NZCTU
Te Kauae Kaimahi

Submission to the Economic Development, Science, and Innovation Committee on the

Incorporated Societies Bill

Submitted by the New Zealand Council of Trade Unions Te Kauae Kaimahi, P.O Box 6645, Wellington
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Summary of recommendations

1. That the financial gain provisions be amended to accommodate and protect the representative and regulatory functions of unions, and

2. That the means for unions to fulfil longstanding social and political functions, by holding and distributing necessary funds, be recognised, and protected.

3. That reasonable restrictions be placed on the powers of the registrar, particularly its power to de-register unions.

4. That union executive committees be exempt from a fiduciary duty to the 'society' to accommodate the union principle of accountability to rank-and-file membership.

5. That prescriptive statutory timeframes for general meetings do not apply to unions.

6. That the 'sensitive operational information' held by unions be protected from disclosure.

1. Introduction

1.1. This submission is made on behalf of the 28 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 300,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. The CTU welcomes the opportunity to submit before the Select Committee on the **Incorporated Societies Bill** (‘the Bill’) in relation to the particular issues for unions as a species of incorporated society.

2. Background

2.1. As incorporated societies, unions are currently regulated (in terms of registration, governance, and accountability obligations) by the Incorporated Societies Act 1908.

2.2. Calls to amend this legislation have been made by the New Zealand Law Commission, noting that the existing statutory framework is some 113 years old and that many aspects of it are outdated.

2.3. Accordingly, the Incorporated Societies Bill [The Bill] was introduced to Parliament on 17 March 2021 with an aim to replace the Incorporated Societies Act 1908.

2.4. The Incorporated Societies Act was not originally designed for unions. In its long history, unions were only covered by this Act’s regulatory framework after 1991.

2.5. Prior to the passing of the Employment Contracts Act 1991, unions were registered under the Labour Relations Act 1987 and various predecessors and alongside the Trade Unions Act 1908. These previous statutory regimes recognised the unique character of unions as workers' organisations and were designed for them.

2.6. The independent statutory framework for registering unions came to an end abruptly with the passing of the Employment Contracts Act 1991, where section 185 required:

> ‘(1) Every union, employers organisation, or association that was registered or provisionally registered or deemed to be registered under the Labour Relations Act 1987 immediately before the commencement of this section shall, as from the commencement of this section, become an incorporated society incorporated under the Incorporated Societies Act 1908, with its current rules, and the Registrar of Incorporated Societies shall, on being given by the Secretary of Labour particulars of the registration under the Labour Relations Act 1987 of any such union, employers organisation, or association, issue a new certificate of incorporation attesting to the registration of that union, employers organisation, or association as a society incorporated under the Incorporated Societies Act 1908.
>
> (2) Subject to this Act, the rights, assets, liabilities, and obligations of every such union, employers organisation, or association shall remain rights, assets, liabilities, and obligations of the society incorporated in its stead under this section.’

2.7. Unions have remained within the fold of a statutory regime that has not been designed with their interests in mind since the passing of the Employment Contracts Act.

2.8. Another unique feature of unions is that their roles, purposes, and functions are defined by another statutory framework, namely the Employment Relations Act 2000. The Incorporated Societies Act as it is, does not reflect any legislative intention to harmonise its framework with what is required of unions in the carrying out of their normal and lawful functions.

3. Issues with the current Bill

3.1. The Incorporated Societies Bill continues to promote a statutory framework that is not always aligned with the functions of a union. Though it is noted that certain provisions in the Bill do refer to unions and, makes some provision for the unique functions they carry out. In the following sections, we outline our primary concerns with how the Bill could be interpreted when applied to the functions of unions.

4. Financial gain

4.1. This part of the Bill restates the longstanding rule that: *"A society must not be carried on for the financial gain of its members"* **clause 22**). However, it goes into more detail as to what kind of activity would breach this rule and expose a society to liability.

4.2. **Clause 23**[1] of the Bill defines certain activities as breaching the rule set out at clause 22.

