



# Far North District Council



## AGENDA

### Ordinary Council Meeting

**Thursday, 31 October 2019**

**Time:** 11:00 am  
**Location:** Council Chamber  
Memorial Avenue  
Kaikohe

**Membership:**

Mayor John Carter - Chairperson  
Cr Ann Court  
Cr Felicity Foy  
Cr Rachel Smith  
Cr Mate Radich  
Cr John Vujcich  
Cr Kelly Stratford  
Cr Dave Collard  
Cr David Clendon  
Cr Moko Tepania



**Far North District Council  
Ordinary Council Meeting**  
**will be held in the Council Chamber, Memorial Avenue, Kaikohe on:  
Thursday 31 October 2019 at 11:00 am**

**Order Of Business**

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**1 PRAYER****2 APOLOGIES AND DECLARATIONS OF INTEREST**

Members need to stand aside from decision-making when a conflict arises between their role as a Member of the Council and any private or other external interest they might have. This note is provided as a reminder to Members to review the matters on the agenda and assess and identify where they may have a pecuniary or other conflict of interest, or where there may be a perception of a conflict of interest.

If a Member feels they do have a conflict of interest, they should publicly declare that at the start of the meeting or of the relevant item of business and refrain from participating in the discussion or voting on that item. If a Member thinks they may have a conflict of interest, they can seek advice from the Chief Executive Officer or the Team Leader Governance Support (preferably before the meeting).

It is noted that while members can seek advice the final decision as to whether a conflict exists rests with the member.

**3 DEPUTATION**

No requests for deputations were received at the time of the Agenda going to print.

**4 MAYORAL ANNOUNCEMENTS**

**5 CORPORATE SERVICES GROUP**

**5.1 MAKING AND ATTESTING OF DECLARATIONS**

**File Number: A2706774**

**Author: Aisha Huriwai, Team Leader Governance Support**

**Authoriser: William J Taylor MBE, General Manager - Corporate Services**

**PURPOSE OF THE REPORT**

The purpose of this report is to set out the process for making and attesting of declarations.

**BACKGROUND**

Clause 14(1) & (2) Schedule 7 of the Local Government Act 2002 states that no person shall be capable of acting as a member of any local authority until he or she has made an oral and written declaration as set out below.

**DISCUSSION AND NEXT STEPS**

The Chief Executive Officer will witness the declaration of the Mayor and then the Mayor will witness each Councillor’s declaration.

The declaration that each member is required to take is set out in Clause 14(3) Schedule 7 of the Act and reads as below. A translated version will also be made available for any members who would prefer to make their declaration in te reo Māori.

**DECLARATION BY MAYOR OR MEMBER**

I, \_\_\_\_\_ declare that I will faithfully and impartially, and according to the best of my skill and judgement, execute and perform, in the best interests of the Far North District the powers, authorities and duties vested in or imposed upon me as Mayor/Member of the Far North District Council by virtue of the Local Government Act 2002, the Local Government Official Information and Meetings Act 1987 or any other Act.

DATED at Kaikohe this 31st day of October 2019

**Signature** \_\_\_\_\_

In the presence of: \_\_\_\_\_

**FINANCIAL IMPLICATIONS AND BUDGETARY PROVISION**

There are no financial implications or the need for budgetary provision as a result of this report.

**ATTACHMENTS**

**Nil**

## 5.2 EXPLANATION OF LAWS AFFECTING ELECTED MEMBERS

**File Number:** A2706826

**Author:** Aisha Huriwai, Team Leader Governance Support

**Authoriser:** William J Taylor MBE, General Manager - Corporate Services

### PURPOSE OF THE REPORT

At the first meeting after the three-yearly local election, elected members are required to receive a general explanation of the laws that affect them as elected members. This report outlines the core legislation affecting members supported by a presentation by Council's In-House Counsel.

### RECOMMENDATION

**That Council note the report "Explanation of Laws Affecting Elected Members", and the advice provided at this meeting.**

### BACKGROUND

It is a requirement to have the core legal requirements brought to the members' attention at the first meeting following the triennial election, under Clause 21 (5)(c) of Schedule 7 of the Local Government Act 2002.

### DISCUSSION AND NEXT STEPS

There are a number of core legal requirements that elected members should be aware of when making decisions. These include the:

- Local Government Act 2002
- Local Government Official Information and Meetings Act 1987
- Local Authorities (Members' Interests) Act 1968
- Health and Safety at Work Act 2015
- Crimes Act 1961
- Secret Commissions Act 1910
- Financial Markets Conduct Act 2013
- Council decision-making requirements
- Personal liability of elected members
- Public law decision-making principles.

In addition to these core legal requirements, there are many other statutes relevant to certain council decisions (for example the Resource Management Act 1991 and the Reserves Act 1977).

Elected members will receive advice from staff on a case-by-case basis to ensure that they understand their legal obligations when making decisions.

### FINANCIAL IMPLICATIONS AND BUDGETARY PROVISION

There are no financial implications or budgetary provision needed as a result of this report and presentation.

## ATTACHMENTS

1. **Guidance for Members of Local Authorities about the Local Authorities (Members' Interests) Act 1968 - A2706810** [↓](#) 
2. **A General Guide Through the Laws Affecting Elected Members - A2717761** [↓](#) 



Good practice guide

Guidance for  
members of  
local authorities  
about the Local  
Authorities  
(Members'  
Interests) Act  
1968



## Guidance for members of local authorities about the Local Authorities (Members' Interests) Act 1968

This is a good practice guide,  
published under section 21 of the  
Public Audit Act 2001.

October 2010

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## Auditor-General's overview

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I am pleased to issue this new edition of our guide for local authorities on the requirements of the Local Authorities (Members' Interests) Act 1968 (the Act). We produced the first of these guides in 1995 to help people understand the Act's requirements and what they need to do to comply. We revise it every three years at the time of the local authority elections so that up-to-date guidance is available for new members when they take office.

The Act helps protect the integrity of local authority decision-making by ensuring that people are not affected by personal motives when they participate in local authority decision-making and cannot use their position to obtain preferential access to contracts. The two specific rules in the Act are that members cannot:

- enter into contracts with their local authority worth more than \$25,000 in a financial year; or
- participate in matters before their authority in which they have a pecuniary interest, other than an interest in common with the public.

In each case, my office has power to grant approvals or exemptions. The detail of the rules and the various exemptions is complex, and members need to take care to ensure that they understand how the Act may apply to them.

It can be serious if members get it wrong. Breaching these rules is a criminal offence, and we are the prosecuting authority. Disqualification from office is automatic if a person breaches the contracting rule, or if a person is convicted of having participated in matters in which they had a pecuniary interest.

My staff therefore work closely with the staff of local authorities to help members do the right thing. We have well-developed systems for considering requests for approvals and exemptions, and for providing advice. This guide explains those systems and the information that we need to respond to requests promptly.

Part 5 of this guide discusses more general conflicts of interest and bias questions that arise regularly in the local government sector. Although we do not have the same formal role in relation to these issues, we are regularly asked for guidance and comment on good practice. We have also issued a more general good practice guide that discusses these issues in more detail: *Managing conflicts of interest: Guidance for public entities* (June 2007).

I thank Dean Knight, a senior lecturer in the Faculty of Law at Victoria University of Wellington, for his assistance in preparing this new edition of the guide.



Lyn Provost  
Controller and Auditor-General

14 October 2010

## Part 1

### Introduction

#### What this guide is about

- 1.1 This is a guide to the Local Authorities (Members' Interests) Act 1968 (the Act) for members of the governing bodies of territorial authorities, regional councils, tertiary institutions, and those other public bodies that are covered by the Act.<sup>1</sup> Appendix 1 sets out a full list of the organisations covered by the Act.
- 1.2 The Act has two main purposes:
- ensuring that members are not affected by personal motives when they participate in decisions of their local authority; and
  - preventing members, in contracting situations, from using their position to obtain preferential treatment from the authority.
- 1.3 Part 5 of this guide sets out information on other aspects of the law applying more generally to conflicts of interest.

#### Terms used in this guide

- 1.4 In this guide:
- “you” and “member” means a member of an authority as described in paragraph 1.1 and Appendix 1;
  - “local authority” or “authority” means a body subject to the Act;
  - “we”, “our”, and “us” refer to the Auditor-General and the Office of the Auditor-General;
  - “the Act” means the Local Authorities (Members' Interests) Act 1968; and
  - “common law” refers to law that has been developed by the courts.

#### Who does this guide apply to?

- 1.5 This guide is intended for members of local authorities. It focuses on the requirements of the Act that apply to members in decision-making at authority meetings and the capacity of members to contract with the authority of which they are a member.
- 1.6 This guide does not discuss other behaviour or situations that, while not unlawful, might be regarded as unethical.
- 1.7 Neither the Act nor this guide applies to staff of local authorities but may be useful to them in providing advice to members.

<sup>1</sup> Previous editions of this guide were called *A Guide to the Local Authorities (Members' Interests) Act 1968* (1995 and 1998); *Financial Conflicts of Interest of Members of Governing Bodies: A Guide to the Local Authorities (Members' Interests) Act 1968* (2001); *Conflicts of Interest: A Guide to the Local Authorities (Members' Interests) Act 1968 and Non-pecuniary Conflicts of Interest* (2004); and *Guidance for members of local authorities about the law on Conflicts of Interest* (2007).

### Other guidance

- 1.8 We have published separate guidance about managing conflicts of interest in the public sector more generally: see our 2007 publication *Managing conflicts of interest: Guidance for public entities*. That publication discusses a broader range of organisations, situations, and personnel, and considers ethical expectations as well as legal rules. Members of local authorities may also find that guide useful in cases where there is no risk of breaching the Act but where there may still be doubts about whether the situation or behaviour is ethically appropriate in a public sector context.

### The law applying to conflicts of interest generally

- 1.9 The Act is a small subset of the law about conflicts of interest that applies to local authority members. The body of law on conflicts of interest has been developed by the courts over a long period of time as part of the law on bias, and applies to local authority members when they are making decisions. In Part 5 of this guide we set out some general comments on the common law applying to conflicts of interest. However, the Auditor-General has no specific role in relation to conflicts of interest generally. We have a specific role only in relation to pecuniary conflicts of interest that are regulated by the Act.
- 1.10 We have no formal decision-making role in relation to non-pecuniary conflicts of interests. Only the courts can determine whether the law has been breached in any particular instance and what the consequence should be. However, we can look into matters of probity involving a member of an authority, which could include examining whether a member failed to declare a conflict of interest.

### What the Local Authorities (Members' Interests) Act 1968 applies to

- 1.11 The Act applies to the pecuniary interests of members of local authorities. The Act:
- controls the making of contracts worth more than \$25,000 in a financial year between members and their authority (see Part 2); and
  - prohibits members from participating in matters before the authority in which they have a pecuniary interest, other than an interest in common with the public (see Part 3).
- 1.12 The Act applies to members of city councils, district councils, regional councils, community boards, tertiary institutions, and a range of other public bodies (see Appendix 1).

- 1.13 The Act regulates the actions of individual members of authorities, not the actions of their authorities.
- 1.14 Members, not their authorities, may be prosecuted for breaches of the Act.
- 1.15 The Act also applies to members of committees of those authorities (regardless of whether a committee member is also a member of the authority). It does not apply to council-controlled organisations, port companies, airport companies, or energy companies.

### The role of the Auditor-General under the Act

- 1.16 Our role in administering the Act includes:
- deciding applications for approval of contracts worth more than \$25,000 in a financial year;
  - deciding applications for exemptions or declarations from the rule against members discussing and voting where they have a pecuniary interest;
  - providing guidance to local authority members and officers, to help them comply with the Act in particular situations; and
  - investigating and prosecuting alleged offences against the Act.
- 1.17 We do not issue “rulings” about whether a member has a pecuniary interest in a particular matter, nor about whether the Act has been breached. Only the courts can determine those matters.

### What is a pecuniary interest?

- 1.18 A pecuniary interest is one that involves money. It can sometimes be difficult to decide whether an interest in a particular matter is pecuniary or some other kind (see “Frequently asked questions” in Part 6).

### This guide is not a substitute for the law

- 1.19 This guide discusses the Act and suggests some ways to approach questions that could arise for you. However, it is not a formal or definitive statement of the law. Nor is it to be treated as legal advice for specific situations. In difficult situations, we recommend that you refer to the actual wording of the Act or consult your own lawyer.

## Part 2

# The rules on contracting with your authority

- 2.1 In this Part, we explain the Act's restrictions on your ability as a member of an authority to be involved in contracts with the authority.

### Disqualifying contracts

#### The disqualification rule

- 2.2 You will be automatically disqualified from office if you are "concerned or interested" in contracts with your authority and the total payments made, or to be made, by or on behalf of the authority exceed \$25,000 in any financial year. In practice, we use the authority's financial year as the relevant time period (that is, 1 July to 30 June).
- 2.3 The \$25,000 limit includes GST. The limit relates to the value of all payments made for all contracts in which you are interested during the financial year. It does not apply separately to each contract, nor is it just the amount of the profit the contractor expects to make or the portion of the payments to be personally received by you.
- 2.4 We can give prior approval and, in limited cases, retrospective approval for contracts that would otherwise disqualify you under the Act. See paragraphs 2.25-2.48 for information on how to apply.
- 2.5 It is an offence under the Act for a person to act as a member of an authority (or a committee of the authority) while disqualified.
- 2.6 A disqualification lasts until the next:
- general election for the authority; or
  - opportunity for appointment to the authority.
- 2.7 Disqualification means that you cannot be elected or appointed to:
- the authority; or
  - any committee of the authority;
- or hold office as a member of the authority (or any committee).

#### The restriction applies to you, not your authority

- 2.8 The restriction on contracting applies to you, not to the authority. The Act does not affect the authority's power to enter into contracts. The fact that a contract has disqualified you from membership does not invalidate the contract.
- 2.9 It is your responsibility to keep track of payments under any contracts or subcontracts in which you are concerned or interested. If you are concerned or

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interested in contracts through your business, you should ensure that everyone in your business is aware that you could be disqualified from membership of the authority if the total amount of payments to the business exceeds the \$25,000 limit in one financial year (without our prior approval).

- 2.10 You should ensure that all business interests are recorded in the authority's register of interests (if one exists). This will help the staff of the authority to support your compliance with the Act. You should also regularly advise the chief executive of your authority about interests that may result in dealings with the authority.

**You cannot discuss or vote on the contract**

- 2.11 If you are concerned or interested in any contract with your local authority, you cannot participate in any discussion or voting on that contract (see Part 3).

**When are you “concerned or interested” in a contract?**

- 2.12 You can be disqualified if you are either directly or indirectly concerned or interested in a contract with your authority.
- 2.13 You are directly concerned or interested if you are a party to the contract. You may be indirectly concerned or interested if the contract is between the authority and another person, and you:
- have a personal connection with that person; or
  - could benefit from the contract.

**Types of indirect interest**

- 2.14 It is difficult to be precise about what is or is not an indirect “concern or interest” in a contract. Each case has its own circumstances. The Act does provide certainty in two common types of case (discussed below). However, it is important to note that you can be indirectly concerned or interested in a contract in other ways (such as, for example, where your family trust has a contract with your authority and you are a beneficiary of that trust).

**Interest through spouse or partner**

- 2.15 If your spouse, civil union partner, or de facto partner is concerned or interested in a contract, the Act says that you are deemed to be concerned or interested, unless:
- the two of you are living apart; or
  - you did not know, and had no reasonable opportunity of knowing, that they were concerned or interested in the contract.

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2.16      This rule applies whether their interest is direct or indirect.

**Interest in a company**

2.17      If a contract is between the authority and a company in which you or your spouse or partner have some interest or involvement, the disqualification rule applies only in the following cases:

- you or your spouse or partner, singly or together, own 10% or more of the shares in:
  - the company; or
  - another company that controls it; or
- either you or your spouse or partner is a shareholder of the company, or another company that controls it and either of you is the managing director or general manager (by whatever name you are actually called) of the company or the controlling company; or
- either you or your spouse or partner is the managing director or general manager (by whatever name you or they are actually called) of the company and either of you is a shareholder of another company that controls it.

**The disqualification rule also applies to subcontracts**

2.18      The disqualification rule also applies if you are concerned or interested in a contract with the authority as a subcontractor, as if it were a contract directly with the authority. The limit of \$25,000 applies to the value of the subcontract, not the head contract.

2.19      The term “subcontract” is defined in section 2(1) of the Act. The definition is wider than the generally understood meaning, because it extends to subsidiary transactions. For example, if you are involved in a contract with an authority as an agent for the other contracting party (such as a real estate agent acting in relation to a property transaction), the arrangement for your remuneration as agent falls within the definition of a subcontract.

**Community boards**

2.20      Community boards are subject to the Act in their own right, separate from their “parent” authority. If you are a member of a community board, but not a member of the “parent” city or district council, the disqualification rule will not apply to your contracts with the council. This is because the disqualification rule applies only to contracts between you and the authority of which you are a member. This is the same for local boards in Auckland.

**Exceptions**

2.21 There are several circumstances in which, although you are concerned or interested in a contract, you will not be disqualified.

**If you were unaware of the contract**

2.22 You will not be disqualified by a contract that exceeds the \$25,000 a year limit if:

- the contract was entered into by a committee of the authority, or an officer, acting under delegation; and
- you were not a member of that committee and did not know, and had no reasonable opportunity of knowing, about the contract at the time it was made.

2.23 However, as soon as you or the authority becomes aware of the contract, the authority must write to us to verify that you did not know and had no reasonable opportunity of knowing about the contract. The letter must confirm that the committee or person who entered into the contract was properly authorised to do so.

**If your contract is exempt from the Act**

2.24 Certain types of contracts are not subject to the Act.<sup>2</sup> This means that you can be concerned or interested in the following types of contracts without being disqualified under the Act:

- an employment agreement between you and the authority;
- a loan raised by the authority (whether as security or otherwise);
- a payment for an advertisement inserted by the authority in any newspaper;
- a lease granted to the authority;
- a compensation payment under the Public Works Act 1981;
- the supply of goods or services during a civil defence emergency;
- a contract to be an administrator of an estate or a trustee of a trust – as long as you are not a beneficiary of the estate or trust, or a manager under the Protection of Personal and Property Rights Act 1988.

<sup>2</sup> The Act also includes a number of other exemptions for certain types of advances or agreements that are no longer relevant because the empowering legislation for those types of agreements or advances has been revoked and not been replaced. Those exemptions were for:

- an advance made by an authority under the Rural Housing Act 1939;
- an advance made or guarantee given by an authority under Part 32 of the Local Government Act 1974; and
- an agreement under section 81 of the Noxious Plants Act 1978.

## Getting approval to exceed the limit

### Prior approval

- 2.25 Under section 3(3)(a) of the Act, we can grant prior approval for contracts that would otherwise take you above the \$25,000 limit in any financial year.

### When approval may be sought

- 2.26 We can give approval for:
- a single contract; or
  - multiple small contracts that are of the same or similar type (such as day-to-day purchases of supplies), up to a particular value.
- 2.27 We prefer to specify a precise monetary amount or upper limit, but, if the exact amount is not yet known, a reasonable estimate of a suitable upper limit is sufficient. Where the approval is for an ongoing arrangement, our usual practice is to grant approval for only one financial year at a time.
- 2.28 We consider it a good idea to seek approval for a contract that does not exceed the \$25,000 limit by itself but could well do so when combined with the value of other small contracts. Similarly, where a number of similar small contracts may cumulatively approach or exceed the \$25,000 limit, we encourage an application for approval of a higher limit to apply to all of those contracts.

### Criteria for approval

- 2.29 The Act requires the existence of a “special case” before prior approval can be granted. This requires a full assessment of the circumstances, to determine whether approval should be given.
- 2.30 In essence, we must be satisfied that there is no risk that you may have received preferential treatment from the authority or that you may have had an undue influence on the decision. We consider whether the process followed by the authority in awarding or agreeing to the contract is fair and transparent, and whether the authority’s reasons for selecting you as its preferred contractor are justifiable.
- 2.31 In the case of a single contract (usually for a larger amount), the following criteria will usually be relevant:
- Has the authority taken all reasonable steps to ensure that all potentially interested parties had an opportunity to tender or quote for the contract?
  - Has the authority considered and evaluated each of the tenders or quotations, and can it justify the preferred choice on the basis of cost, performance, or quality of service?

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- Has the authority resolved to accept the contract subject to the Auditor-General's approval?
  - Do the minutes record that you declared your interest and did not vote or speak on the matter when it was considered at a meeting of the authority?
- 2.32 In the case of multiple contracts for smaller amounts, such as arise from day-to-day purchases of supplies, it will usually be necessary for the authority to confirm that:
- after due enquiry, it has found no alternative satisfactory source of supply or product; or
  - the desired source of supply is the most efficient and/or the most competitive on the basis of cost, performance, or quality of service.

**Prior approval is not automatic**

- 2.33 Prior approval cannot be assumed. We must be satisfied that the criteria set out above are met and that the risk of preferential treatment has been addressed.

**When to apply for approval**

- 2.34 A local authority does not need to seek approval to invite tenders for a contract.
- 2.35 The most suitable time to seek approval of a tendered contract is usually either:
- once tenders for the project have been received and assessed, and it looks likely that the contract is to be offered to the member (or their company); or
  - immediately after the authority has resolved to accept the tender, subject to the Auditor-General's approval.
- 2.36 In the case of a series of small contracts over a period of time that would not individually require approval but that cumulatively may exceed the \$25,000 limit, we suggest applying for approval:
- at the beginning of the financial year, if it seems certain that the limit will be exceeded; or
  - as soon as it becomes clear that this is a distinct possibility.

**Procedure**

- 2.37 The authority, rather than you, must apply for approval to enter the contract. Usually the authority will hold the relevant information that we need to determine whether the criteria have been satisfied.

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2.38      The application must be made in writing and addressed to:

Assistant Auditor-General – Legal  
Office of the Auditor-General  
Private Box 3928  
Wellington 6140  
Telephone: 04 917 1500  
Facsimile: 04 917 1549  
Email: LAMIA@oag.govt.nz

2.39      Please indicate whether the application is urgent.

**Information generally required in an application**

2.40      In the authority's application, we need to be provided with information about:

- the reasons the authority wishes to use the proposed contractor for this work (for instance, how the authority justifies its choice on the basis of, for example, cost, performance, quality, expertise, or experience);
- the process the authority has followed in selecting the proposed contractor (including, for example, whether other potential contractors were considered or had the opportunity to quote or tender, whether the authority followed its standard procedures for contracts of this type or value, how the proposal was evaluated, and who was involved in making the relevant recommendation or decision);
- whether the member concerned has had any involvement in any authority decisions about the contract; and
- the monetary amount for which approval is sought.

2.41      We provide a checklist in Appendix 4 of the information that should be included in the application.

**Retrospective approval**

2.42      We have a limited power to grant retrospective approval for contracts that have already been entered into.

2.43      When considering an application for retrospective approval, we apply the same criteria as for an application for prior approval. As well, we must be satisfied that:

- there is a sufficient special reason why prior approval was not obtained; and
- prior approval would have been obtained if it had been sought.

