To: Chris Moller
Sue Suckling

From: Suzanne Speer, ASA Board Member, SNZ Board Member
Brian Palmer, ASA Executive Officer
and on behalf of the Auckland Swimming Board:
Jim Swanson, ASA Board Member, Steering Group for the SNZ Review
Willem Coetzee, ASA Board Member, Vice-Chair
Cameron Gibson, ASA Board Member
Gwen Ryan, ASA Board Member

Date: 17 July 2012

Re: Review of the SNZ Proposed Draft Constitution and the Findings (including 21 Recommendations) of the Swimming New Zealand Review by the Independent Working Group

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INTRODUCTION

Firstly, we would like to state upfront that Auckland Swimming fully supports the findings of the Independent Working Group and sees them as being a foundation for the establishment of a constructive future for our sport. We thank you and the Working Group for the effort put into the Review. Accordingly, Auckland Swimming is seeking every opportunity to ensure that these recommendations are fully and successfully implemented, and this is the intent and purpose of this discussion paper.

Secondly, however, we wish to record our concerns about several key elements within the Proposed Draft Constitution that accompanies the recommendations. Our concerns are fundamentally one that the Constitution does not reflect the direction for governance of our sport as set out in the Review findings. Explanatory notes follow regarding the key areas of concern.

Thirdly, therefore, we are concerned that the SNZ Board has interpreted that the solution now rests around the 'bundling together' of the Review findings and recommendations, together with the Proposed Draft Constitution which, in our opinion, is clearly not yet in a final form and requires refinement which could best emanate through a robust process of consultation.

Fourthly, we believe that there are serious issues of constitutionality associated with the proposed business of the forthcoming SNZ SGM which may extend to rendering any decision taken under that remit as being ultra vires. Therefore, we would urge a cautious approach to ensure the orderly adoption and implementation of all 21 recommendations.

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We have requested information from SNZ relating to the way and process in which the SGM has been called, but as yet have not received the documents we have requested. From what we understand, it is highly likely that the process used to call the SGM does not comply with the requirements of the current SNZ Constitution, which in turn would mean that any business conducted at the SGM would be flawed. While it is beyond the scope of this document, we are happy to detail the reasons why we have been able to conclude that the SGM as proposed is not in accordance with the requirements of the current SNZ Constitution, and remain confident that when that detail is received you too will come to the same conclusion as we have. In the context of the detail which follows, it would seem this could be a blessing in disguise at it will allow for an 'unlocking' of the Proposed Draft Constitution from the business of accepting the 21 Recommendations of the Moller Report, which we are confident most, if not all, members of the swimming community wish to see adopted.

And fifthly, following a significant (although at this stage incomplete) review of the Proposed Draft Constitution, and following consultation with our clubs in an ASA Special General Meeting (convened Thursday 12th July) for the purpose of seeking their mandate, we have been encouraged to seek suitable remedies surrounding a recognition that we have been presented with a Proposed Draft Constitution, and have as yet to be presented with the companion documents (Regional Constitution and others), and that all of these documents require further engagement in a process of consultation.

For the above reasons, we are now of the opinion that the best course of action is that the SGM scheduled for July 28th should be abandoned. We are of the opinion that a new SGM should be called (probably on a motion of the Board) under Rule 18.1 along the lines of the following:

A. Accept the recommendations of the Moller Report and to begin the process of implementation of the 21 Recommendations.

NB. It may be sensible to propose a time frame to make sure the matter moves and does not stagnate.

B. That the members are provided with the Proposed Draft Constitution and Transitional Regulations to consider with adequate time for consultation (28 days) and feedback.

NB. It is this consideration which is called for in the Moller Report under Recommendation 15.

We would also note that transitional regulations suitable to the current SNZ Constitution, but covering the same key issues as those proposed within the Proposed Draft Constitution should be made available to cover the governance functions until the subsequent adoption of a new agreed Constitution.

We have identified in our review of the Proposed Draft Constitution multiple errata which is, of course, understandable given the draft nature of what has been provided. Obviously at its most simple, an adopted Constitution must have errata corrected. However, we have been informally advised that to now make changes to the Proposed Draft Constitution (which is appended as an exhibit to the resolution of the SNZ SGM), even for the purposes of correcting errata, could under the relevant provisions relating to Incorporated Societies render the entire process ultra vires. We do not wish to see that position occur.

We have further identified several areas of form which affect the substance of governance, but which we would expect in a robust process of review to be smoothed through. We believe that an extended and robust process of review will ensure that these areas of form, once refined, will result in a more robust document which will survive the test of time. This discussion paper explains some (although not all) of those concerns. We have highlighted the key issues for summary purposes in the next section, Key Issues, but this is followed by much fuller explanatory comments.

Please note that this document is not intended as a comprehensive consultation paper covering a very complex governance document. It is intended to invite constructive engagement at the behest of our stakeholding clubs to seek suitable remedies in order that the 21 Working Group Recommendations can have their effect in an acceptable governance model.