4.3. Of these, **Subclauses 23 (1)(a)** and **(c)** may pose challenges to the ability of unions to carry out their ordinary functions.

4.4. **Subclause (23)(1)(a)** provides that a society will be treated as [unlawfully] being carried out for if: "*it distributes, or may distribute, any gain, profit, dividend, or other financial benefit to any of its members (whether in money or in kind)*". However, unions carry out certain representative and regulatory functions on behalf of their members that necessarily involve the obtainment and distribution of financial 'gains' or 'benefits'.

4.5. We are concerned that **Clause 23** of the Bill could be interpreted as prohibiting or restricting certain activities that are common to the normal and lawful practices of unions.

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[1] **Clause 23 of the Incorporated Societies Bill: [Financial gain]**

(1) A society (or proposed society) must be treated as having a purpose of being carried on for the financial gain of any of its members if—

(a) it distributes, or may distribute, any gain, profit, dividend, or other financial benefit to any of its members (whether in money or in kind); or

(b) it has, or may have, capital that is divided into shares or stock held by its members; or

(c) it holds, or may hold, property in which its members have a disposable interest (whether directly, or in the form of shares or stock in the capital of the society or otherwise).

(2) A society must be treated as being carried on for the financial gain of any of its members if it acts as referred to in any of paragraphs (a) to (c) of subsection (1).

4.6. For example, a union is entitled to act as an authorised representative of one (or more) of its members in pursuing their individual employment rights[2]. In practise this means that a union may raise a personal grievance, pursue claims of unjustifiable action, disadvantage, or dismissal, and seek compliance with an employer's legal duties on behalf of an individual member.

4.7. Pursuing these rights on behalf of individual members may require a union to lodge matters at Mediation or, at the Employment Relations Authority or the Court. Necessarily, this activity will involve the pursuance and obtainment of 'financial gain' for union members, such as compensation, costs, wage arrears and penalties. In pursuing legal matters, a union may also be awarded 'costs claims' that are payable directly to the union because of their provision of legal service.

4.8. Unions also have a regulatory function and have a recognised role in monitoring employer compliance with the "operation of a collective agreement"[3] and any statutes that provide "employment related rights in relation to union members."[4] Again, this function may require unions to pursue legal claims and, obtain penalties from non-compliant employers.

4.9. Similarly, the operation of **subclause 23(1)(c)** may also conflict with the practical reality of a union, carrying out its function as a workers' organisation where it defines as a financial gain purpose, instances where a society "*…holds or may hold property in which its members have a disposable interest".*

4.10. For the purposes of **subclause 23 (1)(c)** 'holding' property may touch on union activities such as the operation of 'strike funds' that are raised, held and distributed among members. There is also a question as to whether interest accrued on funds held in bank accounts (such as strike funds) are 'financial gains' and whether such gains can be distributed to members without breaching the rule that a society cannot be carried out for a financial gain purpose.

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[2] **Employment Relations Act 2000-** Sections 18(3) and 236.
[3] Section 20 (2)(c).
[4] Section 20 (2)(d).

4.11. Unions also raise and hold money as 'welfare funds' on behalf of their members, particularly where unions organise sections of the working populace that experience worker exploitation or hardship. Having welfare funds, for some unions, constitutes an important membership benefit and keeping these kinds of funds (including strike funds), has long been intrinsic to the practise of unionism.

4.12. **Subclause 24** lists certain kinds of activities that a society may carry out, without being treated as having a financial gain purpose.

4.13. **Subclause 24 (d)** does provide that a society may: *"provide benefits to members of the public, or of a class of the public, including members of the society or their families"*. However, this exception does not appear to allow for a union to hold strike or welfare funds, which are not held for a 'class' or section of the public that may 'include' union members, but which are held exclusively for the benefit of union members.

4.14. **Subclause 24 (i)** refers to unions specifically and allows them to: "…negotiate or arrange, in the ordinary course of promoting its members' collective employment interests, the salaries, wages or other terms or conditions of employment of its members". However, this exception is too narrow and does not relate to a union's function in pursuing the individual employment rights of its members, or to a unions ability to monitor compliance with collective agreements and employment law.

