defendants are:
- (a) the members of the managing committee of an unincorporated association;
 - (b) the trustees who hold the land on behalf of an unincorporated association where the tort arises from the occupation of land;
 - (c) particular members of an unincorporated association who have assumed responsibility for a particular activity;
 - (d) all the members of an unincorporated association at the time the tort was committed; and/or
 - (e) the individual who committed the tort.

Identifying these individuals may be difficult for some plaintiffs and this may act as a barrier to access to justice.

- [2.4] In *Grace v Hendrick*,² the High Court recognised the practical difficulty faced by plaintiffs who, unable to sue an unincorporated association because of the common law rule, attempt to identify and locate members of an unincorporated association at a relevant time for the purposes of initiating legal proceedings. In the case, Hyland J ordered a provincial leader of a religious congregation to disclose the names and addresses of persons who were members of the

¹ [2017] IESC 6, [2017] 2 IR 196.

² [2021] IEHC 320.

congregation during a particular timeframe when abuse was alleged to have occurred. However, a High Court order is expensive and relatively inaccessible.

- [2.5] The Commission would welcome the views of consultees as to whether reform of the law is required to oblige those involved in running or managing the activities of an unincorporated association to disclose the identity of all other members, as well as the identities of committee members and other relevant officers on request. This and other reform options are considered in greater detail in Chapter 4.
- [2.6] Liability in tort may be by way of 'primary liability', in other words, a finding that a wrong has been committed by an individual member or members, such as failing to take reasonable care in the activity which caused the loss. Liability in tort may also be by way of 'vicarious liability',³ in other words, the liability which falls on one person as a result of an action of another, for example, the liability generally of an employer for the acts and omissions of employees. See "**4. Employment Law**" below for a discussion of employment law and unincorporated associations.

(i) Primary liability

Negligence and nuisance

- [2.7] The torts that are most likely to be of concern to an unincorporated association or club are negligence and nuisance.
- [2.8] Negligence is a tort involving the breach of a legal duty of care where damage is caused to the party to whom the duty of care is owed.⁴ Negligence is the doing by a person of some act that a reasonable and prudent person would not have done in the same circumstances, or the failure to do something that would have been expected of a reasonable person in the same circumstances.⁵ Negligence is the tort of widest application because it is based on conduct rather than a particular right deserving of protection. A person will be liable in negligence when that person is in breach of a duty of care owed to the plaintiff.
- [2.9] Nuisance is a tort that involves an act or omission that amounts to an unreasonable interference with, disturbance to, or annoyance to another person in the exercise or their rights.⁶ If the rights interfered with belong to a person as

³ Hunt, *Murdoch and Hunt's Encyclopedia of Irish Law* 6th ed (Bloomsbury Professional 2016).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

a member of the public, the act or omission is a public nuisance.⁷ If the rights relate to ownership or occupation of land or, the act or omission amounts to a private nuisance.⁸

- [2.10] The Irish High Court case of *Massey v Stagg*⁹ demonstrates that a club secretary of a sports club can be liable in negligence as the occupier of the property of a GAA club for the injuries suffered by a non-member who uses the property and suffers a serious injury. Although *RTÉ* and *The Irish Times* reported that the plaintiff non-member, Mr Massey, "... sued Longwood GAA Club"¹⁰ and was awarded damages "... against Longwood GAA club",¹¹ the club was not in fact the defendant in the legal proceedings. In fact, the defendant in the legal proceedings was the club secretary, Mr Stagg. This case, and media reporting on it, serve as a useful example of how the legal position at common law may differ from the public perception that the liability is that of the sports club.
- [2.11] The *Massey* case serves as a useful example of the legal hazards that can arise when a non-member is injured on the premises of an unincorporated club, and highlights the fact that members of a club, in particular members of the managing committee such as the club secretary, can be sued by non-members in certain circumstances.
- [2.12] Similarly, English cases on sports clubs show the potential exposure of club members to personal liability for collective negligence and nuisance.¹² That potential is illustrated in numerous other cases:
- In the New Zealand case of *Evans v Waitemata District Pony Club*¹³ all club members were held liable in negligence for injuries caused to some paying spectators.¹⁴

⁷ *Ibid.*

⁸ *Ibid.*

⁹ [2017] IEHC 21.

¹⁰ "€145,000 award for man who lost part of finger due to 5-a-side incident" *RTÉ* (19 January 2017) < <https://www.rte.ie/news/crime-and-legal/2017/0119/846275-award/> > accessed 7 September 2022.

¹¹ "Man who lost finger retrieving football awarded €145,000" *The Irish Times* (19 January 2017) < <https://www.irishtimes.com/news/crime-and-law/courts/high-court/man-who-lost-finger-retrieving-football-awarded-145-000-1.2943790> > accessed 7 September 2022.

¹² *Miller v Jackson* [1977] QB 966; *Bolton v Stone* [1950] 1 KB 201 CA and [1951] AC 850.

¹³ [1972] NZLR 773.

¹⁴ The finer points of primary and secondary liability were not addressed in the judgment. The finding against the club was appealed to the Court of Appeal. The appeal was dismissed. *Waitemata District Pony Club, East Coast Bays Branch v Evans* [1974] 1 NZLR 28.

- In *Kennaway v Thompson*,¹⁵ all members of the Cotswold Motorboat Racing Club were held liable in nuisance to a lakeside homeowner in respect of their powerful and noisy racing boats on Whelford Lake.
- In *Tetley v Chitty*,¹⁶ all members of the Medway Kart Club were held liable in nuisance because their go-karting activities caused excessive noise that affected local residents.

(ii) *Vicarious liability*

- [2.13] Vicarious liability is the liability that falls on one person as a result of an action of another, for example, the liability of an employer for the acts and omissions of employees.¹⁷ Vicarious liability does not depend upon fault but rather depends upon the relationship between a defendant and the person who actually committed the tort. The most common form of vicarious liability is between an employer and an employee. However, vicarious liability may also exist between a principal (the person on whose behalf another individual, called the agent, legally acts) and an agent (the person who legally acts on behalf of another individual called the principal).
- [2.14] Being a member of an unincorporated association does not in itself make all members liable for the acts of individual members. All members might, however, in appropriate cases, be vicariously liable to third parties if an individual member was acting as agent of a club or “in furtherance of a common interest”.¹⁸
- [2.15] In recent decades case law established a wider test of “close connection”, whereby an employer can be vicariously liable for an employee’s wrongdoing if the wrong is so closely connected with their employment that it is ‘fair and just’ to hold the employer vicariously liable. In England and Wales the test was established in the case of *Lister v Hesley Hall Ltd*.¹⁹ In Ireland it was adopted in the judgment of the High Court in *Hickey v McGowan* where O’Neill J observed:

¹⁵ [1981] QB 88, CA.

¹⁶ [1986] 1 All ER 663.

¹⁷ Hunt, *Murdoch and Hunt’s Encyclopedia of Irish Law* 6th ed (Bloomsbury Professional 2016).

¹⁸ *Murphy v Roche* (High Court, 15 May 1987) at para 18.

¹⁹ [2002] 1 AC 215 (HL).

“Thus, the majority of the Supreme Court in the *O’Keeffe* case held that the ‘close connection’ test is now firmly embedded in our jurisprudence on vicarious liability.”²⁰

- [2.16] In *Hickey v McGowan* the Supreme Court held that the relationship between a religious order (which was an unincorporated association) and its members may give rise to vicarious liability, but it would be wrong to hold that it can almost entirely displace the legal responsibility of an employer. Accordingly, O’Donnell J apportioned responsibility equally between the Order and the manager of the school, who had not been sued.
- [2.17] The case concerned allegations of historical child sexual abuse committed by a Marist Brother against Mr Hickey while he was a student at St John’s National School in Sligo between 1968 and 1972. Mr Hickey’s civil action was brought against the alleged perpetrator of the abuse, Brother Cosgrave, but also against the Provincial of the Marist Order, Brother McGowan. An important reason for doing so was to secure judgment against the Marist Order itself, so that the court’s judgment could be recouped from the Order’s substantial assets.
- [2.18] The plaintiff argued that the members who collectively comprised the Order at the time the offence was alleged to have been committed should be vicariously liable for the actions of Cosgrave, because the Marist Congregation had full control over the running of the school at that time. The plaintiff relied strongly on the judgment of the UK Supreme Court in *Catholic Child Welfare Society v Various Claimants*²¹ (“CCWS”) in support of the plaintiff’s claim that the religious order should be treated as a separate legal entity from the members who comprise the religious order, such that legal judgment could be recovered from the religious order itself.
- [2.19] CCWS was a case of strikingly similar facts to *Hickey v McGowan*. It concerned claims of sexual abuse against young boys in the care of the De La Salle Order. In the CCWS case, Lord Phillips held that, despite the fact that the Order was an unincorporated association, the Order should nonetheless be treated as if it were an incorporated body for the purposes of civil suit and therefore the judgment could be recouped from the Order itself. Lord Phillips’ reasoning was essentially that if the organisation acts for all intents and purposes as a corporate body, it may be treated as such for the purposes of a civil suit.
- [2.20] The High Court in *Hickey* was content to follow the approach of the UK Supreme Court and held that the Marist Order was, for all intents and purposes, a corporate body formed to provide education to boys. O’Neill J offered the same

²⁰ [2014] IEHC 19 at para 48.

²¹ [2012] UKSC 56, [2013] 1 All ER 670, [2013] 2 AC 1.

reasoning as the UK Supreme Court, but in more descriptive terms when he said that: "... the well-known identity of the Marist Congregation cannot simply disappear into the sands of an unincorporated association."²²

- [2.21] The Supreme Court rejected O'Neill J's analysis on this point and determined that the judgment in the High Court could not be upheld. The Irish Supreme Court was not persuaded by the reasoning of the Supreme Court of the United Kingdom and declined to follow *CCWS*. The Supreme Court, rather than attributing legal personality to the Order, held that the collective body of members of the Order at the time when the offence was alleged to have been committed could be vicariously liable for the actions of some of their members at that time. O'Donnell J noted that while there are not that many legal decisions in common law jurisdictions regarding the liability of members of an unincorporated association, it is reasonably well established that members can be jointly and severally liable for the torts of another member.
- [2.22] Having regard to the employer-employee relationship between the abuser and the Order, the deeper "moral nature of the submission to religious vows", and the "close connection" of the abuse to the carrying out of the operations of the Order (namely teaching), the Supreme Court determined that it was appropriate to impose vicarious liability. Crucially, however, the Supreme Court held that judgment could only be recovered from members and not the Order itself. The Supreme Court also held that future members could not be held liable for the actions of previous members. Charleton J held:
- "That is the nature of unincorporation: rights and liabilities do not continue despite people calling themselves the same name. When they are gone, the liability is not passed on."²³
- [2.23] O'Donnell J commented that the decision of the Supreme Court rendered the judgment of limited value to the plaintiff, because the plaintiff was unlikely to be able to recover such a large sum from the Brothers as private individuals, especially considering each Brother took a vow of poverty and gave their salaries directly to the Order at the time the abuse took place. Nevertheless, O'Donnell J felt this admittedly "... narrow and somewhat technical approach" was correct in law.²⁴
- [2.24] The effect of the decision is to underscore the potential for vicarious liability to be attributed to those who share membership of an unincorporated association

²² [2014] IEHC 19 at para 69.

²³ [2017] IESC 6 at para 54, [2017] IR 196 at para 128.

²⁴ [2017] IESC 6 at para 56, [2017] IR 196 at para 57.

on the basis of “close connection.” The uncertainty as to the extent of an individual member’s exposure to legal consequences is undesirable. It may also be unjust, in that there may be some considerable distance, both in terms of knowledge and control, between an individual member and another member or agent of the club or association in respect of whose actions fellow members are held vicariously liable.

(b) Liability in tort of unincorporated association to members of that association

- [2.25] When members of an unincorporated association are injured as a result of an act or omission of the association, they may wish to claim compensation through the law of tort. For example, a member may slip on the floor in the club house of a golf club or may be injured in a rugby match at a rugby club due to a failure to appropriately maintain the rugby pitch.
- [2.26] Regarding the application of tortious liability in cases involving an unincorporated association, no duty of care is owed between members of an unincorporated association on the basis of membership.²⁵ Rather, for a duty of care to arise between members of an unincorporated association, it needs to be established on ordinary principles of the law of negligence.²⁶
- [2.27] There have been a number of court decisions where members of unincorporated associations have attempted to bring claims for compensation against their own unincorporated association. In the High Court case of *Nolan v Fagan*, a member of a golf club brought a claim against another member of the golf club and others (as trustees of the golf club) for injuries which he sustained arising from a gas explosion at the golf club. In that case, Gannon J held that the plaintiff, a member who had a contractual relationship with the golf club, could not maintain a claim against the club. The plaintiff was not entitled, for the purpose of making a claim for compensation, to treat the golf club as a separate legal entity. It would be tantamount to the plaintiff suing himself.²⁷
- [2.28] Gannon J returned to this question in *Murphy v Roche (No 2)*.²⁸ Mr Murphy was a member of a GAA club and paid to attend a dance held in the premises of the club. He fell and was injured. Mr Murphy claimed that the injuries occurred because the people who organised the dance, and who were responsible for

²⁵ *Owen v Northampton Borough Council* [1992] 156 LGR 23 at para 29; *Hrybynyuk v Mazur* [2004] NSWCA 374 at para 9.

²⁶ *Hrybynyuk v Mazur* [2004] NSWCA 374 at para 9.

²⁷ *Nolan v Fagan* (High Court 8 May 1985). The judgment was *ex tempore*, but Gannon J had a note of his judgment which he cited in *Murphy v Roche (No 2)* [1987] IR 656 at 660.

²⁸ [1987] IR 656.

managing the club premises, were negligent. The plaintiff did not bring proceedings against the GAA club. Instead, he brought proceedings against trustees of the GAA club as representatives²⁹ as representatives of the club.

- [2.29] The defendants argued that the plaintiff could not bring a claim for damages because he was a member of the GAA club, and that the GAA club was an unincorporated association, which cannot be sued. The plaintiff argued that although he was a member of the club, he had paid an admission fee to enter the dance and argued that this gave him a legal cause of action and a right to sue the GAA club, as his attendance at the dance was unrelated to his membership. The Supreme Court ordered that the preliminary issue to be decided in the High Court was whether or not the plaintiff could sue the GAA club, an unincorporated association. The High Court held that it was not aware of any legislation applicable to the GAA club (of which the defendants were representatives) which gave the GAA club the character of a legal person separate from its members.
- [2.30] The High Court adopted the established legal position at common law, namely that an unincorporated association has no legal personality separate and distinct from its members and a member of an unincorporated association cannot sue their own unincorporated association because the member would, in effect, be suing himself or herself. Gannon J in the High Court rejected the plaintiff's action against the representatives of the GAA club. The fact that he paid an admission fee like other members of the public did not give him a cause of action. Gannon J referred to his own note of an *ex tempore* ruling he had made in the case of *Nolan v Fagan*³⁰ as follows:

"The plaintiff as a member with the defendants of an unincorporated club cannot impose on the defendants or invoke against them any duty in law to the plaintiff by virtue only of such membership distinctive from the legal duties or responsibilities of the plaintiff as a member of such club.

By reason of the legal identification of the plaintiff with the defendants by virtue of their mutual membership of the club the plaintiff cannot maintain the present proceedings against the members of their club or these particular members being the defendants as trustees."³¹

²⁹ In practice, the nominated representative is usually the general secretary, chairperson or treasurer of an unincorporated association or all of the above.

³⁰ (High Court 8 May 1985).

³¹ *Murphy v Roche* (No 2) [1987] IR 656.

[2.31] In *Talbot v Hermitage Golf Club, Golfing Union of Ireland and Murphy*,³² the plaintiff, a member of the Hermitage Golf Club, brought a claim against the defendants, asserting that the defendants committed the tort of libel by providing him with a golf handicap certificate signed and issued by a person from the so-called "Handicap Building". The plaintiff claimed that the words "Handicap Building" were false, defamatory and imputed that he cheated when completing golf score cards. The first defendant, the Hermitage Golf Club, was an unincorporated association. Herbert J stated that the plaintiff could not succeed in his action against the Hermitage Golf Club as the statements made were protected by qualified privilege. Herbert J also held that:

"[e]ven if I had come to the conclusion that the protection of qualified privilege which I found attached to the publication of the defamatory words in this case had been negated by proof of malice, the plaintiff could still not succeed in this action against the first defendant. It has long been decided that an action will not lie against an unincorporated association in its collective name for libel because it has no capacity to publish a libel or to authorise it to be published."³³

[2.32] Some cases focus on the uncertainty as to whether the plaintiff was a member or not. In *Walsh v Butler*,³⁴ Morris J was required to decide whether a person was in fact a member of a rugby club for the purposes of deciding whether a rugby club could be liable to that person in tort. The plaintiff had been injured while playing rugby for the club. Before 1979, the rugby club had no constitution or rules. When the club acquired premises in 1979, it decided to apply for a liquor licence, which required the club to adopt a set of rules. The club was granted a licence in accordance with the Registration of Clubs (Ireland) Act 1904. The club continued to operate successfully but its members paid virtually no regard to the rules, except for the creation of various committees and the holding of an annual general meeting. Members did not follow the procedures prescribed by the rules of the club for the election of members. Instead, the club operated on an informal basis.

[2.33] Although members were required to pay an annual subscription, no sanction resulted from their failure to pay. The plaintiff started to play rugby with the club in 1982. He had paid the annual subscription in the 1987/88 and 1988/89 rugby seasons but did not pay for the 1989/90 rugby season. The plaintiff was

³² [2012] IEHC 372 at para 89.

³³ [2012] IEHC 372 at page 9. The case was appealed to the Supreme Court ([2014] IESC 57) but that aspect of the judgment of Herbert J was not addressed on appeal.

³⁴ [1997] IEHC 9, [1997] 2 IRLM 81.

injured in early 1990. The defendants sought to avoid liability as a preliminary issue on the basis that the plaintiff was a member of the club. They argued that it was within the capacity of all the members of the club to accept a member into the club without having to follow the formal procedure provided for by the rules of the club. They further contended that the plaintiff's conduct (the plaintiff had held himself out to be a member for a number of years) precluded the plaintiff from seeking to establish that he was not a member of the club.

- [2.34] Morris J held in favour of the plaintiff. It had not been possible for the plaintiff to acquire membership in defiance of the rules of the club, which required the names and addresses of the persons proposed as ordinary members to be displayed in the club premises for at least two weeks before election and provided that all members shall be elected by the general committee. Even if it was within the capacity of the membership of the club to set aside the formal election procedure and assume a candidate was a member of the club, there was no evidence that this had occurred. Morris J identified a further fundamental point. Under the club's rules, if the plaintiff had been a member of the club, his membership would have lapsed when his subscription remained unpaid on the date of the annual general meeting in May 1989. While there is a good deal of sense to this reasoning, McMahon and Binchy have commented on the *Walsh* case:

"... it is not hard to sense in Morris J's judgment an underlying dissatisfaction with the implications of an immunity from suit in this area [of law]."³⁵

- [2.35] The authors also note that, in light of the right to equal treatment under the law and the right to litigate, the current legal position could be considered inconsistent with the right to litigate, as enumerated by the courts under Article 40.3 of the Constitution of Ireland³⁶ and/or the right of access to the courts under Article 6(1) of the European Convention on Human Rights.³⁷ The logic that precludes a person from suing themselves following an incident in which they are entirely at fault—cases involving single vehicle road traffic collisions for example—does not readily extend to injuries caused by others who are spared litigation because of common membership of an association with the injured party. Not only does the position present an access to justice barrier for an

³⁵ McMahon and Binchy *Law of Torts* 4th ed (Bloomsbury 2013) at para 39.25.

³⁶ See *Tuohy v Courtney* [1994] 3 IR 1; *The State (Quinn) v Ryan* [1965] IR 70 and *MacCauley v Minister for Posts and Telegraphs* [1966] IR 345. See also Hogan and Whyte (eds) *JM Kelly: The Irish Constitution* 4th ed (Tottel 2003) at paras 1446 – 1464.

³⁷ See *Golder v UK* 21 February 1975, 1 EHRR 524; *Ashingdane v UK* 7 EHRR 528. See also Reid *A Practitioner's Guide to the European Convention on Human Rights* 3rd ed (Thomson 2008) at pages 85-95.

individual potential litigant, it does little to encourage compliance with health and safety standards.

- [2.36] The issue of members being excluded from suing other members was also raised in the recent High Court case of *McGroarty v Kilcullen*.³⁸ The first four named defendants were sued in their capacity as trustees and representatives of the golf club, while the fifth was sued for the negligent act of operating the circular saw without adhering to the necessary safety precautions or using the required work equipment, such as a work bench.
- [2.37] Mr McGroarty was generally considered to be a member of Cobh Golf Club, when he was asked to assist with building work being undertaken there. Mr McGroarty was instructed to hold a long plank of timber, balanced on a single milk crate, while Mr McKeown cut the timber with a circular electric saw. Mr McGroarty was holding the timber when the defendant lost control of the saw, which made contact with Mr McGroarty's left hand, resulting in the loss of his finger.
- [2.38] Upon examination of the rules of the club, Hyland J found that as Mr McGroarty had not paid his annual subscription fee at the time of the incident, he could not be considered a member of the golf club. Mr McGroarty was awarded damages for the negligence of the defendants who it was found had owed him a duty of care. This case clearly highlights the potential injustice that can occur when club members attempt to sue the clubs they belong to. Had Mr McGroarty been up to date with his membership fee and been found to be a member, it is likely that he would not have succeeded in the claim.
- [2.39] If a duty of care and its breach is established, it is difficult to see any benefit to the rule which precludes members from suing their clubs solely on the basis of them being members.
- [2.40] The importance of the rules of the club in defining membership can be seen in the High Court case of *Connolly v O'Connor*.³⁹ The plaintiff had been drinking in the bar of the Tolka Rovers AFC & Sports Club when he fell off the pavement at the side of the clubhouse and suffered injury to his right shoulder which required surgery.
- [2.41] Mr Connolly sued Mr O'Connor as a representative of Tolka Rovers AFC & Sports Club as he claimed the club was negligent as occupier of the premises. The defendant raised the preliminary issue that the plaintiff was a member of the club and so was unable to take an action against the club. It was established that Mr Connolly was an 'associate member' of the club at the time of the

³⁸ [2021] IEHC 679.

³⁹ [2021] IEHC 736.

incident. However, the plaintiff contended that there was no category of associate member in the rules of the club and therefore he could not be considered a member.

[2.42] Barr J held that the introduction of different categories of members was not permitted by the rules of the club. The fact that the creation of such categories of membership was not explicitly prohibited in the rules, did not of itself confer any power on the committee of management to create such new categories of membership. In light of that, Barr J held that Mr Connolly was not a member of the club at the time and so the case could proceed to be heard on its merits.

[2.43] English cases have cast doubt on whether this immunity from suit can be said to be absolute in nature. In *Owen v Northampton Borough Council*,⁴⁰ the Court of Appeal of England and Wales held that it is open to a court to find that a duty of care exists:

“...[w]here a club officer or a member of a committee takes upon himself some task which he [or she] is to perform for other members of the club in the course of which he [or she] acquires actual knowledge of circumstances in which he [or she] knows gives rise to risk of injury to club members acting as he [or she] knows they will or may be expected to act if not told of the cause of danger.”⁴¹

[2.44] Moving to the southern hemisphere, the decision of the New South Wales Court of Appeal in *Hrybnyuk v Mazur*⁴² suggests that a member of a club can be liable in tort to another member of the club where a member has powers and duties delegated to him by the committee of the club, requests another member to participate in a task which is different in scale and concept to tasks traditionally performed by members in their use and enjoyment of the club, the task is dangerous, and the member participating in the task is inexperienced in carrying out such task.

[2.45] In the Irish case of *Brady v Moore*⁴³ although work was being undertaken on a voluntary basis by members of the club to remove slates from a roof in circumstances in which Stack J noted “little or no regard was paid to health and safety”, she was not in favour of imposing liability on members of unincorporated associations on the basis that:

⁴⁰ [1992] LGR 23.

⁴¹ [1992] LGR 23 at para 29.

⁴² [2004] NSWCA 374.

⁴³ [2022] IEHC 420.

“[i]f liability were too readily imposed, people who otherwise volunteer their time might be dissuaded from doing so and this would be damaging to the social life and leisure pursuits of a very large proportion of the population.”⁴⁴

- [2.46] The plaintiff had participated freely in a joint activity by the club membership, which was done in pursuit of the common interest of the club. The plaintiff was, in his capacity as member, the occupier of the premises for the purposes of the Occupiers’ Liability Act 1995, and he could not sue himself. These cases demonstrate the hurdles faced by plaintiffs in seeking legal remedies when injured while involved in club-related activities.

2. Liability in contract – common law

(a) Liability in contract law to third parties

- [2.47] Whatever the nature or size of an unincorporated association, during the course of its lifetime, it is likely to be involved in contractual relationships of various sorts. For example, as a purchaser of goods and services, as a provider of services in return for payment, as a provider of amenities to members and non-members, and perhaps as an employer of employees.
- [2.48] There are few Irish cases that deal with contractual relationships concerning unincorporated associations. Turning to case law from other jurisdictions, it is clear that a direct contractual relationship between an unincorporated association and a contractor is not possible because the common law has consistently refused to recognise an unincorporated association as a legal entity separate and distinct from its members,⁴⁵ and a legal non-entity does not have the capacity to contract.⁴⁶ Individual members contracting on behalf of the association may be personally liable or may be acting as agents for the other members. When a member purports to act as agent for the association, they can be held personally liable if they do not have the necessary legal authority to enter the contract on behalf of the others.⁴⁷
- [2.49] Ordinarily an agent will act with the authority of the principal, the person on whose behalf the agent acts (for example by entering a contract). In practice

⁴⁴ [2022] IEHC 420 at para 39.

⁴⁵ *Lloyd v Loaring* (1802) 6 Ves 773; *Peckham v Moore* [1975] 1 NSWLR 353 at para 368; *Bailey v Victorian Soccer Federation* [1976] VR 13.

⁴⁶ Fletcher, “Unincorporated Associations and Contract: The Development of Committee Liability and Unresolved Issues” (1979) 11(1) *University of Queensland Law Journal* 53.

⁴⁷ Practical Law, “Unincorporated Associations” (UK) 2021.

there are two ways in which a principal can be liable, either by actually authorising or by “holding themselves out” as authorising. In the context of a committee or other organ of an unincorporated body, the question is either:

- (a) did the body as a whole or a relevant committee authorise an agent to contract on their behalf, in the sense of committing each relevant member (of the club or committee) to be a party to the contract? or
- (b) did the members generally or of a relevant committee act in such a way as they might reasonably be held to have led the other party to the contract to believe that they had authority to bind all?

These distinctions are evident in differing outcomes in contract law cases discussed below. The cases must be considered against this backdrop.

[2.50] While it is not possible to contract with the unincorporated association itself, it is also impossible at common law for an unincorporated association to make a valid contract with third parties to bind all persons who are, from time-to-time, members of an unincorporated association.⁴⁸

[2.51] It is an inescapable fact of modern life that unincorporated associations may need to make purchases, obtain credit and engage employees, and it is possible that the operation of this common law rule restricts the day-to-day operations of unincorporated associations and those attempting to contract with them. An unincorporated association’s lack of contractual capacity is not always appreciated by the members and officers of associations, or by persons dealing with unincorporated associations.⁴⁹

[2.52] Failure to appreciate an unincorporated association’s lack of contractual capacity may result in the liability of members.⁵⁰ For example, in *Delaunay v Strickland*,⁵¹ a member of an unincorporated club was found liable to pay for the cost of plate supplied to the club at the request of the manager. The court found that all members of an unincorporated association are jointly liable for association contracts, in the same manner as all partners in a partnership are

⁴⁸ See *Walker v Sur* [1914] 2 KB 930.

⁴⁹ *Ibid.*

⁵⁰ Fletcher, “Unincorporated Associations and Contract: The Development of Committee Liability and Unresolved Issues” (1979) 11(1) *University of Queensland Law Journal* 53.

⁵¹ (1818) 2 Starkie 416, 20 RR 706, at paras 53-54.

jointly liable for partnership contracts.⁵² However, in most instances liability will be restricted to committee members of the unincorporated association and will depend on the rules of the association.

- [2.53] There are three general propositions to be kept in mind when considering an individual member's contractual liability to a third party:⁵³
- (a) the club is not a legal person separate and distinct from its members;
 - (b) no contract can exist without principal parties; and
 - (c) whether a member can be held personally liable for contracts purporting to have been made on behalf of the club depends on both the constitution or rules of the association and the law of agency.⁵⁴
- [2.54] A third party dealing with an unincorporated association faces obstacles in respect of remedies should there be a breach of contract. The funds of an unincorporated association belong to all the members of the unincorporated association in equal shares.⁵⁵ To receive compensation for breach of contract from these funds, a third party would have to demonstrate that all members of the unincorporated association were liable to the third party according to the rules of agency.⁵⁶ Under the rules of agency, the principal (the person or persons on whose behalf another individual, called the agent, legally acts) is liable for the actions of the principal's agent (the person legally acting on behalf of the principal). The principal is legally bound by the actions of the agent, provided the agent acted according to the instructions of the principal.
- [2.55] The third party would have to establish that the collective membership of an unincorporated association, acting as principal, authorised an individual member of the unincorporated association to act as agent on their behalf in order to enter a contract with the third party. If the members are made liable as principals, their liability will extend beyond the funds of the unincorporated association and any judgment will be enforceable against them personally.⁵⁷

⁵² Fletcher, "Unincorporated Associations and Contract: The Development of Committee Liability and Unresolved Issues" (1979) 11(1) *University of Queensland Law Journal* 53.

⁵³ Ashton, Reid Ashton & Reid *on Clubs and Associations* 2nd ed (Jordan Publishing Ltd 2011) at page 276.

⁵⁴ *Maritime Stores Ltd v H P Marshall & Co Ltd* [1963] 1 Lloyd's Rep 602 at para 608.

