



28 May 2021

Hon Dr David Clark
Economic Development, Science and Innovation Committee
Parliament Buildings
Wellington

Attention:

Committee Secretariat

Email: edsi@parliament.govt.nz

Tēnā koutou,

RE: TE KĀHUI WHAIHANGA SUBMISSION - INCORPORATED SOCIETIES BILL

About Te Kāhui Whaihanga New Zealand Institute of Architects

1. Thank you for the opportunity offered to Te Kāhui Whaihanga New Zealand Institute of Architects to make a submission on *Incorporated Societies Bill*.
2. The Institute has been in existence since 1905 and is the professional body representing more than 90 per cent of New Zealand's registered Architects and many recent graduates entering the profession. In total the Institute represents over 4,300 members. The Institute is active not only in advocating in the interests of our members, but also in promoting practices and providing education and promoting industry wide cooperation that will improve the quality and sustainability of New Zealand's built environment.
3. The Institute has, through its governance structure and membership, significant professional experience in the New Zealand construction industry. That experience includes a wide variety of projects across all construction types and scales. The Institute also has more than a century of experience assisting our members and their clients with projects at all stages, from project establishment and concept design through to contract administration and site observation.
4. The objects for which the Institute is established include the promotion of excellence in architecture, improvement of the technical knowledge and professional development of persons engaged in the practice of architecture and bringing to the attention of central and local authorities any matters affecting architecture or architects.

5. Accordingly, Te Kāhui Whaihanga supports the Government initiatives to modernise the legislation for Incorporated Societies and the obligations on those that administer them. We do, however, wish to draw the Government's attention to several potential issues arising from the proposals included within the Bill as outlined below.
6. The changes proposed in the Bill are significant and there will be a cost of change for all incorporated societies. This cost of change needs to be minimised to ensure that member funds are reinvested in member activities and support.
7. It will also be essential that adequate time for transition is identified and offered to incorporated societies to make these changes. Leaders of societies and those considering such roles also need to have access to information, support and guidance. This should include practical examples of societies and their leaders implementing the Bill. Given that these roles are often filled by volunteer members, the Bill should not become a barrier or disincentive for professionals to contribute to their local communities.

Specific comments and recommendations

8. Clauses 4 and 42 to 60 – Definition of Officer

In clause 4 the definition of "officer" includes not only a natural person who is a member of the committee, but is extended to also include a person occupying a position in the society that allows the person to exercise significant influence over the **management or administration** of the society (for example, a treasurer or a chief executive).

The Institute considers that this extension of the definition from governance positions to management and administration positions has unfortunate consequences, and the following points are noted:

- (a) It is not clear who will be regarded as exercising significant influence over the management or administration of a society. For example, would the definition include an in-house general counsel, the secretary, an operations manager, a patron or a Past President or Director?
- (b) Section 18 of the Health and Safety at Work Act 2015 has a similar provision, but it does not include administration positions, and specifically excludes a person who merely advises or makes recommendations.
- (c) The management and administration employees of a society are likely to have an employment contract with the society which may conflict with clauses in the Bill that relate to officers, for example, the manner in which an officer ceases to hold office under clause 45 of the Bill, notice to the Registrar of their appointment under clause 47, validity of officer's acts under clause 48, the duties of officers as set out in clauses 49 to 56 of the Bill, and the disclosure of interest provisions in clauses 57 to 60. These clauses are drafted with a view to members of the committee, and do not cater or apply easily to employees on employment contracts who in the main part are not involved in governance matters.

Submission:

*That the definition of **Officer** be restricted to the members of the committee.*

9. Clause 24 – When a society does not have financial gain purpose

One of the Objects under the current Rules of the Institute is to establish, administer or contribute to any charitable or benevolent fund from which grants may be made to persons (including members) to:

- (a) provide assistance to those studying or intending to qualify to practice architecture or related activities in New Zealand who are likely otherwise not to be able to complete their courses because of lack of finance;
- (b) provide assistance to members of the Institute or related professions or trades, and their dependents, where the financial circumstances merit such assistance whether by reason of natural disaster or personal circumstances.