4.15. A solution to the issues arising under **Part 3, Subpart 2** of the Bill will require some comprehensive drafting that accommodates and recognises the characteristics of unions as workers' organisations. The advocacy and representative functions that are protected under the Employment Relations Act, as well as activities that are longstanding and intrinsic to the functioning of unions need to be protected and recognised.

4.16. As it is written, a union exercising its representative functions on behalf of individual members, or its regulatory and compliance functions may conflict with the provisions of the Bill. The Bill must explicitly recognise that these functions are

lawful and are not being repealed or restricted by the passing of any new legislation.

4.17. With respect to strike and welfare funds, the Bill should reflect the social and political realities of a union's role in representing its members. Such funds may be essential for some unions in organising and sustaining collective industrial action. Welfare funds may be an indispensable way of reaching out to workers who are prone to isolation and exploitation in the labour market and may be a crucial organising tool for certain unions. Similarly, unions have a longstanding tradition of fundraising in support of political and charitable initiatives that enhance the interests of working people everywhere. If these activities are curtailed, the impact on unions would be significant and detrimental.

5. Membership

5.1. **Clause 8** of the Bill makes a requirement that any society seeking registration must have at least 10 members to be eligible. [5]

5.2. This membership requirement is reinforced at clause 68, where it provides that: *"A society must continue to have at least 10 members"* even after meeting the eligibility threshold.

5.3. It is noted that sections **4** and **7** of the Incorporated Societies Act 1908 require 15 members for a society to become eligible for registration. Thus, **clause 8** of the Bill reduces that threshold. However, the requirement that a society maintain a minimum number of members [at **clause 68]** throughout its existence is new.

5.4. **Clause 69** gives a broad discretion to the **Incorporated Societies Registrar** to require a society to comply with **clause 68** (and increase the number of its members to 10 if

[5] **8- Eligibility to be incorporated society:**
(1) Any 10 or more persons may apply to incorporate a society under this Act for any lawful purpose other than a purpose of being carried on for the financial gain of any of its members.

the society is below that number)[6], apply to the High Court for the society to go into liquidation or, remove the society from the register.[7][8]

5.5. The membership requirements do not allow for exceptional or individual circumstances they may mean that a society with a valid purpose may realistically have a membership of less than 10. This may affect 'local branches' where a union is present in remote areas, or areas with a low population, but where the union carries out its functions and incorporates to do so.

5.6. The powers of the registrar defined at **clause 69** are broad and discretionary. There is nothing in the Bill to safeguard against these powers being used unfairly. Furthermore, there does not seem to be any obligation on the registrar to consider the individual circumstances of the society before taking steps to de-register the society for not complying with **clause 68**.

5.7. A possible solution would be to have an eligibility and membership criteria that is not dependant on a fixed membership.

5.8. Alternatively, some provision should be made for circumstances where a membership of less than 10 may be valid. This may be useful for situations where a union is still able to carry out its lawful functions, notwithstanding a low

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[6]**Clause 69 of the Incorporated Societies Bill- Registrar may act if society has fewer than 10 members:**

(1) The Registrar may, if the Registrar is satisfied that a society has fewer than 10 members, give the society written notice—

(a) requiring it to increase its membership in order to comply with **section 68.**

[7] **Subclause 69(1) (b):**

informing it that, if the society does not comply with that section within 6 months after the date of the notice, the Registrar may—

(i) apply to the High Court to put the society into liquidation; or
(ii) remove the society from the register under subpart 1 of Part 5.

[8] In the **Incorporated Societies Act 1908- Section 25 (b)** gave the High Court a discretion to put a society into liquidation if it had less than 15 members. The discretion was not in the hands of the registrar.

membership. Some provision for fluctuations in membership may also serve to protect small societies.

5.9. The powers of the registrar should also be subject to restrictions and, an absolute discretion should be avoided in the interests of fairness and justice. A small union that carries out a lawful function for its members should not be exposed to abrupt removal from the register technical issue, the fact that a union carries out legally protected functions should be factored into any decision to de-register a union.