2.44      We recognise that, in many cases, a failure to seek prior approval is the result of an oversight. We look at each case on its merits. However, because the test for retrospective approval is narrow, approval should not be assumed.

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**Monitoring**

- 2.45 We encourage authorities to establish a register of members' interests to support compliance with the Act. If the register is updated regularly, and relevant staff are aware of it, the register should help identify situations where contracts should not be entered into without our approval. Particular vigilance may be necessary for subcontracts.
- 2.46 If a local authority makes periodic purchases from businesses in which members have an interest, it should establish some form of monitoring system to provide regular checks of the accumulating value of contracts.

**Seeking extensions to an approved limit**

- 2.47 Contracts that have obtained our approval should be monitored, to ensure that payments do not exceed the amount approved. This can easily happen if contracts are varied or extended.
- 2.48 If the approved amount is exceeded, the consequence is the same as for exceeding the initial \$25,000 limit – the member is disqualified. This problem can be avoided by applying to us for an extension to the previous approval, to take account of the additional costs. This application should be made, and the extension obtained, before the payments exceed the original approval. Inadvertent breach of an approved amount requires retrospective approval, which should not be assumed.

**Candidates for election or appointment****The disqualification rule also applies to candidates**

- 2.49 You cannot be elected or appointed to an authority if you have a disqualifying contract (or contracts) that is current at the time the election or appointment takes place. This means that, if you are concerned or interested in a current contract with the authority that exceeds \$25,000 at the time of the election, you cannot be elected or appointed to an authority. The basic rule is the same as for existing members.
- 2.50 Every candidate for election or appointment to an authority should consider whether they might be ineligible under this rule. You should consider what contracts you have with the authority in the year of the election, and the value of payments to be made in that year.

### Exceptions

- 2.51 Certain types of contracts will not disqualify a candidate from election or appointment. A candidate who has a contract that falls within any of the following categories will not be disqualified:
- before the election or appointment, all of the candidate's obligations in relation to the contract have been performed and the amount to be paid by the authority has been fixed (whether or not it has been paid);
  - although the candidate's obligations under the contract have not been performed before the election or appointment, the amount to be paid by the authority is already fixed (subject to amendments and additions as allowed for in the contract), whether or not it has been paid; or
  - although the candidate's obligations under the contract have not been performed before the election or appointment, either:
    - the contract's duration does not exceed 12 months; or
    - the contract is relinquished (with the authority's consent) within a month of the candidate becoming a member and before they start to act as a member.
- 2.52 We cannot give prior or retrospective approval for contracts between a candidate and an authority. Therefore, if you are a candidate and are interested or concerned in current contracts with the authority that exceed \$25,000 prior to the election, you cannot be elected unless you either fall within one of the exceptions in the Act or cease to be concerned or interested in the contract.

### What if you are re-elected or re-appointed?

- 2.53 If you are re-elected to the authority at a general election or re-appointed to the authority at any time, your membership is considered unbroken under the Act. If you have been granted an approval for a disqualifying contract, and you are re-elected or re-appointed to the authority during the financial year to which the approval relates, the approval remains valid.
- 2.54 Re-election or re-appointment also overcomes a disqualification from the previous term. However, you could still be prosecuted for acting as a member while disqualified during the previous term (see Part 4 for more details on prosecutions).

## Part 3

# Discussing or voting at meetings – the participation rule

- 3.1 This section explains the prohibition against discussing or voting on a matter in which you have a pecuniary interest.

### What is the participation rule?

- 3.2 The participation rule is that members of an authority are not allowed to participate in discussion or voting on any matter before the authority in which they have a direct or indirect pecuniary interest, other than an interest in common with the public.
- 3.3 It is an offence under the Act to participate in the discussion or voting on any matter in which you have a pecuniary interest.
- 3.4 There are several exceptions to the participation rule. These are described in paragraph 3.35. In addition, we can grant exemptions from the rule in particular circumstances (see paragraphs 3.36-3.53 for more details).
- 3.5 There is a flow diagram at the end of this Part to help you assess whether the participation rule will apply to you.

### What is a pecuniary interest?

- 3.6 The Act does not define a pecuniary interest. The test we use is:  
*whether, if the matter were dealt with in a particular way, discussing or voting on that matter could reasonably give rise to an expectation of a gain or loss of money for the member concerned.*
- 3.7 The rule needs to be applied pragmatically. It is a matter of judgement as to what is in fact a “pecuniary interest” for the purposes of the Act. That is, we apply a triviality threshold in determining what is a pecuniary interest. So, for example, if a member were to gain \$20 as a result of a decision, we would not usually consider that that sum amounted to a “pecuniary interest” that the rule would apply to. However, our ability to read a triviality threshold into the Act is limited because the Act includes a specific power for us to grant an exemption under section 6(3)(f) of the Act, on the basis that the pecuniary interest is insignificant.

### When is there a pecuniary interest in a decision?

- 3.8 Some care needs to be taken when assessing a possible interest against the “pecuniary interest” test set out above. The nature and context of the particular decision will be important. There are many situations where the decision is in fact a procedural or more general decision, which does not affect your interest in the same way as a decision on whether to agree to a specific proposal. In addition, the democratic context in which the Act applies is also relevant.

- 3.9 Once a relevant interest has been identified, it is important to assess whether it is a pecuniary interest that must be addressed. The interest has to be actually affected by the particular decision that is to be made. Sometimes, a member has a financial interest in an issue, but it will not be affected by the decision that the authority is about to take. For example, the decision may only be to raise an issue for discussion or to begin research or a consultation process. That decision may not have any particular effect on the member's financial interest.
- 3.10 It is sometimes helpful to view the different types of decisions an authority can make as a continuum: from a general idea, through development and consultation, to a firm proposal and implementation.<sup>3</sup>
- 3.11 When discussing a general idea or making procedural or general decisions, your interest may be so remote that it could not be reasonably expected that you would gain or lose financially from discussing or voting on an issue. There may still be a number of steps the proposal must go through, all of which might result in changes to the proposal. There may be a general possibility, but nothing concrete enough to amount to an expectation of financial gain or loss. That obviously changes, however, as the issue moves towards a fully developed proposal ready for adoption and implementation. You need to be careful and recognise when a proposal reaches the stage where it can reasonably be expected that it affects your interests – at this point you should no longer participate in the decision-making process.
- 3.12 Appendix 2 contains summaries of a number of leading cases in which the courts have discussed pecuniary interests. We suggest that you refer to these case summaries for guidance.

### When is a pecuniary interest held “in common with the public”?

- 3.13 If your pecuniary interest can be said to be “in common with the public”, you will not be prohibited from discussing and voting on the matter.
- 3.14 Whether your interest is in common with the public will depend on the circumstances of the case, and is always a question of degree. The “interest in common with the public” exception needs to be applied in a realistic and practical way (see the examples set out in paragraph 3.19).
- 3.15 When considering whether your interest is in common with the public, you need to consider:
- the nature of your interest (such as the kind of interest, its size or extent, and whether it is a direct or indirect interest);

<sup>3</sup> For the recognition of these different stages in a different context, see *Easton v Wellington City Council* [2009]

NZCA 513 at [14]

## Part 3 Discussing or voting at meetings – the participation rule

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- the size of the group of people who are also affected; and
  - whether or not your interests and the group's interests are affected in a similar way.
- 3.16 The nature of your interest, and the comparison with the interests of the public, will be important. The interests of different people will be affected by a decision in different ways and to different degrees. Some people might be directly affected by a decision; others will be indirectly affected by flow-on effects from the decisions. The effect on one person's interest may be substantial, whereas the effect on another's may be only slight.
- 3.17 For the exception to apply, not only must the public also be affected but there must be some similarity between the way you are affected and the way the public are affected. However, you do not need to be affected to exactly the same extent as other members of the public – there can be some variation in the degree to which you and other members of the public are affected.
- 3.18 The question of whether a group of people should be treated as “the public” is often a matter of degree. On the one hand, the interest does not need to be shared by all members of the public in the district. It is sufficient that you are part of a large group of people affected in a similar way. Most decisions about rating and charging, including targeted schemes, are broad enough in their application to be regarded as affecting the public generally. On the other hand, if you are in a small and clearly identifiable subset that is affected in a different way to the rest of the public, then your interest is not in common with the public. Although the size of the group is important, there is no formula that can be applied – an overall judgement is required.
- 3.19 For example:
- If you are a property developer, you may not have an interest in common with the public on changes to district or regional plans or development contributions policy because your interest is different in kind to that of most other residents or “ordinary” property owners.
  - As a ratepayer, the mere fact that you are affected slightly differently by the adoption of an overall rate because of the value of your property does not generally prevent you from having an interest which is in common with the public.
  - If you are one of a small number of ratepayers affected by a targeted rate, your interest may not be in common with the public because the interest is not shared by a group large enough that it could be reasonably said to constitute “the public”.<sup>4</sup>

<sup>4</sup> These examples are discussed in further detail in our 2007 publication *Local government: Results of the 2005/06 audits*.

- If you are one of a small group of permit holders directly affected by an increase in charges, your interest may not be in common with the public – even if the general public would be indirectly affected by a corresponding slight decrease in rates.<sup>5</sup>
- If you are a dog owner, and the authority is proposing to increase dog licensing fees, your interest would be one in common with the public, as the interest is shared by a group large enough that it could be reasonably said to constitute “the public”.

3.20 Another way is to ask yourself whether the matter affects you in a different way, or to a materially greater degree, than most other people. We acknowledge that it can be difficult to draw a clear line.

3.21 If you think that your pecuniary interest is not in common with the public, it is possible that you may still be able to participate if:

- we grant you an exemption because your pecuniary interest is remote or insignificant (see paragraph 3.42); or
- we make a declaration allowing you to participate (see paragraph 3.46).

### Indirect pecuniary interests

3.22 It is difficult to be precise about when an indirect pecuniary interest exists. Each instance will have its own circumstances. However, the Act does provide certainty where an indirect pecuniary interest exists through a member’s spouse or partner, or through a company. However, it is important to note that, although the Act provides two examples, you can have an indirect pecuniary interest in other ways, such as where you are a beneficiary of a family trust that has a pecuniary interest in the decision.

### Interest through spouse or partner

3.23 If your spouse, civil union partner, or de facto partner has a pecuniary interest in a matter before the authority, you are deemed for the purposes of the Act to have the same interest.

### Interest in a company

3.24 If either you or your spouse or partner is involved in a company that has a pecuniary interest in a matter before the authority, you are deemed for the purposes of the Act to have the same interest only if:

- you or your spouse or partner, singly or together, own 10% or more of the shares in:

<sup>5</sup> See our *Investigation into conflicts of interest of four councillors at Environment Canterbury* (December 2009), which is available on our website, [www.oag.govt.nz](http://www.oag.govt.nz).

- the company; or
- another company that controls it; or
- either you or your spouse or partner is a shareholder of the company, or another company that controls it; and either of you is the managing director or general manager (by whatever name you are actually called) of the company or the controlling company; or
- either you or your spouse or partner is the managing director or general manager (by whatever name you or they are actually called) of the company, and either of you is a shareholder of another company that controls it.

### Direct and indirect interests

- 3.25 The “deeming” provisions on indirect interests can be deceptive. They mean that you are deemed to share a pecuniary interest that your spouse or partner or a company has in a matter. You could also have your own separate direct interest in a matter in addition to, or separate from, an indirect interest that you have through your spouse or partner or a company.
- 3.26 For example, you may be one of many landowners who form a company to develop a community asset in the surrounding area, in partnership with the authority. As well as the company’s interest, you may have a direct interest that arises from the prospect of increased land values in the vicinity of the project. That interest could be caught separately by the participation rule even if your involvement in the company is insufficient to meet the “deemed interest” test.

### Managing pecuniary interests

- 3.27 There are a number of steps you and your authority can take to ensure that possible conflicts of interests are managed smoothly and effectively, before a matter comes before the authority for decision.
- 3.28 In addition, when a matter in which you have a pecuniary interest comes before your local authority, you must ensure that the obligations imposed by the Act, including the obligation to abstain from considering the matter, are carefully observed.

### Pre-meeting processes and assistance

- 3.29 It is sensible for an authority to consider implementing systems that allow for the early identification and assessment of possible conflicts of interest. These may include:
- maintaining a register of interests for members of the authority;

- ensuring that members have early and timely access to agenda papers so they can identify and assess whether they have a pecuniary interest in a particular matter that is to be discussed or voted on;
- providing members with access to legal advice to help them assess whether they have a pecuniary interest in a particular matter that needs to be addressed; and
- ensuring that there is the opportunity for a member to advise the mayor or chairperson of a pecuniary interest before the relevant meeting.

3.30 As a member of an authority, you would be wise to read agenda papers before a meeting to see whether you have an interest in any matters that are to be discussed or voted on. If you are unsure about whether your interest in the matter is a pecuniary interest that must be addressed, you should seek you seek advice, either independently or (if available) with the support of your local authority. If possible, you should advise the mayor or the chairperson before the meeting starts that you are going to declare an interest in a particular matter.

**Addressing a pecuniary interest at a meeting (declaring and recording the interest and abstaining from participating)**

- 3.31 If a matter comes before the authority in which you have a pecuniary interest, the Act says that you must:
- declare to the meeting the existence of a pecuniary interest;
  - abstain from discussion and voting; and
  - ensure that your disclosure and abstention are recorded in the meeting minutes.
- 3.32 You do not need to inform the meeting about the nature of your interest, nor why it exists.
- 3.33 The requirement to abstain from discussion and voting does not mean that you have to leave the meeting room. However, we consider that, to avoid any doubt about your abstention, you should leave the table and sit in the public gallery while the matter in which you have an interest is being discussed and voted on.
- 3.34 The quorum of the meeting is not affected if a member is unable to vote or discuss because of a conflict of interest, provided they are still in the room (see clause 23(1) of Schedule 7 of the Local Government Act 2002).

### Matters to which the participation rule does not apply

- 3.35 The Act sets out a number of matters to which the participation rule does not apply. This means that a member can participate in discussion and voting on the following matters, despite the fact that the member may have a pecuniary interest:
- if you were elected by, or appointed to represent, a particular activity, industry, business, organisation, or group of persons, and your pecuniary interest in a matter is no different from the interest of those whom you represent – this exception is designed for situations where a person is explicitly elected or appointed to represent a particular group;<sup>6</sup>
  - any payment to you or for your benefit where it is legally payable and the amount, or the maximum amount, or the rate, or maximum rate, of the payment has already been fixed – such as payment of remuneration to members in accordance with determinations made under the Local Government Act 2002;
  - any contract of insurance insuring you against personal accident;
  - your election or appointment to any office, notwithstanding that any remuneration or allowance is or may be payable for that office;<sup>7</sup>
  - any formal resolution to seal or otherwise complete any contract or document in accordance with a resolution already adopted;
  - the preparation, recommendation, approval, or review of a district scheme or any section of such a scheme,<sup>8</sup> unless the matter relates to:
    - any variation or change of, or departure from, a district scheme or section of the scheme; or
    - the conditional use of land,<sup>9</sup> or
  - the preparation, recommendation, approval, or review of:<sup>10</sup>
    - reports as to the effect or likely effect on the environment of any public work or proposed public work within the meaning of the Public Works Act 1981.

<sup>6</sup> This exception does not apply to councillors elected to represent general constituencies or wards. See our *Investigation into conflicts of interest of four councillors at Environment Canterbury* (December 2009), which is available on our website, [www.oag.govt.nz](http://www.oag.govt.nz).

<sup>7</sup> This would apply, for example, to the appointment by a local authority of one or more of its members as directors of a council-controlled organisation. It would not, however, apply to any subsequent discussion of the directors' remuneration (see *Calvert & Co v Dunedin City Council*, discussed in Appendix 2).

<sup>8</sup> This exception was applied in the case of *Auditor-General v Christensen* [2004] DCR 524.

<sup>9</sup> The terminology about district schemes is based on the repealed Town and Country Planning Act 1977. We interpret it by reference to the Resource Management Act 1991.

<sup>10</sup> The Act also includes another exemption for the preparation, recommendation, approval, or review of general schemes under the Soil Conservation and Rivers Control Act 1941 for the preventing or minimising of damage by floods and by erosion. This exemption is no longer available because the relevant provision of that Act, which enabled catchment boards to recommend, approve, or review general schemes, has been repealed.

### Exemptions and declarations

- 3.36 If you are member of an authority with a pecuniary conflict of interest covered by section 6 of the Act, it is possible for you to apply to us for approval to participate. There are two ways in which we can approve participation:
- Section 6(3)(f) allows the Auditor-General to grant an exemption if your interest is, in our opinion, so remote or insignificant that it cannot reasonably be regarded as likely to influence you when voting or taking part in the discussion.
  - Section 6(4) allows the Auditor-General to grant a declaration enabling a member to participate if we are satisfied that:
    - the application of the participation rule would impede the transaction of business by the authority; or
    - it would be in the interests of the electors or inhabitants of that district that the rule should not apply.

### The procedure

- 3.37 An application for an exemption or a declaration must be made before you participate. We cannot grant a retrospective exemption or declaration.
- 3.38 The application must be in writing, and can be made by you or by the authority on your behalf.
- 3.39 To be able to consider an application for an exemption or declaration, we need to be provided with detailed information about:
- the nature of the decision that is to come before the authority; and
  - the nature and extent of your pecuniary interest in the decision, and how that interest may be affected by the decision.
- 3.40 That information is important to enable us to assess whether there is a financial interest in the particular decision that is covered by the Act. We also need this information to assess how significant the decision and the pecuniary interest are. In practice, it is often helpful if the authority is able to provide us with a draft copy of the paper that is to be considered.
- 3.41 We also need to be provided with detailed information setting out the reasons why the necessary grounds for an exemption or declaration may exist (see paragraphs 3.42-3.53).

### Exemptions

- 3.42 We can grant an exemption under section 6(3)(f) of the Act if your interest is, in our opinion, so remote or insignificant that it cannot reasonably be regarded as likely to influence you when voting or taking part in discussion on the matter.
- 3.43 When determining whether an exemption is appropriate, we consider the relationship between your pecuniary interest and the matter under consideration and the significance (that is, the size, weight, and importance) of the pecuniary interest in terms of its possible influence on you when discussing or voting.
- 3.44 When we are considering an application under section 6(3)(f), we need to understand how directly the proposed decision is connected to your pecuniary interest (the remoteness ground). We also need to understand how large or important the pecuniary interest is. That means we need reasonably precise information (if it is available) on the value of the cost or benefit to you that will result from the decision. It is also useful to be able to assess any cost or benefit to you in the context of your overall financial situation or that of your business. A cost that might be significant at an individual level may not be so important if it is borne by a large business.
- 3.45 The test in the Act is an objective one. Although your views about how significant the interest is and whether it is shaping your position on the issue are relevant, they are not determinative. Ultimately, we must assess how significant the interest looks to an observer.

### Declarations

- 3.46 We can grant a declaration under section 6(4) of the Act if we are satisfied that either:
- the application of the participation rule would impede the transaction of business by the authority; or
  - it would be in the interests of the electors or inhabitants of the district that the rule should not apply.
- “Impede the transaction of business” ground**
- 3.47 For a declaration based on the “impede the transaction of business” ground, we consider such factors as whether:
- the participation rule would preclude a majority of the members of the authority or committee from participating in the matter;
  - the declaration sought is for only a minor or procedural decision; or
  - the application of the rule could unduly distort the way in which the authority deals with the matter.

- 3.48 To assess an application for a declaration based on the “impede the transaction of business” ground, it is useful for us to receive information on how many members might be prevented from participating, how significant the decision is for the area and the authority, and any other information that can help explain to us why it might be problematic if a member was not allowed to participate. For example, we have at times granted declarations on this ground when a number of members might otherwise have been prevented from participating in a decision on the future of an authority’s significant shareholding in a listed company.
- “Interests of the electors or inhabitants” ground**
- 3.49 For a declaration based on the “interests of the electors or inhabitants” ground, we must weigh the benefits of allowing you to participate against the risk that your pecuniary interest could be seen to unduly influence the outcome. Relevant factors could include such factors as whether:
- you have any particular expertise in the matter under consideration;
  - the views of the people in the area would be inadequately represented if you were not able to participate; or
  - the matter justifies the involvement of all elected members because of its significance to the community as a whole.
- 3.50 We may also take into account the extent to which:
- your pecuniary interest is quantifiable; or
  - the matter involves decisions focused on the rights, interests, and obligations of individuals – as opposed to matters of high-level policy or matters where the authority has only advocacy or recommendatory powers.
- 3.51 To assess whether it would be “in the interests of electors or inhabitants” for a member to be able to participate, we need to assess the benefits of allowing that member to participate against the risk that their participation could be regarded as distorting or tainting the decision. Therefore, we need information on why that member’s participation is important. It may be because they have particular expertise or knowledge, or provide an important link with another organisation or community group. It may be that the issue is so significant for the community that the participation of all elected members is seen as more important than any individual interests. There may be a strong representation argument that the views of a particular group or community would not otherwise be able to be represented at the authority table.
- 3.52 For example, we have granted a declaration on this ground when the decision related to a council position in a submission on a long-term plan being prepared by another organisation, and the relevant councillor provided an important link

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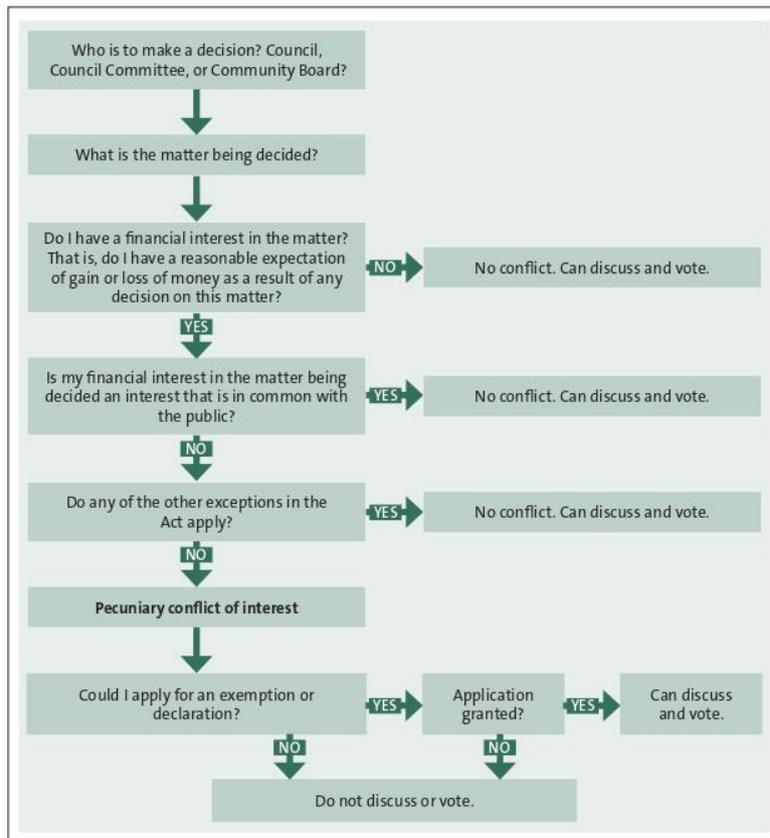
with, and voice for, the most affected section of the community. The council saw it as an important part of its role in the consultation process to give voice to that community and saw the particular councillor as critical to that process, even though the councillor was also potentially directly affected.