⁵⁵ Law Reform Advisory Committee for Northern Ireland, *Unincorporated Associations* (LRAC No 14, 2004) at para 2.10.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

[2.56] To guard against the serious risk of committee members being personally liable to a third party, the courts have traditionally ruled that the usual authority of a committee does not extend to pledging the credit of individual members. Rather, their authority is normally limited to the expenditure that can be provided out of the funds of the unincorporated association.⁵⁸ According to the Law Reform Advisory Committee for Northern Ireland,⁵⁹ if the value of the third party's claim for breach of contract does not exceed the amount available in the funds of the unincorporated association, and if the contract was a type of contract contemplated by the rules of the unincorporated association, the third party should be able to obtain an order for compensation out of the funds of the unincorporated association:

“[p]rovided that his [or her] claim does not exceed the amount available in the association fund and that the contract was one of a sort contemplated by the rules [of the unincorporated association], he [or she] should be able to obtain judgment and with it an order for payment out of the funds [of the unincorporated association].”⁶⁰

[2.57] Trustees of the funds of an unincorporated association may be joined as parties in a claim seeking payment out of the funds of an unincorporated association.”⁶¹

[2.58] While an unincorporated association cannot enter a contract in and of itself, when a contract is purportedly made on behalf of an unincorporated association, it is not necessarily a nullity. The persons who entered the contract may be personally liable, or if there was the necessary legal authority, the principal of the unincorporated association will be liable.⁶² In an unincorporated members' club, the committee, as principal, will commonly rely on one of the club's officers, such as the club secretary or one of its employees, to organise or enter contracts on behalf of the club. The officer or employee will act as the committee's authorised agent. This is unsatisfactory from the point of view of committee members undertaking liabilities on behalf of an unincorporated club. Liability could be substantial, and committee members who expressly or impliedly authorised the contract may be liable if there is a breach of contract.

[2.59] Mere membership of an unincorporated club does not give rise to personal liability for goods supplied to an unincorporated club unless expressed in the

⁵⁸ *Flemyng v Hector* [1836] 2 M&W 172.

⁵⁹ Law Reform Advisory Committee for Northern Ireland, *Unincorporated Associations* (LRAC No 14, 2004).

⁶⁰ *Ibid* at para 2.10.

⁶¹ *Ibid* at para 2.10.

⁶² Warburton *Unincorporated Associations: Law and Practice* 2nd ed (Sweet & Maxwell 1992).

club's constitution or rules.⁶³ An ordinary member of an unincorporated association does not by virtue of that membership alone incur any personal liability for goods supplied to an unincorporated association.⁶⁴

- [2.60] A member may, however, be liable to a creditor if such member agrees to the contract in respect of which such liability has arisen.⁶⁵ A member may also be liable if they provide credit or ratify an order.⁶⁶ Moreover, members of an unincorporated association will be held liable as principals to contracts made on behalf of the unincorporated association when they have authorised such contracts, and authorisation may be derived from the rules of the unincorporated association.⁶⁷ For example, the members of a managing committee, being in control of the affairs of a club, are in the ordinary course of events personally liable for all contracts made by them on behalf of the club because they will be held to be the principals.⁶⁸ In this event, the committee members will be liable to the full extent of the contract, and not merely to the full extent of the funds of the club.⁶⁹
- [2.61] If a member of an unincorporated association purports to contract on behalf of all the members, but in fact has no such authority, that member may be held to have contracted personally.⁷⁰ A member will also be personally liable if found to be acting in excess of the authority which has been granted.⁷¹ The reluctant acceptance or tacit approval of a club contract may be sufficient to establish liability against a member.⁷² The extent to which committee members of an unincorporated association are exposed to personal liability may be underappreciated by some members of unincorporated associations who agree to act, or who are elected to act, as committee members.

⁶³ Law Reform Advisory Committee for Northern Ireland, *Unincorporated Associations* (LRAC No. 14, 2004) at para 1.10.

⁶⁴ *Ibid.*

⁶⁵ *Ibid* at para 1.10.

⁶⁶ *Ibid.*

⁶⁷ Stewart, Campbell and Baughen, *The Law of Unincorporated Associations* (Oxford 2011) at para 7.06.

⁶⁸ *Glenester v Hunter* (1831) 5 Car & P 62 at 65 (Tindal CJ); *Steele v Gourley and Davis* (1886) 3 TLR 772 at para 773; *Bradley Egg Farms Ltd v Clifford* [1943] 2 All ER 378 CA at para 386.

⁶⁹ *Pink v Scudamore* (1831) 5 Car & P 71.

⁷⁰ *Duke of Queensbury v Cullen* (1787) 1 Bro Parl Cas 396.

⁷¹ *Chapleo v Brunswick Permanent Building Society* (1881) 6 QBD 696.

⁷² *Steele v Gourley and Davis* (1886) 3 TLR 772 CA at para 773.

[2.62] Case law demonstrates that committee members of unincorporated associations are viewed as a suitable target for the imposition of contractual liability. Fletcher has noted that:

“Outsiders, committee members and even judges appear to recognise that the committee is a convenient surrogate for the association when ‘association contracts’ ... are litigated.”⁷³

[2.63] Although there is recognition that the committee of an unincorporated association is a convenient surrogate for an unincorporated association when contractual issues are litigated, the exact scope of the liability of committee members has not yet been determined. Fletcher has observed that:

“Notwithstanding the numerous cases in which the contractual liability of committee members has been before the courts, the exact nature of that liability has not yet been determined.”⁷⁴

(b) Liability in contract to association members

[2.64] The foundation of each unincorporated association is the contractual agreement made between each member to one another by way of the association’s rules, as stated in *Hickey v McGowan*:

“In law, the absence of incorporation means that the body is created by the agreement of its members embodied in rules which are in the nature of a contract between the members.”⁷⁵

[2.65] The importance of an association’s rules was illustrated in *Fitzharris v O’Keefe*, when Laffoy J held that:

“Whether there was a contractual relationship between the plaintiff and the National Association turns on whether, by reference to its Constitution and Rules and as a matter of fact, the plaintiff was a member of the National Association. The nature of the contractual liability is a matter of the construction of the Constitution and Rules.”⁷⁶

[2.66] However, it is important to note the distinction that an unincorporated association, as a separate entity, has no capacity to contract with one of its

⁷³ Fletcher, *Unincorporated Associations and Contract: The Development of Committee Liability and Unresolved Issues* (1979) 11(1) *University of Queensland Law Journal* 53.

⁷⁴ *Ibid.*

⁷⁵ [2017] IESC 6 at para 53, [2017] 2 IR 196 at para 54.

⁷⁶ [2008] IEHC 438.

members at common law.⁷⁷ For example, when a social club member pays for a drink at a club bar, that member is not, contrary to what that member might believe, purchasing the drink from the club. Rather, the club members are releasing the value of their share in that drink in consideration for the member's payment.⁷⁸

- [2.67] A person who becomes a member of an association may obtain certain contractual rights (subject to the rules of the club), for example the right to use the facilities of the club in exchange for payment of an annual subscription. However, the contract cannot be with the club as an unincorporated association at common law. Instead, the contract can only be with all of the other members of the association. This is so whether or not the members are mutually aware of the identity of the other members.⁷⁹
- [2.68] In *Corner v Maxwell Irwin, trading as Maxwell Irwin and Sons*,⁸⁰ Palles CB held that a manager of an unincorporated association could not sue in contract law in his own name upon a contract entered with the unincorporated association even though according to the contract itself the manager was able to sue.
- [2.69] *Hyland v Dundalk Racing (1999) Ltd t/a Dundalk Stadium*,⁸¹ discussed contractual enforcement of sporting rules. In this case, Hogan J cited an English decision as authority:

"In essence, *Anderton [Anderton v Rowland [1999] QB 5]* is simply an authority for the proposition that the rules of a sporting organisation must evince a clear intention to create contractual relations between members to have a cause of action against another member in respect of the breach of such a rule. As Jack J pointed out, such rules are normally designed to regulate the relationship between the individual member and the club or organisation in question. The golfer who joins a golf club well understands that the rules governing the member's relationship with that club and further understands that a serious breach of those rules might lead to the termination of that membership. But the member would be surprised to learn that a

⁷⁷ See Scottish Law Commission, *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140).

⁷⁸ *Carlton Lodge Club v Customs and Excise Commissioners* [1974] 3 All ER 798, [1974] BVC 16.

⁷⁹ Scottish Law Commission, *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140).

⁸⁰ [1876] IR 10 CL 354.

⁸¹ [2014] IEHC 60 at para 44.

breach of those rules might bring about a situation in which another member could sue them in respect of such a breach.”⁸²

[2.70] The legal position between one member and another member may be surprising for many members of unincorporated associations who may believe that they are contracting with the unincorporated association rather than other individual members. Members may also be surprised to learn that the rules of an unincorporated association are not always drafted so as to control the relationship between the member and the unincorporated association but may be drafted in a manner so as to control the relationship between members. As mentioned by Laffoy J in *Fitzharris v O’Keeffe*,⁸³ in circumstances where the rules of the unincorporated association demonstrate a clear intention to create contractual relationships between members, one member may have a legal cause of action against another member and be entitled to sue the other member for breach of a rule of the unincorporated association. It is advisable, therefore, for unincorporated associations to review their rules to ensure that persons becoming members of unincorporated associations are aware of these contractual issues.

3. Civil liability as reflected in statute

[2.71] The treatment of unincorporated associations as legal non-entities is not consistently acknowledged in Irish legislation, which leads to complication and uncertainty. In a variety of circumstances, the law simply proceeds upon an assumption that unincorporated associations do exist for certain purposes. For example, section 18(c) of the Interpretation Act 2005 provides that an Act or statutory instrument that refers to a “person” includes “an unincorporated body of persons” within the meaning of “person”. Charleton and McDermott have noted in their discussion of section 11(c) of the Interpretation Act 1937 (which is identical in substance to section 18(c) of the Interpretation Act 2005) that:

“This [the inclusion of ‘an unincorporated body of persons’ within the definition of ‘person’] by-passes the complex law on vicarious liability so that where a group, whether incorporated or not, requires something to be done in breach of the law, that body of

⁸² *Hyland v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* [2014] IEHC 60, affirmed on this issue at [2017] IECA 172.

⁸³ [2008] IEHC 438.

persons in making that decision acts contrary to the criminal as well as civil law.”⁸⁴

(a) The Interpretation Acts

[2.72] The Interpretation Acts appear to provide that **every** piece of legislation can be applied to unincorporated associations unless an express contrary intention appears. While this is a matter of legislative convenience, arguably it leads to incoherence in the law, since it means that, in theory at least, even statutes that relate to intentional action (both civil and criminal) can apply to entities that have no separate legal personality, nor any controlling mind in the way that a company with a clear management and accountability structure has.

[2.73] Section 18(c) of the Interpretation Act 2005 provides a general rule of interpretation that is applied when interpreting every Act of the Oireachtas and every statutory instrument made wholly or partly under an Act of the Oireachtas on or after 1 January 2006. Section 18(c) of the 2005 Act states:

“Person” shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of “person” shall be read accordingly”.

[2.74] Section 4(1) of the Interpretation Act 2005 provides that:

“A provision of [the 2005 Act, for example, section 18(c)] applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made.”

[2.75] On a strict, textual interpretation of section 18(c) of the Interpretation Act 2005, every Act of the Oireachtas and every statutory instrument made wholly or partly under an Act of the Oireachtas that includes the word “person” must be interpreted as meaning an “unincorporated body of persons”. However, this interpretation is incomplete, because section 18(c) of the 2005 Act must be read in conjunction with section 4(1) of the 2005 Act. Section 4(1) of the 2005 Act contains the words “... except in so far as the contrary intention appears ...”.

[2.76] An example of contrary intention arising in case law occurred in *Friends of the Irish Environment CLG v the Legal Aid Board*.⁸⁵ In this case, the applicant made

⁸⁴ Charleton, McDermott, *Charleton & McDermott’s Criminal Law and Evidence* 2nd ed (Bloomsbury Professional 2020) at para 14.04.

⁸⁵ [2020] IEHC 454.

the argument that the word “person” in the Civil Legal Aid Act 1995 included legal persons, meaning the applicant ought to be permitted to seek legal aid. Hyland J held that the proper test for the interpretation of the word “person” was the contrary intention test outlined in section 4(1) of the Interpretation Act 2005. Hyland J rejected the applicant’s assertion that an express deviation from the universally recognised term of person is required in order to find a contrary intention.

- [2.77] An example of an express contrary intention insofar as unincorporated associations are concerned can be seen in the Local Government (Extension of Franchise) Act 1935 which was repealed in 1963. Section 1(1) of the 1935 Act expressly stated that in the 1935 Act, “[t]he word ‘person’ does not include ... an unincorporated body of persons.” However, most legislation does not expressly exclude unincorporated associations, even though in practical terms it may be impossible to apply that legislation to an unincorporated body. For example, for certain statutory obligations to have effect they must be tied to an entity with personality, particularly criminal and regulatory obligations which provide for conviction, imposition of a fine or imprisonment. It is difficult to see how such legislative test could be met if the personality that is subject to the statutory provisions is the personality of each individual member, rather than the personality of the unincorporated association as an entity separate and distinct from the members.

(b) Legislation applicable to unincorporated associations

- [2.78] Clubs and associations are subject to the general obligation to comply with the law.

(i) Registration of Clubs legislation

- [2.79] Under the provisions of the Registration of Clubs Acts 1904 to 2008, a club can make an application to court to have their club registered pursuant to the Acts in order to sell alcohol. The Registrar of Clubs is the Clerk for the court area where the club is situated. Once registered, the club is entitled to sell intoxicating liquor to its members⁸⁶ and their visitors on the club premises⁸⁶ and to hold social functions.⁸⁷
- [2.80] In order to be registered, the club must satisfy certain criteria detailed in the Registration of Clubs Acts 1904 to 2008. In general terms, it must be shown that the club has been established, and conducts its affairs, in good faith, without fraud or deception, that the building of the club has been constructed in

⁸⁶ McNamara, *A Legal Guide for Clubs and Associations in Ireland* (First Law Limited 2005) at page 25.

⁸⁷ Section 29(1) of the Intoxicating Liquor Act 2000.

accordance with planning permission, and that the Fire Officer's requirements have been met.⁸⁸

[2.81] However, the Registration of Clubs Acts 1904 to 2008 do not legally define what constitutes a club or unincorporated association and therefore any unincorporated association of persons, gathered for social or sporting purposes, is entitled to make an application to have their club registered, provided all other conditions are satisfied.

[2.82] Under the legislation, to obtain or renew a Certificate of Registration, the rules of a club must provide, among other things, that the club is managed by a committee or governing body which is elected by the members and subject to re-election, the committee or governing body must hold periodic meetings, members of the club must pay a membership fee, and that correct accounts and financial records are kept.

(ii) Equality legislation

[2.83] The Equal Status Acts 2000 to 2018 apply to most organisations engaged in the provision of services. Discrimination in the provision of services is prohibited by the Equal Status Acts on the following nine grounds:

- (a) gender;
- (b) marital status;
- (c) family status;
- (d) sexual orientation;
- (e) religion;
- (f) age;
- (g) disability;
- (h) race; and
- (i) membership of the Traveller community.⁸⁹

[2.84] These nine grounds are relevant to clubs and unincorporated associations in relation to the employment of staff, persons applying for membership,

⁸⁸ McNamara, *A Legal Guide for Clubs and Associations in Ireland* (First Law Limited 2005) at page 25.

⁸⁹ Such services include the sale and supply of goods, accommodation, and educational establishments.

treatment of members, and treatment of members of the public who may wish to use the facilities of the club or unincorporated association.

- [2.85] The legislation has specific provisions dealing with unincorporated associations and clubs that hold a Certificate of Registration.⁹⁰ Section 8 of the Equal Status Act 2000 deals specifically with clubs. Clubs holding a Certificate of Registration can have their Certificate suspended if they are found to be engaging in discriminatory practices.
- [2.86] The suspension of a club's Certificate of Registration has the effect of prohibiting the club from selling alcohol during the period of suspension. If there is a second or subsequent determination that a club is a discriminating club, a Certificate of Registration will not be renewed.
- [2.87] In *Equality Authority v Portmarnock Golf Club*,⁹¹ the District Court suspended the Certificate of Registration of Portmarnock Golf Club for one week after the Court found that Portmarnock Golf Club's membership rules discriminated against women and contravened section 8 of the Equal Status Act 2000. The suspension was deferred pending the outcome of High Court proceedings initiated by Portmarnock Golf Club. The dispute related principally to Rule 3 of Portmarnock Golf Club which stated:

"The Club shall consist of members and Associate Members ... who shall be gentlemen properly elected and who shall conform with the rules of amateur status."

- [2.88] The High Court, and subsequently the Supreme Court, declared that Portmarnock Golf Club was not a discriminating club under the legislation because the rules of the Club fell within the exemptions provided by section 9 of the Equal Status Act 2000.
- [2.89] O'Higgins J in the High Court stated that there was:

"... nothing inherently undesirable with a person seeking in a social context, the society of persons of the same gender or the same nationality or the same religion."⁹²

- [2.90] There are indeed some situations in which the Equal Status Acts 2000 to 2018 allow people to be treated differently in relation to both registered and unregistered clubs. These are called exemptions. For example, it is not

⁹⁰ Section 8 of the Equal Status Act 2000.

⁹¹ [2005] IEHC 235 (High Court), [2009] IESC 73, [2010] 1 IR 671 (Supreme Court).

⁹² [2005] IEHC 235. See further Bolger, Bruton and Kimber, *Employment Equality Law* 1st ed (Roundhall 2012) at 1-55.

discriminatory to create a club exclusively for individuals of a diverse sexual orientation or gender identity, for example LGBTQ Ireland.

(iii) Data protection legislation

- [2.91] The Data Protection Acts 1988 to 2018 oblige people and organisations that process information to protect personal data. The Acts give rights to individuals to, for example, know what personal data is held about them, to seek a copy of that personal data and to rectify details concerning their personal data. The Data Protection Act 2018 was enacted to give effect to the EU General Data Protection Regulation (GDPR)⁹³ in Ireland. Data protection legislation applies to all organisations that collect personal data.
- [2.92] Clubs control and/or process personal data, for example membership information. The data that clubs collect and/or process about their employees or members is likely to be subject to data protection legislation. For example, depending on the nature of the club, names, addresses, dates of birth, religious beliefs and/or medical histories may be controlled or processed.⁹⁴ A Data Protection Officer is a person who, either alone or with others, controls the contents and use of personal data. For most clubs, the Data Protection Officer is the club secretary.
- [2.93] In early 2020, the GAA advised its clubs to avoid using WhatsApp in order to comply with the General Data Protection Regulation (“GDPR”).⁹⁵ The GAA’s advice to members of GAA clubs may demonstrate that, in practice, an unincorporated association’s lack of separate legal personality does not allay concerns about liability. Although GAA clubs have no separate legal existence, the GAA deemed a GDPR breach a valuable concern. The warning adds to the examples of uncertainty in enforcement evident in this examination of the liability of unincorporated associations.

(iv) Electoral legislation

- [2.94] The Electoral Acts 1992 to 2019 provide for the general regulation of the electoral system. Specifically, the Electoral Acts 1992 to 2019 provide a statutory system for the acceptance and disclosure of political donations and the opening

⁹³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016.

⁹⁴ See section 34 of the Data Protection Act 2018.

⁹⁵ See William Fry, “Social Media Policy and Guidelines - Do Sports Clubs' WhatsApp Groups Breach the GDPR?” (2020).

of political donation accounts. The Acts place restrictions and reporting obligations on “third parties” (which includes unincorporated bodies of persons) other than registered political parties that accept in a particular calendar year a donation for “political purposes” that is greater than €100.⁹⁶ Political parties are also obliged to nominate officers for compliance with electoral law. Section 71(1) of the Electoral Act 1997 provides that each political party shall appoint an ‘appropriate officer’ for the purposes of Parts III (Payments to Political Parties and Reimbursement of Election Expenses of Candidates), IV (Disclosure of Donations), V (Expenditure by Political Parties and Candidates at Dáil Elections and European Elections), VIII (Miscellaneous) and IX (Political Parties - Disclosure of Accounts) of the Electoral Act 1997.

(v) *Competition legislation*

- [2.95] The Competition Acts 2002 to 2017 are designed to deal with anti-competitive behaviour in Irish markets.
- [2.96] The Competition Act 2002 defines an undertaking as “a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service and, where the context so admits, shall include an association of undertakings.”⁹⁷
- [2.97] According to the Supreme Court in *Deane v Voluntary Health Insurance (VHI) Board*,⁹⁸ the term “for gain” does not necessarily mean the same thing as the term “for profit”. The plaintiffs in the *Deane* case were the trustees of a private hospital run by a religious order. They brought an action under section 5 of the Competition Act 1991 (the predecessor to the Competition Act 2002) claiming that VHI had abused its dominant position in the health insurance market. The question in *Deane* was whether or not a non-profit-making organisation, such as a health insurance provider, was engaged “for gain”.
- [2.98] The Supreme Court held that a non-profit-making organisation could fall within the definition of an undertaking and that the term “for gain” did not mean “for profit”. In *Deane*, the Supreme Court held that the term “gain” covers an activity carried on or a service supplied which is done in return for a charge or payment. However, it is important to understand that VHI was not an unincorporated

⁹⁶ See, in particular, sections 22, 23, 23A, 23B and 23C of the Electoral Act 1997. Section 2 of the Act provides: “‘person’, except in Part VI, shall include an individual, a body corporate and an unincorporated body of persons and a body corporate and any subsidiary thereof shall be deemed to be one person.”

⁹⁷ Section 3(1) of the Competition Act 2002.

⁹⁸ [1992] 2 IR 219.

association, but a statutory corporation. The case is relevant because it clarifies that some non-profit-making bodies, presumably including unincorporated bodies, may be considered to be undertakings where they are engaged in economic activities.⁹⁹

(vi) Miscellaneous legislation

[2.99] The Occupiers' Liability Act 1995 and the Defamation Act 2009, for example, both use the word "person" and therefore, because of the Interpretation Act 2005, it appears these Acts apply to unincorporated associations. Moreover, some statutory provisions apply to unincorporated associations, for example, by defining the concept of "undertaking" as including them or using the definition of "undertaking" found in EU instruments, which includes unincorporated bodies.

[2.100] The Safety, Health and Welfare at Work Act 2005 defines an undertaking as:

"... a person being an individual, a body corporate or an unincorporated body of persons engaged in the production of, supply or distribution of goods or the provision of a service (whether carried on by him or her for profit or not)".¹⁰⁰

[2.101] For most tax purposes, "body of persons" is defined as including clubs and unincorporated associations.¹⁰¹ Examples of taxes that may apply to unincorporated associations are income tax on profits generated from non-member income, deposit interest retention tax ("DIRT") on interest received from money held on deposit, capital gains tax ("CGT") on the disposal of assets, gift tax on donations, value added tax ("VAT") on sales, and stamp duty on the purchase of land or buildings.¹⁰²

⁹⁹ Cahill, Power, Connery, Kennedy and O'Loughlin *Law Society of Ireland: European Law* 5th ed (Oxford University Press 2011) at page 144.

¹⁰⁰ Section 2(1) of the Safety, Health and Welfare at Work Act 2005.

¹⁰¹ For example, section 2(1) of the Taxes Consolidation Act 1997, defines "body of persons" as meaning "any body politic, corporate or collegiate, and any company, fraternity, fellowship and society of persons, whether corporate or not corporate"; the same definition is used in section 2(1) of the Value-Added Tax Consolidation Act 2010.

¹⁰² However, pursuant to section 235 of the Taxes Consolidation Act 1997, Revenue may grant tax exemption to a sports body whose sole purpose is to promote an athletic or amateur game or sport. Any income received by the sports body must be used for the purpose of promoting the game or sport.

4. Employment law

- [2.102] Although it is unusual for residents' associations or community groups to have employees, it is common for unincorporated associations such as clubs and sporting organisations to have paid employees. In such cases nominated members of the club, such as the officers or committee members, often take on the role of employer and such persons must be familiar with and ensure compliance with the legislation and regulations governing the terms and conditions of employment, for example, legislation dealing with unfair dismissal,¹⁰³ holidays,¹⁰⁴ minimum notice,¹⁰⁵ rates of pay,¹⁰⁶ employment equality,¹⁰⁷ employment of children and young persons,¹⁰⁸ and maternity leave.¹⁰⁹ Many clubs, societies and associations are reliant on volunteers who, but for the fact that they are not paid, are similar to employees.
- [2.103] Under the Safety, Health and Welfare at Work Act 2005, duties are placed on employers concerning the provision of a safe work environment. The 2005 Act places an obligation on every employer to ensure, so far as is "reasonably practicable", the safety, health and welfare at work of their employees,¹¹⁰ as well as persons other than employees.¹¹¹ Employers who fail to comply with these statutory duties may be found to have committed a criminal offence.
- [2.104] "Reasonably practicable" is defined as exercising all due care by:
- (a) identifying the hazards and assessing the risks to safety and health likely to result in accidents or injury to health in the workplace; and
 - (b) putting in place the necessary protective and preventative measures, unless the putting in place of such measures is grossly disproportionate, having regard to the unusual, unforeseeable, and exceptional nature of any circumstance or occurrences that may result in an accident or injury at work.¹¹²

¹⁰³ Unfair Dismissal Acts 1977 to 2015; Redundancy Payments Acts 1967 to 2014.

¹⁰⁴ Organisation of Working Time Act 1997.

¹⁰⁵ Minimum Notice and Terms of Employment Act 1973.

¹⁰⁶ Payment of Wages Act 1991; National Minimum Wages Act 2000.

¹⁰⁷ Employment Equality Acts 1998 to 2015.

¹⁰⁸ Young Persons (Employment) Act 1996.

¹⁰⁹ Maternity Protection Acts 1994 and 2004.

¹¹⁰ Section 8 of the Safety, Health and Welfare at Work Act 2005.

¹¹¹ Section 12 of the Safety, Health and Welfare at Work Act 2005.

¹¹² Section 2(6) of the Safety, Health and Welfare at Work Act 2005.

According to the common law, a 'club' cannot be an employer. Rather, in the case of a small association, all members of the club are collectively in the position of employer. In larger associations, such as the GAA, affairs are organised so that all members of a particular club, together with the county board and the provincial council will be the 'employer' of the individual. By way of explanation, the Commission understands that the GAA is organised along county and provincial lines. Neither the county board nor the provincial council are incorporated, both operate on a committee basis.¹¹³ At a local level is the club, often an unincorporated association; the county board oversees all GAA activity at a county level while the provincial councils organise competitions at provincial level and disburse central funds. Given the sheer number of individuals who might collectively comprise the 'employer' of an individual in this context, it is difficult in law to determine who in this collective is responsible for ensuring compliance with employer obligations and who in this collective is exposed to legal risk.

- [2.105] Identifying the proper employer is important for the purposes of determining where responsibility lies for employment law compliance, as well as determining issues of vicarious liability. For third parties dealing with unincorporated associations and for members dealing with their own unincorporated associations, it can, however, be difficult to identify who, in law, is the employer.
- [2.106] Given that a club does not have its own legal personality separate and distinct from its members at common law, the club, as an entity, cannot be an employer. Rather, all the members, the committee acting on behalf of the club, or an appointed officer or officers on behalf of the club may be deemed to be the employer.¹¹⁴ A relevant decision on the issue of identifying the proper employer is the English case of *Affleck v Newcastle Mind*.¹¹⁵ In *Affleck*, an unincorporated association had a charitable purpose, and its members had no proprietary interest in the assets of the association. The Court concluded that the employees were employed by the management committee and its members from time-to-time and not by the members of the association. The *Affleck* case shows the difficulty in attributing civil liability in employment law cases. This

¹¹³ See GAA, *The GAA Official Guide - Part 1* [2021] Central Council of the Association Croke Park, Chapter 3.

¹¹⁴ This has consequences in relation to statutory criminal liability, in particular: (i) the general duty of an "employer" under section 8(1) of the Safety, Health and Welfare at Work Act 2005 to ensure, so far as is reasonable practicable, the safety, health and welfare at work of their employees; and (ii) the general duty of an "employer" to persons other than their employees under section 12 of the 2005 Act to manage and conduct their undertaking in such a way as to ensure, so far as is reasonably practicable, that in the course of the work being carried on, individuals at the place of work (not being employees) are not exposed to risks to their safety, health or welfare.

¹¹⁵ [1999] UKEAT/0332/09.

case was cited by the Employment Appeals Tribunal¹¹⁶ in *Hyde v Kelleher & Foras Áiseanna Saothair* in which it was stated that:

“Those employed by unincorporated associations, whether registered charities or not, are employed by the relevant management committee and its members as constituted from time to time. They therefore have continuity of employment despite changes in the composition of the committee.”¹¹⁷

[2.107] In practice, the inner workings of an unincorporated association need to be understood to be able to successfully identify the appropriate defendant(s) and bring a claim against them. In many cases, it can be difficult, if not impossible, to find publicly available information on the inner workings or employment structure of unincorporated associations because this information is usually kept private. For example, individuals who work closely with GAA clubs, for example coaches or games promotion officers, are usually employed by a county committee in conjunction with a provincial committee. Employment contracts are signed by the individual and the chairperson or secretary of the committee. However due to the lack of legal personality of an unincorporated association, the totality of members of the GAA club, together with the relevant county and provincial body, may in law be the employer of the individual, and the individual will be assigned to work for a particular GAA club. In other situations, a company limited by guarantee may be formed by members of a GAA club and the company will act as the employer of an individual employee. In smaller organisations that do not have the benefit of such clear organisational structures the position is less clear.

[2.108] Employers are obliged to furnish employees with a statement in writing of the terms of their employment, including the full name of their employer.¹¹⁸ Needless to say, it is not acceptable for a body that is not a legal entity to be listed as a party to an employment contract.

[2.109] The issue regarding the civil liability of an unincorporated association to members who are also employees arose in the Northern Ireland Court of Appeal case of *Kinner v McKeown as trustees of West Belfast Pigeon Club*.¹¹⁹ The liability in question was the liability of members of the West Belfast Pigeon Club in their capacities as trustees of the West Belfast Pigeon Club, an unincorporated

¹¹⁶ The Employment Appeals Tribunal (EAT) has since been dissolved. It dealt with appeals, claims and disputes in relation to employment legislation. The EAT has been replaced by the Workplace Relations Commission

¹¹⁷ (Employment Appeals Tribunal 23 February 2004).

¹¹⁸ Section 3 of the Terms of Employment (Information) Act 1994.