5.10. Unions organising migrant workers may also struggle to properly reflect the true extent of their membership. For example, migrant workers often approach unions through informal channels and, the reality of organising these workers may mean that it could take some time before their membership is formally recognised.

6. Officers

6.1. **Clause 40** of the Bill requires that: "*Every society must have a committee*" of 3 or more "officers"[9] who are qualified to hold their positions under the provisions of **clause 42** of the Bill.

6.2. **Subclause 41(1)** provides that: *"The operation and affairs of a society must be managed by or under the direction or supervision of its committee*". These committees of officers are vested under **subclause 41(2)** with: "…*all the powers necessary for managing, and for directing and supervising the management of, the operation and affairs of the society."*[10]

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[9] **40-Committee:**

(1) Every society must have a committee.
(2) The committee must comprise 3 or more officers who are—
   (a) members of the society; and
   (b) qualified to be appointed under **section 42.**

[10] **41- Management of society:**

(1) The operation and affairs of a society must be managed by, or under the direction or supervision of, its committee.
(2) The committee has all the powers necessary for managing, and for directing and supervising the management of, the operation and affairs of the society.

6.3. Unions promote worker participation and democracy and, have well developed systems for holding their executive bodies accountable to their membership. The prescriptive nature of these provisions may not apply to unions and may be at odds with the already existing democratic structures that unions maintain. The specific "qualifications" for officers laid out in **Clause 42** may not be appropriate for unions[11]. Many positions on union governance and executive bodies are elected by

(3) This section is subject to any modifications, exceptions, or limitations contained in this Act or in the society's constitution.

[11] **42- Qualifications of officers:**

(1) A natural person who is not disqualified by **subsection (2)** may be appointed as an officer of the society, so long as that person—
(a) has consented in writing to be an officer; and
(b) certifies that they are not disqualified from being appointed or holding office as an officer of the society.
(2) The following persons are disqualified from being appointed or holding office as an officer of a society:

(a) a person who is under 16 years of age:
(b) a person who is an undischarged bankrupt:
(c) a person who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, an incorporated or unincorporated body under the Companies Act 1993, the Financial Markets Conduct Act 2013, or the Takeovers Act 1993:
(d) a person who is disqualified from being an officer of a charitable entity under section 31(4)(b) of the Charities Act 2005:
(e) a person who has been convicted of any of the following, and has been sentenced for the offence, within the last 7 years:
i. an offence under **subpart 6 of Part 4**:
ii. a crime involving dishonesty (within the meaning of section 2(1) of the Crimes Act 1961):
iii. an offence under section 143B of the Tax Administration Act 1994:
iv. an offence under **section 22(2)**:
v. an offence, in a country other than New Zealand, that is substantially similar to an offence specified in **subparagraphs (i) to (iv)**:
vi. a money laundering offence or an offence relating to the financing of terrorism, whether in New Zealand or elsewhere:

(f) a person who is subject to any of the following orders:
i. a banning order under **subpart 7 of Part 4**:
ii. an order under section 108 of the Credit Contracts and Consumer Finance Act 2003:
iii. a forfeiture order under the Criminal Proceeds (Recovery) Act 2009:
iv. a property order made under the Protection of Personal and Property Rights Act 1988, or whose property is managed by a trustee corporation under section 32 of that Act:

(g) in relation to any particular society, a person who does not comply with any qualifications for officers contained in the society's constitution.

(3) A person who is disqualified from being an officer but who acts as an officer is an officer for the purposes of a provision of this Act that imposes a duty or an obligation on an officer.

members or their representatives. Union democracy traditionally means that members have been free to elect “officers” to these positions who reflect their interests as working people. The qualifications imposed by **clause 42** do not relate to an elected officer standing as a workers’ representative, instead they relate to bankruptcy, corporate standing, criminal records, and other matters.

6.4. Accordingly, **clause 42** provides significant restrictions on the ability of unions to elect and appoint officers in alignment with their own principles and functions as workers’ organisations.

