

**Submission to:**

Ministry of Business, Innovation and Employment
30 June 2016

Subject:

Exposure Draft: Incorporated Societies Bill

We would welcome the opportunity to meet with the Ministry to discuss our comments.

Contact Person:

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Background

The purpose of our organisation is to:

- Ensure that individuals do not suffer through ignorance of their rights and responsibilities or of the services available; or through an inability to express their needs effectively — Me noho matāra kia kua te tangata e mate i tāna kore mōhio ki ngā āhuatanga e āhei atu ana ia, ki ngā mahi rānei e tika ana kia mahia e ia, ki ngā ratonga rānei e āhei atu ana ia; i te kore rānei āna e āhei ki te whakaputu i āna hiahia kia mārama mai ai te tangata.
- Exert a responsible influence on the development of social policies and services, both locally and nationally — Kia tino whai wāhi atu ki te auahatanga o ngā kaupapa-ā-iwi me ngā ratonga-ā-rohe, puta noa hoki i te motu.

We support the principle of partnership reflected in the Treaty of Waitangi. E tautoko ana Ngā Pou Whakawhirinaki o Aotearoa i te mātāpono o te pātuitanga e ai ki Te Tiriti o Waitangi.

We work to empower individuals to resolve their problems and to strengthen communities. The person-to-person service provided by over 2,400 Citizens Advice Bureau (CAB) volunteers is unique in New Zealand. From 83 locations around New Zealand, the CAB provides individuals with a free, impartial and confidential service of information, advice, advocacy and referral. In the 2014/2015 financial year we had 530,000 interactions with clients, including over 200,000 in-depth enquiries where we offered information, advice and support across the gamut of issues that affect people in their daily lives.



1.0 General comments

1.1 CAB structure

Our organisation consists of over 80 independent incorporated societies, all of which are members of Citizens Advice Bureau New Zealand, itself an incorporated society.

We welcome this opportunity to help shape the legislation that will govern our functioning in the future. Our responses to this exposure draft are informed by the CAB's particular organisational structure.

At CAB a person begins their involvement with a local bureau as a volunteer, with the primary motivation to serve their local community by providing the CAB service. A volunteer may then 'advance' to membership status within the bureau when certain requirements are fulfilled. These same volunteers may also contribute to the functioning of the incorporated society by putting themselves forward for election to their bureau board. Having volunteers prepared to participate in this way is fundamental to the functioning of the CAB and it is essential that they are as well-supported as possible to operate effectively in their governance roles. Ensuring there is an accessible, sensible, plain language, legislative framework for incorporated societies to operate within would help to achieve that objective. For these reasons, we very clearly support the intended outcome of the review as stated by the Law Commission: to make societies more robust, help them govern themselves, and provide more constructive options when things go wrong.

We also support the principles underlying the review of the Act, namely that societies are private bodies that should be self-governing and free from inappropriate government interference and should not distribute profits and financial benefits to members.

1.2 New legislation must offer flexibility

The new legislation must be sufficiently flexible to support the diversity of ways different societies operate. It also has to allow for the complexities that can arise as a result of individuals wearing multiple 'hats' within a society. In our organisation the various 'hats' can include, for example: volunteer; member; manager of volunteers; board member and our policies and procedures take account of all these roles and the interplay between them. We see the new requirements relating to resolving disputes and grievances as a positive, but believe societies must have the freedom to draft their procedures in a way that fits best with their organisational structure and that the detail of these procedures should be able to sit outside the constitution. For more detail see our comments to Clause 24(1)(j).

1.3 New legislation must be easy to read and understand

In his 2003 Harkness Henry Lecture, 'Statutes and the Ordinary Person', Professor John Burrows began with the wishful statement that "It would be good if ordinary members of the community could consult the law that affects them, and understand it, particularly if it

imposes duties on them.”¹ The Incorporated Societies Act is an example of legislation that, precisely because it imposes duties on ‘ordinary members of the community’, should be as accessible as possible to the lay reader.