¹¹⁹ (Northern Ireland Court of Appeal (Civil Division), 5 August 1998).

association, rather than the liability of the unincorporated association itself. Exemplifying the unclear structure of employee-employer relationships when dealing with unincorporated associations, MacDermott LJ noted in *Kinner* that:

“We were not informed as to the terms of his [the plaintiff’s] employment or who precisely his employer was but for the purposes of this appeal we assume that he was employed by the Club notwithstanding that in paragraph 1 of the defence of the defendants, the Trustees of the Club deny that they employed the plaintiff.”¹²⁰

- [2.110] The plaintiff was both a member and an employee of the club. In a claim for personal injuries alleged to have occurred while working, the defendants argued that the plaintiff could not sue because, as a member, they would, in effect, be suing themselves.
- [2.111] The Court held that the plaintiff’s membership of the club did not provide the club with immunity. A distinction could be made between the plaintiff and other club members because it was in his capacity as an employee of the club that he was injured.¹²¹
- [2.112] The Court of Appeal of Northern Ireland agreed that a duty of care under *Donoghue v Stevenson*¹²² may be owed to a club member undertaking special responsibilities as an employee.¹²³ MacDermott LJ ruled that once a duty to take care is established, an individual’s membership of a club cannot have the effect of excluding ordinary liability in tort.¹²⁴ The case shows that litigation against unincorporated associations can be elaborate, with uncertain results.

5. Title to sue and be sued

- [2.113] At common law, unincorporated associations cannot sue or be sued in their own names. As reiterated by Hyland J in the case of *McGroarty v Kilcullen*:

“It is well established that a club is, as a matter of law, an unincorporated association. Various consequences flow from this, one of which is that the club per se is not a legal entity and therefore cannot be sued in its own name. The difficulty that this presents is circumvented by plaintiffs generally suing the trustees

¹²⁰ (Northern Ireland Court of Appeal (Civil Division), 5 August 1998) at page 1.

¹²¹ (Northern Ireland Court of Appeal (Civil Division), 5 August 1998) at page 2.

¹²² [1932] AC 562.

¹²³ (Northern Ireland Court of Appeal (Civil Division), 5 August 1998) at page 3.

¹²⁴ (Northern Ireland Court of Appeal (Civil Division), 5 August 1998) at page 2.

of a club or the office holders of the club, such as the president, secretary, treasurer and so on, who act effectively as nominees on behalf of the body of members."¹²⁵

[2.114] Therefore, an action against an unincorporated association cannot be taken against the association by name, but rather must be taken against some or all members of the unincorporated association. This leads to practical difficulties in identifying and serving legal documents on persons who were members of an unincorporated association at the time an event occurred. Some members may have died, retired, be uncontactable, or lack the financial means to satisfy a court order made against them. By contrast, the service of documents on companies is relatively straightforward and the practical difficulties mentioned above do not arise. The Companies Act 2014 provides:

- (1) A document may be served on a company—
 - (a) by leaving it at or sending it by post to the registered office of the company; or
 - (b) if the company has not given notice to the Registrar of the situation of its registered office, by delivering it to the Registrar.

- (2) For the purposes of this section [51 of the Companies Act 2014], any document left at or sent by post to the place for the time being recorded by the Registrar as the situation of the registered office of a company shall be deemed to have been left at or sent by post to the registered office of the company notwithstanding that the situation of its registered office may have changed."¹²⁶

[2.115] Of course, there might not be a registered office, nor any means by which to identify who the relevant members and office holders are, particularly if clubs are not registered in accordance with the Registration of Clubs Acts 1904 to 2008.

(a) Power to sue

[2.116] According to the common law, an unincorporated association does not have the legal capacity to bring or defend legal proceedings. However, it is clear from the judgment of Clarke J in *Sandymount & Merrion Residents Association v An Bord Pleanála*¹²⁷ that there can be exceptions to this rule, whether set out in

¹²⁵ [2021] IEHC 679.

¹²⁶ Section 51 of the Companies Act 2014.

¹²⁷ [2013] IESC 51, [2013] 2 IR 578.

legislation or otherwise. In that case, the notice party sought to set aside the grant of leave to bring judicial proceedings on the grounds that the applicant, an unincorporated association, had no capacity in law to bring the proceedings.

- [2.117] Clarke J stated that it seemed to be a necessary inference to be drawn from section 50A of the Planning and Development Act 2000 that it was intended that any environmental non-governmental organisations meeting the criteria specified in the section have the necessary capacity to bring relevant judicial review proceedings. He was satisfied that section 50A provided a clear statutory exception to the general rule that unincorporated bodies and associations cannot maintain proceedings and concluded that within the parameters referred to in section 50A, bodies complying with the criteria specified in section 50A had both capacity and standing to bring legal proceedings.
- [2.118] In *North Meath Wind Farm Ltd v An Bord Pleanála*,¹²⁸ however, the Court of Appeal held that section 50A of the Planning and Development Act 2000 had no direct application to a situation where an unincorporated body wishes to participate in legal proceedings as a notice party to support the defence of those proceedings. The Court of Appeal also held that the exception to the common law rule that is contained in section 50A is confined to such bodies who seek to challenge a planning decision. Since the unincorporated association lacked legal personality, it could not be joined as a notice party to the proceedings.

(b) Unincorporated associations as respondents

- [2.119] There have been a number of first instance decisions in the High Court of England and Wales where protest groups organised as unincorporated associations have been named in legal proceedings and have been the subject of injunctions.¹²⁹ The unincorporated associations were named as parties in the legal proceedings and court orders were made against the protest groups in their names and not in the names of members or representatives of the protest groups.
- [2.120] According to one view, these High Court decisions from England and Wales may be viewed as casting doubt upon, or evidencing a departure from, the established position at common law that an unincorporated association does not have separate legal personality and cannot be sued. According to another

¹²⁸ [2018] IECA 49.

¹²⁹ *Huntingdon Life Sciences Group Plc v Stop Huntingdon Animal Cruelty "SHAC"* [2003] EWHC 1967 (QB); *Daiichi UK Limited v SHAC* [2003] EWHC 2337 (QB); *Emerson Developments v Avery* [2004] EWHC 194, Field J; *Phytopharm Plc v Avery* [2004] EWHC 503, Goldring J; *Chiron Cooperation v Avery* [2004] EWHC 493, Royce J; *Hall v Save New Church Guinea Pigs (Campaign)* [2005] EWHC 372, Owen J.

view, these High Court decisions from England and Wales may simply demonstrate a pragmatic approach to injuncting all members of an unincorporated association where certain members are not known or are not readily identifiable.

(c) Representation of unincorporated associations in legal proceedings

[2.121] In practice, an individual within an unincorporated association is usually nominated by the association, for example the general secretary, chairperson, or treasurer, who may be joined in proceedings by other parties.¹³⁰ In circumstances where an individual seeks to establish, for example, negligence against various parties, a plaintiff will usually seek to join multiple parties to proceedings by alleging, for example, that, in a game organised by a sports club, the referee was insufficiently trained, the grounds were not properly maintained or that there was inadequate supervision of the event.

[2.122] In practice, there is usually no difficulty in finding an individual to act as a representative of an unincorporated GAA club because both the club and the GAA are required to provide an indemnity to a trustee in respect of any loss or out of pocket expenses incurred by the person acting as representative in the performance of their powers or duties as trustee. Chapter 5, Rule 5.3 of the GAA Official Guide 2021 provides that:

“Each unit [that is to say, an individual GAA club] and the Association [the GAA] shall indemnify and save harmless a Trustee in respect of any loss or out of pocket expenses bona fide [in good faith] incurred by him [or her] in or about the execution of his [or her] powers or duties.”¹³¹

[2.123] It is important to note that the approach taken by the GAA does not necessarily reflect the practice within other unincorporated associations. For other unincorporated associations, particularly those that are not as structured as an unincorporated GAA club or where rules do not provide an indemnity to trustees, it may be difficult in practice to find an individual who is willing to act as representative.

¹³⁰ *Lloyd v Loaring* (1802) 6 Ves 773; *Peckham v Moore* [1975] 1 NSWLR 353 at para 368; *Bailey v Victorian Soccer Federation* [1976] VR 13.

¹³¹ See GAA, *The GAA Official Guide - Part 1* [2021] Central Council of the Association Croke Park, Chapter 3. See also, Fletcher, *Unincorporated Associations and Contract: The Development of Committee Liability and Unresolved Issues* (1979) 11(1) *University of Queensland Law Journal* 53.

- [2.124] The 2017 decision of the Supreme Court in *Hickey v McGowan*¹³² illustrates the practical consequences of failing to name the correct defendant in a legal action, the need for precision in pleadings, and the need for care when suing unincorporated associations. The Supreme Court noted that while, in theory, all members of a religious order were vicariously liable for the acts of a fellow member, only the first named defendant had been identified and sued and damages were reduced accordingly.¹³³
- [2.125] Unincorporated associations' lack of separate legal personality can cause serious practical difficulties and injustice to plaintiffs when trying to identify and sue the appropriate defendant(s). The injustice likely to arise and the difficulties faced by plaintiffs can be seen in the recent High Court decision of Hyland J in *Grace v Hendrick*.¹³⁴
- [2.126] In *Grace*, the plaintiff alleged that he was the victim of several incidents of sexual assault when he was a minor. The incidents occurred between 1979 and 1984 when the plaintiff was a student at CBS Westland Row in Dublin.¹³⁵ During this time period, the school was under the control of the Congregation of Christian Brothers. The plaintiff brought proceedings against the alleged perpetrator, a member of the Congregation of Christian Brothers, and against the European Province Leader of the Congregation of Christian Brothers.
- [2.127] As the plaintiff could take an action against the members of the congregation at the time the abuse occurred on the grounds of vicarious liability, the plaintiff wrote to the European Province Leader and requested him to furnish the names and addresses of members of the congregation who were currently alive and who were members of the congregation when the incidents of sexual assault allegedly occurred between 1979 and 1984. The European Province Leader declined the plaintiff's request.¹³⁶ The plaintiff subsequently issued a Notice of Motion seeking relief from the High Court, directing the European Province Leader to disclose the full names and addresses as the plaintiff had no alternative means of obtaining that information.
- [2.128] In deciding this case, Hyland J considered the privacy of the members concerned. The Court was satisfied that the privacy of such members would not be affected by granting the Order because it would not make known anything that was unknown during the relevant time. At the relevant time, it was clear to

¹³² [2017] IESC 6, [2017] 2 IR 196.

¹³³ Fletcher, *Unincorporated Associations and Contract: The Development of Committee Liability and Unresolved Issues* (1979) 11(1) *University of Queensland Law Journal* 53.

¹³⁴ [2021] IEHC 320.

¹³⁵ *Ibid* at para 1.

¹³⁶ *Ibid* at para 3.

anyone who interacted with members of the congregation that they were Christian Brothers. Therefore, the Court held that the granting of the order would not impact upon their right to privacy because the identities of the members of the congregation were never private.

- [2.129] The High Court’s decision in *Grace* is welcomed as it goes some way in addressing the practical difficulties faced by plaintiffs who are unable to sue an unincorporated association and may find it difficult, due to the passage of time, to identify members of an unincorporated association for the purposes of mounting a claim of vicarious liability. However, the Court’s order to compel the release of the identities of the membership was done under the High Court’s inherent jurisdiction rather than by Rules of Court or statutory provision.
- [2.130] McMahon and Binchy note that Order 15, rule 9 of the *Rules of the Superior Courts 1986* provides a representative action procedure whereby multiple parties may be sued collectively where the cause or matter in question arises from the pursuit of a common interest:

“[w]here there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested.”¹³⁷

- [2.131] The usefulness of this provision is limited in a number of respects. McMahon and Binchy note that the “common interest” requirement weakens the efficacy of the rule and means that it cannot be frequently used in tort law actions.¹³⁸ Also, before a representative action can be brought under this rule, the interests of the prospective litigants must be identical. It is not sufficient that the interests are similar.¹³⁹
- [2.132] In *The Matter of an Application by the Teaching Council of Ireland*¹⁴⁰ Keane J acknowledged that unincorporated associations frequently nominate one of their members as a representative defendant. However, they cannot be forced to do so. In *Grace v Hendrick*,¹⁴¹ Hyland J held that a court cannot order an

¹³⁷ McMahon and Binchy *Law of Torts* 4th ed (Bloomsbury Publishing 2013) at para 39.10.

¹³⁸ *Ibid.*

¹³⁹ Consequently, in *Hardie & Lane Ltd v Chiltern* [1928] 1 KB 663, the plaintiffs were not entitled to sue the defendants in a representative capacity as all members of the Motor Trade Association because that body had a shifting membership with members joining and leaving and as a result the defendants did not have a common interest with the persons to be represented.

¹⁴⁰ [2020] IEHC 683.

¹⁴¹ [2021] IEHC 320.

unwilling defendant to act in a representative capacity on behalf of other unnamed and unidentified defendants; a person can only be treated as a representative of others where there is consent.

[2.133] Lloyd notes:

“It seems clear ... that if the representative parties are plaintiffs, their rights must derive from an identical source e.g., a common contract or grant. If they are defendants their position vis-à-vis the claim must be identical in the sense that there must not be different defences available to each or any of them. This would appear to exclude an action based on tort or contract, whether brought on behalf of or against representative parties; in the former case because each individual would have to prove the damage personal to himself and in the latter, because separate defences might be available to the various defendants.”¹⁴²

[2.134] Delany and McGrath also note that a court will not make an order under Order 15, rule 9 of the *Rules of the Superior Courts 1986* unless the proposed representative defendant is willing to act.¹⁴³ It is also important to note that Order 19, rule 9 does not ascribe separate legal personality to unincorporated associations.

[2.135] In *Hickey v McGowan* the Supreme Court noted that there had been considerable discussion in the course of the appeal about the possibility of seeking an order that the first named defendant was sued in a representative capacity on behalf of all members of the Marist Order, or on behalf of specified members. It was not clear that such an order was possible. O’Donnell J noted that while Order 15 Rule 9 does permit a person to sue, or to be sued on behalf of all persons having the same interest in the matter, Kennedy CJ had held in relation to almost identical 1905 Supreme Court rules that “... no such thing is possible as an action in tort against representative defendants”.¹⁴⁴ O’Donnell J questioned the reasoning, saying:

“I am not sure that that is necessarily correct in all circumstances and in particular where a claim is made for the same vicarious

¹⁴² Lloyd “Actions instituted by or against unincorporated bodies” (1949) 12 MLR 409 at page 414.

¹⁴³ Warburton *Unincorporated Associations: Law and Practice* 2nd ed (Sweet & Maxwell 1992).

¹⁴⁴ *Moore v Attorney General for Saorstát Éireann* [1930] IR 471. See also *Mintuck v Valley River Band No 63A* (1977) 75 DLR (3d) 589.

liability against a number of parties (something that might not have been conceived possible in 1930)."¹⁴⁵

[2.136] It is noteworthy that Order 6, rule 10 of the Circuit Court Rules provides in relation to representative defendants and plaintiffs:

"Save in actions founded on tort, when there are numerous persons having the same interest in one action or matter, one or more of such persons may sue or be sued, or may be authorised by the Judge to defend, in such action or matter, on behalf of or for the benefit of all persons so interested."¹⁴⁶

[2.137] Ultimately O'Donnell concluded in *Hickey v McGowan* that the appropriate course in relation to unincorporated associations such as the Marist Order is to:

- (a) write to the order threatening to sue all individual members of the order unless a defendant is nominated;
- (b) if that course is not taken, then all members who can be identified can be joined as defendants.

He concluded, in a passage that became the genesis of this project:

"If however any judgment is obtained against those defendants, the judgments are individual and whether or not such judgments will be met by insurance, or from assets which may be held for the benefit of the order more generally, may depend on the terms of the insurance, and indeed the terms upon which such assets are held, and perhaps the willingness and ability, of the order to make funds available to satisfy any judgment against an individual. Whether this is a desirable position as a matter of law and whether further changes should or could be made, is a matter which might usefully be considered by those charged with law reform."¹⁴⁷

[2.138] The Commission has considered measures to improve enforceability of judgments, including reforms in relation to property held on trust, in Chapter 4.

¹⁴⁵ [2017] 2 IR 196 at para 57.

¹⁴⁶ Emphasis added.

¹⁴⁷ [2017] IESC 6 at para 57, [2017] 2 IR 196 at para 58.

6. Ownership of property

- [2.139] An unincorporated body cannot acquire, hold, or dispose of property in its own name because at common law it lacks legal personality that is separate and distinct from its members. Instead, the property of an unincorporated association is owned by all the association's members.¹⁴⁸ In *Bray Boxing Club and Taylor v Wicklow County Council*¹⁴⁹ Allen J in the High Court reiterated that an unincorporated association is incapable of holding property and so the property used by its members was held on their behalf by trustees. When property is held in trust for the members, the members have equitable rights against the trustees to ensure that the property is applied for the benefit of the membership.¹⁵⁰ Trustees do not have limited liability and can be sued in their personal capacity for breach of trust and can, in some instances, be held personally liable for third party contractual debts. To counteract this, many organisations arrange insurance to indemnify trustees.
- [2.140] Anti-money laundering and anti-terrorist financing legislation requires each EU Member State to establish a Central Register of Beneficial Ownership of Trusts (CRBOT).¹⁵¹ The CRBOT contains details of relevant trusts (such as charitable trusts and trusts created to hold the assets of an Approved Sports Body under section 235 of the Taxes Consolidation Act 1997) and their beneficial owners. Trustees must submit these details to Revenue, which manages the CRBOT.
- [2.141] Due to the fact that an unincorporated association has no legal personality separate from its members, a folio of land in the Land Registry will detail the holding of property by individuals as trustees rather than by an unincorporated association. In practice, there may be a Deed of Trust in the background. If an unincorporated club decides to borrow, the trustees of the club may have to enter a Deed of Charge. The unincorporated club is likely to pass a resolution authorising the trustees to execute the Deed of Trust.
- [2.142] In order to avoid these practical difficulties caused by the common law rule, members of unincorporated associations sometimes decide to incorporate as

¹⁴⁸ See *Murray v Johnstone* (1896) 23 R 981 and Dowling, "Adverse Possession and Unincorporated Associations" (2003) 54(3) Northern Ireland Legal Quarterly) 272.

¹⁴⁹ [2021] IEHC 182.

¹⁵⁰ Practical Law, "Unincorporated Associations" (UK) 2021.

¹⁵¹ European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2021 (SI No 194 of 2021).

companies in order to ensure that the company can acquire, hold, and dispose of property.¹⁵²

[2.143] It is common for questions to arise as to the true ownership of the assets of an unincorporated club. It is sometimes difficult to determine who has legal and beneficial ownership of assets and property held by unincorporated clubs. There has been some academic debate over the theoretical nature of members' beneficial property interests.¹⁵³ Some have described it as a type of co-ownership that is limited in the agreements found in the contract of formation of an unincorporated association.¹⁵⁴ Others see it as a unique form of property, developed by the courts, with some of the characteristics of joint tenancy or tenancy in common and some inherent differences.¹⁵⁵

(a) Limits on the exercise of property rights

[2.144] Whether these property interests are described as contractual or inherent in nature, it is agreed that the limits placed on members in exercising their property rights are as follows:

- (a) in the absence of an express term in the contract of formation of an unincorporated association to the contrary, a member is presumed to mandate their share in the property to the purposes of the unincorporated association;
- (b) a member cannot demand that their share of the property be severed from the whole;
- (c) a member cannot transfer their interest in the property to another person; and

¹⁵² Examples of clubs that are currently incorporated in Ireland are Gort Gaelic Athletic Association (Hurling Club) Company Limited by Guarantee, Youghal GAA Club Company Limited by Guarantee, The Parnell GAA Club Company Limited by Guarantee and Portarlinton Rugby Football Club Company Limited by Guarantee. Examples of companies that have been established to act as corporate trustees of property on behalf of unincorporated associations are Highfield Rugby Football Club (Trustees) Company Limited by Guarantee and Old Belvedere Rugby Club Trustees Company Limited by Guarantee.

¹⁵³ Green, "The Dissolution of Unincorporated Non-Profit Associations" (1980) 43 *Modern Law Review* 626 at pages 627-28.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Neville Estates v Madden* [1962] Ch 832, 849; *Re Recher's Will Trusts* [1972] Ch 526, 539.

- (d) if a member leaves the unincorporated association, whether voluntarily, by expulsion, or as a result of death, their property interest is terminated with no right of compensation.¹⁵⁶

[2.145] According to Brown, the contract-holding theory dictates that the assets of unincorporated associations (such as money in bank accounts, cash, land, shares etc) are held nominally by the club's officers (such as the chairman and/or treasurer) on trust for the membership of the club who, in turn, hold the equitable title to such assets under a form of joint tenancy.¹⁵⁷

[2.146] Further, the contract-holding theory provides that by their membership terms (as evidenced by the unincorporated association's constitution/rules), members contract with each other between or among themselves. Implied into this contract are terms to the effect that:

- (a) an individual member undertakes not to sever and claim their individual equitable share to the property/assets of the association; and
- (b) in the event of the member's death or resignation, their equitable interest in the club's assets remains unsevered and devolves to the remaining members of the unincorporated association. These implied contract terms keep the club intact, until such time as the membership decide (in accordance with the rules) to wind-up the club and distribute its assets.¹⁵⁸

[2.147] The beneficiaries of the trust containing the property of the unincorporated association will, collectively, be the members of the unincorporated association. The rules of a club will often contain a section on trustees and their powers. It is common for the rules of an unincorporated association to state that the trustees may not deal with the property of the club without the approval of the members of the club in a general meeting.

(b) Borrowing money

[2.148] Regarding borrowing money, it must be expressed in the rules that money may be borrowed on behalf of the unincorporated association.¹⁵⁹ If it is stated in the rules that the unincorporated association may borrow money, mortgages can be secured over land held in trust for the unincorporated association. The

¹⁵⁶ Zakreski, "Reform on the Law Relating to Unincorporated Nonprofit Associations" (2008) 41 *University of British Columbia Law Review* 115.

¹⁵⁷ Brown, "Unincorporated Associations: Property Holding, Charitable Purposes and Dissolution" (2009) 21 *Denning Law Journal* 107.

¹⁵⁸ *Ibid* at pages 107-108.

¹⁵⁹ Practical Law, "Unincorporated Associations" (UK) 2021.

mortgage can be secured by the trustees in whom the land is vested.¹⁶⁰ Loans are generally secured by the trustees of the unincorporated association.

- [2.149] If unsecured loans are taken from third parties or from members of the association, the creditor cannot imply a charge over the association's property. Where individual members have signed for a bond or debenture, they will be personally liable unless the acknowledgement contains a restriction on the right of repayment. In some cases, an unincorporated association's rules may specify that members are liable to make a contribution in the event of a deficit. If that is the case, then a past member may also be liable if bonds were issued during their membership with their knowledge and assent.¹⁶¹
- [2.150] In *Jarrott v Ackerley*¹⁶² and *London Borough of Camden v Shortlife Community Housing*,¹⁶³ it was decided that a lease cannot be granted to an unincorporated association.¹⁶⁴ For this reason, courts in England and Wales and Canada have refused to give legal effect to leases entered into by unincorporated associations in their own name.¹⁶⁵ Regarding a lease to an unincorporated association as a lease to the individual members of the unincorporated association is problematic because the lease could impose onerous personal liabilities on the members of unincorporated associations.¹⁶⁶ It has been suggested that the appropriate procedure is for a lease to be taken in the names of the trustees of an unincorporated association.¹⁶⁷

(c) Dissolution

- [2.151] An unincorporated association may be dissolved because of:

- (1) the inactivity of its membership;

¹⁶⁰ Stewart, Campbell and Baughen, *The Law of Unincorporated Associations*, (Oxford 2011) at para 11.41.

¹⁶¹ Practical Law, *Unincorporated Associations* (UK) 2021.

¹⁶² (1915) 113 LT 371.

¹⁶³ (1993) 25 HLR 330.

¹⁶⁴ See also Dowling, "Adverse Possession and Unincorporated Associations" (2003) 54(3) *Northern Ireland Legal Quarterly* 272.

¹⁶⁵ *Jarrott v Ackerley* 113 LT 371, 85 LJ Ch 135 (1915); *Henderson v Toronto General Trusts Corp* 62 OLR 303, [1928] 3 DLR 411; *Canada Morning News Co v Thompson* [1930] SCR 338, [1930] 3 DLR 833. See also Ford, "Dispositions of Property to Unincorporated Non-Profit Associations" (1956-1957) 55(1) *Michigan Law Review* 67 at page 78.

¹⁶⁶ Ford, "Dispositions of Property to Unincorporated Non-Profit Associations" (1956-1957) 55(1) *Michigan Law Review* 67, at page 70.

¹⁶⁷ Ford, "Dispositions of Property to Unincorporated Non-Profit Associations" (1956-1957) 55(1) *Michigan Law Review* 67, at page 78.

- (2) a vote taken by its members to dissolve the club in accordance with the rules of the unincorporated association; or
- (3) a Court Order resolving a dispute that existed between members of the club.

[2.152] In the ordinary way, the members of a club will need to pass a resolution to dissolve the club. It is common to stipulate in the rules of the unincorporated association that a resolution to dissolve the club may only be passed at a general meeting specially convened to consider the resolution to dissolve the club, and that a two-thirds or three-fourths majority of those present at the meeting and entitled to vote will be required before the resolution is passed.

[2.153] In *Dunne v Mahon*,¹⁶⁸ Hogan J in the High Court considered the dissolution of an unincorporated association and concluded that a majority of the members of an unincorporated association were competent to resolve that it be dissolved.¹⁶⁹ The judge also held that absent an express provision to the contrary in the rules of an unincorporated association, an individual member cannot have a right to block change and “[a]n implied power to amend through majority vote must generally be assumed, as otherwise the association would lack the necessary flexibility to enable it to adapt to the challenges of modern society.”¹⁷⁰ The case was appealed to the Supreme Court¹⁷¹ where Clarke J delivered the judgment of the Court. The parties before the Supreme Court agreed that the trial judge had been incorrect to hold that the rules of the club could be altered by a simple majority vote. The Court held that a simple majority was not, of itself, sufficient to dissolve a club and found that where a club had omitted to prescribe a procedure for governing the amendment of its rules, such an oversight did not entitle the courts to imply a rule of amendment.¹⁷²

¹⁶⁸ [2012] IEHC 412.

¹⁶⁹ The same conclusion was reached in the Irish cases *Feeney v McManus* [1937] IR 23 and *Buckley v Attorney General* (No 2) (1950) 84 ILTR 9 which both related to the dissolution of a club.

¹⁷⁰ Hogan J cited with approval the “intrinsic failure of expression” test for implying terms which had been approved by Maguire CJ in *Ward v Sprivack Ltd* (1957) IR 40, at paras 47-48 and by the Supreme Court in *Sweeney v Duggan* (1997) 2 IRLM 211 and *Carna Food Ltd v Eagle Star Insurance Co (Ireland) Ltd* (1997) 2 IRLM 499 and the arguments advanced in “The Dissolution of Unincorporated Non-Profit Associations” (1928) 41 *Harvard Law Review* 898.

¹⁷¹ *Dunne v Mahon* [2014] IESC 24, [2014] 2 IR 337.

¹⁷² O’Neill, “When Do Clubs Die?” (2015) 38(1) *Dublin University Law Journal* 212.

CHAPTER 3

CRIMINAL LIABILITY AND UNINCORPORATED ASSOCIATIONS

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Introduction

- [3.1] Criminal law is primarily designed to deter the undesirable behaviour of human beings: to provide public condemnation for conduct that threatens or damages individuals, society and the community; to deter conduct that harms others and offends community standards. It makes clear the line between that which is lawful and that which is not. Criminal law requires precision: it is a fundamental aspect of fairness that the contours of criminal responsibility should be clearly defined and ascertainable by those who are exposed to the consequences of criminal conviction.
- [3.2] Over time the criminal law expanded to extend its application, for certain offences, to corporate entities. Corporate entities are capable of committing

offences and of being criminalised on the basis that they are vicariously liable for the acts and/or omissions of their employees and agents. Criminalisation of the company itself is possible because it has legal personality.

- [3.3] Numerous legislative provisions that provide for statutory criminal offences disregard the fact that unincorporated associations do not have a separate legal personality from their members according to the common law. These legislative provisions state that they apply to unincorporated associations even though at common law an unincorporated association is inseparable from the collective identity of its members and does not have its own legal personality. While that is a pragmatic approach, insofar as it seeks to give effect to the law in the widest possible terms, it is ultimately unsatisfactory in that without a separate personality to which liability can be ascribed, either a great many members are potentially exposed to criminal liability or the law is rendered ineffective.
- [3.4] While an unincorporated association might have legal standing to take a judicial review¹ or a statute might make provision for an administrative sanction on a club in a very minor strict liability case (no mental fault required, guilt is based on doing or failing to do an act),² that is very different to attributing legal personality for the purpose of civil or criminal liability. Liability is about apportioning responsibility, laying blame and punishing wrongdoing. This is much less straightforward in cases involving unincorporated associations than it is in respect of companies. Ashworth's *Principles of Criminal Law* (9th edition) sets out:
- "Growing recognition of the significance of corporate wrongdoing has not, however, been accompanied by substantial alteration of the framework of criminal liability. The trend ... has been to attempt to fit corporate liability into the existing structure rather than to consider its implications afresh."³
- [3.5] However little attention has been given to adapting the mainstream criminal liability framework to corporate offending by **incorporated** bodies, it appears that the criminal liability of **unincorporated** bodies – and the fact that they have no separate legal existence – has not been given any detailed consideration.
- [3.6] This chapter examines the current position and explores possible options to clarify and reform the criminal law in relation to unincorporated associations.

¹ *Sandymount & Merrion Residents Association v An Bord Pleanála* [2013] IESC 51, [2013] 2 IR 578.

² *Director of Public Prosecutions v Wexford Farmers Club* [1994] 1 IR 546.

³ Horder, *Ashworth's Principles of Criminal Law* 9th ed (Oxford 2016) at page 167.