6.5. We submit that **clause 42** as drafted, should not apply to unions.

6.6. **Clause 49** is also at odds with characteristics of union governance and democracy in that it requires a societies officers to owe fiduciary duties to “the society”, not the membership of the union.[12] The provisions in the clause to allow for the officers to act in the benefit of “employees” of the society, but this provision does capture the status of union members.

6.7. **Clause 49** should be redrafted to allow unions to be member lead institutions with primary duties being owed to the aspirations and welfare of rank-and-file members.

7. General meetings

7.1. **Clause 78** requires at **(1)(a)** that: *“Every society must call an annual general meeting of members to be held*” and requires that the Annual General Meetings be (**a)** “not later than 6 months after the balance date of the society; and” **(b)** “not later than 15 months after the previous annual general meeting.”

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[12] **49- Duty of officers to act in good faith and in best interests of society:**

(1) An officer, when exercising powers or performing duties as an officer, must act in good faith and in what the officer believes to be the best interests of the society.
(2) This section does not limit the power of an officer to make provision for the benefit of employees of the society in connection with the society ceasing to carry on the whole or part of its activities.
(3) In **subsection (2)**, **employees** includes former employees and the dependants of employees or former employees, but does not include an employee or a former employee who is or was an officer of the society.

7.2. These timeframes are highly prescriptive.

7.3. Many unions, particularly those in the Education Sector are required to structure their General Meetings around such annual occurrences as holiday and exam periods. Other unions may be affected by regular, seasonal events. Accordingly, there may be industry specific factors that affect the availability of members and delegates to participate in General Meetings and, which render prescriptive timeframes unworkable.

7.4. For many unions, the only realistic times in which they can hold General Meetings are when their members are not otherwise at work. This can mean that some unions have very little choice about when they must hold their General Meetings. Where those times do not align neatly with the financial quarters, the imposition of a rigid 6-month time limit will make it unnecessarily onerous for unions to comply. For example, NZEI Te Riu Roa's Annual Meeting involves hundreds of delegates, meeting for up to three days, in the September/October term break. Holding such a meeting at any time other than a term break would impact schools and early childhood centres so severely that employers would quickly become resistant to providing leave for attendance. The term breaks typically fall in April, July and September/October, and, with not only national accounts, but separate accounts for its 140 distinct subordinate branches and area councils, producing audited financial accounts typically takes four to five months.

7.5. **Subclause 78(4)** does provide that: "*If a society is a union or is of a kind prescribed by the regulations, the society's constitution may provide that a right to attend an annual meeting applies only to delegates or other representatives of members (rather than to all members)*." This is a helpful recognition of the role of delegates within the democratic structures of a union. However, this provision still does not deal with the impact of prescriptive timeframes on the ability of unions to hold meetings at times when members and delegates are realistically able to attend.

7.6. Requirements around holding general meetings that account for the challenges faced by many unions in ensuring that such meetings occur at times that are realistic and accessible to members will be required.

8. Access to information

8.1. **Clause 74** of the Bill provides that a member of a society: *"…may at any time make a written request to a society for information held by the society*". **Subclause 74(3)** provides a general obligation on the society receiving the request to comply or agree to comply within a specified timeframe.[13]

8.2. This provision strongly parallels section **178 of the Companies Act 1993**[14], which affords company shareholders a similar right to request information held by the company.

8.3. We do not agree with the appropriateness of uplifting corporate legislation and incorporating it into a scheme that applies to "not for profit" societies.

8.4. For unions, there are certain types of information where specific legal and operational sensitivities apply. Protecting this information is crucial to the normal

[13] **74-Information for members**

(3) The society must, within a reasonable time after receiving a request, —

(a) provide the information; or
(b) agree to provide the information within a specified period; or
(c) agree to provide the information within a specified period if the member pays a reasonable charge to the society (which must be specified and explained) to meet the cost of providing the information; or
(d) refuse to provide the information, specifying the reasons for the refusal.