Unfortunately, this Bill in its current form does not bring the law closer to the lay reader, or give that reader a clear understanding of his/her rights and obligations. Sometimes the opposite is the case (for example in clauses 19, 36(2), 60-63, 77-80). This is unfortunate, even at this preliminary stage, as it may have had the effect of making it harder for lay people to exercise their democratic right to provide constructive comment on draft legislation.

We believe that any group which is in the process of forming a small incorporated society should be able to turn to the Incorporated Societies Act and, without legal assistance, readily access all the information it needs in order to comply with the law. Much more must be done to ensure that the final version of the re-drafted Bill meets this aim and that articulated by Professor Burrows.

Apart from obscure wording, other impediments to comprehension include:

- concepts and processes transferred over from other pieces of legislation such as the Companies Act 1993, seemingly without the content or language having been reviewed with reference to the ‘readership’ of the Incorporated Societies Act.
- the many references to *prescribed manner/persons/information (if any)* with no indication of where to find such information (if it exists). For example Clause 74(2) which reads: *The annual report must contain the prescribed information (if any)*. This instruction is of no assistance to an organisation seeking to draft its annual report in accordance with the law.
- clauses which simply contain a *See* reference to a clause elsewhere. These make it hard to get the full picture. What is the status of these references?

For ease of reading generally, we recommend:

- not splitting words across lines
- not using A or (A) to denote a person as the letter is too easily confused with the indefinite article.

1.4 Need for support for the sector

We believe the sector is likely to need support to implement changes required by this legislation. However, where this support comes from, remains problematic. There is insufficient independent, practical, free support to help societies run well, and to assist them

¹ John F Burrows “Statutes and the Ordinary Person” (2003) 11 Waikato Law Review p.1



to deal with governance and management issues - including supporting volunteers in governance roles, and managing volunteers effectively. While the new Act will establish a clearer operating framework, without such support many of the challenges facing incorporated societies will remain.

We recommend that, alongside the work being done on the legislation, consideration be given to how societies can best be supported to run as effectively as possible. We see this as a necessary commitment to the thousands of volunteers who contribute by giving their time freely, and without monetary reward, to the running of incorporated societies, as well as an important investment in the diverse range of community activities and services delivered by incorporated societies in New Zealand.

1.5 Need for resolution and enforcement options that do not involve the courts

We support the requirement that an incorporated society's constitution include mechanisms for resolving problems and disputes within the society. We consider, though, that only the minimum requirements relating to natural justice processes should have to be embedded in the constitution and that it is important that the legislation allow for the detail of these procedures to be held outside the constitution to ensure that entities are able to establish policies to address the specifics of their structure.

When disputes are not able to be resolved internally we do not think the courts are the appropriate mechanism, as a next step, for enforcing a society's constitution or resolving disputes. We would like to see something akin to the services available in the employment area, such as a free mediation service for disputes or grievances involving members of an incorporated society, or between members and the society.

2.0 Clause-by-clause comment

Clause 19

This entire clause is difficult to understand. We suggest it be expressed in a way which avoids double-negatives.

Clause 22(3)(d)

We recommend the addition of a definition of the term 'benefits'.

Clause 24 general comment

More thought needs to be given to how a society interacts with the legislation in regard to meeting its statutory obligations. It is reasonable to think that if you found the list contained in clause 24 stating what a constitution must contain, and you addressed all the matters in this list, your constitution should be robust and should address all the mandatory requirements. However, on our reading of the exposure draft we have found that many other requirements which interface directly with these aspects of a society's constitution are located elsewhere in the bill. It would be useful if ultimately this section pointed to all the other sections of the Act that may be relevant when a society is drafting a constitution.

