
20 May 2021

SUBMISSION ON THE INCORPORATED SOCIETIES BILL 2021 Parliament 53, Bill No. 15-1

To the Economic Development, Science and Innovation Committee

This submission is from the New Zealand Amateur Sport Association Inc., (2669211), (NZBN: 9429046103086), (the Association). We wish to appear before the Economic Development, Science and Innovation Committee to speak to our submission on the Incorporated Societies Bill 2021, (the Bill). The Association can be contacted by mobile on +64 21 612 451, or by e-Mail at office@asa.org.nz.

In this submission, the Association provides an overview of the likely impact of this legislative reform on Community Sport Organisations (CSOs) and makes seven recommendations to the Committee relating to the following sections of the Bill:

- Part 3, Clause 38 : Procedures In Constitution For Disputes
 - access to and availability of dispute resolution services
- Subpart 4, Clauses 49 to 56 : Officers' Duties
 - Officer liability for actions undertaken and access to professional support
- Subpart 4, Clauses 57 to 67 : Conflict Of Interest Disclosure Rules
 - obligations of national sporting bodies for affiliated members
- Subpart 7, Clause 83 and 84 : Financial Reporting
 - reporting requirements for a small society

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NEW ZEALAND AMATEUR SPORT ASSOCIATION INC.

1.0 INTRODUCTION

- 1.1 In November 2020, the Association wrote to the Hon. Dr. David Clark (Minister of Commerce and Consumer Affairs), concerning the proposed reform of the Incorporated Societies Act 1908 (the Act). This correspondence followed an earlier letter from the Association's Board to the previous Minister (the Hon. Kris Faafoi), in December 2019 on the same subject. The response received from the current Minister encouraged the Association to make a submission to the Economic Development, Science and Innovation Committee on the Bill.
- 1.2 The Association, was formed and incorporated in April 2017 to work collaboratively with all sporting codes in promoting, fostering, advancing, and encouraging the core values of organised amateur sport.
- 1.3 The Association's vision is that all communities (both urban and rural) have viable and enduring amateur sporting bodies which attract, engage, build, and sustain membership based on each participant's and each community's unique needs. Participation and achievement in organised amateur sport is essential for healthy communities and must be a critical goal, for the well-being of society.
- 1.4 In preparation of this submission, the following were consulted, the Board and membership of the Association, the National Sport Club Survey¹ (NSCS) database of CSOs, the Hon. David Clark Minister of Commerce and Consumer Affairs (and his predecessor, the Hon. Kris Faafoi), Succeed Legal Limited² and Crowe New Zealand³. In July 2020, the Association also met with the Minister for Sport and Recreation, Grant Robertson. In December 2020, the Association met with (and discussed the proposed reform), with representatives of New Zealand's crown-entity for sport, Sport New Zealand.
- 1.5 The Association receives no taxpayer funding from Government and is reliant on the financial support of its members, commercial sponsors and community benefactors to support the development and delivery of its strategic focus on amateur advocacy, thought leadership and community engagement.

2.0 SUMMARY

- 2.1 While generally supportive of the objective of the Bill in modernising the Act, the Association opposes certain aspects of the draft legislation owing to concerns that some reforms contained in the Bill will place additional regulatory burdens on CSOs and their volunteers, which have the potential to negatively impact on community participation in sport, (both on and off-field).

¹ The Association is a founding partner of this national survey.

² <http://succeedlegal.co.nz/>

³ <https://www.crowe.com/nz>

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- 2.2 The Incorporated Societies Bill comprises 6 parts, 261 clauses, 141 pages and over 41,000 words, (about half the length of an average novel). It is unlikely that those involved in community sport on a voluntary basis will have read the Bill in its entirety. As one Auckland CSO based in Eilerslie wrote to the Association, “at over 120 pages, our volunteers do not have time nor expertise to review the changes or nuances that may affect us.” By way of comparison, the current Act comprises only 36 clauses and a mere 11,000 words. Notwithstanding its comparative brevity, many incorporated CSOs struggle to meet their obligations under the current Act.
- 2.3 The Association believes that the Bill (as currently drafted) is likely to: a. accelerate the voluntary and involuntary dissolution of CSOs; b. impair the recruitment of volunteers to govern and administer CSOs; c. reduce the ability of CSOs to deliver the physical and social benefits of organised amateur sport in local communities; d. decrease the overall level of participation in CSOs nationally. The Bill is likely to result in unintended consequences for sport in New Zealand which have not been fully considered in the drafting of the legislation.

