



SSPA Submission

Exposure Draft: Incorporated Societies Bill

June 2016

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Submission on the Exposure Draft: Incorporated Societies Bill

Commercial, Consumers and Communications Branch
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I would welcome the opportunity to speak to this submission.

Introduction

Social Service Providers Aotearoa (SSPA) is the New Zealand umbrella organisation for Ministry of Social Development funded non-government providers working with children, young people, families, and communities. With a membership of some 200 social service providers in 16 regions, SSPA represents an approximate collective capacity of 5600 staff and 4000 volunteers providing essential services to children, families and communities throughout New Zealand.

SSPA's membership is open to all providers approved under the Children Young Persons and their Families Act 1989:

- Providers approved under Section 396 Child & Family Support Services (providing foster care and residential services)
- Providers approved under Section 403 Community Services.

Our membership also includes other providers contracted by the Ministry of Social Development, and associated members that hold contracts with other departments – Justice, Education, Health etc.

SSPA is governed by a National Executive Committee elected from among provider practitioner-leaders by the membership body at an annual AGM for a two year term. The current Executive consists of regional representatives as well as representatives of Māori, Pacific, Asian, refugee and migrant providers. A National Manager and Events and Administration Officers are based in Wellington.

SSPA exists to support member service providers to make a positive and significant difference in their communities through their work with children, young people and families. SSPA runs best practice professional development for member providers through the provision of resources, facilitation of forums, regional meetings, seminars and conferences. Effectiveness and efficiency of social service practice and decision-making across the sector are also our concern.

SSPA is a registered Incorporated Society and a registered charity. As MSD-approved providers, our member organisations are required to have a recognised legal status. Most are incorporated societies or trusts and many are also registered charities. Both SSPA itself and its member organisations therefore have a strong interest in the proposed changes to the Incorporated Societies Act.

Please note the views in this submission do not represent the views of all SSPA members. We surveyed members on a number of specific matters raised in the Exposure Draft and these views are included in this submission, along with the initial conclusions reached by the National Executive.

This submission is presented as follows:

- (a) General comments
- (b) Comments on specific clauses
- (c) Summary of recommendations.

General Comments

1. SSPA acknowledges the goals of the Exposure Draft to be helpful, principled and complete and believes in general terms these has been achieved. We agree that trust and integrity are essential underpinnings for the operation of incorporated societies and that Societies should be free to operate as private bodies and not distribute profits or financial benefits to members.
2. We commend the approach that has been taken to review the legislation and to consult widely. The joint approach with Hui E! has been a tangible demonstration of the value of the community sector.
3. In general, we share the views of Hui E! and support:
 - The core principles
 - The clarity around ‘financial gain’ (though we are seeking some clarification – see detailed comments below)
 - The long introduction period and transition approach
 - The reduction from 15 to 10 in the number of members a society must have to register (with some reservations about maintaining that number – see detailed comments below)
 - Direction on the range of matters that are required to be included in constitutions
 - The decision to provide standard clauses rather than a model constitution, as this better supports the diversity of the sector
 - The proposal to reduce the minimum age for officers of a Society from 18 to 16, as this recognises the contribution rangatahi young people can make to Societies, especially ones that focus on rangatahi young people
 - The confirmation that the responsibility of officers is to the Society not to members
 - The simple amalgamation procedures.
4. We share the concerns noted by Hui E! on the following matters and address these in our detailed comments below:
 - The requirement for all Societies to meet the same accounting standards as registered charities
 - The absence of any reference to the formation and responsibilities of sub-committees
 - The appeal process with regard to decisions of the Registrar.
5. In addition, SSPA has two further general concerns which we detail in para 6 and 7 below:
 - a. The Exposure Draft does not provide any definition of a ‘member’ of a Society.
 - b. The potential mismatch between the responsibilities of officers of a Society under the Incorporated Societies Act and the responsibilities of officers in the context of a Person Conducting a Business or Undertaking within the meaning of the Health and Safety at Work Act 2015 (HSWA).
6. Definition of a Member of a Society:

The Exposure Draft contains no definition of what constitutes a ‘member’ of a Society, beyond the requirement to ensure a person has agreed to be a member, the maintenance of a register of members and procedures for how people cease to be members. Given the diversity of Societies and the range of categories there may be for participation, it may be appropriate for the Bill not to try and define what a member is. However, **we recommend that there be a standard provision for constitutions which requires Societies to define membership**, including any categories (such as

members and supporters) and to define the nature of their participation in the affairs of the Society. The reason for this is to ensure Societies have clarity about who can participate in which activities or decisions.

7. Alignment with the Health & Safety At Work Act:

HSWA has introduced significant responsibilities for governance bodies and for individual members of those bodies. HSWA and the Exposure Draft define the term 'officer' differently:

- HSWA clause 18 defines an officer as "An officer is a person who occupies a specified position or who occupies a position that allows them to exercise significant influence over the management of the business or undertaking. Organisations can have more than one officer."
- The Exposure Draft clause 36 defines an officer as a member of the Society's committee or holder of any designated position provided for in the constitution.