1. Corporate and unincorporate liability

- [3.7] Although designed for humans, over time criminal law has evolved to encompass corporate offending also, because criminal offences can be facilitated by, and also perpetrated by, corporate entities. The deterrence of criminal conduct is as necessary in corporate activity as it is in every other field of human endeavour. When an individual, or a small group of individuals acting together, engage in criminal conduct, their respective and collective degrees of culpability are easy to determine. By contrast it is much more difficult to draw a line of causation and to ascribe a mental element to a company: the actions of a company involve higher numbers of individual actors with varying degrees of knowledge of and participation, with the consequence that there are many layers of diffused action and responsibility.
- [3.8] This project is, of course, concerned with **unincorporated** associations, but to understand their criminal liability it is first necessary to briefly explain how criminal law applies in practice to corporations (incorporated entities) such as limited companies. Some issues are common both to corporate and unincorporated liability (neither can be imprisoned, for example), but there are important distinctions. This justifies a discussion of corporate crime so as to identify the common problems and those where it is easier to impose liability on a corporate entity.
- [3.9] Corporations have a legal identity that is separate from the natural persons who make up the company and work within it.⁴ Corporate criminal liability generally operates on the basis of vicarious liability, whereby the company is deemed liable for the acts of its employees, but those acts remain the acts of the employees and are not attributed to the company.⁵ Conceptually this is somewhat problematic: a company can only act through its agents or servants, so how, it has been asked, can it perpetrate the external element of a crime? How can it, without any will or intelligence of its own, have intent or be reckless?⁶ Charleton and McDermott note:

“These difficulties have been confronted by finding the necessary mental and physical elements of the offence in the acts and minds of the servants or agents of the company, initially through the development of the concept of vicarious liability and, ultimately by the recognition that a company can be prosecuted if the acts or

⁴ Horan, *Corporate Crime* (Bloomsbury Professional 2011) at para 2.01.

⁵ *Ibid.*

⁶ Charleton, McDermott, Herlihy, and Byrne, *Charleton and McDermott's Criminal Law and Evidence* 2nd ed (Bloomsbury Professional 2020) at para 14.02.

omissions of its servants or agents can be identified as those of the company.”⁷

- [3.10] Strict liability offences are the least theoretically difficult category of offence in the field of corporate liability.⁸ They do not require proof of intention and so are relatively straightforward. Because prosecutions focus on an artificial entity – the corporation – to which criminality will attach in the event of conviction, it has attracted little controversy. It is an altogether different proposition to criminalise a group of individuals who cumulatively make up an association or club without the shield of an entity that has separate legal personality, albeit that many of these associations have all the hallmarks and appearance of a distinct and separate legal entity. In the most minor matters the courts have been satisfied to “convict” clubs as though they are incorporated entities: the Intoxicating Liquor Act 1988 provides that a club “shall be guilty of an offence” and prosecutions have been successfully taken against clubs under that provision: *DPP v Wexford Farmers’ Club*⁹ is an example; in another case a Gaelic football club was fined for failing to specify its clubhouse as the venue for a Joe Dolan concert.¹⁰ However, very little can be extrapolated from these precedents. In licensing cases the club is the licensee; attribution of wrongdoing to the club itself is less straightforward in other contexts. While media reports suggested that a coursing club was to be prosecuted for alleged breaches of licence conditions governing hare coursing under the Wildlife Act,¹¹ in fact it was the club secretary who was prosecuted.¹² As will be seen below, health and safety law seems to present a significant difficulty.

(a) Liability for the acts of employees and agents

- [3.11] Liability for the acts of employees and agents is the most frequent way in which companies find themselves defending criminal charges: sometimes there will be a variety of employee failings that led to the criminal act. Each of those actions alone might not suffice for criminal liability to attach to each of those individuals,

⁷ Charleton, McDermott, Herlihy and Byrne, *Charleton and McDermott’s Criminal Law and Evidence* 2nd ed (Bloomsbury Professional 2020) at para 14.02.

⁸ Charleton, McDermott, Herlihy and Byrne, *Charleton & McDermott’s Criminal Law and Evidence* 2nd ed (Bloomsbury Professional 2020) at para 14.05.

⁹ [1994] 1 IR 546.

¹⁰ “GAA club fined under drink law” *Irish Times* (20 June 1996) <<https://www.irishtimes.com/news/gaa-club-fined-under-drink-law-1.60020>> accessed 9 December 2022.

¹¹ “Coursing club to be prosecuted” *Sligo Champion* (24 March 2011) <<https://www.independent.ie/regionals/sligochampion/news/coursing-club-to-be-prosecuted-27579143.html>> accessed 9 December 2022.

¹² “Coursing club secretary sees case dismissed” *Sligo Champion* (16 February 2012) <<https://www.independent.ie/regionals/sligochampion/news/coursing-club-secretary-sees-case-dismissed-27588749.html>> accessed 9 December 2022.

nor to them collectively, since often what is at play is a series of omissions. To illustrate: in *DPP v O'Flynn Construction Ltd*¹³ a company pleaded guilty to breach of statutory safety provisions for failing to prevent risk to the health and safety of individuals who may be affected by its undertakings, in breach of section 7(1) and 48(1) of Safety, Health and Welfare at Work Act, 1989. This followed from the death of a young boy who had tragically died on a construction site. A barrel of wood preservative caught fire when a group of children were playing on the site without permission. There had been a number of failings: inadequate fencing and no security to prevent children entering the construction site, coupled with the wood preservative being left in the open rather than in a secure location.

[3.12] The Court of Appeal identified the most serious failing as follows:

“The most serious lapse on behalf of the applicant company was the delivery onto the site of a drum containing hazardous material and leaving it placed in the open without securing it against interference by persons such as children or teenagers who ventured on to it. Mr Kelleher claimed that they had a procedure for the securing of such materials in a locked compound but there was no evidence that it had any application in respect of the incident in question. The evidence before the Circuit Judge indicates that neither the person charged with delivering the drum in question, the person who unloaded it nor Mr Patrick O'Flynn, the project supervisor, were informed that the drum or barrel in question contained hazardous material nor were they given any instructions as to its safe storage.”¹⁴

[3.13] The passage illustrates the utility of strict liability regulatory offences. The company was found to be criminally responsible in this case, as what had occurred was the sum of the failings of its employees and agents.

[3.14] Companies can use training, induction and the supervision of management structures to ensure compliance with relevant standards. In unincorporated associations that are reliant on volunteers, much less control is exercisable by the club, society or association over the members, and as has been seen, as far as the law is concerned the club and the members are one and the same.

[3.15] As will be further explained below, purporting to impose criminal liability on unincorporated associations without regard to how they differ from incorporated bodies is highly problematic. Further, there is an important distinction between

¹³ *DPP v O'Flynn Construction Company Ltd* [2006] IECCA 56, [2007] 4 IR 500.

¹⁴ *Ibid* at para 20.

imposing liability on those who are actually responsible (such as a person or small group who actually did or failed to do the thing that creates potential criminal liability) and imposing liability on the whole association. The obvious question arises as to what this means for penalties to be imposed on members personally.

2. The distinction between incorporated and unincorporated bodies in enforcement of criminal matters

- [3.16] There are a number of important differences between corporations and unincorporated associations that make enforcement of the criminal law in respect of the latter much more difficult. This includes the fact that incorporated bodies have a separate legal personality that can be prosecuted, a legal entity separate and distinct from those who comprise and work within the company and that there is a clear legal relationship between a company and their employees and agents, whereas an unincorporated association that cannot in law enter contracts as an entity in and of itself.
- [3.17] As has been seen in Chapter 2, determining who is the employer in law is often difficult in unincorporated associations. Members will frequently engage in work activity on behalf of the club or association in a voluntary capacity. This makes vicarious liability problematic. In addition, there are numerous legal provisions to provide for the practicalities of prosecution of corporate entities (representation, service of documents and so on). Such provisions are not replicated in Irish law in respect of unincorporated associations.
- [3.18] Further, for the purposes of imposing a fine or penalty, accessing the assets of an unincorporated club or association is not as straightforward as with incorporated entities. This is partly because a body corporate has perpetual succession, whereas the assets of an unincorporated association are held on trust for the benefit of the members at a particular point in time.

(a) The absence of separate legal personality and the challenge of vicarious criminal liability

- [3.19] There is a very obvious distinction between an incorporated association and an unincorporated association, namely that the latter does not have a separate legal personality. It is clear from *DPP v O'Flynn Construction Company Ltd*¹⁵ that there are circumstances in which it is desirable, and indeed just, that the company should itself be prosecuted. The company stands accused in place of the employees, managers and board members who were cumulatively responsible for

¹⁵ *DPP v O'Flynn Construction Company Ltd* [2006] IECCA 56, [2007] 4 IR 500.

the tragic result. Through corporate criminal liability the actions of the servants and agents of the company were attributed to the company, an artificial entity.

- [3.20] Seeking to attribute criminal liability to a group of individuals, which is what an unincorporated association is in law, is simply not possible. Ordinarily a person can only be convicted of an offence committed by another if they are themselves involved in the offence, such as by giving assistance before or after its commission.¹⁶ Charleton and McDermott explain the distinction between vicarious liability in civil and criminal matters:

“Central to the regulation of society in civil law is the requirement that those who work on behalf of others, or otherwise act for them, are themselves personally liable for such torts as negligence and sexual violence and that in addition those under whose control they work or act are also responsible in damages. Criminal law is different. Apart from regulatory offences, some kind of mental element accompanying the prohibited action is required ... Vicarious liability in tort has generally resolved itself down to requiring employers, and those in analogous positions, to be responsible when they engage an individual to do the kind of work within the context of which the action takes place. An example is where a teacher within a religious order sexually abuses pupils even though the ethos of the school is committed to decent conduct and strict sexual mores; *Hickey v McGowan*. An employer, on the other hand, cannot generally be convicted of a criminal offence which an employee committed in the course of employment. This is because the employer will lack the necessary mental element.”¹⁷

- [3.21] The authors state that legislation can provide for vicarious culpability, but that the constitutional requirement of fairness means that vicarious liability must be limited to situations where it is necessary for the regulation of society, but only through the creation of minor criminal offences. They suggest that going beyond that, to “true criminal offences”, there would, at a minimum, be a requirement of negligence.
- [3.22] In respect of unincorporated associations, the water is muddied further because many activities take place on a voluntary rather than an employment basis, and

¹⁶ Section 7 of the Criminal Law Act 1997.

¹⁷ Charleton, McDermott, *Charleton & McDermott’s Criminal Law and Evidence* 2nd ed (Bloomsbury Professional 2 November 2020) at para 1.115.

because an employer/employee relationship in this context is not a straightforward legal relationship between the club as an entity and the individual. It might involve various people who are very far removed from the day-to-day work activities. In unincorporated associations, structures may be ill-defined; some members might have no involvement with, nor knowledge of, actions done by agents of the club or association. Added to this is the difficulty presented by the shifting membership of clubs and associations.

- [3.23] Offences such as those relating to health and safety often rely on an employment relationship, and vicarious liability based on that relationship would be a convenient solution. However, the club itself is not the employer. While *Hickey v McGowan*¹⁸ identified a close connection between the Marist Brothers who were members of the Order at the time sexual abuse was perpetrated, such that they had vicarious liability in civil law for the acts of other members, that is not the same as saying that the Order itself was vicariously liable in the criminal context.
- [3.24] As was seen in *O'Flynn*, the corporation was a vehicle through which the collective failings were capable of being criminalised, with offences for which the company itself was liable. That liability was based on clear and unambiguous employment/agency relationships. To say that the school manager in *Hickey v McGowan* who directly employed the person who perpetrated sexual abuse on the plaintiff has some civil liability is a very different proposition to saying that he has potential criminal liability for the actions of that agent. Equally to extend criminal liability to the members of the Order, who may have had no knowledge of the teacher's wrongdoing, is simply not possible in criminal law.¹⁹
- [3.25] In *Re Article 26 and the Employment Equality Bill 1996*,²⁰ legislation which proposed vicarious criminalisation of an employer for the actions of their employee was declared unconstitutional. Section 14 of the Bill provided an offence relating to discrimination; section 15 provided that anything:

"done by a person in the course of his or her employment shall be treated for the purposes of this Act as done also by that person's employer, whether or not it was done with the employer's knowledge or approval."

¹⁸ [2017] IESC 6, [2017] 2 IR 196.

¹⁹ It is possible to prosecute an individual who had knowledge of potential sexual abuse and failed to take steps to prevent it because that, in itself, is a criminal offence (reckless endangerment of children contrary to section 176 of the Criminal Justice Act 2006), but that is not the same as vicarious responsibility for the criminal act of another.

²⁰ [1997] IESC 6, [1997] 2 IR 321.

The Supreme Court held that vicarious criminal liability could only be imposed if:

- (1) offences are essentially regulatory in character;
- (2) they apply where a person has a particular privilege (such as a licence) or a duty to make sure that public standards as regards health or safety or the environment or the protection of the consumer, and such like, are upheld;
- (3) and where it might be difficult, invidious or redundant to seek to make the employee liable.

[3.26] In many cases involving criminality, the individual actor can be identified and prosecuted, but *O'Flynn* demonstrates the kind of offence contemplated by the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996*:²¹ a case in which it might be difficult or unjust to seek to make the employee liable, but nevertheless one in which a criminal sanction was required and warranted.

(b) The absence of criminal procedural rules to facilitate prosecution of unincorporated associations

[3.27] It would appear that there is no procedural infrastructure in Irish law to facilitate, in practical terms, the prosecution of an unincorporated association. It is again useful to compare the position as it applies to incorporated entities.

[3.28] Section 868 of the Companies Act 2014 provides in relation to indictable matters:

- (1) The following provisions of this section apply where a company is charged, either alone or with some other person, with an indictable offence.
- (2) The company may appear, at all stages of the proceedings, by a representative and the answer to any question put to a person charged with an indictable offence may be made on behalf of the company by that representative but if the company does not so appear it shall not be necessary to put the questions and the District Court may, notwithstanding its absence, send forward the company for trial and exercise any of its other powers under Part 1A of the Criminal Procedure Act 1967, including the power to take depositions.
- (3) Any right of objection or election conferred upon the accused person by any enactment may be exercised on behalf of the company by its representative.

²¹ [1997] IESC 6, [1997] 2 IR 321.

- (4) Any plea that may be entered or signed by an accused person, whether before the District Court or before the trial judge, may be entered in writing on behalf of the company by its representative, and if the company does not appear by its representative or does appear but fails to enter any such plea, the trial shall proceed as though the company had duly entered a plea of not guilty.
- (5) In this section, "representative" in relation to a company means a person duly appointed by the company to represent it for the purpose of doing any act or thing which the representative of a company is authorised by this section to do.
- (6) A representative of a company shall not, by virtue only of being appointed for the purpose referred to in subsection (5), be qualified to act on behalf of the company before any court for any other purpose.
- (7) A representative for the purpose of this section need not be appointed under the seal of the company.
- (8) A statement in writing purporting to be signed by a managing director of the company or some other person (by whatever name called) who manages, or is one of the persons who manage, the affairs of the company, to the effect that the person named in the statement has been appointed as the representative of the company for the purposes of this section shall be admissible without further proof as evidence that that person has been so appointed.

[3.29] The effect of the provision is that where a company is charged with an indictable offence, a representative may appear on its behalf, enter a plea and exercise a right of election (to opt for trial by jury in a Criminal Justice (Theft and Fraud Offences) case,²² for instance). It may not be possible, or indeed practical, to extend a similar provision to unincorporated associations, but the comparison is drawn here to illustrate the stark absence of any similar provision to even serve a summons on an unincorporated association.

[3.30] Regarding a company's ability to appear in court, it was historically held that the requirement for prisoners to 'stand at the bar' prevented an appearance on behalf of a company by an advocate, which meant that a company could not be

²² Section 53 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

prosecuted.²³ This problem was remedied for indictable offences by section 382(2) of the Companies Act 1963. A representative may appear on behalf of a company at all stages of the proceedings and may answer any questions which would ordinarily be put to the person charged with an indictable offence, such as how the company wishes to plead and whether the company elects for trial on indictment where there is a right of election.²⁴ There does not appear to be any equivalent provision in respect of unincorporated associations.

- [3.31] As a company cannot be arrested, proceedings against a company are commenced by the laying of a complaint or information or by the administrative summons procedure under the Courts (No 3) Act 1986. A summons requires the attendance of an accused at a particular court on a particular date to answer the allegation contained in the summons. A summons will outline the particulars of the complaint or allegation and the name and address of the accused. For companies, the appropriate method of service is by sending the summons by pre-paid registered post to the company's place of business or by leaving it at the company's place of business. A document may be served upon a company by leaving a copy at, or sending a copy by post, to the registered office of the company or, if the company has not given notice to the Registrar of Companies of the situation of its registered office, by registering it at the office for the registration of companies.²⁵
- [3.32] It would appear that the practical realities of prosecuting unincorporated associations have not been satisfactorily considered or resolved in Ireland.

(c) Seeking to apply the criminal law to unincorporated associations

- [3.33] There are very real barriers to transmitting criminal liability from one individual to a group of other individuals who had no knowledge of, nor involvement in, the criminal action. In a limited number of legislative provisions, the criminal law has attempted to extend itself to unincorporated associations, but it has done so by effectively disregarding the non-corporate status of such bodies. When considering the provisions in Irish law which purport to apply criminal liability to unincorporated entities as though they are incorporated, the fundamental difficulty in terms of absence of legal personality and vicarious criminalisation

²³ Horan, Murphy, *Corporate Crime* 1st ed (Bloomsbury Professional 28 February 2011) at para 4.79.

²⁴ *Ibid.*

²⁵ District Court Rules 1997, order 10, rule 6(1). Order 10, rule 6 represents a substantial re-enactment of section 379 of the Companies Act 1963. For the service of documents on a company for the purpose of tax legislation, see section 869 of the Taxes Consolidation Act 1997.

must be at all times borne in mind. While the Interpretation Acts appear to provide a solution, on examination it is an ineffective one.

- [3.34] The ease with which corporate criminal liability can be transmitted from agent/employee to the company does not have a parallel in unincorporated associations, which are far from uniform in their organisation and structure. As Charleton put it in *Hickey v McGowan*, (again discussing civil liability, but useful as a frame of reference in discussing criminal liability):

“... the operation of the Marist Brothers must be far from a local hurling or bridge club, to the extent that any legal rule which would treat both similarly for the purpose of vicarious liability has the potential of leading to unfair outcomes. Any test that would seek to apply vicarious liability to unincorporated associations must take this distinction into account.”²⁶

- [3.35] The Interpretation Act 2005 allows for the substitution of the term “unincorporated association” for “person”, where it appears in legislation. But, as will be seen, that is an incomplete and indelicate solution.

(i) *Interpretation Act 2005*

- [3.36] In the English case of *R v RL and JF*,²⁷ oil escaped into a watercourse from an underground pipe on land owned by a golf club. This constituted an offence under section 85(1) of the Water Resources Act 1991²⁸ of England and Wales by causing “... poisonous, noxious or polluting matter ... to enter any controlled waters”. In Ireland, a similar offence is provided by section 3 of the Local Government (Water Pollution) Act 1977.²⁹ The 900-odd members of a club were joint maintainers of a tank and were therefore each potentially guilty of the strict liability offence.
- [3.37] The Court of Appeal of England and Wales noted that the offence applied to the landowner; in ordinary language that meant the club. The chairman and club treasurer (who was also the chairman of the “special building committee” which oversaw the work being carried out by the contractors) were prosecuted. The Court noted that it was not alleged that either was personally culpable, nor that they had gone beyond the actions of the 900 other members. It was noted “[t]he club had

²⁶ [2017] IESC 6 at para 47, [2017] 2 IR 196, at para 121.

²⁷ [2008] EWCA Crim 1970.

²⁸ 1991 c 57; section 85 repealed (6 April 2010) by *The Environmental Permitting (England and Wales) Regulations 2010* (SI 2010/675) regulation 1(1)(b), Sch 26 para 8(2)(a), Sch 28 (with regulation 1(2), Sch 4).

²⁹ No 1 of 1977.

- 900 or so members. Any one or all of those members would have been in an identical legal position.”
- [3.38] The prosecution had proceeded against the chairman and treasurer, as the prosecutor considered that the club itself could not lawfully be prosecuted. However, the Court held that the club itself could have been prosecuted, therefore avoiding the injustice that would flow from criminally penalising those two officers of the club individually. In effect, the Court bypassed the inconvenient fact of a lack of separate identity, using the Interpretation Act to substitute the club for “person” in the relevant legislation. This approach, while pragmatic, is problematic.
- [3.39] The Interpretation Acts were considered in Ireland in respect of an unincorporated association in the case of *Director of Public Prosecutions v Wexford Farmers’ Club*.³⁰ There the High Court had to decide (on a case stated from the District Court) whether or not a charge under section 45(1) of the Intoxicating Liquor Act 1988 could properly be brought against an unincorporated body. Section 45(1) of the 1988 Act provided that a “person” shall not publish, or cause to be published, any advertisement drawing attention to any function to be held on the premises of a “registered club”. A prosecution was brought by the Director of Public Prosecutions (“DPP”) against an unincorporated association called the Wexford Farmers’ Club, alleging that Wexford Farmers’ Club was a “person” that published, or cause to be published, an advertisement drawing attention to a function held on the premises of its “registered club”.
- [3.40] The Court reviewed section 11(c) of the Interpretation Act 1937. Section 11(c) provided that in every Act of the Oireachtas and in every statutory instrument made wholly or partly under an Act of the Oireachtas, the word “person”, unless the contrary intention appears, shall be interpreted as meaning “... an unincorporated body of persons as well as an individual.”
- [3.41] The Court also noted that the Intoxicating Liquor Act 1988 contained a specific reference to the liability of a “registered club” in section 45(3).
- [3.42] The Court held that having regard to section 11(c) of the Interpretation Act 1937 and the specific reference to liability of a “registered club” in section 45(3) of the Intoxicating Liquor Act 1988, the word “person” in section 45(1) of the 1988 Act had to be interpreted as referring to an unincorporated body of persons as well as an individual.
- [3.43] Section 45(3) of the 1988 Act contains separate sub-paragraphs for the imposition of criminal liability on “the registered club” under sub-paragraph (a) and any “person” who published the advertisement or caused it to be published under sub-paragraph (c). Sub-paragraphs 45(3)(a) and (c) of the 1988 Act provide that where

³⁰ [1994] 1 IR 546.

there is a breach of section 45(1) of the 1988 Act, the “registered club” and any “person” who published, or caused to be published, the advertisement shall be guilty of an offence.

- [3.44] Given that the legislation provided for criminal liability of the club itself, the Court did not necessarily have to use the Interpretation Act 1937 in order to attach liability in *Wexford Farmers’ Club*. It would be misguided to extrapolate from the *Wexford Farmers Club* case that unincorporated associations can, as a general proposition, be made criminally liable: the section expressly provided for the criminalisation of the club itself, which is a contradiction in terms – even a legal fiction – in respect of unincorporated associations that have no legal identity. There was no provision for imprisonment in respect of that particular offence and the penalty was a low-level fine indicating the minor nature of the offence. However, there are a number of references in Irish legislation to criminalisation of unincorporated associations, complete with references to terms of imprisonment. Such references, which ignore the key question of attribution of liability to a group of individuals, are arguably absurd.
- [3.45] The Interpretation Acts 1937 – 2005 do not, therefore solve the difficult issues that arise in seeking to apply the criminal law in this context. Crucially, it must be noted that the Irish Supreme Court has very firmly and deliberately rejected the approach adopted in the UK of treating unincorporated entities as though they are incorporated. In *Hickey v McGowan*, both O’Donnell J and Charleton J rejected the position taken by the UK Supreme Court in *Catholic Child Welfare Society v Various Claimants (FC)*³¹ (“CCWS”), in which Lord Phillips had relied on a number of cases as authority for the proposition that an unincorporated association could be made vicariously liable in a manner separate and distinct from its members. As Fitzgibbon put it in an analysis of *Hickey v McGowan*:

“on a closer analysis of those cases, they did not, in fact, reveal this to be so, in circumstances where those bodies enjoyed a statutory footing which clearly permitted them to circumvent the unincorporated character of their association for the purposes of legal proceedings.”³²

- [3.46] Again, it must be emphasised that the discussion in *Hickey v McGowan* related to civil liability, but the principles are instructive nonetheless. The judgment of O’Donnell J makes the following points:

³¹ [2012] UKSC 56, [2013] 1 All ER 670, [2013] 2 AC 1.

³² Fitzgibbon, “The Vicarious Liability of Religious Orders in Child Abuse Civil Actions” (2017) 35(8) *Irish Law Times* 104, at page 107.

"If indeed the common law had recognised the Church and religious orders as possessing legal personality distinct from its members, then this and other cases would be much easier. However that step was not taken either in the United Kingdom or even in Ireland post-Independence..."³³

Further:

"I cannot accept that by some process of unexplained alchemy a group of individuals such as that involved in this case, which is in law, an unincorporated association, can come to be treated for the purposes of these proceedings only, as if it were a corporate entity."³⁴

He concluded:

"... the Marist Order is an unincorporated association and must be viewed by the law as such. It is essential to the very nature of an unincorporated association that it is not a body corporate. It cannot therefore be treated as if it was that which by very definition it is not."³⁵

[3.47] Charleton J stated:

"Lord Phillips posits the proposition ... that an unincorporated association can be liable for those acting for it. He seems to mean the association itself assuming corporate status while not being a corporation. That does not represent the law."³⁶

[3.48] A group, Charleton J says, can employ someone, and if that person negligently injures another, the members of the group can be liable, but that is different. It means that members of a group can share liability for the negligent organisation of an event.³⁷

[3.49] He also suggests that there may be occasions where the body of members of an association may become liable. But a distinction is drawn between that joint civil liability and the attribution of liability to a non-entity. Further, the constantly

³³ [2017] IESC 6, O'Donnell J, at para 48, [2017] 2 IR 196, O'Donnell J, at para 49.

³⁴ [2017] IESC 6, O'Donnell J, at para 49, [2017] 2 IR 196, O'Donnell J, at para 50.

³⁵ [2017] IESC 6, O'Donnell J, at para 52, [2017] 2 IR 196, O'Donnell J, at para 53.

³⁶ [2017] IESC 6, Charleton J, at para 48, [2017] 2 IR 196, Charleton J, at para 122.

³⁷ [2017] IESC 6, Charleton J, at para 48, [2017] 2 IR 196, Charleton J, at para 122.

shifting membership of such groups is a crucial difference by comparison with an incorporated body:

“[R]ights and liabilities do not continue despite people calling themselves the same name.”³⁸

[3.50] These basic principles as to the nature of unincorporated associations and liability are important to consider when assessing the effect of the Interpretation Acts.

(ii) Environmental Legislation

[3.51] The European Communities Environmental Objectives (Surface Waters) Regulations 2009 (the “2009 Regulations”)³⁹ apply to all surface waters and provide for the establishment of legally binding quality objectives for surface waters and environmental quality standards for pollutants. Under the 2009 Regulations, public authorities must ensure that the emission limits laid down in authorisations comply with water quality objectives and standards. Regulation 13 provides that a criminal offence is committed when there is a failure to comply.

[3.52] Regulation 14 states that an “unincorporated body” that is guilty of an offence under the 2009 Regulations is liable:

- (a) on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 3 months or to both; or
- (b) on conviction on indictment to a fine not exceeding €500,000 or to imprisonment for a term not exceeding 3 years or to both.

[3.53] The European Communities Environmental Objectives (Groundwater) Regulations 2010 (the “2010 Groundwater Regulations”)⁴⁰ established a regime for the protection of groundwater and the prevention of pollutants into groundwater. Regulation 21 provides that a criminal offence is committed when there is a failure to comply.

[3.54] Regulation 22 states that a person, public authority, body corporate or unincorporated body that is guilty of an offence under the 2010 Groundwater Regulations is liable:

- (1) on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 3 months or to both; or

³⁸ [2017] IESC 6, Charleton J, at para 54, [2017] 2 IR 196, Charleton J, at para 128.

³⁹ SI No 272 of 2009.

⁴⁰ SI No 9 of 2010.

(2) on conviction on indictment to a fine not exceeding €500,000 or to imprisonment for a term not exceeding 3 years or to both.

[3.55] Regulation 22 provides for, among other things, the imprisonment of an unincorporated body that is guilty of an offence under the 2010 Groundwater Regulations.

[3.56] The European Communities (Assessment and Management of Flood Risks) Regulations 2010 (the “2010 Flood Risks Regulations”)⁴¹ set out a process for implementing flood risk management plans in the community.

[3.57] Regulation 52(3) of the 2010 Flood Risks Regulations states that an “unincorporated body” guilty of an offence under the Regulations is liable:

(a) on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 3 months or to both, together with, in the case of a continuing offence, a further fine not exceeding €1,000 for every day during which the offence is continued or maintained; or

(b) on conviction on indictment to a fine not exceeding €500,000 or to imprisonment for a term not exceeding 3 years or to both.

[3.58] It would appear that the words “unincorporated body of persons” in these regulations were included for comprehensiveness, or perhaps for catch-all convenience. An unincorporated body cannot be imprisoned, and the imprisonment of an unincorporated body under these Regulations cannot occur in practice. When legislation applies to both natural persons and incorporated and unincorporated bodies, the legislation should distinguish the treatment of both groups, and consider the practical means of enforcement.

(iii) Criminal Justice (Theft and Fraud Offences) Act 2001

[3.59] Section 58 of the Criminal Justice (Theft and Fraud Offences) Act 2001 treats incorporated and unincorporated bodies as though they are one and the same. It provides that:

“58.—(1) Where—

(a) an offence under this Act (other than Part 5 or 6) has been committed by a body corporate, and

⁴¹ SI No 122 of 2010.

(b) the offence is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, a person who was either—

(i) a director, manager, secretary or other officer of the body corporate, or

(ii) a person purporting to act in any such capacity,

that person, as well as the body corporate, is guilty of an offence and liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with the member's functions of management as if he or she were a director or manager of the body corporate.

(3) The foregoing provisions shall apply, with the necessary modifications, in relation to offences under this Act committed by an unincorporated body."

[3.60] First, section 58(1)(a) requires that an offence has been committed "by a body corporate." Attribution of corporate criminal liability to an artificial entity is, as has been explained, straightforward. Attribution to individual members of an unincorporated association is not, and raises issues of constitutional fairness. It is questionable as to whether the offences in the Act are suited to vicarious criminal liability because of their seriousness.

[3.61] Section 58 of the Criminal Justice (Theft and Fraud Offences) Act 2001 is a good example of unincorporated associations being subject to a piece of legislation that does not tailor itself to the difficulties or practicalities of prosecuting them.

[3.62] Section 58(3) suggests that an unincorporated body that has committed an offence under the 2001 Act is liable to be proceeded against and punished in accordance with the 2001 Act. The problem, however, is that the 2001 Act contains various provisions detailing different offences, most of which require the presence of a guilty mind in order to commit the offence. Although section 58(3) makes it clear that an unincorporated body guilty of an offence under the 2001 Act is liable to be proceeded against and punished under the Act, the 2001 Act does not specify which offences apply to unincorporated associations.