3.0 BACKGROUND

- 3.1 The current Act, as highlighted in the Law Commission’s report⁴, was designed to enable incorporation of community related organisations, ranging from local chess clubs to the New Zealand Rugby Union.
- 3.2 As you may be aware, many non-profit CSOs are incorporated under the Act⁵. Incorporated status offers certain legal protections (and status) to CSOs, for example enabling them to protect their members from individual liability and to assist them in making application for community funding, among other benefits.
- 3.3 You may not be aware that between the years 2016 to 2020, a total of 937 CSOs were dissolved⁶ by the Registrar of Incorporated Societies (the Registrar), (21% of the total incorporated society dissolutions), under s. 28 of the Act.
- 3.4 Earlier this year the Association contacted many of these organisations and identified that over a third of dissolved non-profit CSOs continue to operate regardless, in many cases unaware of their dissolved status, the reasons for their dissolution (and the implications), and the potential remedy of revocation. When made aware of their status many CSOs did not know what steps they needed to take to resurrect their incorporated status.

⁴ Review of the Incorporated Societies Act Report, 20 August 2013.

⁵ The Law Commission has identified that approximately 45% of the over 23,000 incorporated societies are cultural, sporting, and recreational bodies. Research by this Association suggests around one-third of these incorporated societies are community sport organisations (CSOs).

⁶ The Registrar will dissolve an incorporated society if it is believed that the society is no longer operating, (e.g. if the society fails to file a copy of its annual financial statements).

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- 3.5 The Association notes that other impacts of CSO dissolution include:
- a. liability and responsibility passing to all office holders personally, with the heightened risk of Officers becoming subject to criminal and/or civil prosecution for “holding out to be an incorporated society” when in fact they are not, also resulting in liability insurance (if any) becoming void;
 - b. in the event of default, credit ratings of the individual unincorporated office holders may impact their own personal credit ratings and their ability to take on personal debt;
 - c. an unincorporated society will find it difficult to obtain community grants (a condition of receiving grant funding is that a CSO must be incorporated, and stay incorporated during the spending of that grant); and
 - d. other fundraising activities will also be impacted, e.g. a CSO will be unable to run normal raffles with prizes, (the Department of Internal Affairs will not grant a licence for supervised draws, etc.),
- 3.6 With reference to point 3.4 above, some notable comments⁷, were received following consultation with dissolved CSOs. The Association also found that 80% of the dissolved CSOs requested the Association's help to restore their status and understand the requirements for Incorporated Society status; suggesting that these societies did not understand their requirements under the current Act.
- 3.7 In reflecting on the above (and with reference to relevant findings from the annual NSCS), the Association suggests that the overall regulatory burden placed on volunteers who deliver sport in the community today (often whose governance capabilities do not meet the compliance requirements of the current Act), is a major contributing factor to the governance issues represented by the above dissolution statistics.
- 3.8 The Association suggests that there are a broad range of issues arising from the proposed reform (as contained in the Law Commission's report and now contained in the Bill), which are unlikely to be within the competence and resources of existing CSOs which are registered incorporated societies to effectively manage.

⁷“I am very concerned that we have been dissolved, we had no idea that had happened or why.”; “We had no indication of the de-registering and were never informed of any problem.”; “At the time of your (NZASA) email we were unaware of the club being dissolved ... we had not been contacted (by the registry) prior to being dissolved by mail.”; “it (the society in question) is definitely run by volunteers (except the instructors, most of whom are paid, as is our administrator)”; “We would greatly appreciate any help you could forward on as we are currently in the process of applying for some funding and we need to be incorporated for this, I think. Does this process take long?”