There is potential for confusion about officers of Societies and whether all or only some of them would have responsibility under the HSWA.

Other areas of potential difficulty between the HSWA and the Exposure Draft are:

- Use of the term 'duty of care'. In s44(2) of HSWA the duty of an officer is stated: "an officer of a PCBU must exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances". The Exposure Draft has a similar concept but different wording: "An officer must exercise the care and diligence that a reasonable person with the same responsibilities would exercise in the same circumstances..." (clause 51). Committee members may have difficulty in interpreting the different 'reasonableness' standards that apply in matters concerning health and safety and other matters.
- Liability of officers. In the Exposure Draft, officers are liable for loss or damage suffered by the Society because of a breach of duty. Under HSWA, directors and other officers are personally liable if they breach their due diligence duty. However, volunteer officers are exempt. Again, there is the potential for confusion.

We **recommend that further consultation takes place within MBIE** to ensure the alignment of the language and concepts between the HSWA and the Incorporated Societies Bill before it is tabled in Parliament. Specific guidance from the Registrar of Incorporated Societies and Worksafe is recommended to ensure officers of Societies meet their obligations under both pieces of legislation.

Comments on Specific Clauses

SSPA has the following comments to make on specific clauses listed below.

Clause 22: Financial gain

SSPA supports the continuation of the principle that Societies do not have the purpose of financial gain and that members do not profit from the Society's actions.

We are seeking clarification on one aspect of financial gain. SSPA is a sector umbrella group and one of the ways it supports members is to pass on benefits of commercial arrangements we may reach with, for example, suppliers of travel, office supplies, etc. Clause 22(3) does not list such activity amongst the exclusions from financial gain. We assume it is not the intention to prevent such activity, which is common amongst NFP organisations, but because it is not specified, we are seeking clarification that the term financial gain would not be applied to such activities. If necessary, an amendment may be required to clause 22(3).

Clause 24: What constitution must contain

SSPA supports the approach of listing the matters that a constitution must contain. We surveyed members as to whether their current constitutions contain the key matters referred to in clause 24(1) and found that the only item appearing in all was how a committee is formed. Just over half had a process for resolving disputes between members and two-thirds described how a person becomes a member. This snapshot confirms the need for guidance as to what a constitution should include.

As noted above, SSPA recommends adding the requirements for constitutions to define membership and any other classes of participants, such as supporters, sponsors, etc.

We recommend a new S24(1)(c) be added to require membership to be defined, with subsequent sub-clauses re-numbered.

We recommend clause 24 be extended to include recognition that committees may set up a range of sub-committees and the process for setting up and removing committees, and the need for clarity about their duties and powers and reporting. It is not uncommon for Societies to set up committees without proper guidance or controls on their decision-making powers and the Committee then finds itself in a rubber-stamping mode. As one of the aims of this updating of the legislation is to reflect good governance practice, this matter should be included.

We further recommend these changes be reflected in any Schedule released under clause 33.

Clause 25: Bylaws, tikanga or culture, and other matters

We received a range of views from members on the inclusion of tikanga in a constitution. The use of procedures and practices that are tikanga-based was generally seen as the more important consideration.

The approach taken in the Exposure Draft, which enables but does not require, will be seen by most as a sensible move.

Clause 31: Procedures in constitution for grievances and complaints

SSPA agrees with the proposed requirement to ensure all constitutions set out processes for handling grievances or complaints. The MSD Approval standards which are mandatory for most of our members require such procedures to be in place but we note that in our survey only just over half the

respondents had this matter in their constitution, as opposed to in a policy document. When the standard provisions are being developed, we recommend MSD is consulted, to ensure alignment between these two sets of requirements.

Clause 36: Definition of officer and Clause 37: Committee

In general, SSPA members already operate with a committee and designated roles for officers, but we did receive some feedback that the construct of a committee and officers did not match the way some organisations with a flat structure (for example, collectives) worked. In such organisations, all members would expect to play a full part in the affairs of the Society and tasks such as chairperson may be rotated rather than designated for any one individual. The concern voiced was that the proposed changes would impact negatively on this mode of operation.

Clauses 56-65: Conflict of interest disclosure roles

SSPA welcomes the clear statement of how conflicts of interest are identified and managed. This is an area where difficulties can and do arise, with negative consequences for the individuals concerned, and the reputation of the Society. Our members currently have a mix of approaches: Approximately 75% have reference in their constitutions to conflict of interest and maintain an interest register but others do not necessarily have formal good governance processes in this matter. We support the approach proposed to provide clear guidance in legislation, and recommend it be supported by practice advice.

Clause 66: Requirement to have at least ten members

SSPA supports the reduction from 15 to 10 members to register and notes the proposed requirements for Societies to have at least 10 members at all times. This generated some debate and comment from members, with negative comments principally from small organisations that currently operate with fewer than 10 members. Some of the comments received:

“As we have a Board of only 6 people, which was hard enough to fill, having to have 10+ members would be a big stretch.”

“Some Trusts operate better on smaller numbers.”