We would really appreciate your careful attention to the matters we have raised, and would be more than pleased to have a discussion with you to help clarify details.

KEY ISSUES

1. COMPLETENESS OF DOCUMENTS

We are extremely concerned that we effectively require multiple documents to create the new governance platform for our sport, but we have been asked to make judgment based on sight of a single document only, and even then only in draft form. We do not consider it prudent to contract to the repealing of our own Regional Constitutions with impacts that impinge on the sovereign rights of clubs without having given due consideration to the replacement. We are confident that our clubs, who are our stakeholders, cannot and will not grant that mandate.

We are concerned that an imbalance is being created which is contrary to the principles of collaboration and federalism which we believe are clearly inferred from our reading of the Working Group Recommendations. We do not wish to be hasty in judgment, but we do not believe we can meet our proper governance and stewardship roles based solely on principles of good faith that the Regional Constitution "will turn out ok at some future date". We would point out that the SNZ Draft Constitution specifically says Regional Constitutions will be adopted by SNZ – it says nothing about Regional consultation and acceptance. Obviously, this approach doesn't work well for Regions.

2. MEMBERSHIP

We agree with the principles espoused relating to membership in the findings of the Working Group. There are aspects of the detail which concern us. These include:

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

The requirement for members to furnish personal details for the data appears unlawful and appears to fall outside the laws pertaining to privacy in this country.

(b) Competitive Membership We consider the definition as proposed of '*competitive member*' with its linkage to participation in approved meets and the further linkage of approved meets to possible central control to be unsatisfactory. We consider that a simpler definition can be established and that such a definition needs to form a part of the Definitions. We consider the definition needs to be re-established and based on 'inter-club competition', a more meaningful definition with wider applicability.

(c) Technical Officials are defined as including National Timekeepers. This qualification does not exist and to include it in a foundation document is nonsensical. Either a commensurate qualification and standard needs to be established to precede incorporation or a new standard needs to be recognised and defined.

(d) Club membership We cannot concur with the exemption of any class of swimmer from club membership as clubs are the fundamental foundation for the delivery of the sport at all levels. We do not understand the drivers behind this recommendation, but in the absence of consultation would see this as being unacceptable.

(e) Transfers and other issues We understand that over many years issues of transferring, multiple club affiliations, eligibility for records etc have been refined, developed and adopted. It may be that these are better placed outside a Constitution and we remain open to that view. The issues are so fundamental to how the sport functions that previous generations have seen them as being of constitutional importance. We would expect to be convinced that suitable alternative provisions will be made before we could see these contentious areas, which took so long to resolve into a satisfactory working model, are repealed.

(f) Honours and Awards We note with concern the removal of an Honours and Awards function and would question the wisdom of having the award of Honours becoming an effective governance, and by extension, political function. There is more for us to understand in this area. We also note with concern that the removal of members from a region carries with it an implication that a region can no longer recognise outstanding service through the grant of Life Membership. We do not believe that we can

consent to the effective removal of Regional Life Membership from those who have been granted this honour in the past and we do not believe it would be prudent to lose the ability to grant such honours in the future. There may be more for us to learn when we see other documents which are related.

(g) Powers to cancel membership We are concerned about the breadth of powers granted to SNZ to cancel membership and its flow-on effects. We are concerned that these powers will lead to the stifling of legitimate democratic debate which will ultimately lead to the diminishment of accountability.

3. SPORT FUNDING STRATEGY

We, and all other regions, currently operate on a self-sufficient basis. We are autonomous and self-governing. The Proposed Draft Constitution, as presented, commits every region and club to an as yet unknown funding strategy with an unlimited power granted to SNZ to levy regions for undefined sums with no reciprocal rights. This is contrary to what we understand are the doctrines associated with Sport New Zealand's Whole of Sport approval process which envisages multi-directional funding flows and full collaboration. With no insight into what the 'Sports Funding Strategy' may be, we cannot agree to this position and still be true to the fiduciary obligations we hold to our members and stakeholding clubs. There is enough disclosed to leave us with legitimate concerns that, as proposed, the sports funding strategy may draw into question at some point the continuing viability of our business model. To meet our obligations we will need to be assured that the sports funding strategy will function within boundaries which allow our region to continue as a viable entity.

4. ACCOUNTABILITY

We are where we are today because of issues of accountability of the governance body to its membership. Our early examination leads us to a view that faced with similar circumstances of systemic failure the 'stakeholders' (however that term may be defined, but for discussion, let's consider them to be federal regions) will have less powers for sanction and accountability than those which existed previously. It was the inadequacy of those powers which led to the Ineson Review, followed by a failure to accept accountability for systemic failure and the inability of the organisation to correct, that led ultimately to the work of this Working Group.