This could be achieved by inserting Table 1 from the consultation document (copied below) and adding to it those clauses that make mention of provisions a constitution may contain, such as:

- **17(3)** *The society's **constitution may contain a provision** relating to the capacity, rights, powers, or privileges of the society only if the provision restricts the capacity of the society or those rights, powers, and privileges*
- **69** *The liability of a member to the society is limited to [...] (b) any liability **expressly provided for in the society's constitution***
- **80** *Indemnity or insurance for breach of officers' duties, etc, must be **expressly authorised by society's constitution***
- **91(a)** *an obligation [...] may be entered into on behalf of the society in writing signed under the name of the society by [...] (ii) if the **constitution of the society so provides**, an officer, or other person or class*
- **129** *The Registrar may remove a society from the register if [...] (b) a request that the society be so removed [...] is given to the Registrar by [...] (ii) the committee or any other person, **if the society's constitution so requires or permits***
- **146** *The amalgamation proposal must be approved by each amalgamating society (a) by a resolution that is [...] (b) otherwise **in accordance with its constitution***
- **167** *Notice of resolutions. (1) The committee of the society must, **in accordance with its constitution**, ensure that written notice of the resolution is sent to every*

member of the society at least 20 working days before the general meeting at which the resolution is to be submitted. (2) The notice must state [...] (d) the right of a member to appoint a proxy (if allowed by the society's constitution); and [...] (f) **other information required by the society's constitution**

- **168 Approval of resolution** (1) The resolution is effective only if (a) it is approved by a simple majority (or a higher percentage specified in the society's constitution) of the valid votes cast by members voting at a general meeting in person or, **if so allowed by the society's constitution**, by proxy; and (b) all other procedural requirements of the society's constitution are satisfied (for example, a constitution may require the resolution to be confirmed at a subsequent general meeting).

Table 1: Links from clause 24 to other clauses	What the constitution must contain	Related clauses
Clause no.		
24(1)(a)	The name of the society	10 & 88-90
24(1)(b)	The purposes of the society	Nil
24(1)(c)-(d)	How a person becomes a member and ceases to be a member	67
24(1)(e)-(f)	Arrangements relating to keeping a register of members and members' access to the register	70
24(1)(g)	The composition, roles and functions of the committee	37-41
24(1)(h)	How the society will control and manage its finances	82
24(1)(i)	Control and use of society's common seal	91(2)
24(1)(j)	Procedures for resolving internal disputes	31-32 & Schedule 2
24(1)(k)	Arrangements and requirements for general meetings	73-76, 58(3) & 24(3)
24(1)(l)	The method by which the constitution may be amended	27
24(1)(m)	The distribution of surplus assets to other not-for-profit entities	161-165 & 24(4)

It would be useful to require constitutions to have a rule about the procedures to be followed on winding up. Whilst clause 24(1)(m) addresses the requirement to include a rule relating to the distribution of surplus assets on liquidation, there is considerable detail about the steps a society must take to resolve to liquidate in clause 167 which is more hidden from view; specifically, the content of the notice of the resolution. For a society reaching the point of considering winding up it may be useful if they can find the required process for this in their own constitution.

Clause 24(1)(j)

We support the requirement for societies to have in place procedures to deal with disputes, misconduct, complaints and grievances and for these to comply with the rules of natural justice, but we do not think it is realistic or practical to require the detail of these procedures to be embedded in the constitution. This seems to be the effect of the current wording of Clause 31. We believe societies must have the flexibility to refine internal procedures as the need arises, without having to wait for an AGM to do so.

Moreover, we think societies should have the freedom to draft their procedures in a way that fits best with their organisational structure. For example, our society's procedures for investigating and dealing with misconduct cover all CAB volunteers, whether or not they are members of the bureau. While misconduct 'as a member' is specifically acknowledged in our organisational policies and procedures, it is recognised that conduct in one area of involvement will inevitably impact on the member's involvement in other roles within the society. Thus, because our procedures cover members as well as volunteers, they do not fit exactly with what is described in 24(1)(j)(ii). In order to comply with 24(1)(j) as it is currently worded, we would have to draft a parallel set of procedures which related exclusively to members. Not only would this be impractical, it would be unworkable for our organisation.

To give more flexibility to societies as they work to comply with these new requirements, we recommend that a provision be added to 24(1)(j) permitting the society's constitution to refer to relevant internal procedures relating to disputes, misconduct, complaints and grievances - on condition that these procedures apply to members (but not necessarily exclusively to members) and that they meet the requirements set out in current clause 31.