[3.63] Under section 4(1) of the 2001 Act, a person is guilty of theft if they dishonestly appropriate property without the consent of the owner and with the intention of

depriving the owner of it. An unincorporated body, having no consciousness nor mentality, is incapable of “dishonestly” appropriating property. It would also be impossible to prove that an unincorporated body had an “intention” to deprive the owner of their property.

- [3.64] Under section 6(1) of the 2001 Act, a person who dishonestly, with the intention of making a gain for themselves or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence. A prosecutor would be incapable of demonstrating that an unincorporated body “dishonestly” intended to make a gain for itself.
- [3.65] Under section 10(1) of the 2001 Act, a person is guilty of an offence if they dishonestly, with the intention of making a gain for themselves or another, or of causing loss to another destroys, defaces, conceals, or falsifies any account or any document made or required for any accounting purpose. Again, it would be impossible to demonstrate that an unincorporated body “dishonestly” destroyed, defaced, concealed, or falsified any account or document.

(iv) Health and Safety Offences

- [3.66] As was seen in the health and safety case of *O’Flynn*, failure to appropriately manage a premises can have tragic consequences. One of the charges alleged a failure to conduct the undertaking so that non-employees were not exposed to risks to their safety. Those involved in club and society activities can be also exposed to risks: in *Massey v Stagg*⁴² a severe finger injury was caused to a player because netting had not been properly maintained; in *McGroarty v Kilcullen*⁴³ the plaintiff lost his left index finger while assisting with building works at a golf club. For all intents and purposes, the golf club was a workplace at the time Mr McGroarty was injured. However, it is quite clear that it would be very difficult to apply the relevant Health and Safety legislation in cases involving unincorporated associations, which is a significant gap in the law.
- [3.67] As with the Criminal Justice (Theft and Fraud Offences) Act 2001, health and safety legislation includes a catch-all provision purporting to extend its application to unincorporated associations. Section 12 of the Safety, Health and Welfare at Work Act 2005 provides that every “employer” shall manage and conduct their “undertaking” in such a way as to ensure, so far as is reasonably practicable, that in the course of the work being carried on, individuals at the place of work (other than employees) are not exposed to risks to their safety, health or welfare.

⁴² [2017] IEHC 21.

⁴³ [2021] IEHC 679.

- [3.68] The word “undertaking” is defined in section 2(1) of the 2005 Act as meaning “... a person being an individual, a body corporate or an unincorporated body of persons engaged in the production, supply or distribution of goods or the provision of a service (whether carried on by him or her for profit or not)”. An unincorporated association will therefore come within the definition of “undertaking” for the purposes of the Safety, Health and Welfare at Work Act 2005 if it is engaged in the production, supply or distribution of goods or the provision of a service, whether carried on for-profit or not-for-profit.
- [3.69] At first glance, an unincorporated association appears capable of falling foul of sections 8 and 12 of the 2005 Act because it is an “undertaking”. However, it is important to note that sections 8 and 12 apply to “undertakings” who are “employers”, and therefore the question arises as to whether an unincorporated association can be said to be an “employer”.
- [3.70] “Employer” is defined in section 2(1) of the 2005 Act as:
- (a) the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment;
 - (b) includes a person (other than an employee of that person) under whose control and direction an employee works; and
 - (c) includes where appropriate, the successor of the employer or an associated employer of the employer.
- [3.71] Based on this definition, it is unlikely that an unincorporated association falls within the definition of “employer”. An individual tasked with cutting the grass on the playing field of an unincorporated association is unlikely to be employed by the unincorporated association. The arrangement may be voluntary, as it was in the case of *McGroarty*, and as such may be informal with no contract of employment in place. Even if it is remunerated, the person under whose control and direction the employee works may be a committee member or a fellow member of the unincorporated association, rather than the unincorporated association itself, which is unable to be the employer.
- [3.72] In these circumstances, although the unincorporated association may be an “undertaking” as defined in section 2(1) of the 2005 Act, the unincorporated association is unlikely to come within the key criminal law provisions of the Act, sections 8 and 12, because it is not an “employer” as defined in section 2(1) of the 2005 Act. Equally, obligations in relation to the conduct of risk assessments under section 20 of the 2005 Act apply to “every employer.” These section 20 obligations include duties to conduct hazard and risk assessments, to ensure that protective measures are put in place, and resources are provided, to protect safety, health and welfare at the place of work, but are unlikely to properly apply to an

unincorporated association, which is not an “employer” for the purposes of the 2005 Act.

- [3.73] Section 17 of the 2005 Act imposes duties in relation to persons who commission, procure, design or carry out construction work. Section 17(3) provides:

“[a] person who carries out construction work shall ensure, so far as is reasonably practicable, that it is constructed to be safe and without risk to health and that it complies in all respects, as appropriate, with the relevant statutory provisions.”

Failing to discharge that duty is an offence. It is clear that the section provides a penalty and deterrence for the individual, but perhaps there is less of a deterrent effect for associations or clubs generally.

- [3.74] Many unincorporated associations have, in reality, a substantial existence which is treated by those who deal with them as being separate and distinct from the sum of those natural persons who are, for the time being, members of the unincorporated association. Those who have attended the premises of an unincorporated association to cut the grass, repair structures, build, or pursue any other type of activity which requires compliance with health and safety laws, do not generally regard themselves as contracting with each member of the unincorporated association personally. Rather, they look to the unincorporated association as if it were an entity with legal personality separate and distinct from its members.
- [3.75] With this in mind, it must be questioned whether or not this is a satisfactory state of affairs, particularly when the membership of unincorporated associations may be shifting in nature and it may be difficult to pinpoint who exactly was the “employer” of an individual at a specific time.

(v) Vetting legislation

- [3.76] The National Vetting Bureau (Children and Vulnerable Persons) Act 2012 provides procedures for vetting individuals who work or carry out activities with children or vulnerable adults. The Act requires relevant organisations engaged in work or volunteering with children or vulnerable adults to register with the National Vetting Bureau.⁴⁴ Organisations that carry out activities involving children or vulnerable adults cannot employ or permit an individual to carry out activities on the organisation’s behalf unless they have first been vetted.⁴⁵ Non-compliance is an offence. The Act specifies that where an offence has been committed by a

⁴⁴ Section 8 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012.

⁴⁵ Section 12 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012.

body corporate, a director, manager, secretary or other officer of the body corporate and the body corporate itself can be held liable. While an unincorporated association involved in relevant activities is required to register with the National Vetting Bureau, there is no provision which specifies the manner in which an unincorporated association will be held liable for contravention of the Act.

(d) What kinds of criminal offences are necessary or desirable in respect of unincorporated associations?

- [3.77] It is not necessary, nor desirable, that every criminal offence, nor even every regulatory offence, should be adapted for enforcement in respect of unincorporated associations. However, it appears to the Commission that consideration should be given to the categories of offence, such as health and safety, in which it would be appropriate to provide for criminal law enforcement mechanisms against the entity as distinct from the individuals who comprise the membership of the association. Indeed, the omission of unincorporated associations was noted by Senator McDowell in Seanad Debates on the Safety, Health and Welfare at Work Bill 2004:

"I was struck by what Senator Moylan said about public events because some high-profile fatal accidents have occurred in recent months and years at such events. Strictly speaking public events do not constitute a workplace and so do not come within the ambit of the Department or this Bill, but nonetheless there is a need to examine the concept of imposing standards on public events, such as where two non-professional sporting clubs play each other or where people or children play in a ground run by a voluntary sporting club. We must find a mechanism of implementing standards in terms of equipment and buildings in such places that fall outside the context of the workplace."⁴⁶

- [3.78] In England and Wales, the Criminal Justice and Courts Act 2015 provides a good example of criminalisation of an unincorporated association, in legislation that takes account of the unique characteristics of an unincorporated association. Crucially it clarifies, for the purposes of the legislation, a distinction between the unincorporated association and its members, so that the members are shielded from criminal liability, avoiding the injustice of collective criminal responsibility for the acts of some of the membership. The Act creates an offence of ill-

⁴⁶ Safety, Health and Welfare at Work Bill 2004: Second Stage. Seanad Éireann debate - Wednesday, 11 May 2005 Vol 180 No 10.

treatment or wilful neglect by a “care provider” and it defines “care provider” in section 21(2)(a) of the 2015 Act as an “...unincorporated association which provides or arranges for the provision of (i) health care for an adult or child ... or social care for an adult ...”.

- [3.79] According to the Explanatory Notes to this legislation, the intention behind including unincorporated associations within the definition of “care provider” is to ensure that the definition of “care provider” covers not just provider organisations such as hospitals (whether public or private) and companies but also sole traders such as GP practices.⁴⁷ The effect is that it covers not only for-profit traders and partnerships, but also voluntary organisations that are unincorporated: there may be many people involved in the provision of care, and it may be difficult to determine who ill-treated or wilfully neglected an adult or child at a particular time and place. Due to the shifting nature of those working in these environments, there was a risk that a prosecution for ill-treatment or wilful neglect would not succeed because the person or persons causing the ill-treatment or wilful neglect could not be identified in order to establish a definitive causative link between individual care-providers and the harm caused. As with *O’Flynn*, often in such cases what has occurred is the sum of collective failings.
- [3.80] To ensure that justice could be achieved for victims in such circumstances, it was decided that the voluntary body or GP practice, as an unincorporated association, can be treated as the “care provider” under the 2015 Act of England and Wales, rather than having to identify the specific individual who, although tasked with providing care to a victim, ill-treated or wilfully neglected the victim. The deliberate treatment of unincorporated associations as “care providers” extends liability by ensuring that unincorporated associations, and not simply individuals, can be culpable in certain circumstances.
- [3.81] If a jurisdiction feels it is necessary to reform the law to ensure that the public are sufficiently protected against certain actions of unincorporated associations which may be criminal in nature, the legislature in that jurisdiction can specifically override the common law position by ensuring that a specific statute is drafted so as to expressly state that a body corporate may be prosecuted summarily or on indictment for an offence under that particular statute and that an unincorporated association may be prosecuted for a criminal offence under that particular statute ‘as if it were a body corporate’.
- [3.82] Another issue which is difficult to resolve in this area of law is whether or not a fine must be paid by members of an unincorporated association or by the unincorporated association itself. Section 24(5) of the Criminal Justice and Courts

⁴⁷ Explanatory Notes to the *Criminal Justice and Courts Act 2015* at para 233.

Act 2015 of England and Wales addresses this issue and provides that “[a] fine imposed on an unincorporated association on its conviction of an offence under section 21 or 23 [of the 2015 Act] is to be paid out of the funds of the association.” Section 24 clearly states that for an offence committed under section 21 or 23 of the Criminal Justice and Courts Act 2015 by an unincorporated association, any fine must be paid out of the funds of the unincorporated association and not out of the funds of members of the unincorporated association.

- [3.83] This approach is, in the view of the Commission, preferable to reliance on the meaning of “person” in section 18(c) of the Interpretation Act 2005, which has made the law in relation to the criminal liability of unincorporated associations and their members difficult to determine. The Commission is inclined to the view that if unincorporated associations are to remain without a legal personality separate and distinct from their membership, proposed legislation should carefully consider whether and how liability should be extended to unincorporated associations. If liability should be extended having regard to the context, background, goal or purpose of the legislation, an unincorporated association should be made subject to it by having the legislation expressly state that it shall apply to unincorporated associations or by including unincorporated associations within the definition of those who are subject to the legislation.
- [3.84] As matters stand, statutory provisions that purport to apply to entities that at common law have no legal personality are arguably ineffective. When certain statutory provisions explicitly provide for the conviction of, imposition of a fine on, or ‘imprisonment’ of, an unincorporated association that fails to comply with certain statutory obligations, it is difficult to see how such legislation could truly be effective.

(e) How can criminal procedural rules be applied to unincorporated associations?

- [3.85] As outlined above, rules relating to criminal procedure are under-developed in relation to unincorporated associations. While, for example, section 80 of the Safety, Health and Welfare at Work Act 2005 provides that “undertakings” may be prosecuted, it is hard to understand how an unincorporated association can be lawfully convicted of an offence that is based on the defendant being an employer, when an unincorporated association cannot enter into an employment contract.
- [3.86] In addition, on a much more basic level, there is no provision equivalent to section 382 of the Companies Act 1963 to provide for a representative to appear in court on behalf of an unincorporated association. There is no clarity as to where a summons or book of evidence should be served, nor on whom.

[3.87] It is useful to compare the position with that which is provided for in the UK legislation referred to above, section 21 of the Criminal Justice and Courts Act 2015. Section 21 sets out an offence of neglect that can be committed by a care provider, with express reference to unincorporated associations. Crucially, section 24 sets out what arguably amounts to the *de facto* imposition of liability on the entity itself in a way that protects the members, while also dealing with the practical application of criminal procedural rules and so on:

“(1) For the purposes of sections 21 and 23, an unincorporated association is to be treated as owing whatever duties of care it would owe if it were a body corporate.

(2) Proceedings for an offence under those sections alleged to have been committed by an unincorporated association must be brought in the name of the association (and not in that of any of its members).

(3) In relation to such proceedings, rules of court relating to the service of documents have effect as if the unincorporated association were a body corporate.

(4) In proceedings under section 21 or 23 brought against an unincorporated association, the following apply as they apply in relation to a body corporate—

(a) section 33 of the Criminal Justice Act 1925 (procedure on charge of offence against corporation);

(b) Schedule 3 to the Magistrates' Courts Act 1980 (provision about corporation charged with offence before a magistrates' court).

(5) A fine imposed on an unincorporated association on its conviction of an offence under section 21 or 23 is to be paid out of the funds of the association.”

[3.88] Similar provision is made in section 77 of the Health Act 2006 of England and Wales:

“(1) Proceedings for an offence alleged to have been committed by a partnership shall be brought in the name of the partnership (and not in that of any of the partners).

(2) Proceedings for an offence alleged to have been committed by an unincorporated association (other than a partnership) shall be

brought in the name of the association (and not in that of any of its members).

(3) Rules of court relating to the service of documents shall have effect as if the partnership or unincorporated association were a body corporate.

(4) In proceedings for an offence brought against a partnership or an unincorporated association, the following provisions apply as they apply in relation to a body corporate—

(a) section 33 of the Criminal Justice Act 1925 (c. 86) and Schedule 3 to the Magistrates' Courts Act 1980 (c. 43);

(b) sections 70 and 143 of the Criminal Procedure (Scotland) Act 1995 (c. 46);

(c) section 18 of the Criminal Justice Act (Northern Ireland) 1945 (c. 15 (NI)) and Schedule 4 to the Magistrates' Courts (Northern Ireland) Order 1981 (SI 1981/1675 (NI 26)).

(5) A fine imposed on a partnership on its conviction for an offence is to be paid out of the partnership assets.

(6) A fine imposed on an unincorporated association on its conviction for an offence is to be paid out of the funds of the association.

(7) Subsections (1) and (2) are not to be read as prejudicing any liability of a partner, officer or member under section 76(4) or (6)."

[3.89] In an entirely different context, the UK's Serious Crime Act 2007 expressly extends the reach of the legislation to include unincorporated associations within its remit, with provisions to deal with the practicalities without injustice, by clearly delineating between an association and its members. The Act provides that crime prevention orders against an unincorporated association must be made in the name of the association rather than the members. Notices setting out the terms of such orders are deemed to be delivered to the unincorporated association if they are delivered to an officer of the unincorporated association in person and is sent to the association if sent to an officer of the association at the address of the principal office of the association. The Act also clarifies that in any proceedings for an offence alleged against an association, proceedings must be brought in the name of the association rather than in the names of any members and criminal procedural rules apply to the association as they would if the association was a body corporate. A specified offence that is proved to have been committed

“with the consent or connivance of an officer” of an unincorporated association, the officer is also liable to prosecution.

- [3.90] In Chapter 4, Approaches to Reform, three models are presented as possible means to improve enforceability of the law for both litigants and regulators. The reform approach that is ultimately recommended by the Commission will dictate the approach to the enforceability of criminal legislation. However, it is clear that if criminal or regulatory law is to be effectively applied to unincorporated associations there must be criminal procedural rules that apply to unincorporated associations also.
- [3.91] The Commission seeks the views of consultees on the most effective means of providing for criminal procedural rules to apply to unincorporated associations. Clarity is required in relation to:
- (a) who, or what entity, should be served with a summons?
 - (b) who will attend court, and how will their attendance be compelled?
 - (c) if a fine is imposed on summary conviction or on conviction on indictment, is the fine to be paid out of the funds of the unincorporated association or the funds of members of the unincorporated association?
 - (d) if the unincorporated association fails to appear in court, what provisions apply, and in respect of whom?
- [3.92] The Commission is inclined to the view that for criminal and regulatory law to be fully effective, these practical procedural matters must be addressed in legislation.

CHAPTER 4

APPROACHES TO REFORM

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1. Introduction

- [4.1] The Commission will now turn to the potential for reform. The preceding chapters have set out the various legal difficulties that can arise for unincorporated associations, their members and third parties who interact with them in the absence of a clear and coherent approach to the legal framework.
- [4.2] This chapter begins by identifying the objectives of law reform in this area. Consultees are invited to add, amend, reject or endorse the reform objectives that the Commission has identified.
- [4.3] Reform to achieve the stated objectives can be approached in multiple ways, and the second part of the chapter provides a comparative analysis by setting out some of the solutions adopted in other jurisdictions to the difficulties presented by unincorporated associations. Consultees are invited to consider the

approaches adopted elsewhere to determine if any elements could usefully be included in a reformed Irish system.

[4.4] The chapter presents three broad models for law reform:

Model 1: Legislate to create a “non-profit registered association”, by which separate legal personality could be gained by registration;

Model 2: Confer separate legal personality on unincorporated associations that fulfil specified criteria; and

Model 3: Do not confer separate legal personality, but specify how unincorporated associations are to be held liable in contract, tort and for offences, with a series of focused reforms that do not alter the legal status of unincorporated bodies.

[4.5] The proposals in Model 3 are not necessarily confined to that model. Model 3 sets out a number of focused reforms to address practical problems, many of which could form elements of reform complementary to Models 1 and 2.

[4.6] Regardless of the legal form that a club, association or other unincorporated body takes, the use of trusts to hold funds and assets can put those funds and assets beyond the reach of litigants. One of the focused reforms proposed in Model 3 that could intersect with Models 1 and 2 would provide that in certain circumstances a trust structure can be disregarded to make funds and assets of associations available to meet liabilities. This has been done in Canada and Australia (as discussed in detail below). The chapter concludes by exploring whether or not similar reform should be undertaken in Ireland.

(a) An existing solution: the company limited by guarantee (CLG)

[4.7] Before reform is considered in detail, it should be emphasised that the company limited by guarantee (“CLG”) can, at least in many cases, solve many of the difficulties discussed in the previous chapters. Provided for by Part 18 of the Companies Act 2014, a CLG does not have share capital and members are not required to buy shares in the CLG. Members’ liability is limited to such amount as they undertake in the constitution of the CLG to contribute to the assets of the CLG in the event of its winding up. The Companies Registration Office (“CRO”) has noted that:

“Many charitable and professional bodies find this form of company to be a suitable vehicle as they wish to secure the

benefits of separate legal personality and of limited liability but do not require to raise funds from the members.”¹

- [4.8] For smaller, more casual unincorporated bodies involved in low-risk activities, incorporation is often seen as unnecessary and a drain on resources. It has been noted that, “[f]or a small association, such as a community book club, incorporation is likely more trouble than it is worth”.² However for larger bodies the CLG is an available solution suitable for bodies that own assets, enter contracts and operate with employees or volunteers similar to employees. It is an option worth considering, but the Commission acknowledges that it comes with some administrative and financial costs. However, the Commission considers that the protection afforded to members and third parties will in many cases make the cost worth the outlay.

(i) Should there be an obligation to incorporate?

- [4.9] Many informal groups in society that act in social, political and religious life, including NGOs and civil society, operate without incorporating. Perhaps the members of such unincorporated associations do not consider it appropriate or worthwhile to incorporate as a CLG; perhaps they are unaware of the risks of exposure to personal liability and the limitations of the current law in terms of redress for members; or perhaps the costs and administrative burdens are off-putting.
- [4.10] A simple approach, with obvious appeal, is to provide for a statutory obligation to incorporate using the existing company law structure for associations that enter contracts, hold property and operate with employees or volunteers similar to employees. Such an obligation would solve property-holding and contractual problems and provide both member and third-party protection. The Commission has considered the option of mandatory incorporation and decided against presenting it as a law reform proposal, because a legal obligation to incorporate may interfere with the freedom of such bodies to meaningfully associate in the pursuit of collective goals and to participate in public life. In non-democratic countries, sophisticated laws with burdensome NGO registration procedures and complex regulations enable invasive government control of NGOs. Such measures have been used to curtail civil society groups and undermine freedom of association and dissent.³ As Gilbert and Mohseni have said:

¹ Companies Registration Office, Company Registration
<<https://www.cro.ie/Registration/Company>> accessed 15 November 2022.

² Smith and Kairys, “Canada: Up the Creek without a Paddle: The Law Relating to Unincorporated Associations” (2020) 40(1) *Estates, Trusts and Pensions Journal* 84.

³ Gilbert and Mohseni, “Disabling Dissent: the Colour Revolutions, Autocratic Linkages, and Civil Society Regulations in Hybrid Regimes” (2018) 24(4) *Contemporary Politics* 454.

“... the state can play an important gatekeeping role in how it chooses to enable or disable particular types of state-society interactions, thus serving as an important arena by which autocratic rulers rule and society and dissent are managed.”⁴

[4.11] Obligatory incorporation can be justified if it is deemed an essential form of regulation, for the benefit and/or protection of the public, for example to ensure food safety. However, the Commission is of the view that a general obligation for unincorporated bodies to incorporate would be inappropriate, even for associations holding property or effectively employing people (whether by committee structures or in relationships similar to that of employer and employee), having regard to the need to protect freedom of association and religious freedom. A general obligation to incorporate would limit the freedom of unincorporated associations and would negatively impact the flexibility, innovation and efficiency characteristic of unincorporated associations in civil society. It is also important to note that Irish life has been, and is, characterised by voluntary associations of people, from the earliest clans, tribes and settlements to the formation of villages and towns across Ireland. In contrast, corporations did not exist in Ireland until around the late 1400s.⁵ Accordingly, while mandated incorporation is superficially attractive as a way to reform the law in Ireland, it is a blunt measure and not presented as a law reform proposal in this Consultation Paper.

(ii) The spectrum of unincorporated associations

[4.12] Before considering potential reform, the spectrum and variety of unincorporated bodies must be kept in mind. They include:

- (a) sporting and voluntary bodies with changing membership, sophisticated in their organisation and structure but mostly reliant on volunteers. Such bodies have assets and occasionally contract with employees, service providers and other contractors;
- (b) religious (or similar) orders or bodies with a fluctuating membership, hierarchical in structure, involved in providing education and healthcare. They may have assets (sometimes substantial) and frequently contract with employees (for example)

⁴ *Ibid* at page 460.

⁵ For example, John G Rathborne Limited (trading as Rathbornes) was established as a candle manufacturer in 1488 in Dublin and its company certificate migrated to the Companies Registration Office on 31 March 1914. See also Neary, *The Candle Factory - Five Hundred Years of Rathborne's Master Chandlers* (Dublin, 1988); Registry of Deeds, "Blog No 6: Memorials of Rathborne Candles at the Registry of Deeds" <<https://www.prai.ie/blog-no-6-memorials-of-rathborne-candles-at-the-registry-of-deeds/>> accessed 15 November 2022.

and third parties. The use of trusts to hold assets may be a barrier to obtaining and/or enforcing court judgments against them and similar bodies; and

- (c) small sporting and community groups that do not have substantial assets or premises and do not contract with employees, volunteers or third parties.

- [4.13] These distinctions form an important backdrop to any discussion of law reform and the approach that should be adopted to individual member and organisational liability.
- [4.14] If the law were amended to allow litigation or enforcement proceedings to be brought against unincorporated associations themselves (as bodies rather than as the sum of their members), the litigant or regulator may find that the body has insufficient assets or funds to meet a fine or award. Reform to facilitate litigation or enforcement cannot alleviate the hardship for a person who has been wronged and is unable to recover; it can, however, ensure that there is no unfairness for members who have not been involved in wrongdoing because it prevents them from being liable simply because they are or were members of a club or association. If it were possible to sue a club as a distinct body, a litigant would also have the opportunity to sue the alleged wrongdoer as a co-defendant. Providing a means for unincorporated bodies to achieve legal personality would reduce, or remove entirely, individual members' exposure to tortious, contractual and/or criminal liability by virtue of their membership. It would not, however, free individuals from liability for their own wrongdoing.
- [4.15] There will also be cases where an unincorporated association has substantial assets held on trust for the benefit of members. The effect of the decision in *Hickey v McGowan*⁶ is that if members are held vicariously liable for the wrongdoing of another member, for example because of historical sexual abuse perpetrated by one member with a "close connection" to other members, the liability is shared among those who were members at the time of the wrongdoing. Disentangling what the asset holdings of the trust were at that point in time could be complex and a barrier to recovery of damages in some cases. Where property is held on trust "for the benefit of members", the trustees are limited in, or precluded from, the use of funds for the payment of awards or fines. This, as discussed below, has been addressed in Australia and Canada.

⁶ [2017] IESC 6, [2017] 2 IR 196.

2. Law reform objectives in relation to unincorporated associations

[4.16] Before reform proposals are considered in detail, the objectives of law reform in relation to unincorporated associations must first be identified.

(a) The objective of bringing clarity to the law on unincorporated associations

[4.17] One thing is certain: this area of Irish law lacks clarity. The Commission's first objective is to bring clarity to this unclear area of law and to ensure that the law is fair both to those who may have claims and those against whom claims may be enforced.

(b) The objective of protecting the interests of third parties dealing with unincorporated associations

[4.18] The Commission has highlighted many problems that third parties can face when dealing with unincorporated associations. For instance, potential litigants face the challenge of identifying the correct person or persons to sue, as was apparent in *Grace v Hendrick and Garvey*.⁷ Identifying the correct debtor can also be an issue when a contract is made on behalf of an unincorporated association.

(c) The objective of providing that the assets of an unincorporated association are available to meet its responsibilities

[4.19] As an unincorporated association cannot hold property itself, its assets must be held on trust. This means that trustees hold the assets for current members as beneficiaries. The contract between the members (known as the rules of the association) will set out how the property is to be used. Equitable ownership is in the current members; it is lost by those who leave the unincorporated association and acquired by those who join.⁸ Trustees are limited by the terms of the trust deed (or the terms of the arrangement between members where no formal trust is in place) when determining what can be done with trust property, which makes uncertain the availability of trust funds to settle claims or to meet fines and liabilities following litigation.

⁷ [2021] IEHC 320.

⁸ Wilde, "The Rule Against Perpetual Trusts: Part 2 – Property Holding within Non-charitable Unincorporated Associations" (2022) 35(4) *Trust Law International* 223.

(d) The objective of providing that unincorporated associations can be sued in their own names

- [4.20] Litigating against and enforcing the law against an unincorporated association is not straightforward. On the most basic level, employment and other contractual relationships are unclear and can leave contractors without redress. Third parties litigating against unincorporated associations face real difficulties identifying who to commence legal action against. Members who are injured on the premises of an unincorporated association cannot take legal action against the association, because they would effectively be suing themselves. There is an undesirable potential exposure of members of unincorporated associations to personal liability in certain circumstances. The result is “a considerable amount of operational complexity”.⁹

(e) The objective of clarifying the law on personal liability of members

- [4.21] Personal liability of members of unincorporated associations can potentially arise from claims in contract, tort and for fines imposed under legislation. The Commission aims to make the law easier to access and understand. A key priority of this project is to bring clarity to the law so that the extent of an individual association member’s liability to civil suit and criminal and regulatory sanction is clear and easily understood.

(f) The objective of clarifying the applicability of existing legislation to unincorporated associations

- [4.22] One American commentator, writing in 1916, identified the difficulty in determining the applicability of legislation to unincorporated associations:

“Unincorporated groups have developed hampered by rules of law which seem logically applicable, yet rules which had been formulated with slight regard to the problems presented by individuals in the aggregate.”¹⁰

- [4.23] Some Irish legislation refers expressly to unincorporated associations, though without clarifying how the law can, in practical terms, be applied or enforced in respect of an entity that has no legal existence. Other legislation may be applied to unincorporated bodies of persons, in accordance with section 18(c) of the

⁹ Glennon, “Questioning the Legal Status of Unincorporated Associations” (2000) 51(1) *Northern Ireland Legal Quarterly* 120.

¹⁰ Wrightington, *The law of Unincorporated Associations and Similar Relations* (Little, Brown & Co 1916) at page 6.

Interpretation Act 2005. As has been discussed elsewhere in this Consultation Paper, that is not a cure-all solution.

(g) The objective of ensuring that existing legislation is enforceable in respect of unincorporated associations

[4.24] In many instances legislation claims to apply to unincorporated associations, but on closer inspection it is difficult to see a route to enforcement without either legal personality or provision for representative defendants. Reliance on the Interpretation Act 2005 as a solution solves some interpretative difficulties (provided its existence is known and its provisions are consulted) but not the practical ones: how to ensure service of documents, ensure the availability of a representative to engage with enforcement notices and/or to appear in court on an unincorporated association's behalf. Access to the funds of the unincorporated association for fines arising from regulatory schemes is another important element.

(h) The objective of removing the impediment to suing a club of which you are a member

- [4.25] Many jurisdictions have departed from the rule that precludes members of unincorporated associations from suing their association, such as England and Wales, Australia and, to some degree, Northern Ireland.
- [4.26] It was suggested by Stack J in *Brady v Moore* that "if liability were too readily imposed, people who otherwise volunteer their time might be dissuaded from doing so and this would be damaging to the social life and leisure pursuits of a very large proportion of the population".¹¹ However, the Commission considers that volunteers who have sustained harm should not have to shoulder the financial cost of the negligent acts of others, purely on the basis that they are both members of the same association. As has been noted, this rule can be seen as an overly strict legal interpretation with access to justice ramifications for members who are prevented from suing in situations where they would otherwise be successful. The continued application of this old rule preventing associations from being sued by their members for their acts or omissions provides no incentive for clubs, societies and associations to adhere to adequate safety standards. The continued existence of this rule would allow acts and omissions to go unchecked.