This sport could conceivably face similar systemic collapse in the future. If the core of that failure rests at a governance level, this Proposed Draft Constitution provides less capacity to remedy it than the current SNZ Constitution. Given everything the sport has been through in recent years, we are not prepared to leave the sport with fewer protections than those which have already proved inadequate. We have identified possible solutions.

REVIEW OF THE SNZ PROPOSED DRAFT CONSTITUTION

1. BACKGROUND

1.1. On 18 May 2012, the Board of Auckland Swimming, along with others, were invited to the presentation of the draft findings and recommendations of the Working Group of the Independent Review of Swimming New Zealand.

Subsequently, the final report of the Group was released in June and with its 21 recommendations are to form the basis for drafting the replacement constitution for Swimming New Zealand and replacement standard constitution for all 16 Regional Associations.

1.2. Swimming New Zealand has called a Special General Meeting of the Regional Associations to consider the Working Group's findings in conjunction with a proposed new SNZ Constitution.

1.3. The resolution given to Regional Associations to be considered at this meeting is as follows:

> *That Swimming New Zealand Incorporated accepts and adopts in full the report of the Independent Working Group for the Review of Swimming New Zealand dated June 2012, including the recommendations in it numbered 1-21 inclusive, and, to help give effect to those recommendations, Swimming New Zealand Incorporated repeals its existing constitution and adopts the attached new constitution dated July 2012.*

1.4. The proposed replacement Constitution for Regional Associations is not available at this time and will not be considered at this SGM; nor will any new Regulations for Swimming New Zealand.

2. THE BOARD OF SWIMMING AUCKLAND'S POSITION RELATING TO THE RECOMMENDATIONS OF THE INDEPENDENT WORKING GROUP FOR THE REVIEW OF SWIMMING IN NEW ZEALAND, DATED JUNE 2012.

2.1. The Board of Swimming Auckland supports the findings and recommendations of the Independent Working Group.

2.2. The Board of Swimming Auckland has sought input from its clubs by way of a Special General Meeting (12th July 2012) and has received unanimous support from those clubs who participated in the SGM to support the adoption of the 21 recommendations of the Independent Working Group.

3. THE BOARD OF SWIMMING AUCKLAND'S POSITION AS IT RELATES TO THE NEW PROPOSED DRAFT CONSTITUTION FOR SWIMMING NEW ZEALAND.

3.1. Swimming Auckland is unable to support the Proposed Draft Constitution for Swimming New Zealand in its entirety for the reasons listed below. However, the Board of Swimming Auckland considers that the Proposed Draft Constitution can be revised to incorporate and address its concerns as listed below in Section 5.

3.2. At the ASA SGM (referenced above) the Board of ASA has been mandated by those clubs to seek suitable engagement to ensure that the Proposed Draft Constitution is subject to both a process and period of consultation with the intention of a more acceptable and refined document being developed.

4. REASONS FOR SWIMMING AUCKLAND'S POSITION.

4.1. Incomplete documents for consideration.

4.1.1. The publication of the Proposed Draft Constitution alone is insufficient to permit a comprehensive assessment of potential likely effects on Regional Associations and Clubs.

4.1.1.1. To achieve a holistic evaluation of the likely impact of these changes, any SNZ Proposed Regulations and the Proposed Constitution for Regional Associations must accompany the SNZ Constitution.

4.1.1.2. As the Proposed Draft Constitution contains reference to the responsibilities of clubs, there will be merit in also viewing any guidelines being developed which may have direct affect for clubs under the responsibilities that a new constitution might impose on clubs.

4.1.1.3. These three, and possibly four, documents are interrelated. An example of this interrelationship is seen by proposed provision Section 8.3 of the Proposed Draft Constitution which states that:

> *A Regional Association is an entity governing a Region which…….adopts the form of Regional Associations constitution prescribed by SNZ.*

AND

> *... conducts its activities in compliance with its regional constitution and the SNZ constitution.*

4.1.2. Therefore without a replacement Regional Constitution to consider, affected parties have little idea how the existing Regional Associations' Constitutions will be altered; yet the Associations will be bound to comply with all new provisions without necessarily any ability to be consulted on the matter, as Section 8.3(b) states that the Regional Constitution will be prescribed by SNZ for all Regions.

4.2. Constitutional federalism needs to be strengthened along with necessary checks and balances.

4.2.1. Issue

The current federal structure of governance for a swimming organisation in New Zealand is encompassed clearly in the existing SNZ Constitution, although in the past decade there has been a high degree of central control, especially in the management of international competitive swimming.

4.2.2. The concept of an identified federal constitution has been retained in the findings of the Working Group, albeit with the thought that there are currently too many Regions and ultimately they will need to be reduced in number through self-determination.

4.2.2.1. It is our opinion that this principle of federalism is not reflected in the drafting of the Proposed Draft Constitution for SNZ. Indeed, the level of central control

by the national body of swimming will be significantly increased through the provisions of the Proposed Draft Constitution.

