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Submission to the Economic Development, Science and Innovation Select Committee

Bill to replace the Incorporated Societies Act 1908

28 May 2021

Introduction

This submission is prepared for Trust Democracy Incorporated, a society set up to support and promote participation by citizens of Aotearoa in democratic processes and decision-making. Trust Democracy works for an inclusive democracy in which people feel empowered to solve issues for themselves and to strengthen communities. Incorporated societies, especially small ones, are a vital mechanism for enabling this.

The submission is prepared by Dave Henderson, a member of the Trust Democracy Committee with 47 years of experience and interactions with governance and staff of very many organisations across this remarkably diverse sector, as well as with diverse governments within Aotearoa and internationally.

This submission is based partly also on input gathered during the nationwide series of consultation seminars during February – May 2016.

Our experience coincides with that quoted from the Auckland District Law Society:
"In our experience, members generally want to do their best for their society, are happy to follow rules, and would welcome greater certainty both in terms of internal processes and rights of recourse outside the society."

Request to be heard by the Committee
We request that we attend the Committee to present and clarify points made in this submission. Contact is through Dave Henderson;
email [redacted] or phone [redacted]

Summary of Recommendations

1. That all measures in this Bill that apply blanket reporting requirements to Societies be put on hold until a more targeted approach can be developed, as described by the Financial Action Task Force critique of this approach. (See p5)

2. That Clause 9(e) be amended to recognise that the proposed requirements are impracticable for small organisations, i.e. Societies in Tier 4 of the XRB accounting standards. (See p.5)

3. That in Clause 8, requiring 5 members for registration would be more appropriate, balancing the need to demonstrate the community basis of the

organisation with the practicalities of bringing people together in an organisation that is just starting out. 5 members would be consistent with the minimum for societies registered under the Charitable Trusts Act. (See p6)

4. (i) That a provision be added to *41 Management of society* to specify that the **Committee may appoint one or more sub-committees.** (A Finance Sub-Committee is the most common)

   (ii) That if a power to appoint subcommittees is included in a society constitution, this must be accompanied by provisions **requiring the sub-group to report back to the main Committee.** The 'how' of the reporting should be up to the society. (See p6)

5. That the Conflict of Interest requirements proposed in Clauses 57-60 be simplified for small societies, i.e., societies in Tier 4 of the XRB accounting standards. (See p7)

6. That any fees set under Clause 246 be set in a scale that takes into account affordability for small volunteer groups and clubs. (See p7)

7. (i) Re Clauses 95 to 101, Incorporated societies that sit within the parameters of Tier 4 in the XRB standards be exempt from having to report according to the XRB standard, but should continue to provide the registrar with financial reports in the form chosen by their members and approved at an annual general meeting. (See p10)

   (ii) Incorporated societies in Tiers 1, 2, and 3 should report according to the XRB standard, as the level of donor and grant funding is likely greater, creating a greater public interest. (See p10)

   (iii) Incorporated societies that have Donee Status should report according to the standard, including if they are in Tier 4, as they receive a tax benefit and therefore have accountability beyond their members. (See p10)

8. (i) That a specialist appeal authority be established - a Charities, Trusts and Societies Review Authority – along the lines of the Taxation Review Authority - thus providing charities with the choice of taking their case to this more informal appeal forum, or the High Court. (See p12)

   (ii) That the legislation clarifies the nature of the hearing to be undertaken on appeal, specifically that the Authority is able to convene an oral hearing of evidence if either party so requests, the ability to access an oral hearing in appropriate circumstances is fundamental to natural justice, enabling a robust evidential platform from which to make decisions. (See p12)

   (iii) That the Authority hear appeals under a range of related legislation, such as the proposed new Incorporated Societies Act, the Charities Act, the Trusts Act 2019, and the Charitable Trusts Act 1957, creating overall economies. (See p12)

   (iv) That the Authority facilitate test cases to relieve the burden on individual community groups of developing New Zealand's law. (See p12)

9. Recognising that societies typically have volunteer governance group members who reside at a distance from each other and who only gather monthly or quarterly, **that** the 28 days proposed in the Bill for lodging an appeal be extended to 3 months, to enable

volunteer-based community organisation to gather material, get advice, meet, decide to lodge an appeal and lodge it.
(See p11)