(i) The objective of minimising regulatory burdens

[4.27] The Commission seeks to identify the elements of reform that are required to clarify the applicability and enforceability of the current law and seeks to achieve

¹¹ [2022] IEHC 420 at para 39.

these aims without imposing undue regulatory burdens on the community, sporting and voluntary sector. The flexibility to allow persons to form groups and associations with minimal restrictions should be retained.

- [4.28] Unincorporated associations contribute significantly to the social wellbeing of Irish communities via sporting, charitable and other altruistic endeavours. They are reliant on the time and goodwill of volunteers. The Commission does not consider a solution that imposes undue regulatory burdens on small clubs and associations, taking time and energy from the club or association's core activities, is desirable or feasible. As outlined above, a CLG will be suitable in some circumstances, but it is not a necessary or appropriate structure for clubs and associations, particularly those with no assets, no contracts with third parties, and whose activities pose minimal risks to members, volunteers and third parties.

Tell us your views

- Q. 4.1** Do you agree with the reform objectives that the Commission has identified? Those objectives are to:
- (a) bring clarity to the law on unincorporated associations;
 - (b) minimise regulatory burdens;
 - (c) protect the interests of third parties dealing with unincorporated associations;
 - (d) provide that the assets of an unincorporated association are available to meet its legal responsibilities;
 - (e) provide that unincorporated associations can be sued in their own names;
 - (f) clarify the law on the personal liability of members;
 - (g) clarify the applicability of existing legislation to unincorporated associations;
 - (h) ensure that existing legislation is enforceable against unincorporated associations; and
 - (i) remove the impediment to suing a club of which you are a member.
- Q. 4.2** Do you disagree with any of the objectives set out above? If so, why?
- Q. 4.3** What other objectives, if any, should underpin reform of the law in relation to the liability of unincorporated associations in Ireland?

2. Comparative Analysis

- [4.29] Before setting out further questions and proposals on how the law relating to the liability of unincorporated associations might be reformed, it is worth examining the legal position in relation to unincorporated associations in other jurisdictions. The Commission has chosen a variety of legal approaches to give consultees a spectrum of options that could be adopted in Ireland.
- [4.30] The jurisdictions chosen for this comparative analysis can, broadly speaking, be grouped into three categories:
- (1) those with a form of registration that grants legal existence to unincorporated associations;
 - (2) those that automatically grant legal existence to unincorporated associations fulfilling certain criteria; and
 - (3) those that do not recognise unincorporated associations as separate legal entities, but which make specific provision for the law to be applied to unincorporated associations.
- [4.31] To bridge the gap between full incorporation as a company and no recognition as a legal entity at all, some jurisdictions have developed a legal structure specifically tailored to non-profit organisations. Under this approach, unincorporated associations must register with a relevant authority. This grants many of the benefits of incorporation as a company without onerous administrative or regulatory burdens. Incorporation by registration does not necessarily equate to limited liability for members. This is because, as is discussed in Part 4 below, legal capacity and limited liability are not the same. An artificial legal entity can be created without having all the features and advantages of a limited company.
- [4.32] Some jurisdictions automatically confer separate legal personality on unincorporated associations that fulfil specific criteria. For example, unincorporated associations that have a set of rules and a minimum number of members who come together for a non-profit common aim can automatically be considered entities separate from their members. Automatic attribution of legal personality does not require unincorporated associations to register with a regulatory authority. As with incorporation by registration, automatic attribution of separate legal personality does not necessarily equate to limited liability for members.
- [4.33] Other jurisdictions do not recognise unincorporated associations as separate bodies but have made legislative provision to make their laws more workable and effective in respect of unincorporated associations.

(a) Australia – incorporated associations

[4.34] In Australia, unincorporated associations have the option of incorporating under Australian state and territory laws as incorporated associations. Each state and territory in Australia has an “Associations Incorporation Act”.¹² These Acts vary from one Australian jurisdiction to another. Common features include that the association must:

- (a) have an approved name;
- (b) an address in the state or territory;
- (c) be governed by a set of rules or Constitution; and
- (d) not distribute assets of the association among its members or former members when the incorporated association is wound up.

[4.35] An association established under these Acts has separate legal personality, can sue and be sued, hold property in its own name, and its members are protected from personal liability for debts incurred in its own name.

[4.36] Registering as an incorporated association is an attractive option because of the relatively minor administrative and financial burden involved, the limited liability of members and the continuity of legal existence despite fluctuating membership.

[4.37] Financial reporting obligations differ under each Act, although all incorporated associations have some requirements to file annual returns with the relevant regulatory authority in each state or territory. Once registered, incorporated associations can apply for certain tax exemptions, receive gifts and bequests, and apply for loans.

(i) *Western Australia*

[4.38] To look in detail at one Australian jurisdiction, in Western Australia a group is eligible for incorporation under the Associations Incorporation Act 2015 if it has at least 6 members with voting rights, does not distribute funds to its members and is formed for any of the following purposes:

- (a) religious, educational, charitable or benevolent purposes;
- (b) promoting literature, science or the arts;

¹² See the Associations Incorporation Act 2009 in New South Wales; the Associations Incorporation Reform Act 2012 in Victoria; the Associations Incorporation Act 1981 in Queensland; the Associations Incorporation Act 2015 in Western Australia; the Associations Incorporation Act 1985 in South Australia; the Associations Incorporation Act 1964 in Tasmania; the Associations Incorporation Act 1991 in the Australian Capital Territory; the Associations Act 2003 in the Northern Territory of Australia; and the Associations Incorporation Act 2005 in Norfolk Island.

- (c) providing medical treatment, attention or promoting the interests of people who suffer from a particular physical, mental or intellectual disability or condition;
- (d) sport, recreation or amusement;
- (e) establishing, carrying on or improving a community, social or cultural centre or promoting the interests of a local community;
- (f) conserving resources or preserving any part of the environmental, historical or cultural heritage of the State;
- (g) promoting the interests of students or staff of educational institutions;
- (h) political purposes;
- (i) promoting the common interests of persons engaged or interested in a particular business, trade or industry; and/or
- (j) any other purpose as approved by the Commissioner for Consumer Protection.

[4.39] Members and officers of an association will not generally be liable for the debts and liabilities of the association. They are, however, required to exercise care and diligence, act in good faith and in the best interests of the association and for a proper purpose, and must not misuse their position or private information for personal benefit. Committee members must also take reasonable steps to ensure that an association does not continue to trade if it cannot pay its debts. People who have been convicted of specific offences in relation to the operation of a company or involving fraud or dishonesty are disqualified from being members of a committee of an incorporated association.

[4.40] The Associations Incorporation Act 2015 creates a regulatory framework that goes far beyond the current Irish registration of clubs system. It bears a greater resemblance to the obligations of company law compliance but tailored to voluntary groups. The lengthy Act explains what an association can do and provides for the development of its rules for members, the operation of general meetings, the election of, and exercise of powers and responsibilities by, a committee, the accountability of an association to its members and the public (including financial reporting), the dissolution of an unincorporated association, and other related matters.

[4.41] Different financial reporting obligations apply depending on the annual income of the club or association: the greater the income, the more onerous the accounting and auditing obligations. The obligations mirror those applicable to associations that are registered with the Australian Charities and Not-for-profits Commission ("ACNC"). Associations report on their finances to their members, rather than to the regulator, although the ACNC may access financial reports on request, for example, when investigating a complaint.

- [4.42] Incorporated associations are required to maintain a register of members and record any changes in membership.¹³ The register must be made available to members for inspection.¹⁴
- [4.43] Associations are required to either adopt model rules provided for by regulation, or update their own rules to ensure compliance with the Associations Incorporation Act 2015.¹⁵ Associations can register using an online portal.
- [4.44] The system is elaborate. It was designed “to encourage accountability and efficiency, while minimising, as far as possible, the administrative burdens on associations.”¹⁶
- [4.45] Novel Australian approaches to ensure that awards are not put beyond the reach of litigants, for example by the use of trusts, are considered in Part 4 below.

(b) Canada

(i) Not-for-profit corporations

- [4.46] In Canada, non-profit unincorporated associations can incorporate as non-profit corporations under the Canada Not-for-profit Corporations Act 2009 (the “2009 Act”). The 2009 Act provides for:
- “the incorporation or continuance of bodies corporate as corporations without share capital, including certain bodies corporate incorporated or continued under various other Acts of Parliament, for the purposes of carrying on legal activities and to impose obligations on certain bodies corporate without share capital incorporated by a special Act of Parliament.”
- [4.47] In effect the legislative regime is similar to the Irish CLG. Not-for-profit corporations had been provided for in Canadian federal law since 1917.¹⁷
- [4.48] A non-profit corporation established under the 2009 Act is a legal entity separate from its members. They can be churches, church associations, schools, charities, medical providers, activity clubs, volunteer service organisations, professional associations, research institutes, museums, or in some cases sports associations.

¹³ Section 53 of the Associations Incorporation Act 2015 of Western Australia.

¹⁴ Section 54 of the Associations Incorporation Act 2015 of Western Australia.

¹⁵ Sections 21-37 of the Associations Incorporation Act 2015 of Western Australia.

¹⁶ Government of Western Australia, Department of Mines, Industry Regulation and Safety, *Associations Incorporation Act 2015 Statutory Review Discussion Paper 2022* (February 2022) at page 4.

¹⁷ Section 7A of the Companies Amendment Act 1917.

They must apply for charitable status to gain tax exemption status. They can enter into contracts, own property and borrow money.

- [4.49] To register under the 2009 Act, an association must file its articles of incorporation with the relevant regulatory authority. The articles must set out:
- (a) the name of the corporation;
 - (b) the province where the registered office is to be situated;
 - (c) the classes or other groups of members that the corporation is authorised to establish and, if there are two or more classes or groups, any voting rights attached to those classes or groups;
 - (d) the number of directors or the minimum and maximum number of directors;
 - (e) any restrictions on the activities that the corporation may carry on;
 - (f) a statement of the purpose of the corporation; and
 - (g) a statement concerning the distribution of property upon liquidation and how such property is to be distributed.

[4.50] Once incorporated, a corporation “has the capacity and, subject to the 2009 Act, the rights, powers and privileges of a natural person”.¹⁸ Members of non-profit corporations are not personally liable for debts of the corporation based on membership alone.

[4.51] As in Australia, the legislation creates onerous obligations. The corporation must maintain a registered office and must prepare and maintain the following: articles and bylaws; minutes of meetings of members and their committees; resolutions of members and their committees; minutes of meetings and resolutions of the board of directors and its committees as well as a debt obligations register, if any debt obligations have been issued. A register of members, directors and officers must also be maintained,¹⁹ which can be accessed by members of the corporation, their representatives and debt obligation holders. The corporation must also prepare and maintain adequate accounting records.

(ii) Automatic attribution of separate legal personality - Québec

[4.52] The Québec Civil Code (the “Code”) treats unincorporated associations based on contract (which may be written or verbal) as separate entities without the requirement to register as non-profit corporations. Article 2186 of the Code sets out that:

¹⁸ Section 16(1) of the Canada Not-for-profit Corporations Act 2009.

¹⁹ Section 21 of the Canada Not-for-profit Corporations Act 2009.

“A contract of association is a contract by which the parties agree to pursue a common goal other than the making of pecuniary profits to be shared among the members of the association.”

- [4.53] The contract can be written or verbal, and the intention to create an association may be inferred from facts indicating the intention to form an association.²⁰ The parties involved in the association must agree to pursue a common non-profit goal.²¹
- [4.54] The association may hold property, contract with third parties and may sue and be sued in its own name.²² The directors are bound to act only within the confines of the powers conferred on them by the contract of association, or by law, or by those arising from their mandate.²³
- [4.55] Legal personality arising from the Code does not insulate members involved in the administration of the association from personal liability. This is a key distinction between the statutory incorporation also available under the 2009 Act and the recognition afforded by the Code. Article 2274 of the Code provides:

“Where the property of the association is insufficient, the directors and any member who has the actual administration of the affairs of the association are solidarily or jointly liable for the obligations of the association resulting from decisions to which they gave their approval during their administration, whether or not the obligations have been contracted for the service or operation of an enterprise of the association. However, the property of each of these persons is applied to the payment of the creditors of the association only after their own creditors have been paid.”

- [4.56] Article 2275 provides protection for ordinary members: members who have not been involved in the running of the association are liable only to the extent that they have promised a contribution and to the extent of the membership fees that are due.

²⁰ Article 2267 of the Québec Civil Code.

²¹ Article 2186 of the Québec Civil Code.

²² Article 2271 of the Québec Civil Code.

²³ Article 2270 of the Québec Civil Code.

(c) New Zealand

- [4.57] In New Zealand, unincorporated associations are not automatically recognised as legal entities. This was illustrated in the case of *Brady v The Presbyterian Church of Aotearoa New Zealand*.²⁴
- [4.58] Non-profit associations may incorporate as incorporated societies under the Incorporated Societies Act (New Zealand) 1908 (the “1908 Act”). The 1908 Act provides that any society that has a minimum of 15 members who are associated for any lawful purpose (but not for monetary gain) may apply for registration.²⁵ The rules must provide for the matters specified in the 1908 Act. The incorporation procedure is straightforward and after registration an incorporated society is considered a separate legal entity from its members. To protect the right of freedom of association, unincorporated associations are not required to register. However, those that do not incorporate are not afforded the legal protections granted under the 1908 Act.
- [4.59] Following recommendations made by the New Zealand Law Reform Commission,²⁶ the 1908 Act is set to be repealed. When it is fully commenced, the Incorporated Societies (New Zealand) Act 2022 (the “2022 Act”) will replace the 1908 Act. It is intended to provide more robust governance by mirroring company law provisions in New Zealand legislation.
- [4.60] The 2022 Act will reduce the required number of members from 15 to 10.²⁷ It will require unincorporated associations to develop and record dispute resolution processes and complaints procedures²⁸ and to create a committee as their formal governing body.²⁹ Unlike the 1908 Act, the 2022 Act clearly defines the concept of an “officer” and sets out officers’ duties.
- [4.61] Registration as an incorporated society places societies on a publicly available register of incorporated societies. The information available includes the incorporation number, status and date of incorporation, the registered address, and details relating to a society’s officers. This is a useful resource for third parties and potential litigants to access information essential to take or settle a claim against an incorporated society.

²⁴ [2012] NZHC 3526.

²⁵ Section 4(1) of the Incorporated Societies Act (New Zealand) 1908.

²⁶ New Zealand Law Reform Commission, *A New Act for Incorporated Societies* (NZLC R129) at page 4.

²⁷ Section 8 of the Incorporated Societies Act 2022.

²⁸ Sections 26(1)(j) and 38-44 of the Incorporated Societies Act 2022.

²⁹ Section 26(1)(f) of the Incorporated Societies Act 2022.

- [4.62] According to the 2022 Act, every association must submit annual financial returns to the relevant regulatory authority. Different financial reporting requirements will apply depending on the size of the association.³⁰ An association must have its financial records audited if it is considered a “large society”, in other words if its total assets for the previous two years exceed 66 million (NZD) and/or if its total revenue exceeds 33 million (NZD).³¹
- [4.63] Under the 1908 Act, on dissolution, the assets of the association are disposed of in the manner provided for by the rules of the incorporated society.³² If such assets cannot be disposed of in accordance with the rules, the Registrar will direct how the assets are to be disposed.³³ The 1908 Act did not expressly prohibit the assets of the association from being distributed among its members on dissolution. However, under the 2022 Act, the association’s Constitution must nominate one or more non-profit entities that will inherit the assets of the association if it is wound up/liquidated. Individuals are prohibited from inheriting the surplus assets of an association that has been wound up. This follows the recommendation of the New Zealand Law Reform Commission.³⁴
- [4.64] Membership of the incorporated society does not, by itself, impose personal liability on the members for any contract, debt or other obligation entered into or incurred by the association.³⁵ Liability of members is limited to any membership fee that remains unpaid and/or any liability as a member that is expressly provided for in the society’s constitution.

(d) United States

(i) Uniform Unincorporated Non-profit Association Act

- [4.65] In the United States it is possible to incorporate as a “nonprofit corporation.”³⁶ As in Ireland, there are associations that by chance or by choice remain outside that structure as unincorporated bodies.
- [4.66] In 1992 the National Conference of Commissioners on Uniform State Laws (the “NCCUSL”) prepared a model law titled the “Uniform Unincorporated Non-profit

³⁰ Sections 102-108 of the Incorporated Societies Act 2022.

³¹ Section 105 of the Incorporated Societies Act 2022. See also section 45 of the Financial Reporting Act 2013, and the Financial Reporting (Inflation Adjustments) Regulations 2021.

³² Section 27 of the Incorporated Societies Act 1908.

³³ Section 28 of the Incorporated Societies Act 1908.

³⁴ New Zealand Law Reform Commission, *A New Act for Incorporated Societies* (NZLC R129) at page 10.

³⁵ Section 78 of the Incorporated Societies Act 2022.

³⁶ The American Bar Association’s Model Nonprofit Corporation Act has been adopted, with variations, in most states.

Association Act" (the "UUNAA").³⁷ The model law has been enacted in a number of States including Alabama, Arkansas, Colorado, Delaware, the District of Columbia, Hawaii, Idaho, Louisiana, North Carolina, Texas, West Virginia, Wisconsin and Wyoming. An unincorporated non-profit association is described in the prefatory (explanatory) note as:

"a nonprofit organization that is not a charitable trust or a nonprofit corporation or any other type of association organized under statutory law that is authorized to engage in nonprofit activities. A nonprofit association is, thus, a default organization."³⁸

[4.67] The UUNAA is intended to provide a basic legal framework for small, informal organisations because:

"[t]hese informal organizations are likely to have no legal advice and so fail to consider legal and organizational questions, including whether to incorporate. The act provides better answers than the common law for a limited number of legal problems."³⁹

[4.68] The UUNAA, as amended in 1996, deals with a limited set of circumstances, namely: tortious and contractual liability of members, the owning and conveying of property, suits by and against a non-profit association, as well as practical matters such as service of documents on an unincorporated association.

[4.69] The UUNAA was amended again in 2008 to include provisions relating to governance, member rights, transfers, resignations and duties, mergers, and winding up.⁴⁰ Under UUNAA 2008, unincorporated associations have the same powers as an individual to do all things necessary or convenient to carry on their purposes.

[4.70] The UUNAA 2008 does not specify that an unincorporated association must have a written constitutive document. It provides that the "governing principles" of an unincorporated association are "the agreements, whether oral, in a record, or implied from its established practices, or in any combination thereof, which

³⁷ National Conference of Commissioners on Uniform State Laws, *Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2011)* (19 August 2015) <<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=34379091-21b1-10d0-83e6-8eefd39c2324&forceDialog=0>> accessed 15 November 2022. UUNAA was significantly amended in 1996 and 2008.

³⁸ National Conference of Commissioners on Uniform State Laws, *Uniform Unincorporated Nonprofit Associations Act (2008)* (19 August 2015) at page 1.

³⁹ National Conference of Commissioners on Uniform State Laws, *Uniform Unincorporated Nonprofit Associations Act (2008)* (19 August 2015) at page 2.

⁴⁰ The revised Model Nonprofit Corporation Act has been adopted by Arkansas, the District of Columbia, Kentucky, Pennsylvania, Iowa and Nevada.

govern the purpose or operation of an unincorporated association and the rights and obligations of its members and managers".⁴¹ The governing principles may include provisions arising from a course of conduct referred to in UUNAA as "established practices", namely "the practices used by an unincorporated nonprofit association without material change during the most recent five years of its existence, or if it has existed for less than five years, during its entire existence".⁴² An unincorporated association may also acquire, hold, or transfer property in its name.⁴³

(ii) California

- [4.71] California has comprehensively legislated for unincorporated associations in its Corporations Code (the "Code"). Title 3 (sections 18000 to 24001.5) of the Code deals with unincorporated associations. Section 18035(a) of the Code defines an "unincorporated association" as "an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organised for profit or not". An unincorporated association may, in its name, acquire, hold, manage or transfer an interest in property.⁴⁴ Property acquired by or for an unincorporated association is property of the unincorporated association and not the property of members.⁴⁵
- [4.72] Although an unincorporated association has the power to acquire, hold, manage or transfer an interest in property and the power to decide how it does so, this power is restricted when an unincorporated association commits an unauthorised act, there are proceedings to dissolve the unincorporated association, or when there are proceedings against a director, officer or agent of the unincorporated association for violation of that person's authority.⁴⁶
- [4.73] This provision strikes a balance between providing unincorporated associations with property rights and ensuring the property of an unincorporated association cannot be put beyond the reach of a third person in circumstances where there has been an unauthorised act, the unincorporated association has or is expected to be dissolved, or where proceedings against a director, officer or agent of an unincorporated association have begun or are anticipated. Ensuring the availability of the property of unincorporated associations in these circumstances

⁴¹ Section 2(2) of the Uniform Unincorporated Nonprofit Associations Act 2008 (last amended 2011).

⁴² Section 2(1) of the Uniform Unincorporated Nonprofit Associations Act 2008 (last amended 2011).

⁴³ Section 6(a) of the Uniform Unincorporated Nonprofit Associations Act 2008 (last amended 2011).

⁴⁴ Section 18105 of the California Corporation Code, Title 3: Unincorporated Associations.

⁴⁵ Section 18110 of the California Corporation Code, Title 3: Unincorporated Associations.

⁴⁶ Section 18125 of the California Corporation Code, Title 3: Unincorporated Associations.

is important because such property could be used to settle or compensate a third person in circumstances where the third person is unable to identify another person to sue, or where no other property is available or discoverable.

- [4.74] Section 18200 of the Code allows an unincorporated association to file a form with the Secretary of State that contains the location of its principal office in the State of California and the name and address of the person residing in the State who has capacity to act as the agent of the unincorporated association for the service of process.
- [4.75] Under section 18205 of the Code, the Secretary of State indexes this information which can be accessed upon request. If such provisions were contained in Irish legislation, the difficulties faced by persons seeking to identify the location of an unincorporated association and the representative of an unincorporated association who is capable of being served with legal documents would be considerably reduced. It would also save time and costs in legal proceedings where the location and identity of a party is in dispute.
- [4.76] Section 18260 of the Code states that a money judgment against an unincorporated association, whether organised for profit or not, can be enforced against the property of the unincorporated association. This section clarifies that a money judgment against an unincorporated association is not enforced against the property of members.
- [4.77] Section 18250 of the Code deals with liability and states that except as provided by law, an unincorporated association is liable for its act or omission and for the act or omission of its director, officer, agent, or employee, acting within the scope of the office, agency, or employment, to the same extent as if the association were a natural person.
- [4.78] Section 18310 of the Code deals with the termination or suspension of membership of an unincorporated association and provides that termination of membership does not relieve a person from an obligation incurred as a member before termination or affect the right of an unincorporated association to enforce an obligation against a person incurred as a member before their termination. If such a provision was contained in Irish legislation, the difficulty faced by persons seeking to prove the liability of a previous member of an unincorporated association would be reduced. It would also save time and costs in legal proceedings where the liability of a previous member is in dispute.
- [4.79] The Code also contains specific provisions dealing with non-profit associations. For the avoidance of doubt, section 18605 of the Code provides that a member, director, or agent of a non-profit association is not liable for a debt, obligation or liability of the association solely by reason of being a member, director, officer or agent. Section 18610 of the Code further clarifies that a member of a non-profit association is not liable for a contractual obligation of the association unless the member:

- (a) expressly assumes personal responsibility for the obligation in a signed written statement;
- (b) expressly authorises in writing the specific contract;
- (c) receives a benefit under the contract;
- (d) executes the contract without disclosing that they are acting on behalf of the association; and
- (e) executes the contract without authority to execute the contract.

[4.80] The inclusion of such provisions in Irish legislation would make clear that the simple fact that someone is a member of an unincorporated association does not mean that they are liable for a debt, obligation or liability of the unincorporated association. It would also make clear that a member is not generally liable for a contractual obligation of an association. It would also save time and costs in legal proceedings where liability and contractual issues are in dispute.

(e) England and Wales

[4.81] England and Wales has not provided for incorporation by registration. Instead, the courts have recognised that an unincorporated association should be treated as a *de facto* corporation and the legislative focus has been on enforceability. In *The Catholic Child Welfare Society and others v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others*⁴⁷ ("CCWS"), the United Kingdom Supreme Court adopted a pragmatic view that an unincorporated religious order should be treated as if it was a corporate body, capable of suing and being sued.

[4.82] In the CCWS case, Lord Phillips held that, despite the fact that the religious order was an unincorporated association, it should be treated as if it were an incorporated body for the purposes of civil proceedings and therefore the monetary judgment could be obtained from the religious order itself. Lord Phillips' reasoning was essentially that if the organisation acts as a corporate body, it should be treated as a corporate body.

[4.83] Therefore, substantial, well-structured unincorporated associations that display all the characteristics of a corporate entity may be treated as such for the purposes of civil claims. The judgment, when combined with legislative provisions, demonstrates the *de facto* recognition (in other words the factual recognition) of unincorporated associations for the purposes of attributing liability in England and Wales.

⁴⁷ [2012] UKSC 56, [2013] 1 All ER 670, [2013] 2 AC 1.

- [4.84] Certain offences in the legislation of England and Wales are capable of being committed by unincorporated associations, and there is provision in such legislation to treat the association as a distinct entity from its members. There is no registration requirement. The Political Parties, Elections and Referendums Act 2000 is an example. The Act clearly sets out that proceedings for an offence under the Act, alleged to have been committed by an unincorporated association, shall be brought against the association in its own name (and not in that of any of its members).
- [4.85] The Health and Social Care Act 2008 of England and Wales provides that offences alleged to have been committed by an unincorporated association are to be brought in the name of the association and not in that of any of the members.⁴⁸ Rules of the courts of England and Wales relating to the service of documents are to be treated as if unincorporated associations are bodies corporate and fines are paid out of the funds of the unincorporated association. If a specific officer or general member of the unincorporated association is found to have breached the Act, that member will be held personally responsible, as well as the unincorporated association.
- [4.86] This is a useful solution to determining the issue of where liability ought to fall when an unincorporated association is guilty of an offence and would solve many of the difficulties discussed in the previous chapters.
- [4.87] These are useful examples of how legislation can bring clarity to the method in which unincorporated associations are, in practical terms, to be made liable for statutory offences. These provisions provide protection to ordinary members of unincorporated associations who may otherwise be exposed to liability for offences over which they had no knowledge or control. As with standard corporate liability provisions in legislation, they allow officers or members of the governing body to be held liable where an offence is committed with their knowledge or attributable to their neglect.
- [4.88] Irish legislation could easily emulate provisions such as these to provide much needed clarity to this area of law.

(f) Northern Ireland

- [4.89] Prior to *CCWS*, the law in Northern Ireland did not recognise unincorporated associations as separate legal entities. There is still, however, a lack of clarity as to the position in respect of those unincorporated associations that are not as structured as the defendant in *CCWS*, the De La Salle Order. The general position, in the absence of legislation, is that unincorporated associations in Northern

⁴⁸ Section 92 of the Health and Social Care Act 2008.

Ireland do not have separate legal personality, cannot sue or be sued, and cannot hold property in the associations' name.

- [4.90] The Northern Irish case of *Kinner v McKeown and others as Trustees of West Belfast Pigeon Club*⁴⁹ was decided before *CCWS*, and it is clear from this judgment that the common law rule on litigating against a club of which you are a member has been diluted in that jurisdiction. It was held that existence of an employment relationship meant that the plaintiff's membership did not provide the other members with immunity.
- [4.91] Under section 10 of the Charities Act 1964, the trustees of charitable unincorporated associations in Northern Ireland can seek a certificate granting them body corporate status which allows them to hold property and assets in the association's name. Similar to the situation in England and Wales, certain offences are capable of being committed by unincorporated associations, and there is provision in the 1964 Act to treat the association as a distinct entity from its membership.

(g) Scotland

- [4.92] The position in Scotland is strikingly similar to the position in Ireland: the law is based on the common law and is under-developed by statute. This prompted a detailed examination of the law relating to unincorporated associations by the Scottish Law Commission, which noted that in Scotland:

"... the current law does not recognise the existence of such organisations as separate legal entities. In the case of associations of sufficient size [who] wish to enter into contracts, own property, engage employees and so forth, this absence of legal personality has given rise to a variety of problems, highlighted in the substantial body of case law over many years ... Much statutory regulation proceeds upon the (strictly false) assumption that an unincorporated association has some form of existence in law. ... The non-existence of such associations as a matter of law is often quietly ignored."⁵⁰

- [4.93] The Scottish Law Commission went on to comment that "[b]y failing to make any statutory provision according some form of legal status to not-for-profit associations, the UK jurisdictions have fallen conspicuously behind other major

⁴⁹ Northern Ireland Court of Appeal (Civil Division) (5 August 1998); [1998] 7 BNIL 91.

⁵⁰ Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217) at pages 2 and 3.

legal systems.”⁵¹ Following a consultative process, the Scottish Law Commission recommended a system of automatic attribution of legal personality for unincorporated associations that satisfy certain statutory conditions: that they have at least two members, that they have adopted a constitutive document containing specified minimum provisions and that they are not profit-making in their objective. It was proposed that the “Scottish Association with Legal Personality (SALP)” should protect members and office bearers from personal and contractual liability. At the time of writing (December 2022), the Scottish Law Commission’s proposals have not been implemented in Scottish law.

(h) France

[4.94] In France, there are three legislative options for non-profit organisations and charities, depending on the purpose and activities of the organisation. The 1901 Act, the 1905 Act and legislation that governs general private sector business activities in France.

(i) *Non-profit and charitable associations*

[4.95] Associations of persons may be formed freely without prior authorisation or declaration, but they can only enjoy legal capacity if they register under the Act of 1901.⁵² To gain legal personality, an association must apply to the relevant authority for registration, providing the title and object of the association, its address and the names, professions, nationalities and domiciles of those who, in any capacity, are responsible for its administration.⁵³

[4.96] To register under the 1901 Act, an association must be non-profit in nature, the business activities of the association cannot compete with businesses in the private sector and the creation and governance of the association depend on its statutes. An association established under the 1901 Act is considered a legal person and can be sued in the association’s name.

[4.97] The President of the association generally represents it in court proceedings. An association may be liable to fines, may have its property confiscated, be banned from exercising a social or professional activity, or be dissolved. The association is liable for its members’ actions, but members’ liability may be incurred when a member acts outside of, or contrary to their duties. Therefore, associations can take legal action and summon third parties.