4.2.2.2. Within the Proposed Draft Constitution, powers of the National Sports Organisation (NSO) of SNZ have substantially increased when compared with the existing Constitution. This has been achieved in the Proposed Draft Constitution by the omission of necessary checks and balances to the power of the NSO.

4.2.2.3. This lack of checks and balances relates not only to the creation of new Policies, Strategies, Rules and Regulations by the NSO, but also in its exercise and implementation of these.

5. ISSUES AND POSSIBLE SOLUTIONS

5.1. Examples of unacceptable expanded powers of the NSO are shown in the following sections of the Proposed Draft Constitution and these need to be amended:

5.1.1. Section 8.3(h) requires SNZ to approve a Regional Association as a member of SNZ. In addition, SNZ may remove a Regional Association as a member or any other member of the organisation, as given in Section 7.3.

5.1.1.1. The Board of SNZ has sole discretion to do this and there is no independent arbitrator to appeal any such decision of the NSO.

5.1.1.2. Criteria used for assessing if a member should be expelled or suspended by the NSO are open-ended and very subjective.

AND

5.1.2. Section 8.5(b) requires a Region to *act consistently with the Whole of Sport Plan, policies, standards and KPIs determined by SNZ* while not allowing for any input from Associations before determining these.

5.1.2.1. To implement 'Whole of Sport' and other SNZ requirements, Regions must self-fund these without assistance from its NSO.

5.1.2.2. The NSO can at the same time limit a region's ability to fundraise by the stipulation that it must comply with a national fundraising plan, written and enforced by the NSO without consultation, as stated in Section 8.5(e).

AND

5.1.3. Regions must pay any money, levies, and amount determined by SNZ to the NSO as per the all encompassing provisions of Section 5.1(b).

5.2. Accountability of the SNZ Board

5.2.1. Issue

There is no formal process under the Proposed Draft Constitution to hold the Board of SNZ responsible for its actions. If it fails to fulfill its duties as a Board it cannot be removed.

5.2.1.1. This lack of accountability has been of grave concern to Regions and members and was a very recent concern as encapsulated in the Regions' proposed remits (later withdrawn) at the 2011 SNZ AGM.

5.2.1.2. Even a vote of 'no confidence' in the Board at a Special General Meeting or Annual General Meeting does not legally remove the Board under the new Proposed Draft Constitution.

5.2.1.3. If such a vote were supported by delegates, then it would be up to the Board to take steps, by way of resignation, if it chooses to do so. If the Board did resign *en masse* then SNZ would be left without a Board so there needs to be a process in place to appoint an interim Board.

5.2.2. Solution

Below is a suggested clause to remove the Board, as a whole or individual Directors, by delegates which will complement the proposed provisions contained within Section 12.10 which will enable the SNZ Board to remove its own Directors:

12.10(e) *The delegates at a SGM called for the purpose of removing the Board as a whole or individual directors may, by a majority of 60% of the votes cast, remove any Director, or the Board as a whole , before the expiration of their terms or its term in office as follows:*

(a) *Upon the Chief Executive receiving a request for a SGM (under rule ...) for the purpose or removing a Director or the Board as a whole, the Chief Executive shall send the notice of the SGM to the Director concerned or the Board as a whole (as the case may be), in addition to the persons specified in rule … (Notice of SGM). Any such request for a SGM to remove a Director or the Board as a whole shall specify the reasons for the proposed removal.*

(b) *Following notification under rule ... (Notice of SGM), and before voting on the proposal to remove a Director or the Board as a whole, the Director or the Board (as the case may be) affected by the proposal to remove them, shall be given the opportunity prior to , and at, the SGM to make submissions in writing and/or verbally to the persons entitled to be present at the SGM about the resolution.*

(c) *If a Director is removed under this rule, the Board shall leave the position vacant until the AGM in the following year, at which time it shall be filled in accordance with this Constitution. If the Board as a whole is removed or more than one Director is removed so that a quorum cannot be met, the delegates at the meeting shall elect such number of Directors as*

are necessary to ensure the board comprises of at least 4 Directors. Nominations for Directors in these circumstances may be made by the delegates at the meeting from the floor and the usual time period for nominations shall not apply. The Directors elected under this rule, shall constitute the Board until the AGM in the following year, at which time the positions will become vacant and such vacancies will be filled in accordance with the constitution. No appointed Directors may be appointed during this period.

5.2.3. The above has not been drafted specifically to be integrated into this Proposed Draft Constitution, but is an example of the types of powers for checks and balances which one might expect to find.

5.2.4. We would also express a concern that the powers to call a SGM have been reduced (or perhaps better, the barriers have been raised) ensuring that a SGM represents an extremely high threshold.

5.2.5. We are very concerned that issues which precipitated the current review process were deep-seated and became more serious because there was no constructive process by which sanctions could be applied, when in the case past, a Board as a collective refused to accept accountability for systemic failure. We are concerned that faced with similar circumstance of systemic failure that the Proposed Draft Constitution provides arguably even less capacity to deal with systemic failure than existed previously.