- 3.53 In general, we are happy to receive applications and to then ask the authority staff or affected member for any further information that we need. We recognise that, sometimes, these issues arise with some urgency because the potential conflict may be identified only shortly before the meeting in question. When a decision on a declaration is needed within a few days, it is helpful to our consideration if the initial application is as comprehensive as possible.

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3.54 This flow diagram is provided to help you assess whether the participation rule applies to you.



## Part 4

### Investigation and prosecution

4.1 The Act is enforced by prosecution. The Auditor-General is the sole prosecuting authority.

#### Offences

4.2 There are two offences under the Act, as shown in Figure 1.

**Figure 1**  
**Offences under the Local Authorities (Members' Interests) Act 1968**

Section	Offence	Penalty on conviction
5	Continuing to act as a member after becoming disqualified from office, by reason of a breach of the contracting limit under section 3(1).	A fine not exceeding \$200.
7	Failing to observe the prohibition in section 6(1) against discussing or voting on a matter in which the member has a pecuniary interest.	A fine not exceeding \$100 and, if the conviction is not successfully appealed, automatic disqualification from office.

4.3 Proceedings must begin within two years of the offence being committed.

#### Deciding whether to investigate

4.4 We may investigate a possible breach of the Act or related offence either on receipt of a complaint or at our own discretion.

4.5 To investigate a complaint, we must first be satisfied that there is enough evidence to justify an investigation. A bare allegation or simple assertion that there has been a breach is not enough.

4.6 A complaint should be supported with enough evidence to demonstrate that the complaint warrants further investigation, such as:

- details about the alleged pecuniary interest;
- information about the decision taken by the relevant local authority and the member's participation in that decision; and
- documentary evidence, such as minutes of the local authority's meeting where the decision was taken, and any supporting council reports.

### Investigating possible breaches

- 4.7 Any member of the public may complain or raise questions about your compliance with the Act. However, both the investigation and the final resolution of the matter are primarily between you and us.
- 4.8 Where a complaint is made to us that you may have breached the Act, and we decide that it warrants further investigation, we will give you full details of the complaint and an opportunity to respond to it. However, we do not disclose the identity of a person who makes a complaint. This is consistent with the approach taken by all prosecuting agencies. It is important that members of the public feel free to provide information about possible offences, without fear of their identity being disclosed.
- 4.9 We will investigate the complaint carefully to ascertain the relevant facts and to evaluate whether there has been a breach of the Act. This involves considering whether the factual circumstances disclose a breach, and whether any of the exclusions or defences can be relied on.
- 4.10 We will also seek information about the broader context of the complaint, including your reasons for acting as you did, your understanding of the nature of your interest in the matter and the general context, and the other matters you took into account.
- 4.11 Although we will give you full details of the complaint and an opportunity to respond to it, you do not have a formal right to be consulted about whether criminal charges are laid or not. However, we carefully consider whether to prosecute (see paragraphs 4.17-4.21) and take external advice from the Crown Law Office or a Crown Solicitor before beginning any prosecution.
- 4.12 If an investigation does not result in a decision to prosecute, our usual practice is to:
- inform the complainant (if there is one) that we have completed our enquiries; and
  - convey our findings in writing to you.
- 4.13 We may also inform the authority of our findings.
- 4.14 We have a discretion as to how much of our investigation we publicly report, and we carefully consider this in each case. We consider the balance between effects on a member's reputation, effects of disclosing personal financial information of the member, public accountability, and the public interest. Because the balance of these factors will differ in each case, we decide on a case-by-case basis how much of our investigation we will publicly report.

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- 4.15 We note that in some cases it better serves the public interest for us to report more fully on our investigations and conclusions.<sup>11</sup> This is particularly so where we have investigated publicly made allegations of breaches of the Act that have attracted considerable local public interest.
- 4.16 In such cases, therefore, as well as reporting our findings to you and your authority, we may also make a brief public statement about our investigation and findings. You are then accountable to the public for your conduct.

### Deciding whether to prosecute

- 4.17 If we consider the circumstances warrant it, we may begin proceedings. This involves the exercise of discretion. The need to even consider prosecution is a matter of serious concern. However, in any particular situation, we may form the view that, although an offence appears to have been committed, the circumstances do not warrant prosecution.
- 4.18 In exercising our discretion, we take account of the Solicitor-General's *Prosecution Guidelines* issued by the Crown Law Office.<sup>12</sup> These guidelines are the accepted and authoritative description of how any prosecuting agency should exercise its discretion.
- 4.19 These guidelines require both that the facts provide evidence of a breach of the Act and that it is in the public interest to bring a prosecution.
- 4.20 There must be a reasonable prospect of obtaining a conviction – there must be credible evidence that can be relied on in court to reasonably expect that a judge will convict. The burden of proof for criminal prosecutions is stricter than the test required to invalidate an authority's decision in judicial review proceedings for bias. As well as needing to establish that there has been a breach, it must be clear that none of the exclusions or defences in the Act apply.
- 4.21 Even if there is evidence that can establish a breach, the public interest in any prosecution must also be considered. Factors relevant to that assessment include:
- whether it is more likely than not that a prosecution will result in conviction;
  - the size and immediacy of any pecuniary interest, the damage caused, the level of public concern, and the extent to which the member's participation influenced the outcome;
  - mitigating and aggravating factors, including any previous misconduct, willingness to co-operate with an investigation, evidence of recklessness or irresponsibility, and previous breaches, cautions, and warnings;

<sup>11</sup> See, for example, our *Investigation into conflicts of interest of four councillors at Environment Canterbury* (December 2009), which is available on our website, [www.oa.govt.nz](http://www.oa.govt.nz).

<sup>12</sup> *Crown Law Prosecution Guidelines* (January 2010), available at [www.crownlaw.govt.nz](http://www.crownlaw.govt.nz).  
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- the effect of a decision not to prosecute on public opinion;
- the availability of proper alternatives to prosecution, such as reporting publicly to the council or the public;
- the prevalence of the offending and need for deterrence;
- whether the consequences of a conviction would be unduly harsh or oppressive; and
- the likely length and expense of the trial.

4.22 This list is illustrative only and is not exhaustive.

## Part 5

### Other conflict of interest issues

- 5.1 Having a pecuniary interest in a matter before the local authority, as discussed in Part 3, is one type of conflict of interest. However, quite apart from the Act, there are legal rules about conflicts of interest more generally, which apply to both pecuniary and non-pecuniary conflicts of interest.
- 5.2 In this Part, we comment on other types of conflicts of interest that may be relevant to local authority members. In particular, we discuss the common law rule about bias as it relates to non-pecuniary conflicts of interest. However, this is not a formal or definitive statement of the law. Nor is it to be treated as legal advice for specific situations.
- 5.3 Although we have a specific formal role with pecuniary conflicts of interest in relation to local authorities under the Local Authorities (Members' Interests) Act, we do not have any special role with conflicts of interest generally. In particular, we have no enforcement role and cannot give formal rulings.
- 5.4 In our experience, most local authority staff are able to provide informed and practical advice to members on these issues. If staff have major concerns about a particular current or potential issue, we encourage the organisation to get specific legal advice rather than to seek general guidance from us. Alternatively, you can consult your own lawyer.

#### Conflicts of interest generally

- 5.5 A conflict of interest exists where two different interests intersect – in other words, where your responsibilities as a member of the local authority could be affected by some other separate interest or duty that you may have in relation to a particular matter. That other interest or duty might exist because of:
- your own financial affairs;
  - a relationship or role that you have; or
  - something you have said or done.
- 5.6 The common law requires that public decision-making be procedurally fair. In particular, conflicts of interest are usually dealt with under the rule about bias. The law about bias exists to ensure that people with the power to make decisions affecting the rights and obligations of others carry out their duties fairly and free from bias. It is summed up in the saying “no one may be judge in their own cause”.

### Bias

- 5.7 The law about bias has been developed to achieve two main goals. First, it ensures that the best decision is made based on relevant information and arguments, not ulterior motives or prejudices. Secondly, it ensures that people affected by, or interested in, a decision have trust and confidence in the process – meaning they are more likely to accept a decision once it is made.
- 5.8 This means the rules about bias operate not only to ensure that there is no actual bias, but also so there is no appearance or possibility of bias. The principle is that justice should not only be done, but it should be seen to be done.
- 5.9 If a person challenges a local authority's decision by taking judicial review proceedings, the courts could invalidate the decision because of bias on the part of a member of the decision-making body. The question you need to consider, drawn from case law, is:<sup>13</sup>

*Would a fair-minded observer reasonably think that a member of the decision-making body might not bring an impartial mind to the decision, in the sense that he or she might unfairly regard with favour (or disfavour) the case of a party.*
- 5.10 The law about bias does not put you at risk of personal liability. Instead, the validity of the authority's decision could be at risk.
- 5.11 Your focus should be on the nature of the conflicting interest or relationship, and the risk it could pose for the decision-making process.
- 5.12 The need for public confidence in the process is paramount. Perception can be an important factor. Each case must be decided on its own circumstances.

### How does the law about bias apply to local authorities?

- 5.13 The courts recognise that local authorities are different in nature from other decision-making bodies. As one judge has said, the fairness of a local authority decision-making process must be assessed “without too quickly importing concepts of administrative law grown from the soil of quite different contexts”.<sup>14</sup> In particular, the democratic status of a local authority, the representative nature of the members of a local authority's governing body, and the practice where decisions are often made by a committee of members by majority vote must be recognised when applying general principles of administrative law about bias and fairness in the decision-making process. Some care must be taken when drawing principles from cases involving courts and judges, or other public bodies and officials that are required to adopt a court-like procedure.

<sup>13</sup> *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35; [2010] 1 NZLR 76.

<sup>14</sup> *Goulden v Wellington City Council* [2006] 3 NZLR 244 at [50]. See also *Friends of Tūritea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 at [105] and *Wakatu Incorporation v Tasman District Council* [2008] NZRMA 187 at [22]-[25].

- 5.14 The courts acknowledge that, where Parliament entrusts a function to an elected or political body (instead of to a tribunal or a court), it is natural to expect that:
- the members of the authority will bring their own experience and knowledge to the decision-making process;
  - the members may already have views – even strong or publicly stated views – about the matter; and
  - political considerations may play a part in the decision.
- 5.15 As usual, the nature and context of the particular decision will be important too. The courts are likely to take a stricter approach with decisions that directly affect the legal rights, interests, and obligations of an individual or small group of individuals (as opposed to decisions with a large policy or political element).
- 5.16 For instance, the sorts of decisions where a stricter approach may be taken include:
- licensing applications;
  - decisions under the Resource Management Act 1991;
  - decisions requiring a formal statutory process and hearing (such as road-stopping proposals);
  - dealings in land; or
  - other decisions that have a regulatory or coercive effect.
- 5.17 By contrast, the courts may take a less strict approach to decisions about:
- high-level policy-making;
  - issues in which the authority has only advocacy or recommendatory powers; or
  - operational or service functions.

**Situations where a risk of bias may exist**

- 5.18 The most common risks of non-pecuniary bias are where:
- your statements or conduct indicate that you have predetermined the matter before hearing all relevant information (that is, you have a “closed” mind); or
  - you have a close relationship or involvement with an individual or organisation affected by the matter.
- 5.19 Paragraphs 5.20-5.53 discuss these two types of non-pecuniary bias, and offer our comments on some common scenarios. The examples are a general guide, but each situation needs to be assessed on its own merits. Our suggestions are neither authoritative nor comprehensive.

### Predetermination

- 5.20 A claim of bias may be made on the basis of predetermination. An allegation of predetermination is generally based on the expression of a view or conduct that suggests a member might have approached the issue with a closed mind. Accordingly, it is an issue within your control. By exercising care over your statements and behaviour, you should be able to prevent this issue creating problems for you.
- 5.21 For example, predetermination might occur if your public statements indicate that you made up your mind about the matter before it came to be heard and deliberated on. In other words, that you, as decision-maker, had a closed mind and were not prepared to listen fairly to all the arguments.
- 5.22 You are not expected to approach matters without any existing opinions at all. Elected members take office with publicly stated views on a wide variety of policy issues. In local authority decision-making, the courts therefore acknowledge that a degree of local knowledge and pre-existing views – especially where a matter involves wide public policy issues – is both inevitable and desirable.
- 5.23 The critical factor is that you remain, and are seen to remain, open to persuasion. That is, that you do not express views in a way that implies an unwillingness to listen fairly to new arguments or to give the matter further consideration when it comes before the authority.

### What is predetermination?

- 5.24 You could create a legal risk for the decision that the local authority is making if you participate in the authority's consideration of a matter and you:
- make statements that suggest your mind is made up about the particular matter before having heard all views, that your position is so fixed that you are unwilling to fairly consider the views of others, or that you are not prepared to be persuaded by further evidence or argument; or
  - refuse to read or listen to reports or submissions presented to the authority about the matter.
- 5.25 As noted earlier, the nature of the decision is important. There is unlikely to be any legal risk in you commenting about broad policy issues, particularly where your remarks are expressed in general terms. However, the legal risk is likely to be much higher if you comment about specific decisions that are focused on the rights and interests of one individual or a few individuals, and where other people have the right to make a submission to a formal hearing about the matter.

- 5.26 You could also create a legal risk to the authority's decision if you participate in the authority's consideration of a matter and you have made a formal submission to the authority in your personal capacity to support or oppose a particular proposal as part of a public submissions process. There may be rare situations where you may still be able to consider such matters. However, as a potential decision-maker, to avoid creating legal risk for the authority's decision, it is advisable to avoid making submissions on matters that will come before your authority for decision – doing so will usually compromise your ability to participate in the decision-making process.
- 5.27 The level of legal risk will always depend on the facts of the situation. For example, the legal risks may not be great if you make a submission before being elected as a councillor or if some years separate the submission and the decision. The key question is whether you have an open mind at the time you are making the decision.
- 5.28 It seems generally accepted that the common law does not prevent you from:
- discussing issues and exchanging ideas with members of the public;
  - promoting a particular view during debate around the meeting table; or
  - advocating opinions or policies in public – or campaigning for election – about issues of public interest;
- so long as you do not indicate that you have already closed your mind to further consideration of a particular matter.
- 5.29 General personal factors, such as your ethnicity, religion, national origin, age, political or philosophical leanings, wealth, or professional background, will, of themselves, not often constitute predetermination.

#### Presence at hearings

- 5.30 As noted above, predetermination can also be shown to exist through a member's conduct. For example, lengthy periods of non-attendance at a hearing could suggest that you have predetermined the matter and that your decision is not based on the evidence and submissions presented. Therefore, to avoid the risk of the decision being challenged on this basis, where evidence and submissions are being heard on a particular matter, you should be present for the whole hearing to show a willingness to consider all points of view. Very short absences might be acceptable, but lengthy periods of non-attendance at a hearing create risks.

### Relationship with other persons or organisations

- 5.31 A conflict of interest may exist if you have a close relationship with a person or organisation involved in, or affected by, the matter before the local authority – for example, if the matter involves or affects a family member, or an organisation to which you belong, or a business of which you are an employee. Such a connection could affect how other people view your impartiality.
- 5.32 This sort of conflict of interest arises not from something you have said or done, but from a pre-existing state of affairs. Accordingly, no matter how careful you are, this type of conflict sometimes cannot be prevented.
- 5.33 In deciding whether to participate, you should consider:
- the extent of your personal links or involvement with the other person or group; and
  - the degree to which the matter under discussion directly affects that person or group.
- 5.34 However, it is important to bear in mind that, in politics, the merest perception of impropriety can be extremely damaging, whether or not a court would find your actions to be lawful. To avoid risks to the authority's decision, if you have any relationship with a person or organisation involved in a matter, you should seriously consider the wisdom of whether to participate at all. The safest advice is always "If in doubt, stay out".

### Personal relationships

- 5.35 You could create legal risk for the authority's decision if you participate in the authority's consideration of a matter when:
- the decision directly affects a member of your immediate family or a close friend; or
  - a member of your immediate family has made a submission about the matter.
- 5.36 People can have different views on who is regarded as an immediate family member or close relative. This can make it difficult to assess whether a conflict of interest exists. However, we do not think that a person needs to be regarded as part of your immediate family for these purposes just because they are part of your wider kin group descended from a common ancestor (such as an iwi or hapū).

- 5.37 You may want to consider carefully whether to participate where the matter involves or affects:
- a personal or professional acquaintance;
  - someone who funded your election campaign; or
  - a more distant relative.

5.38 The particular facts will always be important for assessing the legal risks.

**Membership of other organisations**

- 5.39 There may be increased legal risks to the authority decision if you participate in consideration of a matter before the authority involving or affecting a club or similar organisation that you are involved in if:
- you are an executive officeholder or trustee, or are otherwise strongly publicly identified with the club; or
  - the matter specifically and significantly involves or affects the club – such as a proposed grant of money to the club, or something else directly affecting the club’s finances or property.
- 5.40 On the other hand, the possibility of the decision being challenged is likely to be very low if you participate and:
- you are a passive or ordinary member of the club, and the organisation is relatively large; or
  - the matter affects the club only indirectly – such as a broad public policy issue in which the club has chosen to take an interest.

5.41 Similarly, the legal risks are likely to be low if you participate and you have only a past involvement with the club, or merely have friends who are involved in the club.

**Employment with other organisations**

- 5.42 If the matter concerns your employer, the legal risks to the decision are likely to be high if you participate in the decision and:
- you are a senior executive (particularly where the matter directly concerns the organisation); or
  - you are personally involved in the issue as part of your employment.
- 5.43 However, the legal risks to the decision are likely to be lower if you participate in the decision and you are a junior staff member (particularly in a large organisation), and have had no personal involvement in the issue through your employment. However, you will always need to exercise your judgement carefully.

- 5.44 See also paragraph 6.11 for discussion of whether your employment might raise a question of a pecuniary interest.

#### **Membership of committees and community boards**

- 5.45 It is common for members of a local authority to also be on committees or subcommittees of the authority, or on a community board. There is normally no legal risk in your participating in the decision at one of these levels and then again when the decision reaches the governing body of the local authority.
- 5.46 However, the legal risks may be greater if your participation at the other level could raise a risk of predetermination to the decision of the governing body. An example is where you are a councillor and also a member of a community board, and the board decides to make a formal submission to the council about a review of representation arrangements for elections. In this situation, you need to decide at which level you can best participate. For example, you might choose to refrain from participating in the board's decision if you want to preserve your ability to participate later at the council level.

#### **Appointment as the local authority's representative on another organisation**

- 5.47 You may have been appointed as the authority's representative on the governing body of a council-controlled organisation or another body (for example, a community-based trust).
- 5.48 That role will not usually prevent you from participating in authority matters concerning the other organisation – especially if the role gives you specialised knowledge that it would be valuable to contribute.
- 5.49 However, you could create legal risks to the decision if your participation in that decision raises a conflict between your duty as a member of the local authority and any duty to act in the interests of the other organisation. These situations are not clear cut and will often require careful consideration and specific legal advice.
- 5.50 Similarly, if your involvement with the other organisation raises a risk of predetermination, the legal risks to the decision of the authority as a result of your participation may be higher – for example, if the other organisation has made a formal submission to the authority as part of a public submissions process.

### Membership of some other public body

- 5.51 If you have been appointed or elected to the governing body of some other public entity unconnected with your position on the local authority (such as a district health board), we recommend that you consider potential conflicts of interest on a case-by-case basis. You should consider whether your ability to consider a matter before the local authority with an open mind could be affected by:
- your legal duty to act in the interests of the other body;
  - any involvement you may have had in the matter through the other body; or
  - the degree to which the other body is affected by, or interested in, the local authority's decision on the matter.
- 5.52 It may be wise to seek some specific legal advice on when it will or will not be appropriate to participate.

### Other personal involvement with an organisation

- 5.53 Even if you are not formally associated with an organisation affected by a matter before the local authority, if you have a close personal involvement with the organisation, your participation may create legal risks for the decision – for example, if you have helped the organisation prepare its application to the authority, or have been paid to do so in a professional capacity.

### What to do?

- 5.54 If you decide you have a non-pecuniary conflict of interest in a matter before the authority, we recommend that you follow the same procedures that you are required to follow in cases of a pecuniary interest – that is:
- declare that you have a conflict of interest when the matter comes up at the meeting;
  - refrain from discussing or voting on the matter; and
  - ensure that your declaration and abstention is recorded in the minutes.
- 5.55 We consider that it is good practice to also leave the meeting table while discussion and voting on the matter take place.
- 5.56 Non-pecuniary conflicts of interest always involve questions of judgement and degree. In the interests of openness and fairness, we encourage members to take a cautious approach. Authority staff can provide advice, and it can also be useful for you or the authority to seek legal advice. However, if in doubt, it is always safer to declare an interest and abstain from discussing or voting on the matter.
- 5.57 Appendix 3 contains summaries of a number of cases in which the courts have considered non-pecuniary conflicts of interest.

## Part 6

### Frequently asked questions

6.1 This Part sets out some frequently asked questions about conflicts of interest, and our answers.

6.2 **I think I might have an interest in a matter. How do I tell if it's pecuniary or non-pecuniary?**

Ask yourself whether the matter could reasonably give rise to an expectation of a gain or loss of money for you personally (or, in the case of a deemed interest,<sup>15</sup> for your spouse or partner or a company).

6.3 **Are pecuniary interests treated more strictly than non-pecuniary interests?**

Generally, yes. Under the common law, a pecuniary interest of any size gives rise to an automatic disqualification – in effect, a presumption of bias. This rule is reflected in the Act, which governs pecuniary interests for members of local authorities (subject to the powers of exemption and declaration set out in paragraphs 3.42-3.53). On the other hand, non-pecuniary conflicts of interest involve a more discretionary judgement – you can consider all the circumstances of the situation to determine whether or not a reasonable observer would consider that a real danger of bias exists.

6.4 **Do the legal consequences of not declaring a pecuniary or non-pecuniary conflict of interest differ?**

Yes. A breach of section 6 of the Act – which relates to a pecuniary interest – can result in you being prosecuted for an offence. If convicted, your office as a member is vacated (that is, you will no longer be a member of the authority) and you could be fined up to \$100.

Failing to declare a non-pecuniary conflict of interest is not an offence. But it could result in legal proceedings that challenge the validity of the authority's decision. Those proceedings would not directly affect you personally, but you could face condemnation from your colleagues and the public if your actions resulted in the authority's decision being overturned by the courts.

6.5 **Can the common law rule about bias apply to pecuniary interests too?**

Yes. Pecuniary interests of members of local authorities are mainly governed by the Act. But the common law rule about bias could also be used to overturn a local authority's decision on the ground of a member's pecuniary interest.

6.6 **Can anything else happen to me if I don't follow the rules?**

Your actions might constitute a breach of the authority's code of conduct.<sup>16</sup> The authority might also take some form of action against you – for example, a censure motion or removing you from a council committee.

For members of city councils, district councils, and regional councils, your actions could also result in personal financial liability under section 46 of the Local Government Act 2002. This might arise if your conduct contributed to the local authority incurring a loss.