10. That draft regulations developed under this Bill, when it becomes an Act, must be circulated as an Exposure Draft, and feedback sought, in the same way as worked so well with the Exposure Draft of this Bill. (See p12)

11. That clause 168(1)(e) be amended by deleting the words “or 1 or more of its officers” (See p13)

Registration and Regulation; Background to Government’s drive to impose greater regulation on community organisations

We acknowledge the shortcomings of the current 1908 Act and support the recommendations of the Law Commission in its 2013 Report *A New Act for Incorporated Societies.*

However we are concerned that some aspects of the proposed Bill substantially alter the relationship between incorporated societies and government. Possibly this is without conscious intention but whether or not it is deliberate it brings in ‘us and them’ elements, policing through regulation, when the relationship could be more productive both for the community and for Government.

In recent years the role of the Registrar of Incorporated Societies has been benign[1], with only minimal demand placed on societies on terms of annual reporting to the Registrar. This is appropriate, given the UN resolutions which lay out the independence, rights, and freedoms of civil society organisations. This Bill embodies a qualitative shift to active regulation[2].

Several aspects of the Bill indicate a belief on the part of government, and its MBIE advisors, that incorporated societies are not independent, and that government is somehow free to or even has a duty to impose greater regulation, and a greater compliance burden. **Why is this?**

Internationally there is wide awareness of the global Financial Action Task Force (FATF), set up in 2004 in response to the September 2001 terrorist attacks in the US. FATF created a set of ***International Standards on Combating Money Laundering and the***

[1] **A benign regime** is one that provides a framework which facilitates a community group in setting up a structure which has continuity of purpose and purpose-related activity, beyond the coming and going of particular personnel - thus supporting their shared vision or aspiration, whether it’s to support local people with kidney disease, to rent a hall for monthly ballroom dancing, or get together and play rugby. Creating a Register has advantages like finding similar groups, but it also has advantages for government and society – the information can be the basis of measures of community wellbeing, or the basis for planning community facilities.

[2] **An active regulatory regime** is one where government decides it has a responsibility to regulate what is happening, demanding "accountability" which means regular reporting, which requires development and accounting standards that everyone must follow. I've seen it too often, in many countries, where officials feel a need to get better control over what is happening, they don't understand it so they don't trust it, and they persuade their Minister there is a problem that needs to be addressed.

Financing of Terrorism & Proliferation with 8 key recommendations for participating governments, of which New Zealand is one.

Recognising that training of Islamist pilots was funded through a US-based non-profit organisation, (NPO) these included the following:

"8. Non-profit organisations: *Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:*

> *(a) by terrorist organisations posing as legitimate entities;*
> *(b) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and*
> *(c) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations."*

As noted by the then UN Special Rapporteur on Civil Society[3], FATF Recommendation 8 badly undermined the relationship and the level of trust between governments and civil society. He called for governments to instead embrace NPOs as integral of the solution.

Recommendation 8 has changed governments' attitude to independent civil society organisations, providing a rationale for a shift from benign registration regimes to active regulation, with significant negative consequences for social cohesion and social capital.

Ironically while the NZ government has imposed greater compliance burden on Charities through the Charities Act and is proposing replacement of the 1908 Incorporated Societies Act with something that similarly imposes greater blanket regulation and compliance costs, particularly in the area of financial reporting, the FATF has acknowledged the negative effects of Recommendation 8 and revised it.

More recently, FATF has itself passed judgement on the New Zealand approach.

It is not widely recognised that the Charities Act, and this review of the Incorporated Societies Act are in part New Zealand's FATF response. FATF has recently completed an evaluation of New Zealand, and with respect to non-profit organisations, it concluded:

New Zealand's legislation does not focus on NPOs identified as vulnerable to abuse for Terrorist Financing (TF), nor considers the proportionality or the effectiveness of regulatory actions available to addressing the TF risk.