5.2.6. We see this as being an issue of significance.

5.3. Lack of consultation, provisions, rights and regard to input from Regional Associations.

5.3.1. <u>Issue</u>

Consultation with members is commonplace in organisations as it relates to proposed Plans, Policy, Regulation, or similar matters.

5.3.1.1. In recent times, Regional Associations have had significant problems in dealing with new proposed regulations from the NSO as they have often been formulated without regard to regional input or proper evaluation of such input by the NSO.

5.3.1.2. The Proposed Draft Constitution under Section 4.1 does stipulate that the NSO … *in supporting its primary Object, SNZ has the further Objects to work with Regional Associations and Member Clubs and others …* but there is no process put in place within the Proposed Draft Constitution to achieve this and ensure that this occurs.

5.3.2. <u>Solution</u>

Rules should therefore be introduced into the Constitution to ensure that there is proper consultation with all members and any proposed Plan, Policy, Regulation or similar matter should be effectively and properly evaluated with input summarised for public notification to all members.

5.3.2.1. Also, while it would be ineffective to require Regions' approval to all such changes, this should be required when there are any Policies, Plans, Regulations or similar matters which will directly affect Regional Associations.

5.3.2.2. Section 13.6 in the Proposed Draft Constitution will need to be amended because the SNZ Board assumes all the powers of SNZ (set out in Rule 4.1) which includes the powers for the Board to *determine its own rules for any matters not specified in the constitution ...*

5.3.3. There may in effect be other ways to accomplish this position which we accept and could welcome. We do recognise that conditions vary around the country and what works in one region may not work in another.

5.3.4. We have a sport where delivery occurs for the most part locally and it is vital that when Policy and Regulations are being established that there is a robust and transparent process of consultation and evaluation which is available.

5.4. The 'Whole of Sport' Plan is not an interactive process under the Proposed Draft Constitution.

5.4.1. Issue

The Proposed Draft Constitution defines the term 'Whole of Sport' as being:

"...SNZ's whole (sic) of Sport strategic plan for competitive swimming."

5.4.2. However, the Sport NZ doctrine associated with 'Whole of Sport' envisages that it will be just as the term suggests, a process involving the entire sport, with multi-directional flows of both input and funding.

5.4.2.1. We do not see this doctrine encapsulated in either the adopted definition nor the practical incorporation and use of the term 'Whole of Sport' throughout the document.

5.4.2.2. As presented, the Proposed Draft Constitution does not capture the collaborative nature of 'Whole of Sport' which we know has been successful with other sports who have completed WOS Plans.

5.4.2.3. We would welcome formal inclusion within the document the recognition of the collaborative nature of WOS as we understand it.

5.4.3. The new Whole of Sport concept within the Proposed Draft Constitution is not drafted to be an interactive approach from all levels of the sport between the NSO, Regions and Clubs; instead a hierarchical model is utilised being one way, from the top downwards.

5.4.3.1. In this regard, Section 13.2 is unacceptable as it clearly excludes Regions from involvement in the creation of the 'Whole of Sport' Plan but instead imposes upon them the implementation of that Plan within their areas of jurisdiction.

5.4.3.2. Regions and Clubs may be required to fund the Whole of Sport Plan themselves as the Proposed Draft Constitution requires them to be financially independent of SNZ and be self-sufficient financially.

5.4.4. Solution

Formulation of the 'Whole of Sport' Plan should incorporate wide consultation of all members and evaluation of submissions received. It should ensure sufficient and effective support by SNZ to Regions and Clubs for its implementation, and in so doing, the Whole of Sport Plan should not detrimentally affect the financial sustainability of any Region or Club required to be part of the Plan.

5.4.4.1. Suitable rules should be drafted in the Proposed Draft Constitution to reflect the above.

5.5. The requirement under Section 6.8 for members to furnish personal details for the national database is considered unlawful and to fall outside the laws pertaining to privacy in this country.

5.5.1. Based on advice which we have received and the expectation of our members, no member should be required to forfeit their legal right to the provisions of the Privacy Act as a condition of membership.

5.5.2. We would expect that in accordance with best-practice, members are granted an assumption of privacy upon membership, with the right to 'opt-in' as opposed to the right to 'opt-out' of having their personal details made available to third parties.

5.5.3. Under the Proposed Draft Constitution there is neither a right to opt-in or opt-out granted. That is unacceptable.

5.6. The lack of clarity in Section 9.1(e) as to where a Member Club is located may further diminish a Regional Association's sovereignty/powers as Member Clubs may locate outside their established primary geographical location.

5.6.1. We believe there needs to be definition established of what is meant by *location* (Section 9.1(e)) as it relates to clubs which are not exclusively geographic entities.

5.6.1.1. Past interpretation on this subject related to a club's principle place of operation, but equally was open to ambiguities relating to whether, for example, that was where the Post Office box was located, the pool (or pools) was located, where swimmers trained, etc. As clubs are members of Regions there must be some alignment between regional boundaries and club boundaries for good governance. As this is not defined it will lead to disputes which could and should be avoided.