⁵¹ Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217) at page 3.

⁵² Loi du 1er juillet 1901 relative au contrat d’association (Law of 1 July 1901 relating to contract of association (France)).

⁵³ Loi du 1er juillet 1901 relative au contrat d’association (Law of 1 July 1901 relating to contract of association (France)), article 5.

[4.98] On dissolution, the property of the association is distributed in accordance with the provisions of its articles, or failing that, by agreement of the members in a general meeting. An association fulfilling certain criteria can also apply for discretionary recognition as an "organisation of public utility" which gives the organisation greater capacity to receive gifts and inheritances.

(ii) Religious associations

[4.99] In France, if an association's sole purpose is religious, the association may be established under the 1905 Act.⁵⁴ An association which has dual, or multiple functions, such as religious and cultural, may not register under the 1905 Act; rather it must seek registration under the 1901 Act.

[4.100] Registration under the 1905 Act requires an association to:

- (a) hold a general assembly meeting to discuss the statutes of the organisation (written minutes must be kept);
- (b) draft the statutes; and
- (c) make a declaration to the relevant authority including the title of the organisation, its object (which can only be religious), the headquarters and the identity of the members, accompanied by a letter.

[4.101] An association established under the 1905 Act is considered a legal person and can be sued in its own name. Because France is a secular jurisdiction, associations established under the 1905 Act cannot receive grants or state funding but can receive gifts and bequests. Associations established under the 1901 Act cannot receive gifts and bequests unless they are recognised as an "organisation of public utility".

(i) Switzerland

[4.102] As noted by the Scottish Law Commission in its Discussion Paper on Unincorporated Associations, another way to reform the law on unincorporated associations could be to provide that an unincorporated association acquires separate legal personality by the expression of an intention to do so.⁵⁵ An example of this approach is provided in the Swiss Civil Code,⁵⁶ which allows an

⁵⁴ Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat. (Law of 9 December 1905 concerning the separation of Church and State (France)).

⁵⁵ Scottish Law Commission *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140) at page 27.

⁵⁶ Articles 52 and 60 of the Swiss Civil Code.

association to acquire legal personality by expressing its intention to do so in its articles of association. Article 52 of the Swiss Civil Code provides that commercial corporate bodies acquire legal personality by being entered on the commercial register. However, bodies that do not have a commercial purpose do not require registration. Legal entities “have all the rights and duties other than those which presuppose intrinsically human attributes, such as sex, age or kinship.”⁵⁷ Article 60 of the Swiss Civil Code provides:

“1 Associations with a political, religious, scientific, cultural, charitable, social or other non-commercial purpose acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association.

2 The articles of association must be done in writing and indicate the objects of the association, its resources and its organisation.”

[4.103] This option (optional acquisition of legal personality by expression of intention to do so) is minimally expensive and limits administrative costs, but the absence of a registration requirement limits the potential for transparency and oversight.

(j) Germany

[4.104] The German Civil Code (“*Bürgerliches Gesetzbuch*”) provides associations with the option to acquire legal personality by registration in the Register of Associations with the relevant authority (*Vereinsregister*).⁵⁸ The German Civil Code distinguishes between a non-profit incorporated association (*Idealverein*) and an economic association (*wirtschaftlicher Verein*) with a business purpose. The non-profit incorporated association is the main form for civic activities in Germany and there are several thousand in Germany.⁵⁹ Each association must have a board,⁶⁰ but otherwise has considerable freedom to regulate its own management through its articles of association.

[4.105] Section 31 of the German Civil Code provides for liability of the association to third parties:

“The association is liable for any damage which the board, a member of the board, or other duly appointed representative may,

⁵⁷ Article 53 of the Swiss Civil Code.

⁵⁸ Section 21 of the German Civil Code.

⁵⁹ Practical Law, Richter and Gollan, *Charitable organisations in Germany: Overview* (Law stated as at 1 March 2020) available at <[https://uk.practicallaw.thomsonreuters.com/3-632-5987?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/3-632-5987?transitionType=Default&contextData=(sc.Default))> last accessed 15 November 2022.

⁶⁰ Section 26(1) of the German Civil Code.

in carrying out [their] duties, cause a third party, if the act obliges the making of compensation."

[4.106] Section 31a restricts the liability of members of executive bodies and special representatives in relation to the association and to third parties:

"(1) If members of executive bodies or special representatives act free of charge, or if they receive remuneration for their activity which does not exceed 720 euros per year, they are liable towards the association for damage caused in performing their duties only in case of intent or gross negligence. Sentence 1 also applies to liability towards the members of the association. If there is a dispute as to whether a member of an executive body or a special representative has caused damage with intent or gross negligence, the burden of proof is incumbent on the association or on the member of the association.

(2) If members of executive bodies or special representatives are obliged under subsection (1) sentence 1 to provide to another party compensation for damage which they caused in performing their duties, they may demand from the association to be released from the obligation. Sentence 1 does not apply if the damage was caused with intent or gross negligence."

[4.107] Section 31b limits the liability of members of the association:

"(1) If members of the association act for the association free of charge, or if they receive remuneration for their activity which does not exceed 720 euros per year, they are liable to provide to the association compensation for damage caused in performing the duties of the association, in accordance with the articles of association, that have been assigned to them, only in case of intent or gross negligence. Section 31a (1) sentence 3 applies with the necessary modifications.

(2) If members of the association are obliged under subsection (1) sentence 1 to provide to another party compensation for damage which they caused in performing the duties of the association, in accordance with the articles of association, that have been assigned to them, they may require the association to release them from the obligation. Sentence 1 does not apply if the members of the association have caused the damage with intent or gross negligence"

[4.108] On dissolution, the property of the association is distributed in accordance with the provisions of its articles, failing that it is divided equally among the members

at the time of dissolution.⁶¹ Sections 55 to 79 of the German Civil Code contains provisions that apply specifically to registered non-profit-making associations. These provisions specify certain minimum requirements for the articles of association of a registered non-profit association, and permit registration only if the association has at least seven members.⁶² Upon registration, the designation "registered association" (*eingetragener Verein*) is added to the name of the association.⁶³ Legal personality is withdrawn if the number of members falls below three.⁶⁴

[4.109] The German Civil Code deals briefly with associations that have not acquired legal personality by registration as follows:

"Associations which have no legal personality are subject to the provisions relating to partnership. If a member of such an association, acting in the name of the association, enters a transaction with a third party, the member so acting is personally liable; if several members so act, they are liable as joint debtors."⁶⁵

(k) Italy

[4.110] The Italian Civil Code (*Codice Civile*) provides for associations to be recognised by a competent public authority and registered as a legal entity in the legal persons' register kept by the public authority, the local representative of the national government (*prefettura*) or the regional government.⁶⁶ Upon registration, the recognised association (*associazione riconosciuta*) is considered a separate legal entity with assets separate from its members. To establish a recognised association, a formal procedure must be followed. The incorporation deed must be signed in the presence of a notary or public official, the association must be governed by a set of rules and must be registered with the tax authority.⁶⁷

[4.111] A recognised association can, for example, use special benefits provided by law, such as the ability to call up contributions from public institutions.⁶⁸ The

⁶¹ Section 45 of the German Civil Code.

⁶² Section 56 of the German Civil Code.

⁶³ Section 65 of the German Civil Code.

⁶⁴ Section 73 of the German Civil Code.

⁶⁵ Section 54 of the German Civil Code.

⁶⁶ Article 12 of the Italian Civil Code.

⁶⁷ Practical Law, Facchini, Fikai and Maimone, *Charitable organisations in Italy: Overview* (Law stated as at 1 November 2018) available at <[https://uk.practicallaw.thomsonreuters.com/7-633-2622?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/7-633-2622?transitionType=Default&contextData=(sc.Default))> accessed 15 November 2022.

⁶⁸ *Ibid.*

organisational structure of associations can vary, depending on the scope, size and kind of activity.

[4.112] Italian law also makes provision for non-recognised associations (*associazione non riconosciuta*). These are associations which are not recognised by the public authority. As such, these types of associations do not have separate legal personality or limited liability and assets cannot be held in the association's name. However, members are only personally liable if the association's assets cannot satisfy all its liabilities.⁶⁹

(l) South Africa

[4.113] An example of automatic attribution of legal personality can be found in South Africa, where there is a type of legal entity known as a *universitas*. A *universitas* is incorporated when a contract is concluded between its members.⁷⁰ A *universitas* will gain legal personality if its members have a serious intention to associate and agree on the essential characteristics and objectives of the *universitas*.⁷¹ The *universitas* is recognised as a separate legal entity from the members forming it and it has the capacity to obtain its own rights and obligations.⁷² The main characteristics of a *universitas* are that it is capable of owning property in its own name and is capable of continuing as an entity despite changes to its membership.⁷³ When determining whether an unincorporated association of persons is a *universitas*, the nature, constitution, objectives and activities of the association must be considered.⁷⁴

[4.114] To be a *universitas*, an association must:

- (a) continue as an entity regardless of any changes to its membership;
- (b) hold property to which no member has rights by reason of their membership; and

⁶⁹ *Ibid.*

⁷⁰ LexisNexis, Small, Understanding a voluntary association of persons (12 August 2020) <https://www.lexisnexis.co.za/lexis-digest/legal/understanding-a-voluntary-association-of-persons#_ftn2> accessed 15 November 2022.

⁷¹ *Collen v Rietfontein Engineering Works* 1948 1 All SA 414 (A).

⁷² *Webb and Co Ltd v Northern Rifles* 1908 TS 462.

⁷³ *Tilbrook v Higgins* 1932 WLD 147 at 153.

⁷⁴ LexisNexis, Small, Understanding a voluntary association of persons (12 August 2020) <https://www.lexisnexis.co.za/lexis-digest/legal/understanding-a-voluntary-association-of-persons#_ftn2> accessed 15 November 2022.

(c) not have as its objects the acquisition of profits for its individual members.⁷⁵

[4.115] No registration or other state authorisation is necessary for an association to become a universitas, and separate legal personality is automatically conferred. As a universitas, an association has separate legal personality from its members and may enter into contracts and sue or be sued in its own name in contract law or in tort law.⁷⁶

(m) Concluding summary

[4.116] Australia, Canada, New Zealand, France, Germany and Italy have legislated to permit unincorporated associations to register as non-profit incorporated associations. These jurisdictions require unincorporated associations to register to gain separate legal personality, the ability to sue and be sued and to hold property. The rights and obligations of incorporated associations vary from jurisdiction to jurisdiction, as do the registration requirements, requirements to file annual financial returns and the processes for distributing surplus assets when an association is wound up.

[4.117] In some states in the United States, in South Africa and in the Canadian province of Québec, an automatic attribution model is adopted: an unincorporated association that fulfils specified criteria can hold property and sue and be sued in its own name without any requirement to register in order to acquire these legal entitlements. Under an automatic attribution of legal personality regime, there is neither a requirement for an association to register with a regulatory authority nor a requirement for a jurisdiction to maintain a register of unincorporated associations.

[4.118] The United Kingdom has not made overarching legislative provision for the regulation of unincorporated associations, such as by providing a means to register or to automatically attribute separate legal personality. Instead, both the courts and legislators in the jurisdictions comprising the United Kingdom have skirted around the common law rule that states that unincorporated associations do not have separate legal personality from their members by treating them as if they do, in fact, have separate legal personality for certain purposes.

⁷⁵ Bamford, *The Law of Partnership and Voluntary Association in South Africa* 3rd ed (1982) at pages 126-131; *Interim Ward S19 Council v Premier, Western Cape Province & Others* 1998 (3) SA 1056 (C); Scottish Law Commission, *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140) at page 29.

⁷⁶ Scottish Law Commission, *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140) at page 30.

3. Law reform approaches

- [4.119] It is clear from the comparative analysis outlined above that there are a number of potential reform approaches, other than the incorporation of an unincorporated association as a CLG, that could address the current difficulties that exist in the law. These approaches can be broadly categorised as follows:
- Model 1:** Legislate to create a “non-profit registered association”, by which separate legal personality could be gained by registration;
 - Model 2:** Confer separate legal personality on unincorporated associations that fulfil specified criteria; and
 - Model 3:** Do not confer separate legal personality, but specify how unincorporated associations are to be held liable in contract, tort and for offences, with a series of focused reforms that do not alter the legal status of unincorporated entities.
- [4.120] Some of the focused reforms proposed under Model 3 would be required to give effect to the proposals in Models 1 and 2. The first consideration in respect of Models 1, 2 and 3 is how any reform should apply: by opt-in registration for legal personality, by automatic attribution of legal personality or by application to all unincorporated associations as if unincorporated associations had separate legal personality from their members. Beyond that, many of the detailed reform proposals (that could apply under Models 1, 2 and 3) can be found in Model 3. One key issue for consultation among the proposals in Model 3 is the necessity for a legislative provision to access association property that would otherwise be unavailable to meet liabilities.
- [4.121] The law in this area is so unwieldy that reform under any of the three models would undoubtedly represent an improvement on the present position. However, each of the reforms has a different potential impact on the position of plaintiffs. Models 1 and 2 would make it easier to sue clubs, societies and other unincorporated associations. Models 1 and 2 would also make it easier to recover or enforce judgments in the event that a plaintiff is successful. However, the objectives that the Commission has identified pull in different ways: making assets more readily available to claimants arguably favours the interests of the individual over the broader association or community interest. As against that it may be argued that safer practices and enforceable laws are in everyone’s interest. Equally, amending the law whereby all members may be jointly and severally liable for actions of the association would be an improvement on the current position.
- [4.122] Not all of the problems that arise can be cured with legal personality: if a fine (or an award of compensation) is imposed on a club, the club is liable to pay the fine (or compensation). That, however, does not solve the issue that arises if the club has insufficient assets. Under Models 1 and 2 the separate legal personality

proposed, personality without the protection of limited liability, the assets of the club or association would be the first port of call. However, if residual liability was incapable of being met by the funds of the unincorporated association, the fact of separate personality would not remove the potential residual liability of members. The Commission reiterates that the CLG is an appropriate means to achieve the protection of limited liability.

(a) The distinction between legal personality and limited liability

[4.123] To ground the discussion on reform it is worth setting out some key definitions:

Legal personality means artificial legal personhood, by which a body is given a legal existence and identity separate and distinct from those who comprise or operate it.⁷⁷

Legal capacity means that which can be done by a body that has legal personality, for example, the capacity to contract, to acquire and dispose of immovable and movable property, and to institute and respond to legal proceedings.

Limited liability means the protection afforded to members of certain types of companies from the debts of the company itself. Because a company is granted separate legal personality, unless an exception applies, the rights of the company's creditors are confined to the assets of the limited liability company and usually there is no recourse against the personal assets of the company's members.⁷⁸ The effect is that there is a cap on the possible losses and the assets of the company's members are protected from the claims of company creditors.⁷⁹

[4.124] It is important to remember that legal personality and limited liability are not the same thing, although they frequently go together. A company registered under the Companies Act 2014 is an artificial legal entity separate and distinct from its members. This is a central principle of company law, and it has a number of important consequences. A key consequence is that where the liability of the members is limited, they cannot, save in exceptional circumstances, be required to pay the company's debts. However, there are also unlimited companies which, although relatively rare, can be advantageous in certain circumstances such as the level of disclosure required. They do have legal personality and thus the first

⁷⁷ In Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016) at page 210, the separate legal personality of a body corporate is described as "... more than the aggregation of individual units; it constitutes a juristic or legal person with a legal identity separate and distinct from that of its members".

⁷⁸ Davies, *Introduction to Company Law* (OUP 2002) at pages 10-11. See also Courtney, *The Law of Companies* 4th ed (Bloomsbury 2016).

⁷⁹ Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* 3rd ed (OUP 2017) at page 9.

recourse for any liability is the assets of the company but if they prove insufficient there can be recourse to the shareholders. Because of the legal personality it is the shareholders for the time being who are liable and not those (if different) who held shares at the time the liability arose. There are other types of body corporate that have an existence distinct from the individual persons who form them, for example a local authority, a body established by charter or by statute. The Law Reform Commission is one.⁸⁰ Local authorities are designated body corporate status by section 11(7) of the Local Government Act 2001, which provides that they have “perpetual succession and power to sue and be sued in its corporate name and to acquire, hold, manage, maintain and dispose of land or any interest in land”.

- [4.125] In considering Models 1 and 2, under which legal personality might be acquired by registration or automatically, it is important to emphasise that separate legal personality does not equate with limited liability for members. The principle that a company is a separate legal entity, distinct from its owners and having a corporate personality of its own was first established in the foundational case of *Salomon v Salomon & Co. Ltd*⁸¹ and company law has been evolving since. The Commission considers that limited liability is properly confined to entities governed by the elaborate company law regime. The protection of limited liability status is highly regulated by the CRO and the Corporate Enforcement Authority, and rightly so. It is undesirable that there should be a means of obtaining the protection of limited liability without the compliance, oversight and enforcement mechanisms of company law.
- [4.126] As explained at the beginning of this chapter, there is an existing company law solution for many of the difficulties referred to: the CLG. With a CLG, the organisation has an identity separate from its members and members are protected from liability. CLGs can litigate and be litigated against and can buy and sell property in their own names. Company law brings with it oversight and onerous obligations. A CLG is required to prepare and file audited accounts every year with the CRO, for example.
- [4.127] For a variety of reasons, many voluntary associations choose not to incorporate in that way. Therefore, what is proposed here are alternatives to the CLG, but they come with the substantial disadvantage that they cannot be a shortcut to limited liability in a parallel and diluted “company-law-light” regime. Rather what is envisaged is a version of body corporate status, whether by registration (as proposed in Model 1) or by a process of automatic recognition (as proposed in Model 2).

⁸⁰ Section 3(6) of the Law Reform Commission Act 1975.

⁸¹ [1897] AC 22.

(i) Bodies Corporate

[4.128] A body corporate is an entity that is permitted by law to have a separate legal identity or personality from the members comprising it. Companies established under the Companies Acts come within the definition (and they can be with or without limited liability, including companies limited by share capital or limited by guarantee). Beyond the company law regime, certain statutes grant certain bodies corporate the capacity to sue and be sued, to hold and dispose of land and have the ability to employ staff. A member of a body corporate has the right to take an action against the body corporate and individual members are often granted statutory protection against claims.

[4.129] Examples of statutes that create body corporate status are listed in Chapter 1. Taking the boards of management of schools as an example, section 14(1) of the Education Act 1998 states that:

“A board established in accordance with subsection (1) shall fulfil in respect of the school the functions assigned to that school by this Act, and, except in the case of a school established or maintained by a vocational education committee, each board shall be a body corporate with perpetual succession and power to sue and may be sued in its corporate name.”

[4.130] Granting body corporate status to boards of management of schools ensures that boards do not encounter legal issues or obstacles when attempting to acquire or dispose of land, to enter contracts with third parties and to sue and be sued, without the concern, and indeed the deterrent, that personal legal issues might arise from their board membership. The same legal division could be offered to members of unincorporated associations.

[4.131] Section 14(7) of the Education Act 1998 provides:

“Except as provided by this Act, no action shall lie against a member of a board in respect of anything done by that member in good faith and in pursuance of this Act or any regulations made by the Minister under this Act.”

[4.132] Protection is afforded once the Act is complied with. The granting of body corporate status to an unincorporated association by, for example, the enactment of a provision similar to section 14 of the Education Act 1998 would afford committee members some measure of legal protection for actions taken as committee members of the unincorporated association.

[4.133] The models for reform set out in Models 1 and 2 below should be considered as a means of achieving a type of body corporate status, and should not be considered as means of providing full limited liability.

(b) Model 1: Legislate to create a “non-profit registered association”, by which separate legal personality could be gained by registration

- [4.134] Under such a reform, associations that meet specified legislative criteria could register with a regulatory authority, comparable to the Friendly Societies Register maintained by the CRO. This is the approach used by some legal systems in continental Europe, such as France, Germany and Italy. As can be seen from the comparative research above, in other common law jurisdictions such as Canada, Australia and New Zealand the approach to acquisition of legal personality by registration is more comparable to the Irish CLG. In those jurisdictions there are carefully prescribed oversight and governance requirements set out in legislation that is similar to the requirements placed on companies but is tailored to the non-profit sector.
- [4.135] What is proposed here is not a parallel CLG system, but rather a much more simplified structure, as in the jurisdictions in continental Europe, with minimal registration requirements. Associations that wish to register could acquire legal personality by registration to become a new form of corporate vehicle called a non-profit registered association. As outlined above, the Commission considers that full limited liability should not be granted outside company law, but it is suggested that the new vehicle could have some of the key benefits of a body corporate, without the administrative and financial burdens of complying with company law.
- [4.136] As can be seen from the comparative discussion, the benefits would include the following:
- (a) It would solve difficulties in relation to entry into contracts directly (including employment contracts) and ownership of property;
 - (b) It would be easier for third parties to take claims against associations, unlike the present position in which it can be difficult to even identify the correct defendant or litigants may be forced to take a case against a collective group of individuals who are not readily identifiable;
 - (c) Registration would assist regulators (such as food safety authorities and fire officers) by providing a means to obtain the details of the key officers and members of the association and would therefore facilitate compliance and enforcement work, which is in the public interest;
 - (d) Members would not be prevented from suing their club;

- (e) Fines and awards made against a club or association could be payable from the funds of the club or association and any confusion as to liability in that regard would be resolved;
- (f) A public register would provide greater transparency for third parties dealing with the club, society or association by creating a means to identify the relevant officers or members; and
- (g) Rather than automatic attribution of legal personality, a positive step would have to be taken by the members to opt-in to a system of registration, and those who wished to remain unregulated could remain so.

[4.137] The register of incorporated associations could include contact information of the officers of the incorporated association, with a requirement to nominate someone to represent the incorporated association in court proceedings, making litigation against the incorporated association more straightforward.

[4.138] The disadvantages of a system of voluntary registration in order to obtain legal personality include the following:

- (h) Undoubtedly registration would subject associations to an administrative burden which they can currently avoid by deciding not to incorporate;
- (i) The administrative burden and costs (for example, one-off costs, set-up costs and ongoing maintenance costs, dual registration obligations for associations already registered with the Charities Regulator) could operate as a disincentive to registration;
- (j) Unincorporated associations could, under a scheme of optional registration, choose to remain unincorporated with the associated problems that brings;
- (k) Smaller associations in Ireland may be unaware of a requirement to register, may be unwilling to register, and may be unable to pay the cost of registering;
- (l) Corporate status affords protection for members, and a system of registration with minimal oversight would arguably result in inadequate oversight of the activities of associations to correspond with the privilege of that corporate protection; and

(m) Registration may misguide people as to the existence of regulation which does not, in fact, exist.

- [4.139] The impact of administration and registration costs on small associations is potentially substantial. The Scottish Law Commission noted in its Discussion Paper on Unincorporated Associations in December 2008 that third parties engaging with its work on the reform of the law of unincorporated associations "... were anxious, above all, that any reform of the law relating to unincorporated associations should not impose an additional regulatory burden upon them."⁸²
- [4.140] In considering Model 1, it should be noted that in 2014 the Irish legislature decided to abolish Friendly Societies, which were a body somewhat similar to that which is proposed here (although without corporate status). Friendly Societies were originally provided for by the Friendly Societies Act 1896, with a register provided for by the Registry of Friendly Societies Acts 1936 and 1977. The Friendly Societies and Industrial and Provident Societies (Miscellaneous Provisions) Act 2014 (the "2014 Act") provided at section 5 that no new Friendly Societies should be established.
- [4.141] Commenting on section 5 of the 2014 Act and the cessation of the registration of new societies under the Friendly Societies Act 1896, Bird notes that:
- "[t]he current legislation does not provide for prudential supervision of friendly societies by any public authority. This is a source of some concern in that there is some potential risk to the interests of certain members of the public and it is in the public interest to restrict the operation of new entities in this area."⁸³
- [4.142] It was also noted that "the evidence in recent years is that [it] has become common practice for many charities and clubs [to] register as limited companies", with the added protection of corporate status.⁸⁴

⁸² Scottish Law Commission *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140) at page 25.

⁸³ Bird, Annotation of the Friendly Societies and Industrial and Provident Societies (Miscellaneous Provisions) Act 2014 (2015) *Irish Current Law Statutes Annotated*.

⁸⁴ Bird, Annotation of the Friendly Societies and Industrial and Provident Societies (Miscellaneous Provisions) Act 2014 (2015) *Irish Current Law Statutes Annotated*.

Tell us your views

- Q. 4.4** The company limited by guarantee (CLG) is an existing way to provide clubs, societies and associations with the protection of separate legal personality. Is another route to body corporate status for clubs, societies and associations desirable?
- Q. 4.5** Is a dilution of the oversight of company law justifiable for unincorporated associations, given their non-profit-making nature and their reliance on volunteers?
- Q. 4.6** What are your views on Model 1, the proposal to provide for a new corporate vehicle by registration, to be known as a non-profit registered association?
- Q. 4.7** If you favour Model 1, conferring legal personality by registration, should the process be one in which a minimal amount of information is recorded, or should there be more onerous obligations in terms of maintenance of the register, keeping accounts and so on?

(c) Model 2: Confer separate legal personality on unincorporated associations that fulfil specified criteria

- [4.143] Reform could be approached by providing that all unincorporated associations fulfilling certain criteria would acquire separate legal personality automatically. This would create a form of body corporate with perpetual succession (and liability) and the power to sue and be sued and hold land in the corporate name. That is the approach that was ultimately recommended by the Scottish Law Commission in its examination of the topic, and is the approach adopted in a number of states of the United States, based on the model law prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL).
- [4.144] The advantageous consequences of statutory recognition would be the same as they would be for bodies registering under Model 1: capacity to contract, to sue and be sued, to hold property would all flow from separate legal personality. Automatic attribution is simply an alternative route to the benefits of body corporate status without the need to comply with ongoing registration requirements.
- [4.145] If automatic attribution of legal personality were the preferred route to reform in this area the term “automatic” is somewhat misleading; a body would still require some level of organisation to meet the specified statutory criteria for legal personality, and organisations could still remain outside the automatic attribution regime whether by choice or by inadvertence. There would, in short, be potential for a great many associations to fall outside the automatic attribution regime, in which case all the uncertainty of the current law would remain.
- [4.146] The automatic attribution model fulfils the objective of a less burdensome process for acquisition of legal personality, which would hold an undoubted attraction for association members. However, it is questionable as to whether it adequately protects the interests of third parties contracting or dealing with the association. Without the accountability that goes with a public register it is a system potentially devoid of oversight.
- [4.147] As unincorporated sports clubs and non-profit organisations that are in receipt of tax exemptions from Revenue already have filing requirements, and charitable unincorporated associations already have quite cumbersome reporting obligations under the Charities Act 2009, one method of attribution of legal personality could be to introduce legislation allowing any organisation registered for a tax exemption from Revenue to be automatically granted separate legal personality. This method might, however, leave members of smaller associations open to liability in much the same way as they are at present.
- [4.148] Alternatively, a more prescriptive approach could be adopted, for example setting out in statute a clear and unambiguous definition of the type of association that comes within the statutory scheme, the minimum number of members required, whether a constitutive document or set of rules is required and what those rules

should contain and so on. The Commission invites consultees to consider what criteria should apply if this is a preferred law reform option.

[4.149] In determining what criteria should apply for automatic attribution, the Commission considers that rather than focusing on the size or financial status of an association the emphasis should be on its governance arrangements.

[4.150] The American Uniform Law Commission researches, drafts and promotes the enactment of uniform state laws in areas of American state law where uniformity is desirable and practical. It has examined the law relating to unincorporated associations and produced a UUNAA⁸⁵ that has been enacted in a number of States.⁸⁶

[4.151] Section 2(11) of UUNAA provides the following definition of “unincorporated non-profit association”:

“Unincorporated non-profit association” means an unincorporated organization consisting of [two] or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, non-profit purposes. The term [‘unincorporated association’] does not include:

(A) a trust;

(B) a marriage, domestic partnership, common law domestic relationship, civil union, or other domestic living arrangement;

(C) an organization formed under any other statute that governs the organization and operation of unincorporated associations;

(D) a joint tenancy, tenancy in common, or tenancy by the entirety even if the co-owners share use of the property for a non-profit purpose; or

(E) a relationship under an agreement in a record that expressly provides that the relationship between the parties does not create an unincorporated non-profit association.”

[4.152] It is also worth noting that UUNAA provides for separate legal personality for unincorporated non-profit associations, so that they can own and convey

⁸⁵ National Conference of Commissioners on Uniform State Laws, Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2011) (19 August 2015).

⁸⁶ Kentucky, Pennsylvania, District of Columbia, Arkansas, Iowa and Nevada.

interests in property and can sue and be sued in their own name.⁸⁷ It also provides the same personal liability protection that a company offers.⁸⁸

[4.153] The Scottish Law Commission ultimately recommended reform of Scottish law to provide for attribution of separate legal personality for unincorporated associations that fulfil certain statutory requirements.⁸⁹ The definition proposed by the Scottish Law Commission in its Unincorporated Associations (Scotland) Bill is worthy of examination:

“Scottish Association with Legal Personality (“SALP”)

1. (1) An unincorporated body has legal personality separate from that of its members if the conditions mentioned in subsection (2) are satisfied.

(2) The conditions are that—

(a) the body has two or more members,

(b) it has an official address in Scotland (“official address” being construed in accordance with section 3(1)),

(c) its management is carried on wholly or mainly in Scotland,

(d) it has a constitutive document,

(e) in the constitutive document there are set out matters which include those mentioned in subsection (4),

(f) its objects (as set out in the constitutive document) do not include the making of a profit for its members, and

(g) there is no resolution of its members that it is not to have legal personality separate from that of its members.

(3) To have effect for the purposes of subsection (2), any such resolution as is mentioned in paragraph (g) of that subsection must be a resolution recorded in writing.

⁸⁷ Section 9 of the UUNAA.

⁸⁸ Section 8 of the UUNAA.

⁸⁹ Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217) at pages 15 and 56.

(4) The matters are—

- (a) the name of the body,
- (b) the objects for which the body exists,
- (c) the criteria for membership of the body,
- (d) procedures for the election or appointment of those managing the body (including procedures for the election or appointment of its office-bearers, if any),
- (e) the powers and duties of the office-bearers (if any),
- (f) provision for the distribution of the assets of the body in the event of its dissolution, and
- (g) procedures for amending the constitutive document.