> • *Some non-charity NPOs and tax-exempt non-resident charities that may present some risk of abuse for TF, are only subject to policies to combat tax evasion.*
>
> • *There has been insufficient work with NPOs on development and refinement of best practices to address TF risks and vulnerabilities and protection against TF abuse.*
>
> • *Some categories of NPOs identified as being of moderate risk of abuse for TF including foreign charities, overseas donee organisations and charitable trusts, are not subject to riskbased monitoring or supervision.*

[3] **SPECIAL RAPPORTEUR CALLS ON FATF TO CONSIDER CIVIL SOCIETY'S ROLE IN COUNTERTERRORISM** https://charityandsecurity.org/financial-action-task-force/kiai_statement_fatf_april2016/

> • *There are no relevant powers to impose sanctions in relation to other moderate-risk NPOs such as non-charity NPOs and tax-exempt non-resident charities.*
> • *The focus under some legislation governing legal persons and arrangements, is on investigating compliance rather than broader wrongdoing by the NPO.* [4]

Thus the Charities legislation, with its blanket application of an increased compliance burden to some 27,793 organisations (as at 1 May) is judged to have not met a key part of the reason it was created. The present Incorporated Societies Bill, aimed at another 15,000 plus community organisations takes the same ill-directed approach that FATF indicates has failed.

Recommendation 1:

That all measures in this Bill that apply blanket reporting requirements to Societies be put on hold until a more targeted approach can be developed, as described by FATF.

Our Response to Specific Clauses

We support some parts of the Bill but find some to be excessively demanding on small independent community organisations.

1. We support the **core principles** that—

(i) societies are organisations with members who have the primary responsibility for holding the society to account; and

(ii) societies should operate in a manner that promotes the trust and confidence of their members; and

(iii) societies are private bodies that should be self-governing and free from inappropriate Government interference; and

(iv) societies should not distribute profits or financial benefits to their members.

2. Re Clause 9 Application for incorporation; 9(e) is excessive for small organisations and clubs where there is no public interest in their activities – it undermines the sense of the principles above, where it is the members who are responsible for holding the organisation (i.e., the officers) to account.

Recommendation 2:

That Clause 9(e) be amended to recognise that the proposed requirements are impracticable for small organisations, i.e., societies in Tier 4 of the XRB accounting standards.

3. We support the improved clarity about the implications of **Incorporation**, the responsibilities of **Members** and about who exactly is and is not and **Officer**.

4. We support clause 28 which provides for **tikanga and culture** to be recognised in an organisation's constitution

[4] https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-New-Zealand-2021.pdf

5. Re Clause 8, we support in principle the reduction from 15 in the number of members a society must have to register, and the requirement to maintain at least that number. The Bill proposes 10.

However, neither figure recognises the practicalities of bringing together a group of people who share a common interest or purpose, when that sharing may be entirely online. **Remember this is intended to apply to a group which is only just starting out.**

Internationally the Open Government Partnership, to which NZ is committed, recommends in it's ***Guide to Opening Government: An Enabling Environment for Civil Society Organizations,*** that the number of founders needed to register an organisation should be no more than 2 or 3 natural and/or legal persons[5].

Recommendation 3:

That in Clause 8, requiring 5 members for registration would be more appropriate, balancing the need to demonstrate the community basis of the organisation with the practicalities of bringing people together in an organisation that is just starting out. 5 members would be consistent with the minimum for societies registered under the Charitable Trusts Act.

6. We support the proposal that the **minimum age for officers** of a society be reduced from 18 to 16 years – there are some great rangatahi groups and rangatahi should be part of their governance. This also makes it easier for rangatahi to gain experience in supporting their community, with long-term benefits for community and society.

7. We support the emphasis that **officers' responsibility in decision-making is to the society**. It is clear from case law and from the "legal person" status of societies that officers owe their duties to the society, but there is a widespread misunderstanding.

8. We support the simpler procedure for **amalgamation** of two or more societies.

9. We note clause 28 *Bylaws, tikanga or culture, and other matters* provides that constitutions may include *(d) any other matter relevant to the society's activities.* However there is **no mention of Sub-Committees** in this context. Very many incorporated societies have them, but they can be a significant cause of strife. One of the most common complaints we hear is that people feel disempowered by the actions of a subcommittee – "I'm an elected officer so I'm legally responsible, but they make all the decisions and I get no say."