5.7. The Proposed Draft Constitution is a relatively complex document with the need for much cross-referencing between sections and provisions and thereby making it unduly difficult to use.

5.7.1. It needs to be simplified and erratum need to be corrected (as for example Section 8.6(e) and the inclusion of National Timekeepers as members of SNZ).

5.8. Commenting on the subject of National Timekeepers, we are respectful of what we suspect was the intent in this inclusion. Sadly, the intent is not matched with fact.

5.8.1. The SNZ Technical Advisory Committee has introduced a policy (effective now for many years) whereby Timekeepers are not qualified nationally. Indeed most regions, as far as we can tell, require a higher standard of qualification for Timekeepers than SNZ expects. We do not see resolution to this as being difficult, but further work is required.

5.9. Section 9.1(c)(v) is unacceptable and unenforceable, as organisations which donate money or equipment to clubs will often require them to be returned if they are not to be used for the specific purpose that they were donated.

5.9.1. Further to this, Section 9 places specific responsibilities on clubs, some of which impinge on the club's own sovereignty as established in their own Constitutions.

5.9.2. We would consider it as being questionable as to whether a Regional Association is empowered to create through the acceptance of this Proposed Draft Constitution an impost of conditions relating to

sovereignty on its member clubs without the express consent of those clubs prior to doing so.

5.9.3. Further, if clubs are to be required to change their Constitutions to comply with the requirements of the adoption of this Proposed Draft Constitution, there are very real cost issues involved. Most clubs are small and frequently marginal operations. To impose the cost of a Constitutional review on each club, where they may not have the internal legal resource, would be a heavy burden in most cases.

5.9.4. We would therefore welcome, in a similar way, what we are anticipating with a template for the Regional Constitution, a commitment to work being done on a best-practice Club Constitution which can be considered for adoption with relatively minor local input, and which would result in alignment with the national and regional documents, together with the Whole of Sport process.

5.10. The Proposed Draft Constitution is not a collaborative approach between Regions and the NSO.

5.10.1. This is shown by the unacceptable provision of Section 8.5(m) which states that Regional Associations *must provide accurate data on a timely basis as required by SNZ and if it has not done so the Board of SNZ may suspend its voting rights.*

5.10.2. Section 5.1 also gives *full powers, jurisdiction and authority …* to the NSO with very few limitations to these powers as it relates to its members.

5.10.3. Further, Regional Associations are required under Section 8.5(a) *to support and work with the Board and executive of SNZ to build a culture of trust, collaboration and discipline.* Yet the NSO and its Board are not similarly required to work in this manner with the Regions and Clubs.

5.10.4. Similarly, the SNZ Board has the right under Section 13.6 *to determine its own rules for any matter not specified in the constitution* without consultation and consideration of members' views on any matter.

5.10.5. Once again, we had expected that doctrines of collaboration and collegiality would be reflected not just as obligations for the regional

and club bodies but to be strongly reflected as obligations for the national body.

5.11. Elite HP Swimmer. We are concerned at this definition and the encapsulation within the Proposed Draft Constitution that in some way there is a class of athlete who is different to the norm. We believe that 'elite' and 'high performance' should be matters of fact, not association.

5.11.1. We do not believe it is appropriate for any athlete to be removed from the requirement to be a member of a club.

5.11.1.1. Clubs are the base vehicle for the delivery of the sport and to remove athletes from a requirement to associate as members of a club would establish an unacceptable precedent.

5.11.2. We believe further (as recommended in the Ineson Report) that provision must be made for athletes who are, by performance standard, both elite and high performance, or who are aspiring to be, or may become either by definition, who choose for whatever reason to operate outside of a High Performance programme run by SNZ. To create a position of distinction and separation between those who are in the 'fold' and those who are 'outside' is not an approach which we can endorse or support.

5.11.3. There must be pathways provided which allow athletes who achieve elite and high performance standing through their ability, rather than through appointment or association, and to be granted both equality of status and opportunity.

5.12. Under 'Definitions' we believe that there is a requirement for the term 'Stakeholder' (as used in Section 13.2(x)) to be defined.

5.12.1. The use of this term has created significant conflict in the past and must either be defined or removed.

5.13. The Appointments Process.

5.13.1. We have reviewed the appointments process as described and presented in the Proposed Draft Constitution with a number of

people with the qualities which ordinarily would lead one to the view that they might have the capacity, whether through professional or sport-specific skills, to contribute as potential SNZ Board candidates. None would have any particular aspiration to put themselves forward for 'national office'.

5.13.2. The question was asked of these potential candidates: Consider the criteria and process for selection. Would you consider that you might be a suitable candidate under that criteria, and would you apply?

5.13.2.1. From a sample of 10 people asked, without weighting one way or the other, those with a sport-specific background universally replied that they did not believe they would be considered to be either qualified or appropriate.