[14] **Companies Act 1993: 178-Information for shareholders**

(3) Within 10 working days of receiving a request under subsection (1), the company must either—

(a) provide the information; or
(b) agree to provide the information within a specified period; or
(c) agree to provide the information within a specified period if the shareholder pays a reasonable charge to the company (which must be specified and explained) to meet the cost of providing the information; or
(d)) refuse to provide the information specifying the reasons for the refusal.

operation and functioning of a union. Such information includes privileged information [relating to legal advice or proceedings] as well as tactically sensitive information relating to proposed industrial action and strategic directions. These kinds of information are not specifically addressed or given adequate protection.

8.5. **Clause 75** provides an inexhaustive list of instances where a request for information under **clause 74** may be declined[15]. However, nothing in this list relates to the types of information that are particularly sensitive to unions.

8.6. **Subclause 75(1)(d)** specifically protects information that is *"not relevant to the operation or affairs of the society*". However, the types of sensitive information referred to above in paragraph 7.5 of this submission need protection, precisely because of the way they relate to the operational workings of a union and its functions. While It is noted that the list at **clause 75** is not exhaustive, the inclusion of **Subclause 75(1)(d)**, may lead to judicial interpretations that exclude information that is operationally sensitive to unions.

8.7. Accordingly, we submit that the statutory language should be re-drafted to provide protection for the 'sensitive operational information' that unions hold and broaden the scope of information that unions may be able to withhold.

[15] **Incorporated Societies Bill: 75-Grounds for refusing request**

(1) A society may refuse to provide the information if—

(a) withholding the information is necessary to protect the privacy of natural persons, including that of deceased natural persons; or
(b) the disclosure of the information would, or would be likely to, prejudice the commercial position of the society or of any of its members; or
(c) the disclosure of the information would, or would be likely to, prejudice the commercial position of any other person, whether or not that person supplied the information to the society; or
(d) the information is not relevant to the operation or affairs of the society; or
(e) the request for the information is frivolous or vexatious.

(2) This section does not limit the reasons for which a society may refuse to provide the information.

9. Conclusion

9.1. The persistent issues caused by the inclusion of unions under the scheme of the Incorporated Societies Act 1908 remain and still need to be addressed.

9.2. Unions have a special character as workers' organisations. They have lawful functions that are protected by other statutory regimes and, this reality needs to be fully reflected in any system under which unions are required to register and submit to regulation.

9.3. The representative and regulatory functions of unions need to be recognised and protected under any new scheme of registration and regulation. Also, the broader social and political role of unions in supporting working people also needs to be recognised. Framing a regulatory system that prevents unions from fulfilling these roles will have a huge and restrictive impact on the way unions operate.

9.4. Unions have a democratic character that makes their executive officers accountable to union membership. A fiduciary duty owed by executive officers to 'the society' as opposed to the membership is not consistent with what is required from a union's management body.

9.5. Unions are bound by the availability of their working membership when organising times for general meetings. Having the ability to schedule meetings at times when members can attend requires unions to have some flexibility in setting their timetables for general meetings. Prescriptive statutory timetables that do not accommodate this need for flexibility may not be workable for many unions.

9.6. Broad discretionary powers in the hands of a registrar may disadvantage unions if there are no mechanisms for ensuring that their particular circumstances are not considered.

9.7. Any legislative scheme regulating the functioning and registration of unions must also protect "sensitive operational information" that unions may hold. This information is crucial to the functioning of unions and, should be protected in

relevant legislation to the same extent as “commercial sensitivity” is protected for corporate entities.

9.8. The NZCTU Te Kauae Kaimahi, looks forward to these recommendations being adopted. We are of the view that if these concerns are not addressed, there is a danger of setting unions and longstanding union functions at odds with the law. Unions are keen to avoid this situation. However, if unions cannot be accommodated in a statutory scheme that is primarily designed for non-union entities, this will add to the persistent concern over the suitability of any umbrella ‘Incorporated Societies Act’ that places unions alongside non-union societies for the purpose of registration and regulation.