Recommendation 4:

i. That a provision be added to *41 Management of society* to specify that the **Committee may appoint one or more sub-committees.** (A Finance Sub-Committee is the most common)

ii. That if a power to appoint subcommittees is included in a society constitution, this must be accompanied by provisions **requiring the sub-group to report back to the main Committee.** The 'how' of the reporting should be up to the society.

[5] See Recommendation 2 on page 7, https://www.opengovpartnership.org/wp-content/uploads/2018/05/OGP-ICNL_Guide-Opening-Government_20180508.pdf

10. We support the proposals around indemnification of officers, members or employees, including the identification of areas where an officer cannot be indemnified.

11. We support the proposals around disqualification of officers, including the opportunity to seek a waiver and also the grounds on which a Court may make orders against an officer or former officer, including enforcing a duty and compensating the society

12. Re **Conflict of Interest (Clauses 57-60)** we agree that some provision is necessary – to define what it is, what should be done to ensure members and officers are aware when it arises, and what should be done to prevent it affecting decision-making in inappropriate ways. However we are not convinced that the proposed requirements are appropriate. They are disproportionately onerous for small societies, and so are unlikely to be followed, thus the law becomes "an ass".

Bear in mind small societies are generally run entirely by part-time volunteers who have a particular shared interest, aspiration or hobby. The extra energy and resources are simply not available.

Recommendation 5:

That the Conflict of Interest requirements proposed in Clauses 57-60 be simplified for smaller societies, i.e., societies in Tier 4 of the XRB accounting standards.

13. Re **Subpart 5, Clause 207** we applaud the implicit recognition that an organisation removed from the register, or removing itself from the register, is potentially going to continue as an informal group, and Parliament has no way to stop that. See the freedoms and independence of civil society organisations referred to above.

14. Re **Clause 246 Fees**, we note that these may be set via regulation, and advise that these must be set to a **scale that takes into account affordability** for small volunteer groups and clubs. Otherwise a disincentive is created to registration, and the opportunity to gather information, or to increase transparency, is lost.

Recommendation 6:

That any fees set under Clause 246 be set in a scale that takes into account affordability for small volunteer groups and clubs

Areas we strongly question

1. Clauses 95 to 101: The proposed requirements re XRB accounting and reporting standards

We applaud the principle behind changes that have been made since the Exposure Draft of this Bill, so as to recognise to some extent the realities of requiring small community organisations to meet accounting standards of which they have no knowledge. However setting the definition of 'small' at $10,000 does not go far enough.

More realistic would be to define the term 'small" as being **within Tier 4** as defined by the Accounting Standards legislation and regulations. This would give greater simplicity, clarity and consistency across different pieces of legislation that societies have to deal with.

An alternative would be to apply consistency across regimes, and relate small societies with small businesses, who only have to register for GST when *"turnover was at least $60,000 in the last 12 months, or you expect it will be at least $60,000 in the next 12 months"*

Read 20 Reasons for our concern:

1. This is an unnecessary compliance burden for small societies – Members should be able to decide what reporting they need, (as they currently do) and Government should accept that. See the core principles that are supposed to guide the legislation, in particular;

    - *Societies are private bodies that are operated by their members*
    - *Societies should be free from inappropriate government interference*

2. One of the unintended consequences of stronger reporting requirements will be that it makes worse the problem of people being unwilling to take on committee roles, puts more burden on those who are prepared to do this work and, over time, undermines the positive community-based outcomes of small incorporated societies

3. If the members of a small society are content with the current level of accountability and financial information they receive from their treasurer, where is the need for government to require a higher level of reporting?

4. We have been contacted by Community Trusts who are concerned about the proposals. These Trusts make grants to a range of small local and regional organisations, they get to know the organisation, and they gather reports on what has been achieved as a result of the grant. If the Community Trusts are happy with the reports they receive, and the organisation's members are happy with the level of accountability within their organisation, where is the need for central government to get involved and require something different?

5. Charities get a significant tax benefit, as do their donors – what's in it for incorporated societies? Why would government impose the same level of compliance as registered charities on a large number of relatively small organisations, when there is no accompanying benefit?