5.13.2.2. Those approached who had professional or commercial backgrounds, again the response universally was that they would not apply as they considered that the process, as defined, was too intrusive.

5.13.3. We hold concerns that unless presented in a gentler manner that this process will attract a very narrow range of applicant who in turn will hold a similarly narrow range of connection with the community. We are concerned that this could lead to a situation of disconnection from the zeitgeist, similar to what we have already experienced under our existing structure.

5.14. Board Procedure.

5.14.1. We note that over time a flavour of the organisation will be established through the development of Board Policy, especially as it relates to the establishment of a 'Whole of Sport' Plan. The nature of that Policy and Plan will reflect the new DNA of the organisation and that cannot be legislated in advance.

5.14.1.1. We are concerned that the Region has clearly been downgraded in this process from being what we might consider key stakeholders.

5.14.1.2. Requirements exist (Sections 13.2(vii), (viii) etc) for the SNZ Board to engage with the '*Sport*'. That is rather ineffective as under the definition of '*the Sport*', the *Sport* is amorphous and has no defined personality. There is no requirement for engagement with Regional bodies or Clubs specifically, which are surely key stakeholders, in the delivery of the sport of competitive swimming.

5.14.1.3. We would wish to see more specific requirements being mandated based on engagement with those who deliver the sport at all levels.

5.15. The President. While we like the concept as presented of a President, we believe there are flaws which require remedy.

5.15.1. We note the use of the term '*mediation*' or '*mediate*'. We would infer that this does not refer to the formal and legal process of mediation for which the President may not be qualified. We infer that it implies some lesser form of dispute resolution capability, but which would not enjoy the effective provisions attached to formal mediation. Nor is it intended to be arbitration. We believe the meaning of *mediation* as used requires definition.

5.15.2. We would note the terms of Section 14.3. To not approve the Board's nomination amounts to an effective vote of no-confidence. Similar action relating to Elected Directors results in the disqualification of the AP from future appointment, yet no similar recognition results from an obvious consideration by members that the Board is not connecting with the zeitgeist.

5.15.3. This should lead to a reality check occurring, and yet the follow through provisions allows the Board to leave the position vacant right at a time when it is likely that trouble is brewing. This is exactly the time when the services of the President in a dispute resolution role could be vital to avoid a crisis and yet it could be the very time where the Board exercises a prerogative to not have a President in Office. This does not seem to be consistent with the thinking which attaches to the decisions (or rejection thereof) of the AP.

5.16. Disputes/Appeals

5.16.1. There are many disputes which arise in sport. Some are competition based, others relate to issues arising from a complex environment and may include, for example, matters relating to child protection, disputes within clubs etc.

5.16.2. It is not reasonable to consider that all those disputes should end on the desk of SNZ.

5.16.2.1. The regional body is an effective buffer for dealing with most disputes when they cannot be resolved within a club. Section 21 of the Proposed Draft Constitution seems to envisage that the responsibility for dealing with disputes is largely a SNZ responsibility. That would be consistent with the notion that a region has no members other than clubs.

5.16.2.2. We do not believe this would be effective, practical or desirable. Experience leads us to a view that the best place for dispute resolution to commence is both quickly and close to the source.

5.16.3. We are concerned that Section 21.1 (extending through to (a)) could be used as a charter to stifle legitimate democratic debate and disagreement. At no stage should the Board be granted a right to adopt a policy which is neither fair, efficient, nor timely.

5.16.3.1. While the intention here is likely to be non-prescriptive it is our view that it would be better to be prescriptive in this instance and require the Board to both adopt and practise policies for dispute resolution which are fair, efficient and timely.

5.16.4. Section 21.1(b) implies that a region will have power to discipline. However, how can this be the case when a region has no members other than a club? Further and better particulars of the Proposed Regional Constitution will be required to cast a further opinion on that subject.

5.17. Transition Regulations. We broadly support the thrust of the transitional regulations. We are however concerned that the provisions of Section 27.8(a) are simply not functional.

5.17.1. SNZ's current database does not have the capacity to categorise present membership in the manner as defined, and nor was data entered in the Zeus database in a manner which was ever intended to be consistent with this regulation.

5.17.2. It is simply not possible to make a transfer from the data entered in the Zeus database and relate it in any meaningful way to the categorisations established under these provisions.

5.18. Membership. We believe we understand and equally support the broad thrust of the membership provisions. However, we feel there are several major omissions and areas of concern.

5.18.1. Section 6.1(a). We reject the notion that competitive membership should be defined by a meet which is effectively capable of being licensed by SNZ. This gives rise to the capacity for SNZ to charge royalties (as is done in some countries) and for the business model of operation for both clubs and regions to be fundamentally compromised.

5.18.1.1. We see no reason to redefine the current accepted requirement for a competitive swimmer as being any swimmer who swims in an inter-club meet during the period. We believe the definitions should define a competitive swimmer in these terms.