6.7 **Can the local authority or chairperson order me not to participate on the ground of a conflict of interest?**

No. The decision about whether to participate is yours (although the authority might be able to resolve to remove you from a committee considering the matter). You should carefully consider any advice offered to you by senior members, the chief executive, or other staff. You should also consider seeking your own legal advice.

6.8 **The authority has resolved that I do not have a pecuniary interest in a particular matter. Does this mean that I can participate?**

No. A resolution of an authority that you do not have a pecuniary interest in a particular matter is not an authoritative statement of the law. If, in fact, you do have a pecuniary interest in the matter and you participate in discussion and voting on it, you will have committed an offence under the Act.

However, if the authority resolves that you should be able to participate, subject to our approval being obtained, we would take the resolution into account when deciding whether to grant an exemption or declaration enabling you to participate.

6.9 **I'm fairly sure that I have a non-pecuniary conflict of interest in a matter, but I still think it is important for me to participate. Can the Auditor-General grant me an official exemption?**

No. We have no power to grant exemptions or declarations for non-pecuniary conflicts of interest. Nor can we provide you with a formal ruling about whether a legal conflict of interest exists – only the courts can determine that. You should approach a lawyer if you want definitive advice.

6.10 **I belong to various clubs throughout my district, as well as being a member of the district council. Do I have a pecuniary interest in every matter that comes before the council that relates to those clubs?**

Usually, no. Membership of community organisations such as sporting or cultural or charitable associations is unlikely to give rise to a pecuniary interest in matters involving those organisations because of their “not for profit” nature. However, it is possible that your membership of an organisation may entitle you to a share of the organisation’s assets if the organisation is wound up. You should check the rules of the organisations you belong to, to see whether you may have a pecuniary interest of this type.

A pecuniary interest may also arise in the case of, for example, a golf club occupying land leased from the authority where the lease rental has a significant bearing on the members’ subscription or other fees.

See paragraphs 5.39-5.41 for discussion of whether membership of a club might give rise to a non-pecuniary conflict of interest.

6.11 **I am an employee of a company/organisation that has dealings with the authority of which I am a member. Do I have a pecuniary interest in any dealings that my company/organisation has with the authority?**

The existence of an employment relationship, where you receive a fixed level of remuneration, does not, on its own, give rise to a pecuniary interest.

If there is any link between the authority’s decision and the level of remuneration paid to you as an employee of the company/organisation, then a pecuniary interest exists. For example, if you were employed by an organisation that received funding from the authority and the authority was deciding whether to stop funding that organisation, possibly resulting in the loss of your job, you would have a pecuniary interest in that decision.

See paragraphs 5.42-5.44 for discussion of whether your employment might give rise to a non-pecuniary conflict of interest.

6.12 **I’m also a member of the board of another organisation. Is it relevant to the question of conflict of interest if I’ve been appointed to that organisation specifically as a representative of the local authority?**

Yes. In that situation, it will often be acceptable to participate in the authority’s decisions about matters concerning that organisation. However, a conflict of interest might sometimes arise. See our discussion in paragraphs 5.47-5.50.

## Appendix 1

# Organisations whose members are subject to the Act

### Classes of organisations

- Administering bodies under the Reserves Act 1977
- Cemetery trustees
- City councils
- College of education councils
- Community boards
- Community trusts established under the Sale of Liquor Act 1989
- District councils
- Licensing trusts
- Local boards (in Auckland)
- Polytechnic councils
- Provincial patriotic councils
- Regional councils
- University councils

### Specific organisations

- Auckland Museum Trust Board
- Canterbury Museum Trust Board
- Chatham Islands Council
- Masterton Trust Lands Trust
- Museum of Transport and Technology Board
- New Zealand Council for Educational Research
- New Zealand Horticultural Export Authority
- New Zealand Māori Arts and Crafts Institute
- Ngarimu V.C. and 28th (Māori) Battalion Memorial Scholarship Fund Board
- Otago Museum Trust Board
- Pacific Islands Polynesian Education Foundation Board of Trustees
- Plumbers, Gasfitters, and Drainlayers Board
- Queen Elizabeth the Second National Trust Board of Directors
- Riccarton Bush Trustees
- Taratahi Agricultural Training Centre (Wairarapa) Trust Board
- Winston Churchill Memorial Trust Board

## Appendix 2

### Leading cases on pecuniary interest

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The Act does not define the term “pecuniary interest”. Its meaning is a matter for legal interpretation according to the circumstances of the particular situation. However, there is a significant body of relevant case law that offers some guidance. The most significant cases are summarised in this appendix.

#### ***Brown v Director of Public Prosecutions* [1956] 2 All ER 189; [1956] 2 QB 369**

This case involved members of an English local authority who were tenants in houses owned by the local authority. The councillors declared their interest in a matter concerning the level of rents for council houses where there were subtenants or lodgers, but nevertheless voted on the matter albeit apparently to their disadvantage.

The judgment declared that all councillors who were tenants of the council had a pecuniary interest in that matter. This included councillors who did not at that time have subtenants or lodgers, because the houses were potential income-producing assets and the possibility existed of sub-letting or taking in lodgers in the future. In explaining the basis of the statutory prohibition, this case also indicated that it does not matter whether the result of the vote would be to the pecuniary advantage or disadvantage of the person voting:

*The object of s.76(1) is clearly to prevent councillors from voting on a matter which may affect their own pockets and, therefore, may affect their judgement, and a councillor's judgement may be affected by a proposal to preserve his liability just as much as by a proposal to terminate it, particularly where other persons in a like situation are being relieved from the same liability. In those circumstances, no narrow construction ought to be put on the words “pecuniary interest” in their context in s.76(1); in particular they ought not to be construed and the contrary has not been suggested as meaning pecuniary advantage.*

#### ***Rands v Oldroyd* [1958] 3 All ER 344; [1959] 1 QB 204**

This case concerned a member of an English borough council who spoke to a motion about the letting of contracts for building council housing. The councillor was managing director and majority shareholder of a building company that had a history of building for the council.

On his appointment as vice-chairman of the housing and town planning committee of the council, the member had decided that his company would not tender in future for any building contracts with the council. However, the Court noted that the company was at all times in a position to be invited to tender for

building work for the council and to tender for such work in the future if it desired, and therefore held that the member had an indirect pecuniary interest in the matter under discussion.

### ***Re Wanamaker and Patterson (1973) 37 DLR (3d) 575***

This case involved the mayor of a town council in Alberta, Canada, who was owner and operator of a coin laundry business in premises located in the town's shopping centre. In his capacity as a member of the council, he proposed and voted on resolutions designed to secure the approval of the Minister of Highways for a project to make a cut in the median strip of a provincial highway in order to provide access for traffic on the highway to the shopping centre.

Since the effect of the improvement of access to the shopping centre would be to increase the number of customers availing themselves of the services in the shopping centre, which would be reflected in increased use of the coin laundry, the mayor would financially benefit, and consequently the question was one in which he had an indirect pecuniary interest. It did not matter that he may have been acting in good faith and in the interests of the municipality.

### ***Downward v Babington [1975] VR 872***

This case concerned a councillor of a shire in Victoria, Australia, who owned and leased certain shops. At different times, the council or its committees had before them:

- a project to allow the establishment of a supermarket in the immediate vicinity of the councillor's shops;
- a proposal to compulsorily acquire land adjoining those shops and the supermarket site for off-street parking;
- a proposal to permit development of vacant land adjoining the councillor's shops as a retail shop; and
- a proposal to buy land in the immediate vicinity for off-street parking.

The case did not involve any finding of fact as to whether the member had a pecuniary interest in those matters, but did produce a useful definition of the term "pecuniary interest":

*... a councillor should be held to have a pecuniary interest in a matter before the council if the matter would, if dealt with in a particular way, give rise to an expectation which is not too remote of a gain or loss of money by him.*

We have chosen to adopt this definition as appropriate in the New Zealand context, although acknowledging that our Act deals separately with the element of remoteness in section 6(3)(f).

### ***Loveridge & Henry v Eltham County Council (1985) 5 NZAR 257***

The council's chairman and deputy chairman both owned land within an area where the council proposed to establish a rural water supply scheme. As with the *Downward v Babington* case, the nature of the proceedings was such that the Court was not required to make a finding as to whether the members had a pecuniary interest in the matter. The Court did, however, observe that:

*The situation contemplated by the Local Authorities (Members' Interests) Act is a particular formalised illustration of the rule that persons charged with an obligation to make decisions should not be affected by a personal motive.*

The Court rejected an argument that the relevant "public" with which to compare the members' interests was the group of landowners affected by the scheme.

With rather limited reference to prior cases, the judgment used the general rules of natural justice as the base on which to state a test for compliance with section 6(1):

*... would an informed objective bystander form an opinion that there was a likelihood that bias existed?*

### ***Calvert & Co v Dunedin City Council [1993] 2 NZLR 460***

This case centred on procedures adopted at meetings in 1990 for determining directors' fees to be paid in relation to four local authority trading enterprises (LATEs), the directors of which had previously been appointed and included various members of the council. The council considered reports on the setting of directors' fees generally and a motion that, if passed, would have required councillor directors to remit their directors' fees to the council, receiving instead from the council sums based on the usual allowances paid in connection with local authority meetings.

That motion was dealt with by debating it separately in relation to each LATE. Councillor directors withdrew when that part of the motion which concerned the LATE of which they were directors was debated and voted on, but took part in debate and voted on those parts of the motion that concerned LATEs of which they were not directors.

The Court held that section 6 was breached when councillor directors discussed and voted on:

- a report containing opinions and recommendations about the range of directors' fees that should be payable – a direct pecuniary interest; and
- motions affecting directors' fees for LATEs to which they were not appointed – an indirect pecuniary interest.

The vote of a particular councillor in effect put their stamp of approval on the method by which the directors' fees had been calculated. That stamp of approval called for a consistent approach and vote by other councillor director members. The length of some meetings, and the memoranda and resolutions, tended to confirm that the councillor directors were in effect acting in harmony in the approach taken by the council towards directors' fees. Certainly the interest of those councillor directors was greater than that of the public at large.

The judgment is notable for the expression of certain propositions based on a review of earlier judgments:

- An indirect pecuniary interest under section 6 of the Local Authorities (Members' Interests) Act 1968 may cover a wide variety of factual situations.
- The indirect pecuniary interest may involve an interest arising from a relationship and not from any specific contract or monetary connection.
- An indirect pecuniary interest may include a potential benefit or potential liability.
- A decision as to whether a particular factual situation amounts to an indirect pecuniary benefit is assisted by considering whether an informed objective bystander would conclude that there was a likelihood or reasonable apprehension of bias.
- The motives and good faith of councillors are irrelevant to whether or not they had an indirect pecuniary interest.

***R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign* [1996] 3 All ER 304**

A rugby club wished to sell its main sports field and move to another location nearby. However, it could only realistically do so if it obtained a commercial site value for its existing site. Planning permission was therefore sought from the local urban development authority to allow the large-scale commercial development of the land.

At the same time, the club had also identified the desired location for its proposed new facilities. This happened to be a piece of open land adjacent to a large private property owned by the chairman of the urban development authority. The chairman's land was "green belt" land, and it was well known that the chairman believed his land ought to be rezoned for housing development (but any rezoning decision would be the responsibility of another council).

The Court found that the chairman had an undisguised interest, worth a great deal of money to him and his family, in getting his private land rezoned. It

also found that a powerful argument in favour of this would have been if the neighbouring site was developed into a rugby stadium. Because it was common knowledge that that was unlikely to occur unless the club was able to secure a commercial sale price for its existing site, the Court held that this meant the chairman had – at that time – a pecuniary interest in the planning application about the club’s existing site. The Court implicitly rejected an argument that his interest was too remote or insignificant.

However, the club later abandoned its proposed new location near the chairman’s land. Furthermore, a fresh development proposal was submitted in respect of the club’s existing site. The Court held that the chairman did not have a pecuniary interest in the authority’s later decisions about the existing site. His former interest did not taint the authority’s subsequent decisions.

## Appendix 3

### Examples of cases on non-pecuniary conflicts of interest

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#### Cases where predetermination was found

These cases illustrate some situations where courts found members to have predetermined the matter.

*English v Bay of Islands Licensing Committee* [1921] NZLR 127 involved an application for renewal of an on-licence. Members of the licensing committee had previously made public statements that the application would be refused unless a new hotel was built. For instance, one member had told the applicant that it did not matter what he said in his application, because “the committee have their minds made up”. The Court held that the members’ public statements went far beyond reasonable expressions of opinion, and amounted to pledging themselves to refuse the licence. This meant they were biased, and had predetermined the application.

In an English case also involving a liquor licence, *R v Halifax Justices, ex parte Robinson* (1912) 76 JP 233, a member of the licensing authority was associated with a temperance society. That fact alone would not have constituted bias, but the Court found that the member had shown himself to have a closed mind by announcing that he would have been a “traitor” to his position if he had voted in favour of granting the licence.

In *Meadowvale Stud Farm v Stratford County Council* [1979] 1 NZLR 342, several councillors who sat on a committee considering an application for an offensive trades licence for a pig farm were also directors or shareholders of a company that occupied land next door. The councillor who was a director had insisted on the farm applying for the licence, and then the company had formally objected to the application and had been represented at the hearing in support of its objection. The Court held that the interested councillors should have been excluded from hearing the application – not only because they had a pecuniary interest in a company potentially affected by the matter, but also because of the active role the company had taken as a submitter.

In *Frome United Breweries v Bath Justices* [1926] AC 586, several members of a licensing authority had instructed a solicitor to appear before the authority on their behalf and oppose a licence application. They were held to be biased.

*East Pier Developments v Napier City Council* (High Court, Napier, CP26/98, 14 December 1998, Wild J) related to a lease, where the council was lessor. The lessee wished to use the land for a different purpose, and the lease agreement required it to seek the council’s approval. The Court found two members of the council to be biased. One had been closely involved in negotiations and meetings about the

matter from an early stage, and the Court held that his overall conduct indicated that from beginning to end he was determined that the council should reject the application. He was never prepared to consider it in an open-minded and impartial manner. Another member, the Court held, was single-minded in his opposition to the application, and so was also not properly open to persuasion.

In *Otago University Students Association v University of Otago* [2009] 2 NZLR 381 (HC), the High Court ruled that the University had properly excluded student Council representatives from sitting on an Appeals Board hearing code of conduct charges against two students, on the basis that the student representatives would not be able to consider the charges with an open mind. The two possible student representatives had previously been involved in submissions against the code and had served on the Student Association Executive that had publicly denounced the code.

### Cases where predetermination was not found

By contrast with the above cases, the courts have often held an expression of a provisional view or broad policy stance about the matter before or during the hearing to be acceptable. The critical factor in these cases is that the views were not expressed in such a categorical way that they implied an unwillingness to listen fairly to new arguments or to give the matter genuine further consideration at the formal hearing. The courts were satisfied that the members, despite their provisional views about the general issues, remained open to persuasion about the particular decision before them.

In *Whakatane District Council v Bay of Plenty Regional Council* [2009] 3 NZLR 799 (HC), the High Court ruled that prior comments, including letters to the editor, made in support of a proposal to relocate the Regional Council offices did not mean some councillors had “irretrievably committed” to the proposal. Nor did the fact that some councillors were not able to attend all consultation meetings mean they had predetermined the issue – their absences were not significant and the councillors had taken steps to acquaint themselves with the proceedings of the consultation meetings. (The High Court’s decision was subsequently overturned on other grounds by the Court of Appeal (*Whakatane District Council v Bay of Plenty Regional Council* [2010] NZCA 346); the Court did not comment on the High Court’s findings on predetermination and councillor absence.)

In *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC), the High Court ruled that the fact that the local authority, as land-owner of a reserve, would financially benefit from a decision to change the status of a reserve did not amount to predetermination or bias. Even though the local authority would receive a financial payment from an electricity generator to

install turbines on the reserve once the status was changed, the Court considered that the local authority members still approached the decision with an open mind, and noted that the purpose of the payment, when viewed in context, was legitimate.

In *Goulden v Wellington City Council* [2006] 3 NZLR 244 (HC), the High Court ruled that members of a local authority had not predetermined a code of conduct complaint against a fellow councillor. By themselves, there was nothing objectionable in the framing of a proposed motion of censure in positive terms, the mayor presiding over the meeting even though she had witnessed and been party to previous incidents, and the fact that councillors had discussed their voting intentions with each other before the meeting.

In *Wakatu Incorporation v Tasman District Council* [2008] NZRMA 187 (HC), the Court emphasised the administrative nature of the assessment about whether there was sufficient information for an application for a resource consent to be publicly notified. Even though the local authority was responsible for processing a resource consent lodged by itself, there was no evidence in the way it processed the application or assessed whether it was ready for public notification that suggested that the matter had been predetermined.

In *Riverside Casino v Moxon* [2001] 2 NZLR 78 (CA), a member of a casino licensing authority had made a number of comments during the oral hearings that were strongly critical of opponents of the application, but the Court held that they did not display a consistent pattern pointing to a closed mind. The Court also recognised that, by the time of the oral hearings, the member could be expected to have legitimately formed some preliminary views from the substantial written submissions already provided. There was no evidence that he had entered upon the process with a closed mind.

In *R v Reading Borough Council ex parte Quietlynn* (1986) 85 LGR 387, a councillor had previously written to a newspaper saying that sex shops should be banned. Some time later, he sat on a committee considering an application for a licence as a sex establishment. In that case, the Court accepted that, despite his general views, he had nevertheless acted fairly when he came to consider the application. The Court suggested that this was a field where local representatives could be expected to have views, perhaps even strong views, about whether or not, in general, licences ought to be granted.

In *R v Amber Valley District Council, ex parte Jackson* [1984] 3 All ER 501, a general declaration of policy by a party caucus within a council was held not to disqualify them from later adjudicating on a planning application, so long as they were able to consider the application on its merits.

In *McGovern v Ku-Ring-Gai Council* (2008) 251 ALR 58 (NSWCA), it was held that, for multi-member elected decision-making bodies, not all members need to maintain an open mind until all other members were prepared to make a decision. It is legitimate for a member of a collegial body to form a conclusion based on the evidence and then to attempt to persuade other decision-makers to agree with their conclusion.

In *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2006] EWHC 2189 (Admin); [2007] LLR 230, strongly expressed views and former membership of a pressure group against a development did not prevent members from considering a development application. Even though the development had been a major political issue in the election and the members were elected on the back of opposition to the development, they had approached the issue with an open mind, with a willingness to consider relevant arguments and to change their mind if the material persuaded them to do so.

### Relationship with other persons or organisations

The following cases discuss non-pecuniary conflicts of interest that may arise if a person has a close relationship with an affected person or organisation.

In *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35 (SC), the Supreme Court ruled that a judge was not prevented from sitting on a case where the lawyer was his long-standing friend, with whom he shared a number of horse-breeding interests. However, in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* (No 2) [2010] 1 NZLR 76 (SC), the Court later changed its mind after becoming aware of more details of the relationship, and ruled that the fact that the judge was beholden or significantly indirectly indebted to the lawyer amounted to a disqualifying conflict of interest.

In *Man O'War Station v Auckland City Council (No 1)* [2002] 3 NZLR 577 (PC), a case concerning a judge, the fact that a witness in the case was the son of a former colleague of the judge was not enough to constitute bias.

In *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 2) [1999] 2 WLR 272 (HL), a judge was held to be biased where he was an active director of a charity closely associated with one of the parties to the litigation.

In a case involving an urban development body, *R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign* [1996] 3 All ER 304, a member who held an honorary position in a rugby club was held to be not biased in relation to a planning application affecting the club. However, a member who was involved in preparing the club's development plans, and whose firm acted for the club, was biased.

## Appendix 3 Examples of cases on non-pecuniary conflicts of interest

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If a number of members of the authority become too integrally associated with the proponent of an issue, then the whole authority could be found to be biased. This occurred in *Anderton v Auckland City Council* [1978] 1 NZLR 657, where the level of the council's involvement with a developer was so great that it was held to have determined in advance to allow planning applications for the developer's project. The council had completely surrendered its powers of independent judgement.

## Appendix 4

### Checklist for section 3(3)(a) application

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Applications for prior approval for a member of an authority to be concerned or interested in a contract needs to be made by the authority on behalf of the member. We need the following information to process an application:

- the name of the member;
- the names of the parties to the contract – if the member is not a party to the contract, their relationship to the person/company who is the party to the contract;
- the payments to be made under the contract for which approval is sought;
- the duration and nature of the contract;
- the reasons the authority wishes to use the proposed contractor for this work (for instance, how the authority justifies its choice on the basis of, for example, cost, performance, quality, expertise, or experience);
- the process the authority has followed in selecting the proposed contractor (including, for example, whether other potential contractors were considered or had the opportunity to quote or tender, whether the authority followed its standard procedures for contracts of this type or value, how the proposal was evaluated, and who was involved in making the relevant recommendation or decision);
- whether this is a subcontracting situation where the Council cannot control who the head contractor chooses to use;
- whether the member concerned has had any involvement in any authority decisions about the contract; and
- whether the member declared an interest and abstained where necessary.

The application must be made in writing and addressed to:

Assistant Auditor-General – Legal  
Office of the Auditor-General  
Private Box 3928  
Wellington 6140  
Telephone: 04 917 1500  
Facsimile: 04 917 1549  
Email: LAMIA@oag.govt.nz

## Publications by the Auditor-General

Other publications issued by the Auditor-General recently have been:

- Annual Report 2009/10
- Effectiveness of the Get Checked diabetes programme
- Spending on supplies and services by district health boards: Learning from examples
- New Zealand Transport Agency: Information and planning for maintaining and renewing the state highway network
- District health boards: Availability and accessibility of after-hours services
- Matters arising from the 2009-19 long-term council community plans
- Inquiry into the Plumbers, Gasfitters, and Drainlayers Board
- Inland Revenue Department: Managing child support debt
- Inquiry into New Zealand Defence Force payments to officers seconded to the United Nations
- The Civil Aviation Authority's progress with improving certification and surveillance
- Annual Plan 2010/11
- Response of the New Zealand Police to the Commission of Inquiry into Police Conduct: Second monitoring report
- Local government: Examples of better practice in setting local authorities' performance measures
- Local government: Results of the 2008/09 audits
- Statement of Intent 2010-13
- Performance audits from 2008: Follow-up report
- Effectiveness of arrangements for co-ordinating civilian maritime patrols
- Auditor-General's inquiry into certain types of expenditure in Vote Ministerial Services – Part 1

### Website

All these reports are available in HTML and PDF format on our website – [www.oag.govt.nz](http://www.oag.govt.nz). Most of them can also be obtained in hard copy on request – [reports@oag.govt.nz](mailto:reports@oag.govt.nz).

### Mailing list for notification of new reports

We offer a facility for people to be notified by email when new reports and public statements are added to our website. The link to this service is in the Publications section of the website.

### Sustainable publishing

The Office of the Auditor-General has a policy of sustainable publishing practices. This report is printed on environmentally responsible paper stocks manufactured under the environmental management system standard AS/NZS ISO 14001:2004 using Elemental Chlorine Free (ECF) pulp sourced from sustainable well-managed forests. Processes for manufacture include use of vegetable-based inks and water-based sealants, with disposal and/or recycling of waste materials according to best business practices.