We see this as an area where the sector will need support and guidance to comply with the new requirements.

Clause 24(1)(k)

It would be helpful to refer here to the other sections relating to the holding of general meetings – currently Clauses 73-76.

Clause 27(2)(b)

We recommend giving societies the flexibility to set the bar higher than a "majority vote of members participating and voting" for a vote on a constitutional amendment. The wording in Clause 168(1)(a) could be used: *a simple majority (or a higher percentage specified in the society's constitution)*.

Clause 27(4)

We recommend that the timeframe for notifying the Registrar of constitutional changes be extended to 3 months to bring it into line with what is required by Charities Services. Many societies are also charities and this will reduce confusion about reporting requirements.

Clause 33

We support the idea of issuing standard provisions for constitutions and that these be accompanied, as the consultation document suggests, by practical guidance on the Registrar's website. Here again, flexibility is important and we recommend that a range of standard provisions be drafted. We suggest that an online Constitution Builder be developed - similar to the Employment Builder on the MBIE website - to assist societies to tailor their constitution to their particular functions and needs.

Clause 36(2)

The definition of officer is extremely difficult to understand, and it does not correspond to the definition recently provided in the Health and Safety at Work Act 2015, or to that in the Charities Act 2005. This is confusing.

We are unclear why, when the Health and Safety at Work Act takes steps to ensure that volunteers acting in governance roles are exempted from personal liability as officers, the contrary should be the case in this Bill where offences are broad-ranging and the penalties harsh. We recommend that the definition of officer, and the liability of a person in that role, be substantially re-worked and expressed in much clearer terms.

Clause 37(2) and Clause 43(3)

We recommend making provision for the committee to appoint a non-committee member (the executive officer or finance manager) to be the contact officer.

Clause 38

The use of the terms *management*, *managed*, *managing* in this clause muddies the governance/management divide. We suggest a change of title to *Governance of society*, or *Governance and management of society* and a corresponding change of wording in (1) and (2).

Clause 47

Express in plain English or add definition of the term valid.

Clauses 60-63

These clauses are difficult to understand and follow. Express in plain English and add examples.

Clause 73(1)

Could the current wording be simplified to: *Every society must hold an annual meeting ...?*

Clause 73(1)(a)

It would be helpful to refer to the section that defines the term *balance date* - currently Clause 81 (see also below)



Clause 74(1)(c)

We question the requirement for disclosures of committee members to be presented to the AGM.

Clause 74(2)

This clause, like similar references to *prescribed information*, is unhelpfully vague. It would be far more useful to list the prescribed information here. Failing that, an indication should be given of where any prescribed information can be found.

Clause 75

We recommend specifying that the size of the quorum is as determined by the society.

Clause 75 (a)-(c)

We recommend amending this wording to make it clear that societies are permitted to choose one option to the exclusion of the others.

Clause 76(1)(b)

We recommend clarifying the status of the minutes referred to in this clause. Does this include minutes that have not yet been confirmed?

Clauses 77-80 general comment

These clauses are difficult to understand and follow. Express in plain English and add examples.

Clause 81

This clause is difficult to understand and follow. Express in plain English and add examples.

Clause 82(3)

Should provision be made for a society to keep its records in Te Reo?

Clause 85

Provide detail here about the prescribed manner and the prescribed information, or give an indication of where that detail can be found.

Clause 93(1) and (2)

Provide detail here about the prescribed manner.

Clause 96(2)(c)

Include a definition of the term *public policy of New Zealand*.

Clause 96(6)(a)

Express in plain English.

Clause 110

Should the provision for the court to refuse an application also apply to the banning orders in subpart 7?

Part 4 Subpart 6 Offences

We recommend that this section be moved so that it follows the section on an officer's duties. In fact consideration could be given to grouping together all the provisions relevant to officers: duties, offences, liability, indemnity.

Clauses 121(1), 122(1), 123(1)

The infringement offences in question are breaches of the society's obligations. We therefore suggest replacing the word *person* with *society* in 121(1) and 122(1).