5.18.1.2. Our ASA Rule 6.01.1 defines *competitive swimmers* in these terms and we believe that is a consistent interpretation around the country.

5.18.1.3. While it may not be the intention, this definition (Section 6.1.a) could unwittingly result in a reduction of the pool of competitive swimmers rather than increase.

5.18.2. Section 6.1(c). There is no such thing as a nationally qualified TK. Either that qualification needs to be established or this proposed rule must be changed.

5.18.3. Section 6.1(e). Who defines what and who are members under this category? Is that a club responsibility, or a national responsibility?

5.18.4. Section 6.2. If an official chooses not to 'pay' does that mean that they will not be permitted to participate? This will be counter-productive and ultimately if enforceable will run counter to the spirit of volunteerism within the community.

5.18.5. Section 6.6. Who will police this and under what method will it be done? The current SNZ database has no capacity to accomplish this as it does not link between membership and competition.

5.18.6. Section 6.8(b). Simply unacceptable as it conflicts with the requirements of the Privacy Act.

5.18.7. Section 6.8(c). This is simply neither practical nor enforceable and the use of the term *must* is a very heavy handed way to deal with members.

5.18.7.1. Section 7.3 lists obligations of members, if for example, a member fails to notify SNZ of their updated details they are in default and possibly liable for expulsion, but so also is their club and their region.

5.18.7.2. This is simply not enforceable nor is it desirable in its implementation in a volunteer organisation of amateur association.

5.18.8. Section 7.3. This clause can, and is likely to, be used to stifle democratic debate and is a catch-all to remove any individual, club or region who may have a differing political view to the NSO.

5.18.9. Section 8.3. We note that a region can only have as its members its affiliated clubs.

5.18.9.1. This would imply that a region cannot honour its longstanding members with Life membership? Does that mean the region may be restricted from extended service and honours awards as it has no members?

5.18.9.2. Surely this was not the intent?

5.19. Sections 8 & 9 Regions and Clubs. In the absence of the Proposed Regional Constitution, meaningful comment cannot be made with regard to these provisions.

5.19.1. However, we do note concerns that as proposed these sections may impinge on both a region and a club's capacity to operate a self-sustaining business model.

5.19.1.1. The capacity of SNZ to make unlimited financial (Section 8.5.k) and resource (meet and report on KPI's, etc) imposts on members, clubs, and regions does mean that in some cases (and Auckland will be no exception) our entire business model will be subject to review for sustainability. That review will not be possible until various SNZ planning process' (including funding, competition and others) are understood.

5.19.1.2. Many regions operate on an amateur basis and this may prove to be the only way all regions can function in the future. We are concerned about the demands on volunteer resource expected under provisions such as Section 8.5(m) and Section 9.5(a) – (e).

5.19.2. Section 8.6(d). How, if a region, under the Proposed Draft Constitution, has no members other than clubs, can it impose regional amounts on the members in its region?

5.19.2.1. It would have no primary or contractual relationship with members and so the only way collection would be enforceable would be if the amounts were imposed on the member clubs.

5.19.2.2. Further and better particulars are required.

5.19.3. Section 8.2. If in Auckland's case it were to agree a change of boundary with its neighbours it could not do so within this rule, given that under the Proposed Draft Constitution new boundaries must be defined by local territorial authorities.

5.19.3.1. The Auckland Territorial Authority is the entire area encompassing all 21 local board areas. Therefore Auckland (and presumably Counties Manukau) must retain their existing boundaries without change as there is no territorial authority which relates to either the current boundary or to any conceivable combination of how Auckland and Counties might adjust their boundaries in the future.

5.19.3.2. Even amalgamation would not succeed because the new boundaries created via amalgamation still would not align with the territorial authority boundary.

CONCLUSION

We appreciate as well as you that the preparation of a robust Constitution which meets the needs of a complex sport is a challenging task. Because the Constitution is so fundamental, it is our opinion that it is very important to 'get it right' even if it takes a bit more time to go through a good consultation process.

Given that the new Constitution will be the core document, as opposed to the '21 recommendations', that will govern the relationships of the sport for generations to come, it is vital that the time is taken to ensure that the document is refined to properly reflect the intentions of the Review findings and the key positions of all key parties to the sport. When disputes arise in the future, they will be resolved by reference to the adopted Constitution – not by reference to what the recommendations of the Working Group were, nor what the intentions may have been at the time.

In our opinion, it is unfortunate that a document clearly intended as a draft has now been placed before us as a final form document for adoption. It is also unfortunate that other complementary documents (like the Regional Constitutions) are not available for consideration because they have to be evaluated side-by-side. We wish to re-emphasise that, in our opinion, it would be imprudent for those with stewardship responsibilities to repeal existing multi-level structures without a clear understanding of all elements of their replacement.

We would really appreciate your careful attention to the matters we have raised, and would be more than pleased to have a discussion with you to help clarify details.

On behalf of

Board of Swimming Auckland