6. There are fiscal implications that Government has apparently not considered. When the accounting standards were introduced a significant number of organisations resolved simply to be incorporated societies rather than registered charities, so as to avoid the greater compliance burden. By now proposing to force that burden on incorporated societies, Government is creating an incentive for them to become registered charities after all, and take the tax advantages;

7. See Recommendation 3 from the Open Government Partnership: *"Reporting requirements are made proportional to the size and scope of different types of CSOs and are not more burdensome than for other legal entities."* The proposals do not meet this standard;

8. The proposals undermine the independent basis of civil society organisations by creating a disincentive to formation of societies. It is not clear whether this is deliberate or unintended, but it will have an effect – not simply because of the perceived work

involved but on principle – people volunteer in communities so that they can achieve something for their community, not so that they can write reports for government;

9. It is widely recognised that since the accounting standards were introduced for registered charities, it has become increasingly difficult for community groups to find anyone willing to be their Treasurer. The proposals in the Bill will make this situation much worse – we know now that organisations slowly collapse if they cannot find a treasurer;

10. The proposal undermines an internationally recognised and valued principle of NZ's legislation – the ease of establishment and maintenance of a community-based legal entity. NZ has a role-model, and exemplar – why sabotage that?

11. The proposals actually increase the risk of misappropriation of funds – a group that decides to not register or to cease registration, because of the need to provide reports to government, will have trouble opening a bank account due to the Anti Money-Laundering legislation. As a result, funds will be kept in a personal account or kept as cash in a drawer somewhere, increasing the risk of misappropriation or loss, as well as potential strife about its handling;

12. Realistically, groups will miss reporting to government not because they have anything to hide, but because of lack of skills and confidence at filling government forms. In this the proposals are in practice discriminatory. Tangata whenua, Pacifica, immigrant and refugee groups may want to organise and register a society, and there is value in their doing so. but may also have language difficulties, may lack experience with the assumed accounting practice, and may also have had previous experiences where any contacts with government have been negative or catastrophic;

13. Many small societies come together around a shared activity or aspiration – reporting to government is not on their radar at all, and registration is one step in their growth towards a significant contribution in NZ society. They should be encouraged and valued for their potential e.g., IHC grew to national significance from a small local parents' support group;

14. Many societies may stay small, but we should not discourage them by imposing needless requirements. Small societies can always choose to report according to the standard but that decision belongs to the members, not to government;

15. Given the difficulties DIA Charities Services are having in establishing consistent reporting according to the standard, from registered charities who have a significant incentive to report, it makes no sense to impose the same requirements on a whole lot more community organisations who lack the incentive. In this, it is worth noting that the average incorporated society is even smaller than the average registered charity;

16. There is evidence registered charities are already making up the numbers they are required to provide to DIA Charities Services, because they do not have the means to gather the required data. MBIE should be aware this is a result of Charities Services focus on gathering reports according to a standard at the end of each organisation's financial year. Charities Services is attempting to address this 'construction' of data, but societies are now realising how little resource Charities Services has to be able to check, and the practice has already become embedded.

17. Given this, the law is an ass if it imposes a greater reporting requirement on over 15,000 societies that are not registered charities, but has inadequate plans or resources

to provide education, to monitor the quality, or even derive any value from the reports. If MBIE intends to simply tick a box that a report has been received we would be better to stick with the existing regime, where societies report in the form chosen by their members.

18. Related to this, the resources that MBIE is hoping to gather to support the necessary bureaucracy would in fact be better spent in actually supporting the sector.

19. There is a rationale for government gathering annual accounts, and this was confirmed by the Law Commission in its review (6.167-6.172). As the Commission noted this has particular value for societies that are not good at keeping consistent records, especially when there is a change of Treasurer.

20. However there is also an argument that the above rationale is patronising - it is certainly inappropriate for government and MBIE to use this as a reason for increased regulation. It is the responsibility of organisations to keep their own records, and if they fail to do so that is their problem, not a reason for government to impose a regulatory burden.