“We would no longer qualify so would need to drop the title.”

“We would struggle to get 10 members at all times. It is for that reason that we have had to change to a Charitable Trust.”

“In small organisations having 10 members can be awkward to manage.”

“In a nut shell... The impacts would be negative as we are already a small organisation and currently have less than 10 members.”

SSPA is concerned at the impact of requiring all Societies to have at least ten members at all times, given the reality some of our members currently face to maintain smaller numbers. We note the proposal for a 6-month period to allow a Society to comply with this requirements, but overall we have a concern about this clause and do not support it. Many of our member organisations work in challenging areas, such as child abuse and sexual violence, and securing support from their communities can be difficult.

We recommend MBIE consider a lower threshold and suggest a minimum of 6 members may be a more realistic figure.

Clause 83 Annual accounts must be prepared and registered

SSPA shares the concerns raised by Hui E! about requiring all Societies, irrespective of their operating expenditure, to prepare and register annual accounts. The new reporting standards place a significant compliance burden on community organisations and it seems unreasonable and unnecessary for very small Societies to be required by law to do this. We note that Hui E! has suggested that Societies with total operating payments of less than \$15,000 annually be exempt. While none of our members fall into that category, we agree in principle with such an exemption, as it would be an unfortunate albeit unintended consequence if the law change was to discourage communities from grouping together to achieve aims that are important to them. There seems no need to impose government reporting on such organisations, especially where they receive no government funding.

Subpart 6 – Offences, in particular clauses 113(2), 115(2), 116(2), 117(6)

Some SSPA members expressed concern at the level of maximum fine for the offences in these clauses. It is understood that these categories may include offending of a serious nature including fraud, but we are also aware of errors that are made arising from lack of understanding of duties and procedures. Clearly there is a high degree of discretion, both in laying charges and in imposing sentences but some members expressed concern at the potential impact for individuals and societies of fines up to \$200,000.

Similarly, fines of up to \$5000 for procedural infringements could have a significant impact on smaller organisations for what may well be an oversight or lack of understanding of the details of record keeping, filing returns and so on. This infringement category seems a heavy-handed response which could contribute towards people being unwilling to take on officer roles.

We recommend reducing the level of fines for offences and infringements under the Incorporated Societies Act.

Clause 146 Approval of amalgamation proposal

SSPA has concerns at the specificity of the amalgamation processes. Locking in a simple majority of 50% plus one does not allow for organisations to decide on a higher level of support for an amalgamation proposal. One possibility is to require each Society to cover this matter in its Constitution with simple majority of 50% plus one being a minimum requirement. Some currently require a 75% majority.

SSPA recommends that this section be amended to require Societies to set out in their constitutions the procedures they will use to determine their response to an amalgamation proposal. This would ensure the procedures are clearly understood but leaves flexibility for Societies to determine their own approach, including those Societies that operate on the basis of consensus.

Clause 187 Appeals from Registrar's decisions

We support the concern of Hui E! with regard to the process for appeal, being to the High Court, and the timeframe for appeals to be lodged.

We recommend that a lower level appeal process be provided, with the District Court being the appropriate body. A further appeal process to the High Court should subsequently be available.

A timeframe of 15 days is unrealistic given the processes needed to be completed by way of gathering evidence, deciding to proceed to appeal, and preparing the papers for an appeal. A longer timeframe to enable this to be done is needed. Sixty days might be a more realistic timeframe.

Summary of Recommendations

1. There should be a standard provision for constitutions that requires Societies to define membership, including any categories (such as members and supporters) and to define the nature of their participation in the affairs of the Society. We recommend adding a new clause 24(1)(c) to give effect to this and to include this in any Schedule released under clause 33.
2. Further consultation take place within MBIE to ensure the alignment of the language and concepts between the HSWA and the Incorporated Societies Bill. Following passage of the Bill, specific guidance from the Registrar of Incorporated Societies and Worksafe is recommended to ensure officers of Societies meet their obligations under both pieces of legislation.
3. Confirm that 'financial gain' (clause 22(3)) does not preclude the provision of commercial benefits negotiated by an umbrella group to its member Societies. If it does, we recommend amending clause 22(3) to specifically exclude this.
4. Extend clause 24 to include the requirement for the powers and duties of sub-committees to be specified in constitutions. Include this in any Schedule released under clause 33.
5. Consult with MSD to ensure alignment between the grievance and complaints requirements under the Incorporated Societies Act and the MSD Approval Standards.
6. Amend clause 66 to reduce the threshold for the number of members at any one time to 6.
7. Amend clause 83 to remove the requirement for societies to prepare and register annual accounts where their total operating payments are less than \$15,000 annually.
8. Amend clause 146 to give Societies the ability to set the level of support required for members to approve an amalgamation proposal, with 50% + 1 of members of each amalgamating Society being a minimum requirement.
9. Amend clause 187 to provide the District Court being the venue for an appeal against the Registrar's decision, with a further appeal to the High Court available on specific grounds (to be determined).
10. Amend clause 187 to provide a timeframe of 60 days to file an appeal.