# A General Guide Through The Laws Affecting Elected Members

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## Introduction

Congratulations on your election to the Far North District Council for the 2019-2022 triennium and your governance role over the next three years.

Some of you have been involved with Council for some time and for others this may be your first experience as a Councillor and you will be new to the process and procedures as to how Council conducts its business.

Council is created by a Statute of Parliament and therefore some understanding of the law and legal issues plays an important role in your decision making and this paper hopes to assist with that in providing a general explanation of some of the laws that regulate the conduct of elected members.

Generally the role and function of the Council and councillors, as well as the conduct of meetings are dealt with in the Local Government Act 2002 (LGA 02) and Local Government Official Information and Meetings Act 1987 (LGOIMA).

Clause 21(5)(c) of Schedule 7 of the LGA 02 requires that, at the first meeting of the Council following a triennial general election, the chief executive must give or arrange for a general explanation of certain laws affecting members, including:

1. Local Government Official Information and Meetings Act 1987;
2. Local Authorities (Members' Interests) Act 1968;
3. Sections 99, 105 and 105A of the Crimes Act 1961;
4. Secret Commissions Act 1910; and
5. Financial Markets Conduct Act 2013.

In particular your attention is drawn to certain legal provisions within the following Acts;

- Secret Commissions Act 1910
- Crimes Act 1961
- Local Authorities (Members' Interests) Act 1968;

Contravention of these provisions may result in the loss of office.

This paper is prepared to firstly meet the above mentioned statutory obligation and also to provide a resource to which members may refer in the performance of their functions. It addresses principles rather than detail, but should nevertheless be of assistance when applied to real problems.

There is a caveat to the above, as this paper does not in any way deal with all the legislation you will come into contact with that affects your role as elected members such as the Rating legislation and a plethora of other Acts that impact on how you will decide matters. The relevant sections of law should be set out in any paper that comes to you for consideration.

This paper has five parts:

- Council Structure and Governance
- Meetings
- Confidentiality
- Conflicts of Interest
- Administrative Law Principles.



## Council Structure and Governance

### So what is Council?

Section 12 of the LGA states that a local authority is a body corporate with perpetual succession (s12(1)). It has full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction. The only restrictions on the above is that it must exercise those powers wholly or principally for the benefit of its district. There are some exclusions and you are encouraged to read section 12.

### Structure of Council

The Far North District Council is comprised of the Mayor and 9 Councillors (Governance).

The purpose of Governance is to enable local decision-making and action by and on behalf of communities and to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future (s10 of LGA).

The Council aims to achieve this by;

- defining the overall vision for the Far North District
- determining local policy and bylaws
- engaging and encouraging community participation in decision-making
- considering the needs and future needs of our district
- monitoring the performance of the organisation against the objectives set in the Long Term Plan
- employing the Chief Executive and monitoring their performance against agreed key performance indicators.

### Role of the Mayor

The role of the Mayor is to provide leadership to Elected Members and the people of the Far North District. The Mayor performs civic duties and leads the development of Council's plans (long term and annual plans), policies and budgets for consideration by Elected Members.

The Mayor at Council meetings has one vote and in the event of a deadlock has a casting vote.

Post-election the Mayor may appoint a Councillor as Deputy Mayor and will establish committees and appoint the committee chairpersons, if he chooses to exercise this power under (s41A). Alternatively, it can be a decision of the Council.

### Role of Councillor

The role of a councillor is governance - this should be open and transparent and clear. Resolutions passed at council meetings setting the strategic direction and tasking the Chief Executive to implement them should be precise and clear.

Councillors are responsible for decision-making on behalf of the ratepayer and must commit to the large amount of reading required and attend workshops to ensure they make sound decisions.

If good government is to be delivered, then the standard of integrity of the members must be the foundation of good decisions.



### Role of the Chief Executive Officer

The Chief Executive Officer (CEO) has overall responsibility for the Far North District Council's operational management and is expected to be apolitical and not to make political or policy decisions. That is the role of the Elected Members.

He is responsible for employing staff, providing leadership to them and implementing and managing Council's decisions. These responsibilities are performed by him delegating tasks to his Strategic Leadership Team and then tasking the work to their staff.

A key part of the role of council staff is to provide Elected Members with comprehensive advice to enable them to make informed and effective decisions. Therefore, a high level of cooperation and mutual respect between Elected Members and staff is essential for the council to perform effectively.

To ensure such cooperation and trust is maintained, Elected Members are expected to:

- recognise the Chief Executive's role as the employer of council staff
- make themselves aware of the obligations the Far North District Council and Chief Executive have as an employer and observe those requirements at all times
- treat all council staff with courtesy and respect
- observe any guidelines the Chief Executive puts in place regarding contact with employees
- not do anything which compromises, or could be seen as compromising, a staff member's impartiality
- avoid publicly criticising council staff, especially in ways that reflect on the staff member's competence and integrity
- raise concerns about council staff directly with the Chief Executive
- raise concerns about the Chief Executive with the Mayor or the Chief Executive
- not seek to improperly influence staff in the normal undertaking of their duties

### Governance versus Management

As an Elected Member your job is oversight, not operations.

Elected Members and the Chief Executive must have a clear understanding of their different roles and responsibilities. One issue that may confront Members is finding the boundary between their role and the role of Management.

In the simplest terms, Members are responsible for oversight and planning, while the Chief Executive, his general managers and staff are responsible for the day to day operational activities.

Members are not permitted to contact staff directly. Communication should be through the Chief Executive, or the relevant General Manager.

### Official Information

As an Elected Member you may be subject to information requests under the Local Government Official Information and Meetings Act 1987 (LGOIMA).

Official information is not just documents or papers. It includes information held in any format, such as emails, phone calls, text messages, videos and photos.

Care should be taken with any information you generate or gain access to as part of your role. This information can be discoverable through the LGOIMA request process. This includes information on your personal email account or home computer, if it relates to Council business.



### Personal liability of elected members

Generally Elected Members of a local authority, which extends to a member of a committee, community board, or other subordinate decision-making body, are indemnified by the local authority for the costs and damages of a civil claim where acting in good faith on council business (s 43 of the LGA 02).

Further, Members are indemnified for the costs of a successfully defended criminal action relating to the member's functions.

A director of a council-controlled organisation is not indemnified by the local authority for actions in that capacity.

The indemnity does not cover any loss found by the Auditor-General to have been incurred or that may be attributed to an unlawful act or omission, or to an intentional or negligent failure to enforce the collection of valid debts by the Council. This could lead to the potential liability of members found responsible to account for the loss. If the Auditor-General makes a report on a loss to a local authority, without limiting the liability of any other person, the loss is recoverable as a debt due to the Crown against the members jointly and severally (s46 of the LGA02).

A member may have a defence to a claim for the recovery of the loss by proving the act or failure resulted without the defendant's knowledge or with knowledge but against the protest or contrary to a vote of the defendant (s46 (4) of the LGA02). For the defence to be upheld the member must have taken some positive step as a failure to vote, abstention or silence on the vote may be taken as assent.

A further defence is available to a member where the legality of a matter was questioned or in doubt, and advice was obtained from a competent professional adviser.

### Meetings

Most business of the Council is to be conducted before the public and generally, information held by the Council should be readily available to the public. The law requires a high standard of transparency to ensure that those governed know what has been done and why.

The fundamental principle in the LGOIMA is that information held by the Council is publicly available, unless one or more specified withholding grounds apply.

The LGOIMA deals with local authority meetings in Part VII. Briefly:

- (a) The Act states the grounds upon which the public may be excluded from meetings (section 48). That may generally only occur when good reason to withhold information exists, and there is a statutory definition of that concept in section 7 of the Act. Also, the public may be excluded where the subject matter of discussion is one in respect of which a right of appeal exists to any Court or Tribunal against the decision made by the Council.
- (b) In excluding the public, the Council must make a resolution stating the subject of each matter to be considered while the public is excluded, and the reasons must be given for excluding the public, in terms of the statutory grounds.
- (c) Chairpersons at meetings may require members of the public to leave a meeting if the behaviour of the person concerned is likely to prejudice or continue to prejudice the orderly conduct of the meeting (section 50). Councillors themselves whose conduct prevents the orderly conduct of the meeting may be asked to leave by the presiding member under the standing orders.
- (d) If a meeting is open to the public, and an agenda is supplied to a member of the public or the minutes of a meeting are produced for inspection by any member of the public after the conclusion of the meeting,



any defamatory matter which is published in this way is to be treated as privileged, unless the publication was predominantly motivated by ill will (section 52). Oral statements made at meetings of the Council are also privileged, unless the statement is proved to be predominantly motivated by ill will (section 53). Ordinarily, a statement that is "privileged" cannot support a cause of action for defamation (even though that statement might be untrue or misleading).

- (e) Items which are not on an agenda for a meeting may nevertheless be dealt with if the meeting resolves to do so and the chairperson explains in open meeting why the item is not on the agenda and why consideration of it cannot be delayed to a subsequent meeting (section 46A(7)). (If the item is a minor matter relating to the general business of the Council then it may be discussed without the meeting having resolved to do so, so long as the chair explains at the beginning of the meeting, and when it is open to the public, that the item will be discussed; but in that case no resolution, decision or recommendation may be made except to refer the item to a subsequent meeting for further discussion (section 46A(7A)).)

## Confidentiality

There are occasions when, for particular and limited reasons, which are specified by law, the Council must conduct its business privately and protect the privacy or confidentiality of information it holds. When the public is excluded by due resolution of the Council and when the Council holds information confidentially, then it is critical that the rules of confidentiality are observed and maintained by the members and the officers of the Council.

The Council has adopted as the rules for the conduct of its business Standing Orders. Included therein is a provision that:

*No member or officer may disclose to any person other than another member, officer or person authorised by the chief executive, any information that has been presented or will be presented to any meeting from which the public is excluded or proposed to be excluded." (rule 17.4)*

The obligation to comply with Standing Orders is reinforced by the LGA, which provides in clause 16(1) of Schedule 7, that:

*"A member of a local authority must abide by the standing orders adopted under clause 27"*

Then, section 238(1) of that Act addresses default:

*"238 Offence of failing to comply with Act*

- (1) *Every person who acts contrary to, or fails to comply with, a direction or prohibition given under this Act, or under an authority given to a local authority or to a member or officer of a local authority, commits an offence and is liable on conviction to the penalty specified in section 242(2)."*

Quite simply, a breach of standing orders may be an offence that might lead to prosecution and a fine not exceeding \$5000.00.

It might be thought that the obligation of confidentiality is less than the obligation for open government. It is not. The duty in each regard is the same.

Governance must be conducted in accordance with the law. The conduct of Council must be fully open until it becomes confidential according to law. Once confidentiality is imposed, that obligation must be observed with equal assurance.

Whistle blowing can be honourable. There are times and places for doing so. They do not include "going public". That is political self-promotion and is dishonourable.



The Ombudsmen's Office and the Auditor-General may be contacted and consulted with any concerns about due standards of performance by the Council, that **will maintain the confidentiality of the Council**.

Members must keep to the law. They cannot choose when to obey and when to breach the law. The constant and consistent observance of the law is necessary for the delivery of good governance.

## Conflicts of Interest

### Members' Financial Interests

The following comments are not an explanatory guide as these comments are limited to a few provisions only.

The Council does not provide legal advice to its members. Each member must seek his or her own independent legal advice.

The Council itself is only indirectly affected. It has some indirect concern for a member's interest, however, because of certain consequences that can follow in the event of the breach by a member.

First, an extraordinary vacancy could result as a consequence of a breach of the Act, but more particularly the breach might be grounds, in certain circumstances, for impugning or challenging, a Council decision.

The object of the statutory provisions discussed below:

*"is clearly to prevent councillors from voting on all matters which may affect their own pockets and therefore may affect their judgment".<sup>1</sup>*

The cases make it clear that it is irrelevant whether there is or is not an actual pecuniary advantage or disadvantage as a result of the vote.

### The Local Authorities (Members' Interests) Act 1968

The Local Authorities Members' Interests Act 1968 (LAMIA) is one of the most important statutes governing the conduct of elected members and we strongly recommend you familiarise yourself with its provisions. (*Also see the Auditor General's Guidance for Members of Local Authorities about the Local Authorities (Members Interests) Act 1968.*) This has been provided to you in your induction pack.

It has two main aspects:

1. The prohibition of certain contracts between local authorities and their members.
2. The prevention of voting on or discussing questions in which a member has a pecuniary interest.

As to the first aspect, LAMIA provides that no-one may be elected or appointed or be a member of a local authority or of any committee of it, if the total payments to be made by the Council in respect of contracts made by it with that person exceeds \$25,000 (including GST) in any year. The Act covers contracts made by the Council directly with the person concerned, and also contracts made by the Council in which the Councillor is concerned or interested. Special provisions deal with companies in which a member or his or her spouse is interested either as a shareholder, or as a member of the company, or by virtue of certain management positions. There are a number of exceptions to this rule but, in case of any doubt, Councillors should refer to the Chief Executive so that proper advice is obtained.

To assist section 3 is set out in full below

#### **3 Disqualifying contracts between local authorities and their members**

- (1) *Except as provided in subsection (3), no person shall be capable of being elected as or appointed to be or of being a member of a local authority or of any committee of a local authority, if the total of all payments made*



or to be made by or on behalf of the local authority in respect of all contracts made by it in which that person is concerned or interested exceeds \$25,000 in any financial year.

- (2) For the purposes of subsection (1), a member of a local authority or of a committee thereof shall be deemed to be concerned or interested in a contract made by a local authority with an incorporated company, if—
- (a) the member or his spouse or partner singly or between them own, whether directly or through a nominee, 10% or more of the issued capital of the company or of any other company controlling that company; or
  - (b) the member or his spouse or partner is a member of the company, and either of them is the managing director or the general manager (by whatever names they are called) of the company; or
  - (c) the member or his spouse or partner is a member of a company controlling the company with which the contract is made and either of them is the managing director or the general manager (by whatever names they are called) of that controlling company; or
  - (d) the member or his spouse or partner is the managing director or general manager (by whatever names they are called) of the company and either of them is a member of a company controlling that company:

provided that nothing in this subsection shall apply with respect to the spouse or partner of any member where, at the time when the contract was entered into,—

- (i) the member and his spouse or partner were living apart; or
  - (ii) in any case to which paragraph (a) applies, the member did not know and had no reasonable opportunity of knowing that his spouse or partner owned any part of the issued capital of the company or of any company controlling that company; or
  - (iii) in any case to which paragraph (b) or paragraph (c) or paragraph (d) applies, the member did not know and had no reasonable opportunity of knowing that his spouse or partner was a member of the company or of the controlling company, as the case may be, or held any of the offices specified in any of those paragraphs.
- (2A) For the purposes of subsection (1), a member of a local authority or of a committee thereof shall be deemed to be concerned or interested in a contract made by the local authority in which his spouse or partner is concerned or interested (not being a contract made with an incorporated company):

provided that nothing in this subsection shall apply with respect to the spouse or partner of any member where, at the time when the contract was entered into,—

- (a) the member and his spouse or partner were living apart; or
  - (b) the member did not know and had no reasonable opportunity of knowing that his spouse or partner was concerned or interested in the contract.
- (3) Notwithstanding anything in subsection (1),—
- (a) no person shall be disqualified under this section by virtue of his being concerned or interested in any contract made in any special case with the prior approval of the Auditor-General on the application of the local authority. In any such special case the Auditor-General may authorise the payment and receipt of such amount as it thinks fit.
  - (aa) a person shall be deemed not to have been disqualified by virtue of his being concerned or interested in any contract made in any special case where, on the application of the local authority, the



subsequent approval of the Auditor-General is obtained; which approval shall be given only if the Auditor-General is satisfied that—

- (i) *there is a sufficient special reason why prior approval was not obtained under paragraph (a); and*
  - (ii) *prior approval would have been obtained under paragraph (a) if that approval had been sought:*
- (ab) *no person shall be disqualified under this section by virtue of his being concerned or interested in any contract made on behalf of the local authority by an employee or committee of the local authority (unless the member of the local authority is a member of that committee) acting under delegated authority, where it is verified in writing to the Auditor-General, by such 1 or more persons and in such manner as the Auditor-General requires, that the member did not know and had no reasonable opportunity of knowing of that contract at the time it was made:*
- (b) *where a person is concerned or interested in any contract solely by reason of being concerned or interested in any subcontract relating thereto, the provisions of this section shall, with the necessary modifications, apply to him as if references in this section to the amount payable by or on behalf of the local authority in respect of a contract were references to the amount payable by or on behalf of the contractor in respect of the subcontract:*
- (c) *in assessing under this section the amount of any payment made or to be made by or on behalf of the local authority in respect of any contract, no account shall be taken of any sum paid or to be paid as a refund of a deposit:*
- (d) *an interest in—*
- (i) *any loan raised by the local authority, whether on security or otherwise; or*
  - (ii) *any payments made or to be made in respect of advertisements inserted by the local authority in any newspaper; or*
  - (iii) *any lease granted or agreed to be granted to the local authority; or*
  - (iv) *any payment received by way of compensation under the [Public Works Act 1981](#) for any loss, damage, or injury suffered by reason of the exercise of any power under that Act; or*
  - (v) *any advance made by the local authority under the Rural Housing Act 1939; or*
  - (vi) *any advance made or guarantee given by the local authority under [Part 32](#) of the Local Government Act 1974; or*
  - (vii) *any contract for the supply of goods or services made during a state of emergency declared, or a transition period for which notice is given, under the [Civil Defence Emergency Management Act 2002](#), if that contract does not continue for more than 1 month after the end of that state of emergency or transition period, and if the goods or services are supplied at charges not in excess of those normally applying in the district of the local authority or in the area under its jurisdiction at the time immediately preceding the state of emergency or transition period,—*

*shall not constitute a disqualification under this section:*

- (e) *[Repealed]*



- (f) *no person shall be disqualified under this section by virtue of his being concerned or interested in any contract made before his election or appointment, if before that election or appointment his obligation in respect of the contract had been performed and the amount to be paid by or on behalf of the local authority in respect of the contract had been fixed; and any payment made thereafter by or on behalf of the local authority in respect of the contract shall not operate to disqualify that person for continuing to hold office or be taken into account for the purpose of calculating the amount that may be lawfully paid to him as a member of the local authority or, as the case may be, of a committee thereof in the same financial year in respect of any contract or contracts:*
- (g) *no person shall be disqualified under this section by virtue of his being concerned or interested in any contract, whether of a continuing nature or otherwise, made before his election or appointment and in respect of which his obligations have not been performed before that election or appointment, where the amount to be paid by or on behalf of the local authority in respect of the performance of the contract has been fixed in that contract subject to such amendments and additions as may be provided for in the contract, or, where the amount to be paid by or on behalf of the local authority in respect of the performance of the contract is not ascertainable until the contract has been performed, if—*
- (i) *the contract is for a continuous period not exceeding 12 months from the date on which the contract is made; or*
- (ii) *the contract is for a continuous period exceeding 12 months from the date on which the contract is made and that person has, with the consent of the local authority, relinquished that contract before acting as a member and within 1 month after the date of his election or appointment, as the case may be;—*

*and any payment made thereafter by or on behalf of the local authority in respect of the contract shall not operate to disqualify that person for continuing to hold office or be taken into account for the purpose of calculating the amount that may be lawfully paid to him as a member of the local authority or, as the case may be, of a committee thereof in the same financial year in respect of any contract or contracts:*

- (h) *no person shall be disqualified under this section by virtue of his being concerned or interested in any contract as an administrator or a trustee of any estate or trust in which he is not a beneficiary, or as the manager appointed under the [Protection of Personal and Property Rights Act 1988](#):*
- (i) *no person shall be disqualified under this section by virtue of his being concerned or interested in any agreement entered into pursuant to section 81 of the Noxious Plants Act 1978:*
- (j) *no person who is a member of a community board is disqualified under this section by virtue of that person or that person's spouse or partner being concerned or interested in any contract made by a territorial authority, if—*
- (i) *the contract, except for any preliminary work associated with it, is to be performed wholly outside the area under the jurisdiction of the community board of which that person is a member; and*
- (ii) *the contract is one in which the community board has no jurisdiction or control or which has not been reported on to the territorial authority by the community board; and*
- (iii) *neither that person nor that person's spouse or partner is also a member of the territorial authority that made the contract.*



- (3A) *Nothing in subsection (3)(j)(iii) applies with respect to the spouse or partner of a member where, at the time when the contract was entered into, the member and the member's spouse or partner were living apart.*
- (4) *For the purposes of subsection (3)(j), **territorial authority** has the same meaning as in the [Local Government Act 2002](#).*

The penalty for breach of these provisions (contained in section 3 of LAMIA) is immediate loss of office as well as the possibility of a fine being imposed (sections 4 and 5).

Section 6 of LAMIA provides that a member of a local authority or of a committee of it shall not vote on or take part in the discussion of any matter before the governing body of that local authority or before that committee in which he or she has, directly or indirectly, any pecuniary interest, other than an interest in common with the public. Once again, there are special provisions dealing with a pecuniary interest in the context of the interests of the member or his or her spouse in a company. The Office of the Auditor-General is empowered to declare that the rule will not apply with respect to any specified matter or specified class of matter on particular occasions. In doing so it must act in the interests of the electors or inhabitants of the district.