In summary, given that:

- Any potential benefit is outweighed by this list of downsides to the Bill's proposal to require detailed reporting of small community groups;

- A ready-made regime for reporting by registered charities exists, but this proposal does not take into account the lessons from it;

- That regime recognises the need to scale reporting requirements according to the size of organisation and to a realistic assessment of risk to the public;

- The Bill acknowledges that in relation to audit at least, there is significantly less public interest and thus less need for public accountability for small incorporated societies;

- There is much lower public interest in the finances of incorporated societies compared to registered charities:

Recommendation 7:

i. Re **Clauses 95 to 101**, incorporated societies that sit within the parameters of Tier 4 in the XRB standards be exempt from having to report according to the XRB standard, but should continue to provide the registrar with financial reports in the form chosen by their members and approved at an annual general meeting.

ii. Incorporated societies in Tiers 1, 2, and 3 should report according to the XRB standard, as the level of donor and grant funding is likely greater, creating a greater public interest.

iii. Incorporated societies that have Donee Status should report according to the standard, including if they are in Tier 4, as they receive a tax benefit and therefore have accountability beyond their members.

2. Clauses 240 and 241: Appeals against Registrar's decisions, and 243: Jurisdiction of District Court

We note the provisions for appeals to be taken to the District Court. This is a great improvement on having to go direct to the High Court as is the case under the Charites Act, but there are still significant problems.

Senior Judiciary acknowledge that the low frequency of cases, exacerbated by a lack of specific experience in the High Court, has created a confused and confusing hash of results, with the Supreme Court now being asked to provide more clarity on key issues.

As can be seen, for example from Ellis J's speech to the Charity Law Association conference in April 2018[6], there is a case for judicial specialisation. Following the example of England and Wales, a specialist Charity Tribunal, with similar rules to those of the Taxation Review Authority, should be established.

The Law Commission also outlined the argument for introducing a new mechanism for trust dispute resolution and decisionmaking, including examining the option of a **Trusts Tribunal**.

Inputs to the Review of the Charities Act have welcomed this as a solution.

Recommendation 8:

i. That a **specialist appeal authority** be established - a **Charities, Trusts and Societies Review Authority** – along the lines of the Taxation Review Authority - thus providing charities with the choice of taking their case to this more informal appeal forum, or the High Court.

ii. That the legislation clarifies the nature of the hearing to be undertaken on appeal, specifically that the Authority is able to convene an oral hearing of evidence if either party so requests, the ability to access an oral hearing in appropriate circumstances is fundamental to natural justice, enabling a robust evidential platform from which to make decisions.

iii. That the Authority hear **appeals under a range of related legislation**, such as the proposed new Incorporated Societies Act, the Charities Act, the Trusts Act 2019, and the Charitable Trusts Act 1957, creating overall economies.

iv. That the Authority **facilitate test cases** to relieve the burden on individual community groups of developing New Zealand's law.

Recommendation 9:

Recognising that societies typically have volunteer governance group members who reside at a distance from each other and who only gather monthly or quarterly, that the **28 days** proposed in the Bill for lodging an appeal be **extended to 3 months**, to enable volunteer-based community organisation to gather material, get advice, meet, decide to lodge an appeal and lodge it.

This change would enable more appeals to be made, but these would be heard at a lower level, and would better enable improvements in practical application of the law.

3. Regulations to be made under the Act

[6]http://www.charitylawassociation.org.au/images/NZ%20event%202018/Presentations/Justice%20Ellis%20Speech.pdf.

Many provisions in the Bill leave the detail of requirements that are to be placed on incorporated societies to regulations, and the power to make these regulations will come into force on the day after the Royal Assent date. However, the extent of the intended regulations is so broad and so varied that societies could be affected in significant ways, without their knowledge or input.

Recommendation 10:

That draft regulations developed under this Bill, when it becomes an Act, must be circulated as an Exposure Draft, and feedback sought, in the same way as worked so well with the Exposure Draft of this Bill.

Clause 168 – Grounds for removal from register

It is disproportionate – the term overkill comes to mind – for a society be removed from the register if a single officer has failed to comply with their duties.

Clause 168(1)(e) of the Bill establishes a new ground on which a society can be removed from the register; that the Registrar has reasonable grounds to believe that the society, *or 1 or more of its officers*, has failed in a persistent or serious way to comply with duties relating to the society under the Act.

It is not appropriate to remove a society from the register on the basis of the actions of 1 officer. Actions of a particular officer can be dealt with through other provisions of the Act, such as banning orders.

Recommendation 11:

That clause 168(1)(e) be amended by deleting the words "**or 1 or more of its officers"**

Submission ends.

Note our request to be heard by the Committee.