- 3.9 While there has been a clear and well-described process of consultation since reform of the Act was first mooted in 2011, the Association notes that none of the eight member Reference Group convened by the Law Commission in the initial stages of reform consultation represented the community sport sector.
- 3.10 Additionally, when the reform was first mooted by the Law Commission in 2013, it received a scant 208 submissions, (a 0.9% representative sample of all incorporated societies). Of these submissions, only 12 were from sport entities. Despite comprising around one-third of the entities affected by the proposed reforms, only 0.05% of incorporated CSOs provided input to the consultation process.
- 3.11 Rather than "a lack of interest", the Association suggests that this statistic represents "a lack of awareness". The above statistics suggest that over the past eight years, as the reform has been considered and the Bill has been drafted, the voice of amateur sport may not have been heard.
- 3.12 The Association therefore suggests that the underlying reform principles should be further reviewed given the lack of consultation with (and feedback from) CSOs.
- 3.13 As further evidence of this proposition, in April 2021 the Association surveyed all members of the NSCS database to determine if a. CSOs were aware of the Bill; and b. if they had received any form of communication from their national governing body in relation to it. While one-third of survey respondents indicated they were aware of the Bill, 98% of survey respondents confirmed that they had not received any communication in relation to it. Various comments⁸ expressing surprise and concern were expressed by survey respondents.
- 3.14 The Association suggests that the Bill as drafted may well have the effect of accelerating CSO dissolutions. Already an alarming statistic as noted earlier, the effect of the Bill's reforms may well act as a further disincentive for volunteers to step forward to serve their communities in sport.
- 3.15 If this occurs, it will not be in the best interests of New Zealand and its proud sporting heritage. Nor will the new legislation meet the Government's goal of improving the physical and mental well-being of New Zealanders.

⁸ "We have no knowledge of the Incorporated Societies Bill". "I was not aware of its existence and have not yet received any notification from a national or regional body that it exists." "We didn't know there were changes proposed." "Haven't heard a thing." "We have no information on the Bill and were not aware." "I was not aware of the Incorporated Societies Bill." "Don't know what the Bill is proposing." "We welcome this information regarding the proposed reform and thank you for being our voice." "I really appreciate that you are working on our behalf." "We are an incorporated Society but knew nothing of this Bill or reform of the Incorporated Societies Act." "Will look into it now that we are aware of it." "I had had no formal notification, nor any informal knowledge, of changes to, or reform of this Act."

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- 3.16 In principle, the Association believes that legislative reform should seek to ameliorate (rather than further impair) the governance and operational capability of non-profit CSOs, a principle that the current Minister has endorsed in his correspondence with the Association.
- 3.17 For these reasons, we recommend seven proposed changes to the Bill which we encourage Parliament to consider in the passage of this legislation, relating to the following reform areas captured in the draft legislation:
- i. duties of officers;
 - ii. managing conflicts of interest;
 - iii. financial reporting;
 - iv. transitional timeframe and costs;
 - v. development of dispute resolution procedures and their arbitration; and
 - vi. the potential requirement to defend criminal offences.

4.0 RECOMMENDATIONS

Part 3, Clause 38 : Procedures In Constitution For Disputes

- a. Findings from the NSCS identified that a majority of CSOs are affiliated to a regional or national sporting body. These bodies will typically have the required governance knowledge, skills and competence needed to formulate procedures applicable to the nature of the sport and its participants.
- b. Obliging a sporting code to develop and maintain a procedure for the management of disputes for its affiliated CSOs, consistent with the natural justice procedures described in Schedule 2 of the Bill, may be more favourable and simpler than individually constructed procedures for each CSO.
- c. Recommendation (1): The Association recommends that the Bill obliges an incorporated national governing body to establish and be accountable for a dispute resolution service (DRS) for all affiliated CSOs.

Members of non-affiliated CSOs should have access to a DRS provided by the Registrar. CSO's should accordingly be exempted from the requirement to include a DRS in their constitution under clause 26 (1) (j) of the Bill.