(5) An unincorporated body which, by virtue of subsection (1), has legal personality is to be known as a Scottish Association with Legal Personality (any body so known being in this Act referred to as a "SALP").

(6) The Secretary of State may, by order made by statutory instrument, amend subsection (4) so as to make further or different provision as to matters required to be set out in the constitutive document of a SALP.⁹⁰

[4.154] The proposed definition in Scotland⁹¹ is heavily reliant on a "constitutive document" or constitution, the rationale being that:

- (a) adopting a constitution with suitable terms is desirable;
- (b) a constitution demonstrates the intention of members to create an association that merits treatment as a separate entity; and
- (c) a loose grouping of individuals who carry on an activity together but do not require rules to regulate their relationship would not be captured within the definition.

⁹⁰ Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217) at page 63.

⁹¹ Not yet implemented in Scotland as of 15 November 2022.

Tell us your views

- Q. 4.8 What are your views on Model 2, the proposal to confer separate legal personality automatically for associations that meet specified criteria?
- Q. 4.9 If you favour Model 2, automatic attribution of legal personality, what do you consider the statutory criteria ought to be?

(d) Model 3: Do not confer separate legal personality but specify how unincorporated associations are to be held liable in contract, tort and for offences, with a series of focused reforms that do not alter the legal status of unincorporated entities

- [4.155] The comparative analysis above demonstrates that civil law countries tend to adopt a minimalist approach to the granting of legal personality to associations. The common law jurisdictions that have legislated have, for the most part, done so comprehensively and in a manner that replicates company law governance procedures but with less regulation and oversight.
- [4.156] Unincorporated associations may not require separate legal personality to function for every purpose. The problems identified could perhaps be addressed without introducing major amendments to the nature of unincorporated associations. Rather than registration for acquisition of legal personality or automatic acquisition of personality for associations fulfilling certain criteria, Model 3 could eliminate some existing litigation and enforcement barriers by directly addressing the legal problems that arise in a targeted way. The approach would be to treat unincorporated associations as if they are a corporate body without the need for positive action on the part of the association. Again, such a reform would not equate with, nor be capable of providing, limited liability to members, but it would improve protection if there were provision in law to litigate against and prosecute an unincorporated association as a separate body, coupled with practical provisions on service of documents, payment of awards and fines and access to information on the association's membership for litigants.
- [4.157] This proposal would require specific legislation to provide clarity in relation to a number of practical matters. It could, for example provide that:
- (a) a contract can be entered into by an unincorporated association, provided the association's rules have been complied with and the signatories had authority to bind the association;
 - (b) members of unincorporated associations are not liable in contract, tort, criminal or regulatory law by reason only of their membership of an association, although members remain liable for their own wrongdoing;
 - (c) unincorporated associations can be litigated against as though they are a corporate entity;
 - (d) rules of court or legislation relating to the service of documents for legal proceedings are to have effect as if an unincorporated association were a body corporate, with a series of practical

provisions on identifying appropriate members and officers for service;

- (e) officers will be obliged to identify and disclose (with appropriate procedural and privacy safeguards, such as by preliminary application to the court) the membership of the association in order to identify the correct defendants for the purpose of civil litigation;
- (f) officers will be obliged to nominate a person to appear in answer to criminal or civil litigation;
- (g) proceedings for an offence under the legislation alleged to have been committed by an unincorporated association are to be brought in the name of the association and not in the name of any of the members or representatives of the unincorporated association (unless they are co-accused);
- (h) a fine imposed on an unincorporated association on its conviction for an offence under the legislation is to be paid out of the funds of the association and not out of the personal funds of any of the members or representatives of an unincorporated association; and
- (i) the rule whereby members of an unincorporated association are prevented from suing an association of which they are a member is abolished.

[4.158] Model 3 has many of the advantages of Models 1 and 2 in terms of regularising contractual liability, demarcating members from the association and easing the path to litigation. It would be applicable to all unincorporated associations and so would apply even if associations chose not to take a positive step, such as registration or adopting the necessary elements for automatic attribution of legal personality. Under this proposal unincorporated associations would not be given legal personality, they would remain legal oddities but their existence, in fact if not in law, would be recognised.

[4.159] The proposal lacks the potential for transparency that is possible under Models 1 and 2; no registration or governance arrangements would be required and so no oversight is built into Model 3. Unincorporated associations would remain unable to hold land in the association's name.

Tell us your views

Q. 4.10 If Model 3 is the preferred approach, which of the following matters **in relation to civil law and litigation** should be provided for?

- (a) contracts can be entered into by an unincorporated association, provided the association's rules have been complied with and the signatories had authority to bind the association;
- (b) unincorporated associations can be litigated against as though they are a corporate entity;
- (c) members of unincorporated associations are not liable in contract, tort, by reason only of their membership of an association, although members remain liable for their own wrongdoing;
- (d) rules of court or legislation relating to the service of documents for civil legal proceedings are to have effect as if an unincorporated association were a body corporate, with a series of practical provisions on identifying appropriate members and officers for service;
- (e) officers or directing members will be obliged to identify and disclose (with appropriate procedural and privacy safeguards, such as by preliminary application to the court) the membership of the association in order to identify the correct defendants for the purpose of civil litigation;
- (f) proceedings for an offence under the legislation alleged to have been committed by an unincorporated association are to be brought in the name of the association and not in the name of any of the members or representatives of the unincorporated association (unless they are co-accused); and/or
- (g) the rule whereby members of an unincorporated association are prevented from suing an association of which they are a member is abolished.

Q. 4.11 In relation to civil litigation and enforcement, what other practical or procedural matters, if any, should be provided for in legislation?

Q. 4.12 Do you have any further observations on this proposal?

(i) Criminal/regulatory enforcement

[4.160] In Chapter 3 the challenges in interpreting and applying criminal law in respect of unincorporated associations were explained. In addition to the confusing references to the applicability of criminal law to bodies without legal personality, there is no procedural infrastructure in Irish law to facilitate, in practical terms, the prosecution of an unincorporated association.

[4.161] Currently, statute law in England and Wales provides for the statutory criminal liability of unincorporated associations and the prosecution of unincorporated associations in various circumstances. Section 24 of the Criminal Justice and Courts Act 2015, section 153(1) and (2) of the Political Parties, Elections and Referendums Act 2000, section 32(4) of the Serious Crime Act 2007, section 1 of the Wild Animals and Circuses (Wales) Act 2020, section 2 of the Public Health (Minimum Price for Alcohol) (Wales) Act 2018, and section 38(2) and (4) of the Public Health (Wales) Act 2017 clearly provide for the prosecution of an unincorporated association, make it clear that an unincorporated association is to be treated as owing whatever duties of care it would owe if it were a body corporate, and clarify that a fine imposed on an unincorporated association on its conviction is to be paid out of the funds of the unincorporated association.

[4.162] Statute law in Ireland, England and Wales has been drafted and used so as to impose criminal liability on unincorporated associations in a manner that does not disturb entirely the long-held view at common law that unincorporated associations have no legal personality separate and distinct from their members. In the limited and specific circumstances provided for in that jurisdiction, an unincorporated association may be made criminally liable because statute law expressly provides that statute law treats an unincorporated association as if it were a body corporate with legal personality separate and distinct from the legal personality of its members, and that a fine imposed on an unincorporated association on its conviction is to be paid out of the funds of the unincorporated association and not out of the personal funds of some or all of the members of the unincorporated association.

[4.163] The Commission is of the provisional view that where an offence has been committed by an unincorporated association, the unincorporated association ought to be held liable in the association's own name and not in the name of the members. That said, if a particular member is guilty of the offence, that member should not be given undue protection from liability. The views of consultees are sought on whether it should be possible to prosecute an unincorporated association as an entity distinct from its members, even if it does not have separate legal personality.

[4.164] The Commission considers that a blanket provision to the effect that offences are capable of being committed by an unincorporated association would be ineffective. It would replicate the current anomaly presented by the Interpretation Act 2005 that offences requiring *mens rea* (in other words, an intention to commit a crime

with the knowledge that the act is wrong) can ostensibly be committed by an entity that has no existence in law. Instead, should Model 3 be the preferred approach, the areas in which it is desirable to regulate unincorporated associations should be identified and specific provision should be made to allow for their application to clubs and associations without legal personality.

- [4.165] The Commission has examined areas of the law in which such a provision might be desirable. The most striking instance is in health and safety law, given that the civil cases that have come before the Irish courts have illustrated the dangers posed to association members and visitors. Other areas of law in which effective regulation may be required for clubs and associations include food safety, environmental law and liquor licensing. Some of these areas span both civil and criminal enforcement: there are statutory obligations and civil enforcement mechanisms (improvement notices and so on) as well as criminal offences in much of Irish regulatory law.
- [4.166] At present unincorporated associations are very much outside the regulatory realm. Again, there is a wide variation in the nature and type of unincorporated association, but even small associations may pose health risks to third parties. Consultees are invited to consider what areas of regulatory enforcement, if any, should be amended to make specific reference to their commission by an unincorporated association.

Tell us your views

- Q. 4.13** Should it be possible to prosecute an unincorporated association as an entity distinct from its members, even if it does not have separate legal personality?
- Q. 4.14** Should the law provide that members of unincorporated associations are not liable in criminal or regulatory law by reason only of their membership of an association (although members remain liable for their own wrongdoing)?
- Q. 4.15** Should the law provide that officers will be obliged to nominate a person to appear in answer to criminal litigation?
- Q. 4.16** If so, what procedure should be provided to compel court appearance?
- Q. 4.17** If unincorporated associations should be prosecutable, what areas of criminal law/regulatory enforcement (if any) should be amended to make specific reference to their commission by an unincorporated association?
- Q. 4.18** In health and safety law the provision proposed under Model 3 would permit unincorporated associations to enter contracts, including employment contracts. Is further reform required to impose health and safety obligations on bodies that engage with third parties (such as volunteers) in circumstances akin to an employment relationship?

(e) Ensuring that association property is capable of being used to meet liabilities

- [4.167] Many of the difficulties in getting access to assets for legal liabilities of unincorporated associations arise because, in the absence of legal personality, assets must be held on trust.
- [4.168] This is problematic from the perspectives of both members and third parties. In the Supreme Court case of *Hickey v McGowan*, O'Donnell J noted the need for reform, saying that if a defendant succeeded in having a judgment awarded in their favour against members of an unincorporated association:
- “... the judgments are individual and whether or not such judgments will be met by insurance, or from assets which may be held for the benefit of the order more generally, may depend on the terms of the insurance, and indeed the terms upon which such assets are held, and perhaps the willingness and ability, of the order to make funds available to satisfy any judgment against an individual. Whether this is a desirable position as a matter of law and whether further changes should or could be made, is a matter which might usefully be considered by those charged with law reform.”⁹²
- [4.169] While trust property held for the general purposes of the unincorporated association could be accessed by trustees for such purposes including liabilities, charitable trusts may be out of the reach of the trustees without statutory intervention.
- [4.170] The use of trusts presents two practical problems for potential litigants. First, apart from property held for charitable purposes, association property is generally held for the benefit of the current members. There may be little or no overlap between the current membership and the members or employees in respect of whom historical liabilities arise. That difficulty would be alleviated under the proposed Models 1 and 2 (or in the event of incorporation as a CLG), as the litigant could take an action against the association itself as a separate legal entity. It would not be solved under Model 3 unless there were specific provision to allow for the property of present members to be used to compensate for the wrongs of past members. The second problem is that it might not be legally possible to interfere with property held on trust for a charitable purpose.
- [4.171] Under Model 3, the law in relation to how associations hold property would not be altered, unless there were specific provision in that regard. Without legal

⁹² [2017] IESC 6 at para 57, [2017] 2 IR 196 at para 58.

personality, property must be held on trust on behalf of the association, and there would still be potential for the personal assets of members to be used to pay damages where the funds of the association are insufficient to meet claims.

[4.172] However, it is possible that legislation could be adopted, similar to that enacted in Australia (discussed below), to ensure that where associations have property a trust structure cannot be used to prevent that property from being used to meet the liabilities of the association.

(i) Australia: the “Ellis defence” and legislative reform to provide for procedural simplicity and access to association funds in respect of historical liabilities

[4.173] In Australia, as in Ireland, unincorporated associations cannot hold assets in their own names. Assets are usually held on trust on behalf of the members. This can insulate assets from legal claims. The issue arose in litigation against the trustees of an archdiocese in respect of historical sexual abuse claims in *Trustees of the Roman Catholic Church v Ellis and Anor*.⁹³ Ellis had attempted to sue both the then current Archbishop of Sydney and the trustees of the Church. The New South Wales Court of Appeal found that an unincorporated association (the Church in this case) cannot at common law sue or be sued because it is not a juridical entity (it does not have a legal existence or personality). The Court held that the plaintiff could not establish a viable claim against the unincorporated association (being all members of the Catholic Church in the Sydney Archdiocese at the relevant times), nor was he able to establish a claim against the Archbishop or the trustees, as they had not employed the perpetrator of the abuse. The Court also held that the fact that the trustees held property for and on behalf of “the Church”, including property devoted to various charitable trusts, could not be inverted into the proposition that the Trustees (and the funds they administer, many of them on specific charitable trusts) can be rendered subject to all legal claims associated with Church activities. This became known as the “Ellis defence”.

[4.174] To address what was perceived to be an injustice, legislation was introduced in a number of Australian jurisdictions to compel the nomination of an appropriate defendant in such cases, and to provide that liabilities could be met from trust assets.⁹⁴ There had been a Royal Commission into Institutional Responses to

⁹³ [2007] NSWCA 117, (2007) 70 New South Wales Law Reports 565.

⁹⁴ See the Civil Liability and Other Legislation Amendment Act 2019 in Queensland; the Civil Law (Wrongs) (Child Abuse Claims Against Unincorporated Bodies) Amendment Act 2018 in the Australian Capital Territory (repealed on 29 September 2018); the Justice Legislation Amendment (Organisational Liability for Child Abuse) Act 2019 in Tasmania; the Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018 in Western Australia; the Civil Liability (Institutional Child Abuse Liability) Amendment Act 2021 in South Australia; and the

Child Sexual Abuse⁹⁵ which recommended that state and territory governments should:

“introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:

- a. the property trust is a proper defendant to the litigation
- b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.”⁹⁶

[4.175] The legislation that followed that recommendation has substantially improved the position of plaintiffs in historical child sexual abuse cases in Australia, first by ensuring that Church or diocesan assets are available to meet damages, and also by clarifying the position on vicarious liability. Section 9(1)(a) of the Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (the “2018 Act”) in the Australian State of Victoria provides that “[d]espite any Act, law or other instrument (including any trust deed)” the trustees “... may apply any trust property to satisfy any liability incurred in the claim...”. Section 9(2) of the 2018 Act specifies that the satisfaction of any liability incurred in such a claim is a proper expense for which a trustee may be indemnified out of the property of the trust. Section 11 of the 2018 Act clarifies that a trustee is not liable for a breach of trust only because of applying trust property to satisfy any liability incurred by the trustee as a proper defendant in a claim to which the 2018 Act applies.

[4.176] The Act is retrospective in its effect, in that it applies to a claim even if the child abuse occurred before the law was enacted. The Act refers to and applies to NGOs – defined in section 2 as a non-government organisation that is an unincorporated association. If a plaintiff commences or wishes to commence a claim against the NGO founded on or arising from child abuse, the NGO controls one or more associated trusts and “but for being unincorporated, the NGO would be capable of being sued and found liable for a claim founded or arising from

Personal Injuries (Liabilities and Damages) Amendment Act 2022 in the Northern Territory of Australia.

⁹⁵ Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report and Recommendations (15 December 2017) <<https://www.royalcommission.gov.au/child-abuse/final-report>> accessed 15 November 2022.

⁹⁶ Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report and Recommendations (15 December 2017) at para 94 <<https://www.royalcommission.gov.au/child-abuse/final-report>> accessed 15 November 2022.

child abuse".⁹⁷ The Act specifies that an NGO does not need to have a written constitution or fixed membership or any other prescribed attribute in order to come within the legislation.⁹⁸

[4.177] The Act is confined to "child abuse", which is defined in section 3 as including an act or omission in relation to a minor that is "physical abuse or sexual abuse" and "psychological abuse (if any) that arises out of that act or omission."

[4.178] Similarly, in New South Wales, the Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 was enacted to make organisations liable in certain circumstances for child abuse perpetrated by persons associated with the organisation, and to make organisations vicariously liable for child abuse perpetrated by employees and persons akin to employees. The amendments (made to the Civil Liability Act 2002) make it possible for plaintiffs to bring proceedings against unincorporated organisations and to access assets held in trust for the purposes of meeting awards made to successful litigants in historical child abuse cases. The Act provides that proceedings may be commenced against an unincorporated organisation in the name of the organisation as if the organisation had legal personality.

[4.179] These legislative amendments might be considered a welcome development for victims of historical child abuse who would otherwise have been unable to receive damages. Their capacity to simplify litigation by solving the difficulty of vicarious liability as it applies to unincorporated associations is also a noteworthy and highly practical reform that operates without altering the traditional position in respect of unincorporated associations. However, there may be additional issues where property is held on trust for a charitable purpose. These have been addressed in the Australian legislation by confining the provisions to trusts over which trustees have control.

[4.180] The Australian legislation addresses a specific and limited type of wrongdoing, historical child abuse, and so is not applicable to cases arising from other civil or criminal wrongs. If a similar law were to be introduced in Ireland, it would remove many of the barriers that victims of historical abuse face in accessing justice.

(ii) *Ontario*: Re Christian Brothers of Ireland in Canada

[4.181] In Canada the challenge presented by the inaccessibility of trust property has also arisen. There the sequence has been the reverse of the Australian experience; whereas in Australia a judgment put trust property beyond a plaintiff's reach, and legislation to alter the position followed, in Canada a court made trust property available with legislative action taken subsequently to unravel the effect of that

⁹⁷ Section 4(2)(b).

⁹⁸ Section 5.

decision. In *Re Christian Brothers of Ireland in Canada*,⁹⁹ the Ontario Court of Appeal found that assets held in charitable purpose trusts could be accessed for the purposes of meeting compensation claims in circumstances in which approximately 90 litigants alleging sexual, physical and emotional abuse between the 1960s and 1980s, with claims estimated at \$36 million. The corporation was being wound up as a consequence. This is an important contextual point: that the charitable entity itself was being dissolved, limiting the reach of the decision. Because the entity was an incorporated body vicarious liability applied, and the court held:

“... the concept of vicarious liability is that the entire corporation is responsible to the victim for the wrong which was done, although it may have been committed by only one person for whose actions that corporation is responsible. Judgment is obtained against the corporation. All of its assets are answerable for that judgment whether they are held beneficially or on trust for the charitable purposes of the corporation, including one or more of those purposes.”¹⁰⁰

[4.182] The decision was regarded by many commentators as involving a radical departure from the basic principles of trust law, that permits trust property to be ringfenced for the purposes dictated in the trust deed (and the standard position that misapplying trust funds is a breach of trust).¹⁰¹ Other commentators have, in contrast, supported the analysis of the Court of Appeal.¹⁰² As is referred to below, at least one Canadian Province, British Columbia, has legislated to exclude the

⁹⁹ [2000] 47 Ontario Reports (3rd) 674 (Ontario Court of Appeal).

¹⁰⁰ [2000] 47 Ontario Reports (3rd) 674 (Ontario Court of Appeal) at para 82.

¹⁰¹ For further discussion, see Carter, “Case Comment: Christian Brothers Decision Exposes Charitable Trust Assets to Tort Creditors” (2001) 16:1 *The Philanthrop* 28; “Donor-Restricted Charitable Gifts: A Partial Overview Revisited II” (2004) 18:2 *The Philanthrop* 121, 153-57; Cullity, “The Charitable Corporation: A ‘Bastard’ Legal Form Revisited” (2000) 17:1 *The Philanthrop* 17, 25-26; Davis, “Vicarious Liability, judgment proofing, and non-profits” (2000), 50 *University of Toronto Law Journal* 407; Note, *Re Winding-up of the Christian Brothers in Ireland in Canada* in [2000] 3 *International Trust & Estate Law Reports* 34; Simmonds, “The Trust Within the Charitable Corporation: A Victim of Judicial Policy Making?” (2001) 20 *Estates Trusts & Pensions Journal* 225; Stevens, “‘Bizarre’ trusts decision should be overturned ASAP” *The Lawyers Weekly* (15 June 1999) 9; Waters, “Special Purpose Trusts and a Corporate Trustee in Liquidation: The Story of Vancouver College and St. Thomas More Collegiate” (2003) 22 *Estates Trusts & Pensions Journal* 199; and Youdan “Creditor Proofing Charities: What to do in Light of the Christian Brothers Decisions”, 2nd National Symposium on Charity Law, Canadian Bar Association (14 April 2004).

¹⁰² Wingfield, “The Attachment of Charitable Property at Law and in Equity: or, Why the Ontario Court of Appeal In *Re Christian Brothers of Ireland in Canada* is Rights and its Critics are Wrong” (2004) 83(3) *Canadian Bar Review* 805.

approach taken in Ontario. Having regard to the discussion below, it is doubtful whether the Court of Appeal's reasoning would be followed here, in the absence of legislative amendment.

[4.183] One commentator has noted that:

"Christian Brothers does not represent the position in England. In English trust law, it is not generally possible to lift the veil of a trust so as to make trust assets available to meet the liabilities of the settler unless the trust is a sham. Thus, the use of separate charitable purpose trusts to protect assets is still possible".¹⁰³

[4.184] The decision was legislated against in British Columbia with the enactment of the Charitable Purposes Preservation Act 2004. The Act provides that discrete purpose charitable property held by a charity may not be seized or attached under any process at law or in equity with the object of satisfying a debt or liability of the charity, including, without limitation, a judgment against the charity, except to the extent that the debt or liability is incurred by the charity in advancing, or in attempting or purporting to advance, the discrete purpose for the property.¹⁰⁴

(iii) Lack of clarity in Irish law

[4.185] While the Commission has noted cases in which awards appear to have been made against club assets (which must, of necessity, be held using a trust), in *Hickey v McGowan O'Donnell J* set out the position which is the principled legal view, and in the opinion of the Commission, the correct view, that as matters stand in Irish law trusts cannot be used for a purpose other than that which was originally intended:

"Different difficulties arise in the case of trusts. Normally, the fact that an individual or property is a beneficiary of a trust would mean that the trust property is not available to meet any award made against the individual. There is nothing to suggest that there is any trust here or in any such similar case, or indeed any similar funds to provide ready compensation for the plaintiff, and therefore assuage concerns as to the extension of liability in the case".¹⁰⁵

¹⁰³ Morgan, "Judgment-Proofing Voluntary Sector Organisations from Liability in Tort" (2020) 6 *Canadian Journal of Comparative and Contemporary Law* 220.

¹⁰⁴ Charitable Purposes Preservation Act 2004, section 2(4).

¹⁰⁵ [2017] IESC 6 at para 45, [2017] 2 IR 196 at para 46.

- [4.186] In Ireland, judgments have been awarded against unincorporated associations, apparently without the fact that the property is held on trust presenting an obstacle.¹⁰⁶ Perhaps in cases where, for example, GAA clubs have settled personal injuries actions, such settlements have been deemed to be “for the benefit of the club concerned” and paid without difficulty from trust funds; perhaps insurance has met the liability; or perhaps loans have been taken to satisfy judgments in order to protect trust property (for example, a sports ground or clubhouse). Nevertheless, greater certainty is desirable. While O’Donnell J hints in *Hickey v McGowan* at the undesirability of the current position, there has not been a definitive Irish judgment on the issue. Undoubtedly, there is benefit in clarity. The Commission is keen to learn if the holding of trust property has presented an impediment to recovering awards made against an association in this jurisdiction, and, if so, whether a reform of the type undertaken in Australia to clarify the availability of trust property to meet liabilities is desirable or necessary in Ireland. If such a reform is considered necessary, the Commission would also welcome views on whether any statutory provision should be confined to specific types of cases as it has been in Australia.
- [4.187] Under current Irish legislation, section 21 of the Trustee Act 1893 gives trustees a statutory power to compromise and settle disputes and to pay debts and protects them from personal liability in doing so. However, trustees are limited by the terms of the trust deed, as the power to settle only applies if doing so is consistent with the terms of the trust deed.¹⁰⁷
- [4.188] Reform to allow access to property in a manner that is contrary to the terms of the trust deed would not, of itself, improve the position of a litigant in the position of the plaintiffs in the Irish case of *Hickey v McGowan* or the Australian case of *Ellis*. The proper defendant problem remains: that the debts and liabilities will not in law be those of the trustees, although and in moral terms the liabilities ought to be those of the organisation. As matters stand Irish law confines trustees to dealing with property in accordance with the terms of the trust deed; a trustee will be liable for breach of trust otherwise. If the law were reformed to allow access to trust property, as has been done in Australia, the provision could set out that notwithstanding any Act or other instrument, including a trust deed, the trustees may apply trust property to satisfy liabilities in connection with specified types of claims or debts.

¹⁰⁶ For example, an award of €15,000 was reportedly made against a GAA club in the recent defamation case of *James Daly v Ann Hogan and Others* in Tralee Circuit Court (2022/00021).

¹⁰⁷ Section 21(3) provides: “[t]his section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.”

Tell us your views

- Q. 4.19 Does the holding of association property on trust present an impediment to recovering awards made against an association in Ireland?
- Q. 4.20 If it does, is law reform required to ensure that property held by unincorporated associations is capable of being used to meet liabilities?
- Q. 4.21 If so, should reform include a provision such as those enacted in Australia, to provide that trust property can be applied to meet liabilities?
- Q. 4.22 If it should, should it be similarly limited to categories of claim arising from child abuse, or should it be broader in its application?
- Q. 4.23 Is there a distinction to be drawn between property held on trust for the benefit of the association and charitable purposes trust property?

Full List of Questions to Consultees

For convenience, the Commission sets out here the full list of questions on which the views of consultees are sought. Submissions may address some or all of the issues raised in this Consultation Paper and may also address other issues that consultees believe may be of relevance.

Law reform objectives

Q. 4.1 Do you agree with the reform objectives that the Commission has identified?

Those objectives are to:

- (a) bring clarity to the law on unincorporated associations;
- (b) minimise regulatory burdens;
- (c) protect the interests of third parties dealing with unincorporated associations;
- (d) provide that the assets of an unincorporated association are available to meet its legal responsibilities;
- (e) provide that unincorporated associations can be sued in their own names;
- (f) clarify the law on the personal liability of members;
- (g) clarify the applicability of existing legislation to unincorporated associations;
- (h) ensure that existing legislation is enforceable against unincorporated associations; and
- (i) remove the impediment to suing a club of which you are a member.

Q. 4.2 Do you disagree with any of the objectives set out above? If so, why?

Q. 4.3 What other objectives, if any, should underpin reform of the law in relation to the liability of unincorporated associations in Ireland?

A route to body corporate status: acquisition of legal personality by registration or by automatic attribution (Models 1 and 2)

- Q. 4.4** The company limited by guarantee (CLG) is an existing way to provide clubs, societies and associations with the protection of separate legal personality. Is another route to body corporate status for clubs, societies and associations desirable?
- Q. 4.5** Is a dilution of the oversight of company law justifiable for unincorporated associations, given their non-profit-making nature and their reliance on volunteers?
- Q. 4.6** What are your views on Model 1, the proposal to provide for a new corporate vehicle by registration, to be known as a non-profit registered association?
- Q. 4.7** If you favour Model 1, conferring legal personality by registration, should the process be one in which a minimal amount of information is recorded, or should there be more onerous obligations in terms of maintenance of the register, keeping accounts and so on?
- Q. 4.8** What are your views on Model 2, the proposal to confer separate legal personality automatically for associations that meet specified criteria?
- Q. 4.9** If you favour Model 2, automatic attribution of legal personality, what do you consider the statutory criteria ought to be?

Legislating for *de facto* legal personality (Model 3)

- Q. 4.10** If Model 3 is the preferred approach, which of the following matters should be provided for?
- (a) contracts can be entered into by an unincorporated association, provided the association's rules have been complied with and the signatories had authority to bind the association;
 - (b) unincorporated associations can be litigated against as though they are a corporate entity;
 - (c) members of unincorporated associations are not liable in contract, tort, by reason only of their membership of an association, although members remain liable for their own wrongdoing;
 - (d) rules of court or legislation relating to the service of documents for civil legal proceedings are to have effect as if an unincorporated association were a body corporate, with a series of practical provisions on identifying appropriate members and officers for service;
 - (e) officers or directing members will be obliged to identify and disclose (with appropriate procedural and privacy safeguards, such as by preliminary application to the court) the membership of the association in order to identify the correct defendants for the purpose of civil litigation;

- (f) proceedings for an offence under the legislation alleged to have been committed by an unincorporated association are to be brought in the name of the association and not in the name of any of the members or representatives of the unincorporated association (unless they are co-accused); and/or
- (g) the rule whereby members of an unincorporated association are prevented from suing an association of which they are a member is abolished.

Q. 4.11 In relation to civil litigation and enforcement, what other practical or procedural matters, if any, should be provided for in legislation?

Q. 4.12 Do you have any further observations on this proposal?

Criminal and regulatory enforcement

Q. 4.13 Should it be possible to prosecute an unincorporated association as an entity distinct from its members, even if it does not have separate legal personality?

Q. 4.14 Should the law provide that members of unincorporated associations are not liable in criminal or regulatory law by reason only of their membership of an association (although members remain liable for their own wrongdoing)?

Q. 4.15 Should the law provide that officers will be obliged to nominate a person to appear in answer to criminal litigation?

Q. 4.16 If so, what procedure should be provided to compel court appearance?

Q. 4.17 If unincorporated associations should be prosecutable, what areas of criminal law/regulatory enforcement (if any) should be amended to make specific reference to their commission by an unincorporated association?

Q. 4.18 In health and safety law the provision proposed under Model 3 would permit unincorporated associations to enter contracts, including employment contracts. Is further reform required to impose health and safety obligations on bodies that engage with third parties (such as volunteers) in circumstances akin to an employment relationship?

Ensuring that association property is capable of being used to meet liabilities

- Q. 4.19** Does the holding of association property on trust present an impediment to recovering awards made against an association in Ireland?
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- Q. 4.21** If so, should reform include a provision such as those enacted in Australia, to provide that trust property can be applied to meet liabilities?
- Q. 4.22** If it should, should it be similarly limited to categories of claim arising from child abuse, or should it be broader in its application?
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