To assist section 6 is set out in full below:

**Member of local authority or committee not to discuss or vote on question in which he has pecuniary interest**

- (1) *A member of a local authority or of a committee thereof shall not vote on or take part in the discussion of any matter before the governing body of that local authority or before that committee in which he has, directly or indirectly, any pecuniary interest, other than an interest in common with the public.*
- (1A) *Nothing in subsection (1) shall apply in any case where a member of a local authority or a committee of the local authority has been elected by or appointed to represent any activity, industry, business, organisation, or group of persons and his pecuniary interest is not different in kind from the interests of other persons in the activity, industry, business, organisation, or group by which the member is elected or in respect of which he is appointed.*
- (2) *For the purposes of subsection (1), where an incorporated company has, directly or indirectly, a pecuniary interest in a matter before the governing body of a local authority or before a committee thereof, a member of the local authority or, as the case may be, of the committee shall be deemed to have a pecuniary interest in the matter, if—*
- (a) *the member or his spouse or partner singly or between them own, whether directly or through a nominee, 10% or more of the issued capital of the company or of any other company controlling that company; or*
  - (b) *the member or his spouse or partner is a member of the company, and either of them is the managing director or the general manager (by whatever names they are called) of the company; or*
  - (c) *the member or his spouse or partner is a member of a company controlling the company having a pecuniary interest in the matter before the governing body of the local authority or, as the case may be, before the committee, and either the member or his spouse or partner is the managing director or the general manager (by whatever names they are called) of that controlling company; or*
  - (d) *the member or his spouse or partner is the managing director or general manager (by whatever names they are called) of the company having a pecuniary interest in the matter before the governing body of the local authority or, as the case may be, before the committee, and either of them is a member of a company controlling that company.*



- (2A) *Where the spouse or partner of a member of a local authority or of any committee thereof has, directly or indirectly, a pecuniary interest in a matter before the governing body of a local authority or before a committee thereof as the owner or one of the owners (otherwise than as a member of an incorporated company) of an estate or interest in any real or personal property or of any business or as a party to any contract or proposed contract with the local authority, the member shall, for the purposes of subsection (1), be deemed to have a pecuniary interest in the matter.*
- (2B) *Nothing in subsection (2) or subsection (2A) shall apply with respect to the spouse or partner of any member where, at the time when the member took part in the discussion of or, as the case may be, voted on the matter before the local authority or committee, the member and his spouse or partner were living apart.*
- (3) *Nothing in subsection (1) shall apply with respect to any of the following matters:*
- (a) *any payment to or for the benefit of a member where it is legally payable and the amount or maximum amount or the rate or maximum rate of the payment has already been fixed; or*
  - (b) *any contract of insurance insuring members against personal accident; or*
  - (c) *an election or appointment of a member of the local authority to any office, notwithstanding that any remuneration or allowance is or may be payable in respect of that office; or*
  - (d) *any formal resolution to seal or otherwise complete any contract or document in accordance with a resolution already adopted; or*
  - (e) *the preparation, recommendation, approval, or review of a district plan under the [Resource Management Act 1991](#) or any section of such a scheme, unless the matter relates to any variation or change of or departure from a district scheme or section thereof or to the conditional use of land as defined in that Act; or*
  - (ea) *the preparation, recommendation, approval, or review of general schemes under the [Soil Conservation and Rivers Control Act 1941](#) for the preventing or minimising of damage by floods and by erosion; or*
  - (eb) *the preparation, recommendation, approval, or review of reports as to the effect or likely effect on the environment of any public work or proposed public work within the meaning of the [Public Works Act 1981](#); or*
  - (f) *any matter in which, in the opinion of the Auditor-General given before the vote or discussion and on written application to the Auditor-General for his or her opinion, the pecuniary interest of a member is so remote or insignificant that it cannot reasonably be regarded as likely to influence him in voting on or taking part in the discussion of that matter.*
- (4) *Notwithstanding anything in subsection (1), the Auditor-General may, of his or her own motion or upon written application made to him or her by the member concerned, declare that that subsection shall not apply with respect to any specified matter or specified class of matter to be considered by the local authority or committee, as the case may be, if the Auditor-General is satisfied that the application of that subsection would impede the transaction of business by the local authority or committee or that it would be in the interests of the electors or inhabitants of the district of the local authority or of the area under its jurisdiction that the subsection should not apply.*
- (5) *Any person who under subsection (1) is prohibited from voting on or taking part in the discussion of any matter at any meeting at which he is present shall, when the matter is raised before the local authority or committee of which he is a member, declare to the meeting that he has a pecuniary interest in the matter, and the fact of the disclosure of interest and of the abstention from discussion and voting shall be recorded in the minutes of the meeting. Any such record in the minutes of the meeting shall be prima facie evidence of its*



*contents, in the event of any question arising as to whether a member made a disclosure of interest and abstained from discussion and voting.*

(6) *Notwithstanding anything in subsection (1), a member of any of the following bodies:*

- (a) *the University Grants Committee:*
- (b) *the Council of Massey University:*
- (c) *the Council of the University of Auckland:*
- (d) *the Council of the University of Canterbury:*
- (e) *the Council of the University of Otago:*
- (f) *the Council of the University of Waikato:*
- (g) *the Council of the Victoria University of Wellington:*
- (gg) *[Repealed]*
- (h) *the Council of Lincoln University:*
- (i) *[Repealed]*
- (j) *[Repealed]*
- (k) *[Repealed]*

*shall be entitled to take part in the discussion before that body, or any committee thereof, of any matter that directly or indirectly affects his salary or allowances, but shall not be entitled to vote thereon.*

The penalty for discussing or voting when there is a pecuniary interest is, once again, loss of office, but only upon conviction of an offence (section 7). Related to these statutory provisions is the common law principle of natural justice, which includes obligations to listen to both sides and not to be a judge in one's own cause.



### Indirect Pecuniary Interest

One question that at some stage may face an elected member is how does one deal with an indirect pecuniary interest? At what point, or in what way, is the interest to be distinct from that of the public in general? Not surprisingly, because the circumstances can be infinite in their variety, the Courts have deliberately refrained from providing fixed boundaries. Each case must be considered on its own facts.

The Courts have recognised that the constraint should not be interpreted so as to make

*"The conduct of municipal business impossible and recognised that since a contravention is made an offence punishable by a penalty the language should only be given meaning which it clearly bears"*<sup>ii</sup>

What is clear is that is that the member's interest is not to be one that is shared in common with the public, it has to be "special and peculiar to him/herself".

The meaning of "the public" is very vague. It will depend upon the circumstances of the case and will always be a question of degree.

An indirect pecuniary interest may involve (see section 6 of LAMIA):

- An interest arising from a relationship and not from any specific contract or monetary connection; and
- Considering whether an informed objective bystander would conclude that there was a likelihood or reasonable apprehension of bias; and
- That any motives and good faith of councillors are irrelevant to whether or not they had an indirect pecuniary interest; and
- Either a potential benefit or a potential liability. It does not matter whether a member gains or loses from his or her interest, "the situation contemplated by the legislation is a particular formalised illustration of the rule that persons charged with an obligation to make decisions should not be affected by any personal motive".

It must be emphasised that pecuniary interests are ones for members themselves to address and resolve. It is not the business of the Council to order, direct or formally advise any member what he or she should do in any particular instance.

Only the member will know sufficient detail to be able to determine his or her liability. There is no authority for the executive of the Council to provide legal advice to members as to their personal affairs.

### Crimes of Bribery and Corruption - Crimes Act 1961

Councillors are within the definition of an "official" in section 99 of the Crimes Act. Section 105 of that Act provides that every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in an official capacity.

Putting this simply, it is an offence against this section to seek or obtain a reward for performing one's official duties as a councillor.

Section 105A, further states that it is an offence, carrying a term of imprisonment of up to 7 years, for an official to use any information acquired by him or her in an official capacity to obtain, directly or indirectly, an advantage or a pecuniary gain for himself or herself, or any other person.

### Secret Commissions Act 1910

The Secret Commissions Act 1910 deems every councillor to be an agent of the Council (section 16(1)(b)). It creates offences in relation to accepting inducements or rewards for doing or forbearing to do something in relation to the Council's affairs, or showing or having shown favour or disfavour to any person in relation to the Council's affairs or business (section 4(1)). It is an offence, similarly, to divert, obstruct, or interfere with the proper course of the affairs or



business of the Council, or to fail to use due diligence in the prosecution of its affairs or business, with intent to obtain any gift or other consideration from any person interested in the affairs or business of the Council (section 4(2)).

Section 5 makes it an offence for a member not to disclose to the Council his or her pecuniary interest in a contract when making a contract on behalf of the Council.

Section 9 of the Act makes it an offence to aid or abet, or to be in any way directly or indirectly concerned in, or privy to, the commission of any offence against the Act.

Conviction of an offence under the Act carries with it the possibility of imprisonment for up to 7 years. Such a conviction would also have the consequence of loss of office, in terms of clause 1 of Schedule 7 to the Local Government Act 2002.

### Financial Markets Conduct Act 2013

Under the Financial Markets Conduct Act 2013, elected members are in a similar position to company directors if the Council were to issue financial products, such as equity or debt securities, under its borrowing powers. Elected members may therefore be personally liable if product disclosure statements to investors contain untrue information, and may be liable for civil action or criminal prosecution if the requirements of the Act, such as keeping an audited register of financial products issued, are not met.

### Health and Safety at Work Act 2015

The Act specifically exempts Local body members at section 52 set out below.

#### 52 Liability of certain office holders

- (1) An office holder listed in subsection (2), when acting in that capacity, does not commit an offence under [section 47](#), [48](#), or [49](#) for a failure to comply with the duty imposed by [section 44](#) (duties of officers).
- (2) The office holders are—
  - (a) a member of the governing body of a territorial authority or regional council elected in accordance with the [Local Electoral Act 2001](#);
  - (b) a member of a local board elected or appointed under the [Local Electoral Act 2001](#);
  - (c) a member of a community board elected or appointed in accordance with the [Local Electoral Act 2001](#);
  - (d) a trustee of a board of a school appointed or elected under the [Education Act 1989](#).
- (3) In this section,—
 

**board** and **trustee**, in relation to a school, have the same meanings as in [section 92\(1\)](#) of the Education Act 1989

**community board** means a board established under [section 49\(1\)](#) of the Local Government Act 2002

**local authority** and **local board** have the same meanings as in [section 5\(1\)](#) of the Local Government Act 2002.



## Administrative Law Principles

This is a brief introductory overview of administrative law principles, which apply to the making of all decisions by the Council. There is an overriding obligation to make decisions fairly.

The Council is subject to the same laws as any other person or body corporate. However, The Council is not the same as a company or an individual. Its public nature, derived from the Crown and being in control of public funds creates a need for additional obligation that Council must adhere to. These additional obligations are the administrative law principles otherwise known as the rules of natural justice which apply to council's decision making.

The Council can be taken to court for both private claims and public action. An example of a private claim is seeking damages against the Council for breach of contract and an example of a public action is judicial review of a Council decision.

What then are the administrative law principles? Three major categories of grounds for judicial review have been recognised. One judge has spoken of illegality, irrationality and procedural impropriety. Another would have councils act in accordance with law, fairly and reasonably.

These are clearly broad principles and are of universal application. Narrower legal terms apply to certain kinds of behaviour, which are found within these requirements to achieve fairness.

## Illegality /Procedural Impropriety

Although Council has a power of general competence, that power is given and constrained by the Local Government Act 2002, other legislation and the common law. This means it cannot do whatever it wants in whatever manner it chooses.

Whenever the Council does act, by resolution of the members themselves in Council meeting, by committee, subcommittee or delegated officer, it must act in the manner specified in the legislation or standing orders. Particular attention should be given to procedural compliance as a to comply with the statutory duties set out in the LGA02 can result in the decision of the Council being illegal and on judicial review overturned.

## A Degree of Conflict in Council Decision Making is Allowed

Elected members will often be involved in other organisations in the community, in addition to private interests and those of their friends and families. Accordingly, having possible conflicting interests is natural and unavoidable

It however is important to note that a conflict only arises if, in a particular situation, there is an overlap between private interest and responsibilities to a public entity, or where a person's duty to one entity is in conflict with a duty to another entity (a conflict of roles/duties).

The law recognises the inevitability of a degree of conflict with in councils when exercising certain functions. It is established, for example, that a council may object to its own district plan and apply to itself for resource consent.

Where there is inevitably an element of pre-consideration by the council of the issue it has to decide, the Courts have tolerated:

*"a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office..."<sup>iii</sup>*

This lesser standard of impartiality has been described in the case of councils in these terms:

*"... the state of impartiality which is required in a council to preserve a freedom, notwithstanding earlier investigations and decisions, to approach their duty of inquiring into and disposing of objections without a*



*closed mind, so that if considerations advanced by objectors bring them to a different frame of mind they can and will go back on their proposals.”<sup>v</sup>*

However, that the necessary element of inevitability is lacking where one member of the Council chooses to make preliminary submissions to the Council or become publicly involved on behalf of one particular option, rather than argue his case in the deliberations of the Council. By taking a prior public position, he steps outside the Council and should not, subsequently, seek to rejoin the Council in its deliberations.

The Council's actions will be tested for bias against strict rules. There must be no:

*“suspicion of bias reasonably and not fancifully entertained by responsible minds”.<sup>v</sup>*

## Bias

The law around conflict of interest and bias is interesting but difficult to apply as it is often a matter of degree. For example in our legislation it is not just a matter of exclusion from the vote, but also exclusion from the deliberation on the particular issue. A public body must be seen to be impartial when making a decision. A prior contract, undertaking or commitment may make later considerations unlawful.

Bias and section 6 of LAMIA are similar in some respects. The test is:

*“whether an informed objective bystander would conclude that there was a likelihood or reasonable apprehension of bias”.<sup>vi</sup>*

Bias is part of the administrative law principles of natural justice, which requires the Council to act fairly in reaching its decisions. The fairness principle has been described in these terms:

*“In exercising that discretion as in exercising any other administrative function they [members] owe a constitutional duty to perform it fairly and honestly... What is a fair procedure to be adopted at a particular enquiry will depend on the nature of its subject matter.”<sup>vii</sup>*

More particularly, in the present context:

*“presumptive bias through interest is a disqualifying factor in the judicial process not because actual bias was present, but because a reasonable man might think it was”.<sup>viii</sup>*

A breach, however, does not automatically invalidate a decision, nor render it void. The decision remains until it is declared by a court to be invalid and set aside.

Administrative law principles, sometimes spoken of as "natural justice", require the Council to act fairly in reaching its decisions. Among other things, that duty requires that conflicting views to be considered in any particular process are given a fair hearing and that the decision is free of predetermination or bias.

Administrative law principles are matters of public law affecting the Council, rather than private law by which a member can be subjected to sanctions. The remedy in public law, in the event of conflict giving rise to bias, is the invalidation of the Council decision, not the imposition of a penalty. It is this potential consequence of non-pecuniary conflict of interest that affects the Council.

The Council needs to consider the decision-making process. Is the process impartial? Might an informed objective bystander think that a member has a conflict of interest? To this extent, the duty of disclosure by members to the Council is vital.

## Reasonableness

The test for reasonableness, known as **Wednesbury unreasonableness**<sup>ix</sup> was stated like this:



*“...a person entrusted with a discretion must so to speak direct to himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not ... he may truly be said ... to be acting “unreasonably”.”*

Further, what is often quoted:

*“If a decision is so unreasonable that no reasonable authority could ever have come to it then the courts can interfere.”*

It is on this standard that rates of McKenzie and Waimate Districts have been struck down.

The Court of Appeal has stated the test of unreasonableness in Wellington City Council v Woolworths in this way:

*“For the ultimate decisions to be invalidated as “unreasonable” to repeat expressions used in the cases, the must be so perverse or absurd or outrageous in their defiance of logic that Parliament could not have contemplated such decisions being made by an elected council.”<sup>x</sup>*

Just because a wide majority of elected representatives, often considering the matter a number of times, have come to a decision which seemed to them to be wise policy, well made, the Courts have nevertheless exercised the power to review and uphold, or reject those Council decisions.

The approach has been refined by the High Court in the recent case of MPR v Refugee Status Appeals Authority. Judge Duffy said at paragraph 14:

*“The test for reasonableness can vary according to the context. Decisions that are entirely about money or that largely involve questions of central or local government policy are subject to the test applied in Wellington City Council v Woolworths (No 2) [1986] 2 NZLR 537 (CA) at 545.... However, it has long been recognised that a lower threshold may be applied in cases involving human rights.”<sup>xi</sup>*

## Conclusion

In decision-making, the Council must act with lawful authority in accordance with lawful procedure and produce rational results. This sounds simple, but in practice circumstances and complexity of the matters that you may have to deal with often make for difficulties in coming to a decision. When there is doubt, act carefully, ask and take advice and in need request further information so that at all times you as a Councillor can strive to make the best decisions you can for the benefit of the district.

## References and Acknowledgements

- <sup>i</sup> Brown v DPP [1956] 2 All ER 189,192, Donovan J
- <sup>ii</sup> Downward v Babington [1975]VR 872,877
- <sup>iii</sup> Franklin v Minister of Town & Country Planning [1948] AC 87 at 103
- <sup>iv</sup> Lower Hutt City Council v Bank [1974] 1 NZLR 545 at 550
- <sup>v</sup> Turner v Allison and Others [1971] NZLR 833 at 848
- <sup>vi</sup> Calvert & Co v Dunedin City Council [1993] 2 NZLR 460
- <sup>vii</sup> Bushell v Secretary of State for the Environment [1981] AC 75, 95
- <sup>viii</sup> Meadowvale Stud Farms Limited v Stratford County Council [1979] 1 NZLR 342
- <sup>ix</sup> Associated Provincial Housing Ltd v Wednesbury Corporation [1948] 1KB 2
- <sup>x</sup> Wellington City Council v Woolworths New Zealand Limited [1996] NZLR 537
- <sup>xi</sup> MPR v Refugee Status Appeals Authority [2012] NZHC 567

I further wish to acknowledge Brookfields Lawyers and the ongoing guidance in the matters.

**5.3 APPOINTMENT OF DEPUTY MAYOR****File Number: A2707046****Author: Aisha Huriwai, Team Leader Governance Support****Authoriser: William J Taylor MBE, General Manager - Corporate Services****PURPOSE OF THE REPORT**

The purpose of the report is to explain the procedure for the appointment of the Deputy Mayor of the Far North District Council for the 2016-2019 triennium.

**RECOMMENDATION**

**That Council note the Mayor's appointment of the Deputy Mayor.**

**1) BACKGROUND**

It is necessary to appoint the Deputy Mayor at the first meeting of the local authority under Clause 21(5) (d) of Schedule 7 of the Local Government Act 2002.

**2) DISCUSSION AND OPTIONS****MAYORAL POWERS (APPOINTMENT)**

Under Standing Order 5.1 the Mayor has the power to appoint the Deputy Mayor.

**Reason for the recommendation**

To appoint a Deputy Mayor in accordance with Standing Orders.

**3) FINANCIAL IMPLICATIONS AND BUDGETARY PROVISION**

There are no financial implications or need for budgetary provisions as a result of this report.

**ATTACHMENTS**

**Nil**

**Compliance schedule:**

Full consideration has been given to the provisions of the Local Government Act 2002 S77 in relation to decision making, in particular:

1. A Local authority must, in the course of the decision-making process,
  - a) Seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
  - b) Assess the options in terms of their advantages and disadvantages; and
  - c) If any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water sites, waahi tapu, valued flora and fauna and other taonga.
2. This section is subject to Section 79 - Compliance with procedures in relation to decisions.

Compliance requirement	Staff assessment
State the level of significance (high or low) of the issue or proposal as determined by the <a href="#">Council's Significance and Engagement Policy</a>	Not applicable
State the relevant Council policies (external or internal), legislation, and/or community outcomes (as stated in the LTP) that relate to this decision.	Not applicable
State whether this issue or proposal has a District wide relevance and, if not, the ways in which the appropriate Community Board's views have been sought.	Not applicable
State the possible implications for Māori and how Māori have been provided with an opportunity to contribute to decision making if this decision is significant and relates to land and/or any body of water.	Not applicable
Identify persons likely to be affected by or have an interest in the matter, and how you have given consideration to their views or preferences (for example – youth, the aged and those with disabilities).	Not applicable
State the financial implications and where budgetary provisions have been made to support this decision.	Not applicable
Chief Financial Officer review.	Not applicable

## 5.4 APPOINTMENT OF WARD COUNCILLORS TO COMMUNITY BOARDS

**File Number:** A2717329

**Author:** Aisha Huriwai, Team Leader Governance Support

**Authoriser:** William J Taylor MBE, General Manager - Corporate Services

### PURPOSE OF THE REPORT

To ask for a Council representative to be appointed to each Community Board.

### RECOMMENDATION

That the Council:

- a) Appoints \_\_\_\_\_ as a member the Bay of Islands-Whangaroa Community Board.
- b) Appoints \_\_\_\_\_ as a member of the Kaikohe-Hokianga Community Board.
- c) Appoints \_\_\_\_\_ as a member of the Te Hiku Community Board.

### 1) BACKGROUND

The Local Government Act 2002 states that the membership of a Community Board will consist of elected officials, and (if any) appointed officials, and that any appointed officials must be elected from the area of Community Board representation, in accordance with the Local Electoral Act.

During the 2016-19 triennium, Council made the following appointments:

- Bay of Islands-Whangaroa Community Board - Councillor Stratford
- Kaikohe-Hokianga - Councillor Vujcich
- Te Hiku Community Board - Councillor Foy

These Councillors are then sworn in at the Inaugural Community Board meeting to be a voting member of that Community Board.

### 2) DISCUSSION AND OPTIONS

Having a Council representative at Board meetings provides a vehicle for communication between the Community Board and Council. It also provides an opportunity for the Council representative to learn not only the role of Council, but understand the role of the community board.

A potential ethical conflict could arise as Councillors are obliged to act in the best interests of the Far North District as a whole, while community boards are concerned with the specific needs of their wards.

The Council has three options to consider for the 2019-22 triennium:

1. Appoint no councillors to community boards.
2. Appoint 1 councillor to each of the 3 community boards.
3. Appoint 2 councillors to each of the 3 community boards.

Members should consider being appointed to the community board as an additional responsibility as they would need to attend Community Board meetings, workshops and events as any other Community Board member.

Previously appointments have been for the duration of the triennium, however the Council could consider rotating membership throughout the triennium and it is recommended that this be reviewed annually, with any committee structure or governance reviews to ensure that workloads on individuals are fair.

### **3) FINANCIAL IMPLICATIONS AND BUDGETARY PROVISION**

There are no financial implications and budgetary provisions needed as a result of this report.

### **ATTACHMENTS**

**Nil**

**Compliance schedule:**

Full consideration has been given to the provisions of the Local Government Act 2002 S77 in relation to decision making, in particular:

1. A Local authority must, in the course of the decision-making process,
  - a) Seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
  - b) Assess the options in terms of their advantages and disadvantages; and
  - c) If any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water sites, waahi tapu, valued flora and fauna and other taonga.
2. This section is subject to Section 79 - Compliance with procedures in relation to decisions.

Compliance requirement	Staff assessment
State the level of significance (high or low) of the issue or proposal as determined by the <a href="#">Council's Significance and Engagement Policy</a>	This matter is of low significance.
State the relevant Council policies (external or internal), legislation, and/or community outcomes (as stated in the LTP) that relate to this decision.	This report is consistent with provisions in the Local Government Act. Council need to ensure that any appointed members are elected from the relevant Community Board area to comply with legislation.
State whether this issue or proposal has a District wide relevance and, if not, the ways in which the appropriate Community Board's views have been sought.	Community Board members may have a preference of who they would like to work with. Their feedback however has not been sought formally so that the appointed member can be sworn in at the relevant inaugural meeting.
State the possible implications for Māori and how Māori have been provided with an opportunity to contribute to decision making if this decision is significant and relates to land and/or any body of water.	There are no particular implications on Māori in making this decision.
Identify persons likely to be affected by or have an interest in the matter, and how you have given consideration to their views or preferences (for example – youth, the aged and those with disabilities).	While this does not directly impact any identified persons, Council should consider appointing members that enrich the diversity of each Community Board.
State the financial implications and where budgetary provisions have been made to support this decision.	There are no financial implications or the need for budgetary provision arising from this report.
Chief Financial Officer review.	The Chief Financial Officer has not reviewed this report.

## 5.5 ELECTED MEMBERS CODE OF CONDUCT

**File Number:** A2717458

**Author:** Aisha Huriwai, Team Leader Governance Support

**Authoriser:** William J Taylor MBE, General Manager - Corporate Services

### PURPOSE OF THE REPORT

The purpose of the report is to introduce the Far North District Council Code of Conduct for members' information.

### EXECUTIVE SUMMARY

- The purpose of the report is to introduce the Far North District Council Code of Conduct for members' information.