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- d. Recommendation (2): The Registrar create and be accountable for the ongoing provision of a DRS, to which incidences of alleged conflicts-of-interest can be referred to or escalated by a CSO not affiliated to a national body.

Subpart 4, Clauses 49 to 56 : Officers' Duties

- a. Although the Association agrees with the general intent of these clauses, we consider that the introduction of Officers' duties that parallel Directors' duties under the Companies Act 1993, is likely to be confronting for Officers of many CSOs, particularly those governed and operated solely by volunteers.
- b. While Officers owe duties to societies under Common Law, the proposed changes, which reflect a higher standard of expertise similar to that required of Directors of corporate entities, is likely to be considered too great a risk for many, if applied to unpaid volunteers on a parallel basis.
- c. As noted, most CSO Officers are volunteers, often possessing minimal governance and business skills and experience. Unduly burdensome Officer duties will likely deter volunteer members of CSOs from acting as Officers, owing to the explicit risks and legal consequences of not fulfilling their duties.
- d. Even those with the required skills and capability may not necessarily be willing to volunteer where risks are borne without the necessary insurance. The costs of Combined Liability Insurance for a CSO (estimated to be \$1,000 to \$3,000 a year⁹), may further cause CSOs to become unviable as incorporated entities and increase the rate of both voluntary and involuntary dissolutions.
- e. In the Association's view, risks should be balanced to accommodate the range of individuals who provide service as Officers for incorporated CSOs and the financial capability of a CSO to pay for Combined Liability Insurance cover.
- f. Recommendation (3): The Association suggests Officers who are volunteers providing services to a CSO which is not affiliated to a national body and who are otherwise not protected by Combined Liability Insurance have their liability limited only to breaches of their duties that arise from their dishonesty or wilful misconduct. This would ensure that Officers' duties can be enforced while providing a degree of protection to volunteer Officers.
- g. Recommendation (4): For CSOs governed and operated entirely by volunteers, a 24/7 regulatory-service-help-desk be created by the Registrar.

⁹ Providing Officers Indemnity insurance cover, (where not otherwise covered by a national body).

The Association suggests this will be more effective than the proposed multi-year education campaign, noting that Officers of CSOs change regularly, and prospective volunteers may be deterred from becoming Officers of CSOs without this support being available, (should the new Bill become law).

Subpart 4, Clauses 57 to 67 : Conflict Of Interest Disclosure Rules

- a. The Association agrees with the general intent of these clauses, but makes two observations. Firstly, these obligations, which will be the responsibility of volunteers who operate CSOs, may simply be another disincentive to the continued operation of their CSO on an incorporated basis. Secondly, larger incorporated CSOs (operating on larger financial budgets, with employed staff) are likely to have specific disclosure practices already in existence.
- b. Many volunteer Officers of CSOs may not understand what a conflict-of-interest is, let alone the concept of materiality, or have the capability to maintain a register. With reference to the Companies Act 1993, the risk for not addressing conflicts-of-interest is that interested transactions may become voidable. It seems unlikely that most CSOs (given the limited scope of their operations and finances) will enter into voidable transactions.
- c. The Association suggests that the types of conflicts-of-interest which may occur in CSOs are, are more likely represented by clause 57 subclause 2B and 2C of the Bill, suggesting the risks of not maintaining required conflict-of-interest disclosures may not be equally applicable to all CSOs.
- d. Recommendation (5): The Association suggests that national sporting bodies be obliged to specify a conflicts-of-interest policy for their affiliated CSO members and that this obligation be contained in the Bill. Where a CSO is not affiliated to a national body, and its operations fall below a specified (e.g. financial) threshold, an exemption to this requirement should be provided.

Subpart 7, Clause 83 and 84 : Financial Reporting

- a. The proposed changes to financial reporting requirements, from those defined currently in s. 23 of the 1908 Act, may create significant and further issues to those already existing for CSOs governed and operated by volunteers.
- b. The Association acknowledges the findings from the Law Commission's Report, which identified that almost all dissolutions are due to an incorporated society's failure to file an annual return. The Association also acknowledges the Registrar's view that the filing of an annual return is an objective gauge under law of whether a society is still operating and that a failure to file an annual return would otherwise infer that a society has become non-operational.