The Institute has established a charitable foundation and also has education and benevolent funds in its budget structure to provide assistance as referred to above, including to members. It also provides educational scholarships and support for key professional activities e.g. archiving building plans.

Submission:

That clause 24 be amended to permit societies to establish charitable or benevolent funds to provide financial benefits to members (other than members of the committee and their families and other related parties) by way of educational and hardship grants and scholarships as approved by the committee.

10. Clause 28 – Penalties

Clause 28 provides that the constitution may contain various provisions including, in clause 28(1)(c), reasonable penalties.

Submission:

That clause 28 be extended to include the imposition and recovery of costs in disciplinary proceedings and other dispute resolution proceedings.

11. Clause 40 – Committee

Clause 40(2) provides that the committee must comprise 3 or more officers who are members of the society. An officer must be a natural person.

The New Zealand Institute of Architects is a large professional body with assets of approximately \$5 million and an annual turnover of a similar amount. It is governed in a manner similar to a large company and probably quite differently from smaller incorporated societies such as sporting clubs or arts organisations. The Institute wishes to be able to include as members of its Board up to three representatives or organisations with which the Institute has an affinity, such as, Ngā Aho, Māori Designers Network; NZ Green Building Council; Association of Consulting and Engineering, who are not members of the society or representatives of a member.

Submission:

That clause 40 be amended to permit a percentage, say 30 percent, of the members of a committee to be persons other than members or representatives of members.

12. Clauses 58 to 60: Duty of an officer to disclose interest

Clause 58 requires an interested officer to disclose their interest as soon as practicable after the officer becomes aware that they are interested. Clause 59 prohibits an interested committee member voting or taking part in the decision of the committee or signing any relevant document unless all members of the committee who are not interested in the matter consent to the interested member acting. The Institute seeks clarification that a retrospective consent can be given by the committee to a member acting while conflicted.

Submission:

That clause 59(2)(b) be amended to provide that non-interested members of a committee may give retrospective consent to an interested member voting on or signing a document in relation to a matter in which they were interested. This could apply to all cases, or be limited to case where the non-interested members of the committee were satisfied that the interested member could not reasonably be expected to have identified the interest at the time that member voted on or signed documents in relation to the matter.

13. Clause 67(2) – Interests register

Clause 67(2) provides that the interests register must be made available for inspection by the officers of the society at any reasonable time. This is ambiguous as it can be read in two ways: that the officers have to make the interests register available to others or that the interests register must be available to the officers.

Submission

That clause 67(2) be redrafted to provide that the interests register must be made available to the officers of the society for inspection by them at any reasonable time.

14. Clauses 74 and 75 – Information for members

Clause 74 requires a society to provide information requested by a member, and clause 75 sets out the grounds for refusing a request for information. The rights of a member to information need to be balanced against the roles and responsibilities of the committee members. The potential release of information may inhibit the free and frank exchange of opinions at the board table, affect the executive decision making process that the information relates to, or result in confidential or sensitive information being released prematurely: members who receive information have no confidentiality obligations and can release the information publicly. These possible consequences could undermine the orderly and effective conduct of the society's activities.

The Institute acknowledges the importance of sharing information with members but considers that a society should also be permitted to refuse to provide the following:

- a. minutes of board meetings;
- b. information concerning an incomplete proposal or negotiation;
- c. information containing matters of supposition or insufficiently definite to warrant disclosure;
- d. information generated for internal management purposes; and
- e. information which is subject to an obligation of confidence or which has legal professional privilege or subject to confidentiality or other agreements terms and conditions.

Submission:

That the grounds for refusing consent set out in clause 75 of the Bill be increased to encompass the information set out in paragraphs (a) to (e) above.

15. Clause 80 – Permitted indemnities

Clause 89(2) permits an officer, member or employee to be indemnified for a liability that arises because of a failure to act in good faith and in the best interests of the society. Clause 49(1) sets out the duty of an officer to act in good faith and **in what the officer believes** to be in the best interests of the society.