### RECOMMENDATION

**That Council adopt the Far North District Council's current Elected Members' Code of Conduct.**

### 1) BACKGROUND

The Local Government Act 2002 states that a Local Government Authority's Code of Conduct must set out understandings and expectations adopted by the local authority about the manner in which members may conduct themselves while acting in their capacity as members, including:

1. behaviour toward one another, staff, and the public; and
2. disclosure of information, including (but not limited to) the provision of any document, to elected members that:
  - a. is received by, or is in the possession of, an elected member in his or her capacity as an elected member; and
  - b. relates to the ability of the local authority to give effect to any provision of this Act; and
3. a general explanation of:
  - a. the Local Government Official Information and Meetings Act 1987; and

any other enactment or rule of law applicable to members.

Local Government New Zealand has updated the 2016 Code of Conduct adopted by the Far North District Council. The main update to the Code of Conduct is the addition of a section on social media and has a new process for dealing with trivial, minor and frivolous complaints.

### 2) DISCUSSION AND OPTIONS

As Local Government leaders, Local Government New Zealand prepare a best practise code of conduct for elected members. The Far North District Council Elected Members Code of Conduct was reviewed to align with best practise but was previously adopted for the specific interests of the Far North.

Council is required by the Local Government Act 2002 to have a code of conduct and, if a new code of conduct is not adopted, the current one will stand.

The Act does not allow for an authority to revoke a Code of Conduct but it does allow for amendments or replacements to be made by resolution with not less than 75% of members present and in support. A member of a local authority must comply with the code of conduct of that local authority.

**Reason for the recommendation**

This report is for information purposes only.

**3) FINANCIAL IMPLICATIONS AND BUDGETARY PROVISION**

There are no financial implications or budgetary provisions needed as a result of this report.

**ATTACHMENTS**

1. **Far North District Council Code of Conduct 2019-10-31 - A2721151** [↓](#) 

**Compliance schedule:**

Full consideration has been given to the provisions of the Local Government Act 2002 S77 in relation to decision making, in particular:

1. A Local authority must, in the course of the decision-making process,
  - a) Seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
  - b) Assess the options in terms of their advantages and disadvantages; and
  - c) If any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water sites, waahi tapu, valued flora and fauna and other taonga.
2. This section is subject to Section 79 - Compliance with procedures in relation to decisions.

Compliance requirement	Staff assessment
State the level of significance (high or low) of the issue or proposal as determined by the <a href="#">Council's Significance and Engagement Policy</a>	This matter is of low significance.
State the relevant Council policies (external or internal), legislation, and/or community outcomes (as stated in the LTP) that relate to this decision.	The legislation relevant to an elected member code of conduct is the Local Government Act and Local Government Official Information and Meetings Act 1987.
State whether this issue or proposal has a District wide relevance and, if not, the ways in which the appropriate Community Board's views have been sought.	While Community Boards are not required to comply with an Elected Members Code of Conduct it is recommended that this code applies to those members as well in the interests of good practise.
State the possible implications for Māori and how Māori have been provided with an opportunity to contribute to decision making if this decision is significant and relates to land and/or any body of water.	There are no implications on Māori
Identify persons likely to be affected by or have an interest in the matter, and how you have given consideration to their views or preferences (for example – youth, the aged and those with disabilities).	This report does not have any particular impact any identified persons.
State the financial implications and where budgetary provisions have been made to support this decision.	There are no financial implications or need for budgetary provision.
Chief Financial Officer review.	The Chief Financial Officer has not reviewed this report.

## Far North District Council – Code of Conduct

Adopted on the 31 October 2019

### 1. INTRODUCTION

The Code of Conduct (the Code) sets out the standards of behavior expected from elected members in the exercise of their duties. Its purpose is to:

- Enhance the effectiveness of the local authority and the provision of good local government of the community, city, district or region;
- Promote effective decision-making and community engagement;
- Enhance the credibility and accountability of the local authority to its communities; and
- Develop a culture of mutual trust, respect and tolerance between the members of the local authority and between the members and management.

This purpose is given effect through the values, roles, responsibilities and specific behaviors agreed in the code.

### 2. SCOPE

The Code has been adopted in accordance with clause 15(1) of Schedule 7 of the Local Government Act 2002 (LGA 2002) and applies to all members, including the members of any local boards as well as the members of any community boards that have agreed to adopt it. The Code is designed to deal with the behaviour of members towards:

- Each other;
- The Chief Executive and staff;
- The media; and
- The general public.

It is also concerned with the disclosure of information that members receive in their capacity as elected members and information which impacts on the ability of the local authority to give effect to its statutory responsibilities.

The Code can only be amended (or substituted by a replacement Code) by a vote of at least 75 per cent of members present at a meeting when amendment to the Code is being considered. The Code should be read in conjunction with the Council's Standing Orders.

### 3. VALUES

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The Code is designed to give effect to the following values:

1. **Public interest:** members will serve the best interests of the people within their community, district or region and discharge their duties conscientiously, to the best of their ability.
2. **Public trust:** members, in order to foster community confidence and trust in their Council, will work together constructively in an accountable and transparent manner;
3. **Ethical behaviour:** members will act with honesty and integrity at all times and respect the impartiality and integrity of officials;
4. **Objectivity:** members will make decisions on merit; including appointments, awarding contracts, and recommending individuals for rewards or benefits.
5. **Respect for others:** will treat people, including other members, with respect and courtesy, regardless of their race, age, religion, gender, sexual orientation, or disability.
6. **Duty to uphold the law:** members will comply with all legislative requirements applying to their role, abide by the Code of Conduct and act in accordance with the trust placed in them by the public.
7. **Equitable contribution:** members will take all reasonable steps to fulfil the duties and responsibilities of office, including attending meetings and workshops, preparing for meetings, attending civic events, and participating in relevant training seminars.
8. **Leadership:** members will actively promote and support these principles and ensure they are reflected in the way in which the Council operates, including a regular review and assessment of the Council's collective performance.<sup>1</sup>

These values complement, and work in conjunction with, the principles of s14 of the LGA 2002 and the governance principles of s39 of the LGA 2002.

### 4. ROLE AND RESPONSIBILITIES

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The Code of Conduct is designed to strengthen the good governance of your city, district or region. Good governance requires that the complementary roles of the governing body and the administration are understood and respected. These roles involve:

#### Members

The role of the governing body includes:

- Representing the interests of the people of the city, district or region;
- Developing and adopting plans, policies and budgets;
- Monitoring the performance of the Council against stated goals and objectives set out in its long term plan;
- Providing prudent stewardship of the Council's resources;
- Employing and monitoring the performance of the Chief Executive; and
- Ensuring the Council fulfils its responsibilities to be a 'good employer' and meets the requirements of the Health and Safety at Work Act 2015.

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<sup>1</sup> See Code of Conduct Guide for examples.

### Chief Executive

The role of the Chief Executive includes:

- Implementing the decisions of the Council;
- Ensuring that all responsibilities delegated to the Chief Executive are properly performed or exercised;
- Ensuring the effective and efficient management of the activities of the local authority;
- Maintaining systems to enable effective planning and accurate reporting of the financial and service performance of the local authority;
- Providing leadership for the staff of the Council; and
- Employing, on behalf of the Council, the staff of the local authority, (including negotiation of the terms of employment for those staff).

The Chief Executive is the only person *directly* employed by the Council itself (s.42 LGA 2002). All concerns about the performance of an individual member of staff must, in the first instance, be referred to the Chief Executive.

## 5. RELATIONSHIPS

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This section of the Code sets out agreed standards of behaviour between members; members and staff; and members and the public. Any failure by a member to comply with the provisions of this section can represent a breach of the Code.

### Relationships between members

Given the importance of relationships to the effective performance of the Council, members will conduct their dealings with each other in a manner that:

- Maintains public confidence;
- Is open, honest and courteous;
- Is focused on issues rather than personalities;
- Avoids abuse of meeting procedures, such as a pattern of unnecessary notices of motion and/or repetitious points of order; and
- Avoids aggressive, bullying or offensive conduct, including the use of disrespectful or malicious language.

Please note, nothing in this section of the Code is intended to limit robust debate.

### Relationships with staff

An important element of good governance involves the relationship between a Council, its chief executive and its staff. Members will respect arrangements put in place to facilitate this relationship, and:

- Raise any concerns about employees, officers or contracted officials with the Chief Executive;
- Raise any concerns about the performance or behaviour of the Chief Executive with the Mayor/Chair or the chairperson of the Chief Executive Performance Review Committee (however described);
- Make themselves aware of the obligations that the Council and the Chief Executive have as employers and observe these requirements at all times, such as the duty to be a good employer;

- Treat all employees with courtesy and respect and not publicly criticise any employee; and
- Observe any protocols put in place by the Chief Executive concerning contact between members and employees.

Please note, elected members should be aware that failure to observe this portion of the Code may compromise the Council's obligations to be a good employer and consequently expose the Council to civil litigation or affect the risk assessment of Council's management and governance control processes undertaken as part of the Council's annual audit.

### Relationship with the public

Given the vital role that democratic local government plays in our communities it is important that Councils have the respect and trust of their citizens. To facilitate trust and respect in their Council members will:

- Ensure their interactions with citizens are fair, honest and respectful;
- Be available to listen and respond openly and honestly to citizens' concerns;
- Represent the views of citizens and organisations accurately, regardless of the member's own opinions of the matters raised; and
- Ensure their interactions with citizens and communities uphold the reputation of the local authority

## 6. MEDIA AND SOCIAL MEDIA

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The media play an important role in the operation and efficacy of our local democracy. In order to fulfil this role the media needs access to accurate and timely information about the affairs of Council. Any failure by member to comply with the provisions of this section can represent a breach of the Code.

1. In dealing with the media elected members must clarify whether they are communicating a view endorsed by their Council, committee or community board, or are expressing a personal view.
2. Members are free to express a personal view to the media or social media at any time, provided the following rules are observed:
  - Comments shall be consistent with the Code;
  - Comments must not purposefully misrepresent the views of the Council or the views of other members;
  - Social media pages controlled by members and used for making observations relevant to their role as an elected members should be open and transparent, except where abusive or inflammatory content is being posted; and
  - Social media posts about other members, council staff or the public must be consistent with section five of this Code. (See **Appendix A** for guidelines on the personal use of social media).

## 7. INFORMATION

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Access to information is critical to the trust in which a local authority is held and its overall performance. A failure to comply with the provisions below can represent a breach of the Code.

### Confidential information

In the course of their duties members will receive information, whether in reports or through debate, that is confidential. This will generally be information that is either commercially sensitive or is personal to a particular individual or organisation. Accordingly, members agree not to use or disclose confidential information for any purpose other than the purpose for which the information was supplied to the member.

### Information received in capacity as an elected member

Occasionally members will receive information from external parties which is pertinent to the ability of their Council to properly perform its statutory duties. Where this occurs, and the information does not contravene the privacy of natural persons, the member will disclose such information to other members and/or the chief executive as soon as practicable.

## 8. CONFLICTS OF INTEREST

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Elected members will maintain a clear separation between their personal interests and their duties as elected members in order to ensure that they are free from bias (whether real or perceived). Members therefore must familiarise themselves with the provisions of the Local Authorities (Members' Interests) Act 1968 (LAMIA).

Members will not participate in any Council discussion or vote on any matter in which they have a pecuniary interest, other than an interest in common with the general public. This rule also applies where the member's spouse/partner has a pecuniary interest, such as through a contract with the Council. Members shall make a declaration of interest as soon as practicable after becoming aware of any such interests.

If a member is in any doubt as to whether or not a particular course of action (including a decision to take no action) raises a conflict of interest, then the member should seek guidance from the Chief Executive *immediately*. Members may also contact the Office of the Auditor-General for guidance as to whether they have a pecuniary interest, and if so, may seek an exemption to allow that member to participate or vote on a particular issue in which they may have a pecuniary interest. The latter must be done before the discussion or vote.

**Please note:** Failure to observe the requirements of LAMIA could potentially invalidate a decision made, or the action taken, by the Council. Failure to observe these requirements could also leave the elected member open to prosecution (see **Appendix B**). In the event of a conviction elected members can be ousted from office.

## 9. REGISTER OF INTERESTS

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Members shall, at least annually, make a declaration of interest. These declarations are recorded in a public Register of Interests maintained by the Council. The declaration must include information on the nature and extent of any interest, including:

- a) Any employment, trade or profession carried on by the member or the members' spouse/partner for profit or gain;
- b) Any company, trust, partnership etc for which the member or their spouse/partner is a director, business partner or trustee;
- c) A description of any land in which the member has a beneficial interest within the jurisdiction of the local authority; and
- d) A description of any land owned by the local authority in which the member or their spouse/partner is:

- A tenant; or
  - The land is tenanted by a firm in which the member or spouse/partner is a business partner; a company of which the member or spouse/partner is a director; or a trust of which the member or spouse/partner is a trustee.
- e) Any other matters which the public might reasonably regard as likely to influence the member's actions during the course of their duties as a member (if the member is in any doubt on this, the member should seek guidance from the Chief Executive).

Please note, where a member's circumstances change they must ensure that the Register of Interests is updated as soon as practicable.

## 10. ETHICAL BEHAVIOUR

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Members will seek to promote the highest standards of ethical conduct. Accordingly members will:

- Claim only for legitimate expenses as determined by the Remuneration Authority and any lawful policy of the Council developed in accordance with that determination;
- Not influence, or attempt to influence, any Council employee, officer or member in order to benefit their own, or families, personal or business interests;
- Only use the Council's resources (such as facilities, staff, equipment and supplies) in the course of their duties and not in connection with any election campaign or personal interests; and
- Not solicit, demand, or request any gift, reward or benefit by virtue of their position and notify the Chief Executive if any such gifts are accepted. Where a gift to the value of \$50 or more is accepted by a member, that member must immediately disclose this to the Chief Executive for inclusion in the publicly available register of interests.

Any failure by members to comply with the provisions set out in this section represents a breach of the code.

## 11. CREATING A SUPPORTIVE AND INCLUSIVE ENVIRONMENT

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In accordance with the purpose of the Code, members agree to take all reasonable steps in order to participate in activities scheduled to promote a culture of mutual trust, respect and tolerance. These include:

- Attending post-election induction programmes organised by the Council for the purpose of facilitating agreement on the Council's vision, goals and objectives and the manner and operating style by which members will work.
- Taking part in any assessment or evaluation of the Council's performance and operating style during the triennium.<sup>2</sup>
- Taking all reasonable steps to acquire the required skills and knowledge to effectively fulfill their Declaration of Office (the Oath) and contribute to the good governance of the city, district or region.

## 12. BREACHES OF THE CODE

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Members must comply with the provisions of the code (LGA 2002, schedule 7, cl. 15(4)). Any member, or the Chief Executive, who believes that the Code has been breached by the behaviour of a member

<sup>2</sup> A self-assessment template is provided in the Guidance to the code.

may make a complaint to that effect. All complaints will be considered in a manner that is consistent with the following principles.

### Principles

The following principles will guide any processes for investigating and determining whether or not a breach under the code has occurred:

- That the approach for investigating and assessing a complaint will be proportionate to the apparent seriousness of the alleged breach;
- That the processes of complaint, investigation, advice and decision-making will be kept separate as appropriate to the nature and complexity of the alleged breach; and
- That the concepts of natural justice and fairness will apply in the determination of any complaints made under the Code. This includes, conditional on the nature of an alleged breach, directly affected parties:
  - Have a right to know that an investigation process is underway;
  - Are given due notice and are provided with an opportunity to be heard;
  - Have confidence that any hearing will be impartial;
  - Have a right to seek appropriate advice and be represented; and
  - Have their privacy respected.

### Complaints

All complaints made under the code must be made in writing and forwarded to the Chief Executive. On receipt of a complaint the Chief Executive must forward the complaint to the Mayor/Chair or, where the Mayor/Chair is a party to the complaint, an independent investigator, drawn from a pool of names or agency agreed in advance.

Please note, only members and the Chief Executive may make a complaint under the code.

### Complaint referred to Mayor/Chair

On receipt of a complaint made under the provisions of the Council's Code of Conduct the Mayor/Chair will, as the situation allows:

- Interview the complainant to assess the full extent of the complaint.
- Interview the member(s) subject to the complaint.
- Assess the complaint to determine materiality.
- Where a complaint is assessed by the Mayor/Chair to be trivial, frivolous or minor, either dismiss the complaint, require an apology or other course of action, or assist the relevant parties to find a mutually agreeable solution.
- Where a complaint is found to be material, or no mutually agreed solution can be reached, the Mayor/Chair will refer the complaint back to the Chief Executive who will forward it, along with any recommendations made by the Mayor/Chair, to the Council or an adjudicative body established by the Council to assess and rule on complaints made under the Code.<sup>3</sup>

If the Mayor/Chair chooses they may, instead of undertaking an initial assessment, immediately refer the complaint to the independent investigator, via the Chief Executive.

### Complaint referred to Independent Investigator

On receipt of a complaint from a member which concerns the Mayor/Chair, or from the Mayor/Chair after initial consideration, the Chief Executive will forward that complaint to an independent investigator for a

<sup>3</sup> Advice on establishing adjudication bodies can be found in the Guide to the Code of Conduct.

preliminary assessment to determine whether the issue is sufficiently serious to be referred, with recommendations if necessary, to the Council or an adjudicative body for assessing and ruling on complaints.<sup>4</sup> The process, following receipt of a complaint, will follow the steps outlined in **Appendix C**.

### Materiality

An alleged breach under the Code is material if, in the opinion of the Mayor/Chair or independent investigator, it would bring the Council into disrepute or, if not addressed, adversely affect the reputation of a member.

An alleged breach under this Code is non-material if, in the opinion of the Mayor/Chair or independent investigator, any adverse effects are minor and no investigation or referral is warranted.

## 13. PENALTIES AND ACTIONS

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Where a complaint is determined to be material and referred to the Council or an adjudicative body established to consider complaints, the nature of any penalty or action will depend on the seriousness of the breach.

### Material breaches

In the case of material breaches of the Code, the Council, or the adjudicative body with delegated authority, may require one of the following:

1. A letter of censure to the member;
2. A request (made either privately or publicly) for an apology;
3. Removal of certain Council-funded privileges (such as attendance at conferences);
4. Removal of responsibilities, such as committee chair, deputy committee chair or portfolio holder;
5. Restricted entry to Council offices, such as no access to staff areas (where restrictions may not previously have existed);
6. Limitation on any dealings with Council staff other than the Chief Executive or identified senior manager;
7. A vote of no confidence in the member;
8. Suspension from committees or other bodies to which the member has been appointed; or
9. Invitation to the member to consider resigning from the Council.

A Council or adjudicative body with delegated authority may decide that instead of a penalty, one or more of the following may be required:

- Attend a relevant training course; and/or
- Work with a mentor for a period of time; and/or
- Participate in voluntary mediation (if the complaint involves a conflict between two members); and/or
- Tender an apology.

The process is based on the presumption that the outcome of a complaints process will be made public unless there are grounds, such as those set out in the Local Government Official Information and Meetings Act 1987 (LGOIMA), for not doing so.

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<sup>4</sup> On behalf of the Council the Chief Executive will, shortly after the start of a triennium, prepare, in consultation with the Mayor or Chairperson, a list of investigators for this purpose of undertaking a preliminary assessment. The Chief Executive may prepare a list specifically for his or her council, prepare a list jointly with neighbouring councils or contract with an agency capable of providing appropriate investigators, such as Equip.

### Statutory breaches

In cases where a breach of the Code is found to involve regulatory or legislative requirements, the complaint will be referred to the relevant agency. For example:

- Breaches relating to members' interests (where members may be liable for prosecution by the Auditor-General under LAMIA);
- Breaches which result in the Council suffering financial loss or damage (where the Auditor-General may make a report on the loss or damage under s.44 LGA 2002 which may result in the member having to make good the loss or damage); or
- Breaches relating to the commission of a criminal offence which will be referred to the Police (which may leave the elected member liable for criminal prosecution).

## 14. REVIEW

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Once adopted, the Code continues in force until amended by the Council. The Code can be amended at any time but cannot be revoked unless the Council replaces it with another Code. Amendments to the Code require a resolution supported by 75 per cent of the members of the Council present at the Council meeting at which the amendment is considered.

Councils are encouraged to formally review their existing Code and either amend or re-adopt it as soon as practicable after the beginning of each triennium in order to ensure that all members have the opportunity to provide their views on the Code's provisions.

## APPENDIX A: GUIDELINES ON THE PERSONAL USE OF SOCIAL MEDIA<sup>5</sup>

There's a big difference in speaking "on behalf of Council" and speaking "about" the Council. While your rights to free speech are respected, please remember that citizens and colleagues have access to what you post. The following principles are designed to help you when engaging in **personal or unofficial online** communications that may also refer to your Council.

1. **Adhere to the Code of Conduct and other applicable policies.** Council policies and legislation, such as LGOIMA and the Privacy Act 1993, apply in any public setting where you may be making reference to the Council or its activities, including the disclosure of any information online.
2. **You are responsible for your actions.** Anything you post that can potentially damage the Council's image will ultimately be your responsibility. You are encouraged to participate in the social media but in so doing you must exercise sound judgment and common sense.
3. **Be an "advocate" for compliments and criticism.** Even if you are not an official online spokesperson for the Council, you are one of its most important advocates for monitoring the social media landscape. If you come across positive or negative remarks about the Council or its activities online that you believe are important you are encouraged to share them with the governing body.
4. **Let the subject matter experts respond to negative posts.** Should you come across negative or critical posts about the Council or its activities you should consider referring the posts to the Council's authorised spokesperson, unless that is a role you hold, in which case consider liaising with your communications staff before responding.
5. **Take care mixing your political (Council) and personal lives.** Elected members need to take extra care when participating in social media. The public may find it difficult to separate personal and Council personas. Commenting online in any forum, particularly if your opinion is at odds with what Council is doing, can bring you into conflict with the Code should it not be clear that they are your personal views.
6. **Never post sensitive and confidential information** provided by the Council, such as confidential items, public excluded reports and/or commercially sensitive information. Such disclosure will contravene the requirements of the Code.
7. **Elected Members' social media pages should be open and transparent.** When commenting on matters related to the local authority no members should represent themselves falsely via aliases or differing account names or block. Neither should they block any post on any form of social media that they have control over unless there is clear evidence that the posts are actively abusive. Blocking constructive debate or feedback can be seen as bringing the whole Council into disrepute.

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<sup>5</sup> Based on the Ruapehu District Council Code of Conduct.

## APPENDIX B: LEGISLATION BEARING ON THE ROLE AND CONDUCT OF ELECTED MEMBERS

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This is a summary of the legislative requirements that have some bearing on the duties and conduct of elected members. The full statutes can be found at [www.legislation.govt.nz](http://www.legislation.govt.nz).

### The Local Authorities (Members' Interests) Act 1968

The Local Authorities (Members' Interests) Act 1968 (LAMIA) provides rules about members discussing and voting on matters in which they have a pecuniary interest and about contracts between members and the Council.

A pecuniary interest is likely to exist if a matter under consideration could reasonably give rise to an expectation of a gain or loss of money for a member personally (or for their spouse/partner or a company in which they have an interest). In relation to pecuniary interests the LAMIA applies to both contracting and participating in decision-making processes.