As noted earlier, this is clearly not the case, with many CSOs continuing to operate without the protection of incorporation, while dissolved.

- c. The Association believes that the current requirements of s. 23 of the Act are not onerous and acknowledges that the simpler filing format prescribed in the Bill relating to “small societies” favours many smaller incorporated societies. The Association, however, is concerned that the definition of “small society” in the Bill is too restrictive and would artificially exclude many small CSOs. The more comprehensive/complex set of financial reporting measures that would then apply to those CSOs would further inhibit, rather than enable, smaller CSOs to achieve compliance in this area.
- d. A society is defined as a “small society” if: (i) in each of the 2 preceding accounting periods of the society, the total operating payments of the society are less than \$10,000; and (ii) as at the balance date of each of the 2 preceding accounting periods, the total assets of the society are less than \$30,000; and (iii) at the balance date of the accounting period, the society is not an entity described in section LD 3(2) of the Income Tax Act 2007 (a donee organisation).
- e. Most CSOs cannot operate without grounds/facilities, which in many cases will have a value in excess of the asset threshold of \$30,000, but for all other intents and purposes operate as a “small society” in practice, with low operating payments in any given year. This means that a significant number of CSOs would be subject to the more comprehensive financial reporting requirements of the Bill, despite the fact that their main assets are not liquid, and their liquid assets fall well below the operating payment threshold.
- f. Without requisite accounting knowledge, competence and skill, the cost for CSOs to employ accountants and/or auditors to submit accounting records, financial reports, and annual returns consistent with the required format, may further reduce any financial surpluses used for the ongoing implementation of the CSOs objectives.
- g. Furthermore, on consultation with a number of CSOs, the Association revealed that a number were apparently never contacted prior to their dissolution, and continue to remain operational in ignorance of their dissolved status. If a failure to file a financial statement warrants the Registrar to assess whether a society is still operational, the above evidence suggests that responsibility for non-compliance may not fall solely on CSOs.
- h. Recommendation (6): That the definition of “small society” be amended to increase the thresholds for what constitutes a small society.

Alternatively, the wording could be amended so a society is considered “small” if it has operating payments of less than \$10,000 or total assets less than \$30,000, rather than needing to meet both those requirements.

- i. Recommendation (7): That the Registrar is obliged, where a CSO has indicated an affiliation with a national body, to advise the national body of any incidences of non-compliance with the obligations of the CSO in relation to relevant legislation and associated regulation, with a 90-day remediation period allowed for before any dissolution takes effect. Where the CSO is not affiliated to a national body, the Registrar is similarly obliged to notify the regional sport organisation in the territorial area where the CSO is located.

5.0 CONCLUSION

- The Association suggests that the current Bill has not adequately canvassed the practical operating circumstances of incorporated CSOs, nor the day-to-day operational and governance challenges CSOs face in delivering sport to New Zealanders under the legislative protection of incorporation.
- Nonetheless, the Association wishes to contribute positively to the Bill as an advocate for those CSOs who are not aware of the reforms proposed by the Bill, the impact on their viability as valuable community organisations and the unintended consequence which may therefore arise from an acceleration in the number of voluntary and involuntary CSO dissolutions.
- The Association considers that national sporting bodies to which member CSOs pay affiliation fees have an obligation to reduce the regulatory burden imposed by the Bill (which should be reflected in the current draft) and that where CSOs are unaffiliated, they should have access to resources and support which enable them to easily fulfil their regulatory obligations, despite the absence of the necessary knowledge, skills and competence implied by the Bill.
- The Association trusts that the recommendations contained in this submission are viewed favourably by the members of the Committee and in the event that the Bill continues to progress to Royal Assent, that the recommendations help CSOs to remain the backbone of all that epitomises the spirit of amateur sport and its role in the social development of communities throughout New Zealand.

ENDS