Submission:

That the above emphasised words be also included in clause 89(2), so that the indemnity would apply, if the officer, member or employee believed they were acting in the best interests of the society, even if they were mistaken about that.

16. Clause 90(3) and (4) – Personal liability for insurance costs

Clauses 90(3) and (4) make an insured officer, member or employee personally liable to the society for the cost of insurance if the officers voting in favour of authorising the insurance did not sign a certificate that in their opinion the cost of effecting the insurance was fair to the society, or did not have reasonable grounds for signing that certificate; provided that the personal liability does not apply to the extent the insurance was fair to the society at the time the insurance was effected.

This provision appears to be unsatisfactory for the following reasons:

- i. the criteria for deciding whether or not insurance is fair to a society is not set out;
- ii. how is the liability to be apportioned – is it joint and several between all of the insured persons or is it pro rata?
- iii. the provision imposes liability on persons, possibly many employees, who have no involvement at all in the insurance being effected, and even an officer who voted against effecting the insurance;
- iv. employees may have employment contracts under which they are indemnified by the society. It would be wrong if they had to pay a part of the costs of insurance taken out by the society to fund that indemnity.

Submission:

That this provision needs to be reviewed and amended to deal with the above points, including removal of the liability of persons who were no way involved in the effecting of the insurance or who voted against effecting the insurance.

17. Clause 122 – Decision made in a dispute which is in conflict with the public policy of New Zealand

Clause 122(2) empowers a court to make an order in relation to a dispute between members being investigated under the procedures in a society's constitution, if the Court is satisfied, among other things, that the decision made on the dispute by a decision maker is in conflict with the public policy of New Zealand.

Submission:

That clause 122 provide guidance as to the meaning of "public policy of New Zealand" and in particular what governmental publications or pronouncements would establish that public policy.

18. Schedule 2 – Dispute procedures that are presumed to be consistent with the rules of natural justice

The Institute considers that recognition should be given to the fact that membership of a society is voluntary, and that giving every person with a grievance the entitlement to be heard in a formal process can be destructively costly for a society and a distraction from its purposes. The following submissions are made to alleviate to some extent the onerous nature of the dispute procedures.

Submissions:

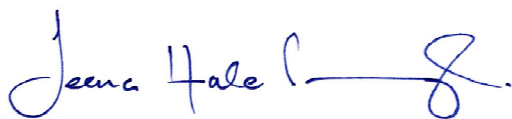
- a. *That a new clause 2(3) be inserted in Schedule 2 providing that procedures are not inconsistent with the rules of natural justice which provide that:*
 - i. *an adverse inference can be drawn from an unreasonable refusal to answer questions; and*
 - ii. *other findings such as convictions can be treated as fact, subject to the person having an opportunity to explain.*

- b. *That a new clause 4(3) be added to Schedule 2 providing that selections and competitive processes do not come within the definition of “disputes” for the purposes of Schedule 2.*
 - i. *That a new paragraph (f) be added to clause 5 of Schedule 2 providing that a Society may decide not to proceed with a matter further if consideration of the matter is not practicable or not desirable in view of the time elapsed since the cause of the dispute or alleged misconduct.*
 - ii. *That paragraph 6(1)(d) of Schedule 2 be amended by adding “the regulatory body of a profession or occupation” as another entity to which a society may refer a complaint, grievance or other dispute.*

19. Te Kāhui Whaihanga would welcome the opportunity to engage with officials and other industry professions on the issues raised in our submission. It will be important that any potential regulatory change is co-designed between industry and Government to ensure that the changes are practical and pragmatic.

20. Thank you for the opportunity to provide feedback on the Incorporated Societies Bill. Should you have any questions about this submission, please contact Te Kāhui Whaihanga’s Chief Executive Teena Hale Pennington on thalepennington@nzia.co.nz.

Ngā mihi,



Teena Hale Pennington
Chief Executive