In 123(1) the infringement notice should be sent to the society's registered office.

Clause 125(2)(b)

It is not clear whether a *society* means any society, or a specifically named society.

The use of the term *management* in this provision could have the effect of banning a person from employment in a management role within a society. This is a high price to pay for what could be alleged incompetence as an officer (125(1)(b)(iii)). We suggest replacing the term *management* with *governance*.

Clause 126(2)(b)

We recommend adding a provision allowing the court to refuse an application for a banning order if the court is of the opinion that the application is vexatious or the issue trivial. Otherwise, what stands in the way of a disgruntled former member of a society bringing a court action alleging the chairperson to be incompetent and asking for a banning order?

Clause 129(2)

The grounds on which a request for removal from the register can be made seem to us to be more important than who can request the removal. We recommend that this section become 129(1).

Clause 144

Provide detail here about the 'other prescribed information' the proposal must include.

Clause 145

Should this read: *not less than 20 working days, before the meeting to decide to amalgamate* instead of: *not less than 20 working days, before the amalgamation is proposed to take effect* ?

Clause 145(c)

We question the need to give public notice of the proposed amalgamation.

Clause 146(2) and 146(5)

We fail to see the need for these provisions when the rationale for the amalgamation has already been set out in the amalgamation proposal. Any certification process should relate to the membership's decision to approve the amalgamation proposal.

Clause 146(3)

We favour giving societies the option of setting a threshold higher than a simple majority for approval to amalgamate. The wording in Clause 168(1)(a) could be used: *a simple majority (or a higher percentage specified in the society's constitution)*.

Clause 147

Add as (c): *if a new society, a revised set of rules*.

Provide detail about the 'other prescribed information' that must be sent to the Registrar.

Clauses 150 and 151

On our reading the provisions in these clauses would only apply if the amalgamation results in the formation of a new society as per 143(2)(b). We think this could be made explicit.

Clause 167

As stated in our general comment on Clause 24, we are concerned that important procedural information is hidden from view in Part 5 Subpart 6. Whilst clause 24(1)(m) addresses the requirement to include a rule relating to the distribution of surplus assets on liquidation, there is considerable detail about the steps a society must take to resolve to liquidate in clause 167, specifically, the content of the notice of the resolution. For a society reaching the point of considering winding up it may be useful if they can find the required process for this in their own constitution.

Clause 168(2)

We are concerned about the level of mandatory requirements applying to the notice of resolution. This increases the risk that a genuine resolution could be invalidated by the accidental omission of something relatively unimportant (eg forgetting to state that the meeting will take place at the CAB premises, when this is where all meetings usually take place). This could be addressed by reducing the number of mandatory requirements, or



adding a clause, consistent with 168(2), to the effect that the resolution cannot be invalidated by the accidental omission of certain details on the notice.

Clause 169(2)

Insert *the* in the phrase *have regard to the purposes of society*.

Clause 170

We suggest adding information about how/by whom the register is established. Specify that all subsequent references to *register* refer to the register of incorporated societies, to avoid confusion with a society's the register of members.

Clause 172

We favour Option B, outlined in the consultation document.

Clause 177

We recommend simplifying the wording in this clause:

Search purposes

A search of the register may be carried out only for the following purposes:

- (a) determining whether an entity is a society under this Act:
- (b) obtaining information concerning the nature, activities, and purposes of a society:
- (c) knowing how to contact a society:
- (d) searching for information about an individual who has given their consent:
- (e) assisting a person in the exercise of their powers under this Act or any other enactment:

Part 6 Subpart 2

Consideration should be given to whether the Disputes Tribunal is an option for hearing and determining applications for orders. As mentioned above, we do not think the courts are always the appropriate mechanism for enforcing a society's constitution or resolving disputes.

Clause 192(1)(d)

This clause is difficult to understand and follow. Express in plain English.

Thank you for this opportunity to comment. We would very much like to speak to our submission and will be in touch with the Ministry to request a meeting.

Yours sincerely

Kerry Dalton
Chief Executive