With regard to pecuniary or financial interests, a person is deemed to be "concerned or interested" in a contract or interested "directly or indirectly" in a decision when:

- A person, or spouse/partner, is "concerned or interested" in the contract or where they have a pecuniary interest in the decision; or
- A person, or their spouse/partner, is involved in a company that is "concerned or interested" in the contract or where the company has a pecuniary interest in the decision.

There can also be additional situations where a person is potentially "concerned or interested" in a contract or have a pecuniary interest in a decision, such as where a contract is between an elected members' family trust and the Council.

### Determining whether a pecuniary interest exists

Elected members are often faced with the question of whether or not they have a pecuniary interest in a decision and if so whether they should participate in discussion on that decision and vote. When determining if this is the case or not the following test is applied:

*"...whether, if the matter were dealt with in a particular way, discussing or voting on that matter could reasonably give rise to an expectation of a gain or loss of money for the member concerned."* (OAG, 2001)

In deciding whether you have a pecuniary interest, members should consider the following factors:

- What is the nature of the decision being made?
- Do I have a financial interest in that decision - do I have a reasonable expectation of gain or loss of money by making that decision?
- Is my financial interest one that is in common with the public?
- Do any of the exceptions in the LAMIA apply to me?
- Could I apply to the Auditor-General for approval to participate?

Members may seek assistance from the Mayor/Chair or other person, to determine if they should discuss or vote on an issue, but ultimately it is their own judgment as to whether or not they have pecuniary interest in the decision. Any member who is uncertain as to whether they have a pecuniary interest is advised to seek legal advice. Where uncertainty exists members may adopt a least-risk approach which is to not participate in discussions or vote on any decisions.

Members who do have a pecuniary interest will declare the pecuniary interest to the meeting and not participate in the discussion or voting. The declaration and abstention needs to be recorded in the meeting minutes. (Further requirements are set out in the Council's Standing Orders.)

### The contracting rule

A member is disqualified from office if he or she is "concerned or interested" in contracts with their Council if the total payments made, or to be made, by or on behalf of the Council exceed \$25,000 in any financial year. The \$25,000 limit includes GST. The limit relates to the value of all payments made for all contracts in which you are interested during the financial year. It does not apply separately to each contract, nor is it just the amount of the profit the contractor expects to make or the portion of the payments to be personally received by you.

The Auditor-General can give prior approval, and in limited cases, retrospective approval for contracts that would otherwise disqualify you under the Act. It is an offence under the Act for a person to act as a member of the Council (or committee of the Council) while disqualified.

### Non-pecuniary conflicts of interest

In addition to the issue of pecuniary interests, rules and common law govern conflicts of interest more generally. These rules apply to non-pecuniary conflicts of interest, including common law rules about bias. In order to determine if bias exists or not members need to ask:

*"Is there a real danger of bias on the part of the member of the decision-making body, in the sense that he or she might unfairly regard with favour (or disfavour) the case of a party to the issue under consideration?"*

The question is not limited to actual bias, but relates to the appearance or possibility of bias reflecting the principle that justice should not only be done, but should be seen to be done. Whether or not members believe they are not biased is irrelevant.

Members focus should be on the nature of the conflicting interest or relationship and the risk it could pose for the decision-making process. The most common risks of non-pecuniary bias are where:

- Members' statements or conduct indicate that they have predetermined the decision before hearing all relevant information (that is, members have a "closed mind"); and
- Members have a close relationship or involvement with an individual or organisation affected by the decision.

In determining whether or not they might be perceived as biased, members must also take into account the context and circumstance of the issue or question under consideration. For example, if a member has stood on a platform and been voted into office on the promise of implementing that platform, then voters would have every expectation that the member would give effect to that promise, however he/she must still be seen to be open to considering new information (this may not apply to decisions made in quasi-judicial settings, such as an RMA hearing).

### Local Government Official Information and Meetings Act 1987

The Local Government Official Information and Meetings Act 1987 sets out a list of meetings procedures and requirements that apply to local authorities and local/community boards. Of particular importance for the roles and conduct of elected members is the fact that the chairperson has the responsibility to maintain order at meetings, but all elected members should accept a personal responsibility to maintain acceptable standards of address and debate. No elected member should:

- Create a disturbance or a distraction while another Councillor is speaking;
- Be disrespectful when they refer to each other or other people; or

- Use offensive language about the Council, other members, any employee of the Council or any member of the public.

See Standing Orders for more detail.

#### **Secret Commissions Act 1910**

Under this Act it is unlawful for an elected member (or officer) to advise anyone to enter into a contract with a third person and receive a gift or reward from that third person as a result, or to present false receipts to Council.

If convicted of any offence under this Act a person can be imprisoned for up to two years, and/or fines up to \$1000. A conviction would therefore trigger the ouster provisions of the LGA 2002 and result in the removal of the member from office.

#### **Crimes Act 1961**

Under this Act it is unlawful for an elected member (or officer) to:

- Accept or solicit for themselves (or anyone else) any gift or reward for acting or not acting in relation to the business of Council; and
- Use information gained in the course of their duties for their, or another person's, monetary gain or advantage.

Elected members convicted of these offences will automatically cease to be members.

#### **Financial Markets Conduct Act 2013**

Financial Markets Conduct Act 2013 (previously the Securities Act 1978) essentially places elected members in the same position as company directors whenever Council offers stock to the public. Elected members may be personally liable if investment documents such as a prospectus contain untrue statements and may be liable for criminal prosecution if the requirements of the Act are not met.

#### **The Local Government Act 2002**

The Local Government Act 2002 (LGA 2002) sets out the general powers of local government, its purpose and operating principles, and details the personal liability of members.

Although having qualified privilege, elected members can be held personally accountable for losses incurred by a local authority where, following a report from the Auditor General under s44 LGA 2002, it is found that one of the following applies:

- a) Money belonging to, or administered by, a local authority has been unlawfully expended; or
- b) An asset has been unlawfully sold or otherwise disposed of by the local authority; or
- c) A liability has been unlawfully incurred by the local authority; or
- d) A local authority has intentionally or negligently failed to enforce the collection of money it is lawfully entitled to receive.<sup>890</sup>

Members will not be personally liable where they can prove that the act or failure to act resulting in the loss occurred as a result of one of the following:

- a) Without the member's knowledge;
- b) With the member's knowledge but against the member's protest made at or before the time when the loss occurred;
- c) Contrary to the manner in which the member voted on the issue; and

- d) In circumstances where, although being a party to the act or failure to act, the member acted in good faith and relied on reports, statements, financial data, or other information from professional or expert advisers, namely staff or external experts on the matters.

In certain situation members will also be responsible for paying the costs of proceedings (s47 LGA 2002).

## APPENDIX C: PROCESS WHERE A COMPLAINT IS REFERRED TO AN INDEPENDENT INVESTIGATOR

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*The following process is a guide only and Councils are encouraged to adapt this to their own specific circumstances.*

### Step 1: Chief Executive receives complaint

On receipt of a complaint under the Code, whether from a member (because the complaint involves the Mayor/Chair) or from the Mayor/Chair after an initial assessment, the Chief Executive will refer the complaint to an investigator selected from a list agreed at the start of the triennium. The Chief Executive will also:

- Inform the complainant that the complaint has been referred to the independent investigator and the name of the investigator, and refer them to the process for dealing with complaints as set out in the Code; and
- Inform the respondent that a complaint has been made against them, the name of the investigator and remind them of the process for dealing with complaints as set out in the Code.

### Step 2: Investigator makes preliminary assessment

On receipt of a complaint the investigator will assess whether:

1. The complaint is trivial or frivolous and should be dismissed;
2. The complaint is outside the scope of the Code and should be re-directed to another agency or institutional process;
3. The complaint is minor or non-material; or
4. The complaint is material and a full assessment is required.

In making the assessment the investigator may make whatever initial inquiry is necessary to determine their recommendations, including interviewing relevant parties, which are then forwarded to the Council's Chief Executive. On receiving the investigator's preliminary assessment the Chief Executive will:

1. Where an investigator determines that a complaint is trivial or frivolous, inform the complainant, respondent and other members (if there are no grounds for confidentiality) of the investigator's decision.
2. In cases where the investigator finds that the complaint involves a potential legislative breach and outside the scope of the Code, forward the complaint to the relevant agency and inform the Chief Executive who will then inform the complainant, the respondent and members.

### Step 3: Actions where a breach is found to be non-material

If the subject of a complaint is found to be non-material, but more than trivial or frivolous, the investigator will inform the chief executive and, if they choose, recommend a course of action appropriate to the breach, such as:

- That the respondent is referred to the Mayor/Chair for guidance; and/or
- That the respondent attend appropriate courses or programmes to increase their knowledge and understanding of the matters resulting in the complaint.

The Chief Executive will advise both the complainant and the respondent of the investigator's decision and any recommendations, neither of which are open to challenge. Any recommendations made in response to a non-material breach are non-binding on the respondent and the Council.

**Step 4: Actions where a breach is found to be material**

If the subject of a complaint is found to be material, the investigator will inform the Chief Executive, who will inform the complainant and respondent. The investigator will then prepare a report for the Council on the seriousness of the breach. In preparing that report, the investigator may:

- Consult with the complainant, respondent and any directly affected parties; and/or
- Undertake a hearing with relevant parties; and/or
- Refer to any relevant documents or information.

On receipt of the investigator's report, the Chief Executive will prepare a report for the relevant Council body charged with assessing and ruling on material complaints, which will meet to consider the findings and determine whether or not a penalty, or some other form of action, will be imposed. The Chief Executive's report will include the investigator's full report.

**Step 5: Process for considering the investigator's report**

The investigator's report will be considered by the Council or adjudicative body established for considering reports on Code of Conduct complaints, or any other body that the Council may resolve, noting that the process will meet the principles set out in section 12.1 of the Code.

The Council, or adjudicative body, will consider the Chief Executive's report in open meeting, except where the alleged breach concerns matters that justify, in accordance with LGOIMA, the exclusion of the public. Before making any decision on a specific complaint, the relevant body will give the respondent an opportunity to appear and speak in their own defense. Members with an interest in the proceedings, including the complainant and the respondent, should not take part in these proceedings in a decision-making capacity.

The form of penalty that might be applied will depend on the nature of the breach and may include actions set out in clause 13.1 of the Code.

The report, including recommendations from the adjudicative body, should that body have no formal delegations, will be heard and accepted by the Council in open session, unless grounds for excluding the public exist, without debate.

## 5.6 STANDING ORDERS

**File Number:** A2706848

**Author:** Aisha Huriwai, Team Leader Governance Support

**Authoriser:** William J Taylor MBE, General Manager - Corporate Services

### PURPOSE OF THE REPORT

The purpose of the report is to present Council with the current Standing Orders.

### RECOMMENDATION

**That Council note the Far North District Council Standing Orders.**

### 1) BACKGROUND

Standing Orders are a set of rules of debate that apply to all meetings of Council and its committees and subcommittees, including Community Boards. Furthermore Standing Orders ensure the legal requirements of the Local Government Act 2002 and the Local Government Official Information and Meetings Act 1987 are met. They also provide clarity as to what is expected of the members within a meeting and generally cover procedures to enable meetings to be held in a fair and transparent manner.

### 2) DISCUSSION AND OPTIONS

In the 2013-2016 triennium Council's Standing Orders were based on the New Zealand Standards (NZS) which had developed model Standing Orders for meetings of local authorities. The current Standing Orders were last adopted by the Council on 15 December 2016 and were based on a version of standing orders revised by Local Government New Zealand.

If new standing orders are not adopted, the current one will stand.

#### Reason for the recommendation

To receive Standing Orders for the Far North District Council.

### 3) FINANCIAL IMPLICATIONS AND BUDGETARY PROVISION

There are no financial implications or need for budgetary provision as a result of this report.

### ATTACHMENTS

1. Far North District Council Standing Orders - A2717796 (under separate cover) 

**Compliance schedule:**

Full consideration has been given to the provisions of the Local Government Act 2002 S77 in relation to decision making, in particular:

1. A Local authority must, in the course of the decision-making process,
  - a) Seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
  - b) Assess the options in terms of their advantages and disadvantages; and
  - c) If any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water sites, waahi tapu, valued flora and fauna and other taonga.
2. This section is subject to Section 79 - Compliance with procedures in relation to decisions.

Compliance requirement	Staff assessment
State the level of significance (high or low) of the issue or proposal as determined by the <a href="#">Council's Significance and Engagement Policy</a>	Not applicable.
State the relevant Council policies (external or internal), legislation, and/or community outcomes (as stated in the LTP) that relate to this decision.	Not applicable.
State whether this issue or proposal has a District wide relevance and, if not, the ways in which the appropriate Community Board's views have been sought.	Not applicable
State the possible implications for Māori and how Māori have been provided with an opportunity to contribute to decision making if this decision is significant and relates to land and/or any body of water.	Not applicable
Identify persons likely to be affected by or have an interest in the matter, and how you have given consideration to their views or preferences (for example – youth, the aged and those with disabilities).	Not applicable
State the financial implications and where budgetary provisions have been made to support this decision.	There are no financial implications or budgetary provision as a result of this report
Chief Financial Officer review.	The Chief Financial Officer has not reviewed this report.

## 5.7 ELECTED MEMBERS ALLOWANCE AND REIMBURSEMENT POLICY

**File Number:** A2717534

**Author:** Aisha Huriwai, Team Leader Governance Support

**Authoriser:** William J Taylor MBE, General Manager - Corporate Services

### PURPOSE OF THE REPORT

The purpose of the report is to introduce Elected Members' Allowances and Reimbursement for Council's Policy.

### EXECUTIVE SUMMARY

- The Remuneration Authority set an annual determination
- The determination includes provision of elected member expenses eligibility
- The policy was last reviewed in December 2017

### RECOMMENDATION

**That Council note the Elected Member Expense and Reimbursement Policy.**

### 1) BACKGROUND

The Remuneration Authority are the national body who determine not only how elected representatives across the country should be remunerated, but the expenses that they could seek reimbursement or allowances for. The current version of Council Elected Member Expense and Reimbursement Policy came into effect in December 2017.

The principal of the policy is that no elected members should incur expense in their role as elected members.

The Remuneration Authority have since updated their determination to provide provision for elected members to claim childcare allowance.

### 2) DISCUSSION AND OPTIONS

This report does not recommend any changes to the policy (attached).

It is recommended that Council note the policy and have a discussion on any amendments they think would be appropriate.

In areas where there is a provision in the determination, but the Council's policy is silent, the determination is what would be applied.

### Reason for the recommendation

To note the Elected Members Expense Reimbursement Policy.

### 3) FINANCIAL IMPLICATIONS AND BUDGETARY PROVISION

Council is required to allocate sufficient budget to fulfil its obligations to both remunerate and reimburse elected members for reasonable costs incurred in their role.

### ATTACHMENTS

1. **Elected Members' Allowances and Reimbursement Policy - A2717831** [↓](#) 

**Compliance schedule:**

Full consideration has been given to the provisions of the Local Government Act 2002 S77 in relation to decision making, in particular:

1. A Local authority must, in the course of the decision-making process,
  - a) Seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
  - b) Assess the options in terms of their advantages and disadvantages; and
  - c) If any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water sites, waahi tapu, valued flora and fauna and other taonga.
2. This section is subject to Section 79 - Compliance with procedures in relation to decisions.

Compliance requirement	Staff assessment
State the level of significance (high or low) of the issue or proposal as determined by the <a href="#">Council's Significance and Engagement Policy</a>	Low significance.
State the relevant Council policies (external or internal), legislation, and/or community outcomes (as stated in the LTP) that relate to this decision.	Elected Members Expense Reimbursement Policy
State whether this issue or proposal has a District wide relevance and, if not, the ways in which the appropriate Community Board's views have been sought.	Not applicable.
State the possible implications for Māori and how Māori have been provided with an opportunity to contribute to decision making if this decision is significant and relates to land and/or any body of water.	Not applicable.
Identify persons likely to be affected by or have an interest in the matter, and how you have given consideration to their views or preferences (for example – youth, the aged and those with disabilities).	Not applicable.
State the financial implications and where budgetary provisions have been made to support this decision.	Council is required to allocate sufficient budget to fulfil its obligations to both remunerate and reimburse elected members for reasonable costs incurred in their role.
Chief Financial Officer review.	The Chief Financial Officer has not reviewed this report.

# Elected Members' Allowances and Reimbursement Policy

Amended: 7 December 2017

## Background

From time to time elected members incur expenses on Council's behalf which need to be reimbursed.

In addition to this document, the Council Policy Register sets out the policies, rules and procedures relating to the expenses and allowances payable to elected members.

## Objective

This policy sets out rules on the claiming of expenses by elected members and the resources that will be available to them during their term of office.

## Policies

1. Reimbursement and the use of Council-supplied resources apply only to elected members personally, and only while they are acting in their official capacity as elected members.
2. Costs for expenses must have a justifiable business purpose and be moderate and conservative in all respects.
3. Transparency is achieved through the monthly publication on the Council's website of all expenses for elected members over the past month.
4. Expense claims are approved by the Team Leader Governance Support and actual receipts are required.
5. Cost reimbursements will be made via the payroll system.
6. All expenditure that falls under this policy is approved on the condition that it can be met within relevant budget provisions.
7. This Policy does not extend to expenses incurred as a result of the election or electoral work (such as attendance at ratepayer meetings or visits to constituents) unless it is official Council business.
8. Where this policy is silent or not specific in relation to claims for expenses or allowances the Chief Executive Officer shall be guided by the Auditor-General's 2007 good practice guide on "Controlling Sensitive Expenditure: Guidelines for Public Entities".
9. The allowances and expenses listed in Appendix B apply to those costs incurred for purposes of Council business only.

## Appendix A - Interpretation

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**COUNCIL BUSINESS** includes attendance at the following:

- Official meetings of the Council and any committee and subcommittee of Council
- Council workshops
- Meetings and workshops of advisory groups established by Council
- Meetings and workshops of external bodies to which the elected member has been appointed by Council
- Statutory hearings
- Meetings of Council-owned companies
- An external event or meeting where there has been:
  - a resolution of Council or a committee, or
  - an authorisation by the Council Mayor, or
  - with respect to the member of a committee, an authorisation by the chairperson of that committee
- Visits to and tours of facilities or sites or works for which the Council is responsible for or has involvement in, or which will be the subject of business to come before the Council or any committee
- Seminars and training courses where the elected member's attendance has been authorised
- Constituency meetings
- Discussions with other elected members or Council officers
- Official briefings.

“Council business” does not include events where the primary focus is on social activity.

## Appendix B – Allowances and Expenses

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### 1. All Elected Members

a. Air travel	<p>All elected members are entitled to utilise domestic air travel for Council-related travel where travel by air is the most cost effective option.</p> <p>All elected member international air travel is by way of economy class. The approval of the Council is required for exceptions, e.g. where Premium Economy or the equivalent air travel is desirable for health or other compelling reasons.</p>
b. Car parking	<p>Car parking will be reimbursed upon the production of <u>actual</u> receipts.</p>
c. Communications equipment	<p>Provision of communications equipment is a Council business decision. Council may choose to provide either:</p> <ul style="list-style-type: none"> <li>a) communications equipment:</li> <li style="text-align: center;"><b>or</b></li> <li>b) an annual allowance for any or all equipment provided by the elected member, as per <a href="#">amounts set by the Remuneration Authority</a>. Where a member is not a member for the whole period of the determination, the amount of the allowance is pro-rated.</li> </ul>

d. Entertainment and hospitality	<p>Costs related to hosting official visitors to the Council must be arranged by Council staff in advance, subject to approval by the Chief Executive Officer.</p> <p>Costs incurred while travelling on council business require the pre-approval of the General Manager Corporate Services.</p>
e. Exceptional circumstances	<p>Staff will arrange reasonable overnight accommodation when travel or business requirements do not allow for return on the same day.</p>
f. General community related expenses	<p>From time to time, councillors and board chairs may have unforeseen costs arise for items relating to community events, such as payment of koha, or the purchase of a wreath for attendance at a commemorative event. Reimbursement of such expenditure should be approved by the General Manager Corporate Services.</p>
g. Rental cars	<p>Rental cars may be utilised when attending meetings or conferences in other centres where this is the most cost-effective travel option and are arranged by staff in advance.</p> <p>Fuel costs will be reimbursed on production of <u>actual</u> receipts.</p>
h. Stationery	<p>Council will supply reasonable amounts of stationery for Council business.</p>
i. Taxis and shuttles	<p>Taxi and shuttle services must be pre-booked by staff. Costs are reimbursed on production of <u>actual</u> receipts.</p> <p>Taxis may not be used if significant travel distances mean that use of a taxi is not the most cost effective option. Shuttles or rental cars booked by Governance Support staff should be considered as an option in such circumstances.</p>
j. Travel and event attendance	<p>All elected members are entitled to payment of actual and reasonable registration, travel, accommodation, meal and related incidental expenses (including travel insurance) incurred in attendance at these events, held both within New Zealand and overseas, subject to:</p> <ul style="list-style-type: none"> <li>a) related expenditure being accommodated within existing budgets, and</li> <li>b) the appropriate approvals as outlined in this policy:</li> </ul> <p>and excluding reimbursement for purchases from hotel mini-bars and charges for in-room video or cable movies.</p> <p>All travel and accommodation arrangements for elected members are to be directed to Governance Support staff for processing, at the most economic cost available (when possible) at the time of booking, unless all travel costs are being met privately or by an outside party.</p> <p>The conference, course, seminar or training event must directly contribute to the member's ability to carry out their role. Voluntary conferences, courses, seminars, or training that contribute to the member's personal development will not be covered by Council.</p> <p>Each elected member may attend one conference or professional development event per representative body to which they are elected or appointed per financial year.</p> <p>Attendance at these events when held in New Zealand must be approved by:</p> <ul style="list-style-type: none"> <li>• In the case of councillors, the Mayor and Chief Executive Officer</li> </ul>

- In the case of community board members, the relevant board chair and the Chief Executive Officer

Attendance by any elected member at these events when held overseas must be approved by the Council.

Applications to attend an additional event in a financial year are approved at the discretion of the Chief Executive Officer in consideration of available budget.

The consequential travel expenses and a report written by the elected members on what they have learned and the value to the organisation will be provided at the next relevant public community board, committee, or Council meeting to provide transparency and confidence to the public that ratepayer funds are being used effectively.

When a Community Board member is to be the Council's representative at a conference or event, the approval of the Council is required.

Travel for RMA hearings and DLC training is managed by staff and determined by business need, as there is a separate budget for these activities.

k. Travel time	Reimbursement for time travelled on Council business is paid as per the Remuneration Authority Determination.
l. Vehicle mileage	<p>Reimbursement for vehicle mileage for travel on Council business is paid as per the Remuneration Authority Determination.</p> <p>Mileage will only be paid upon receipt of a completed Claim for Meeting and Travel Expenses form detailing the nature of the travel.</p>

## 2. The Mayor

a. Airline club	Given frequent travel requirements for the role, the Mayor is entitled to reimbursement of an Air New Zealand Koru Club subscription, on the provision of annual receipt.
b. Car	<p>The Mayor may be provided with a vehicle that will also be available for his/her private use. A deduction will be made from his/her salary as determined by the Remuneration Authority. The Mayor will not be able to claim for vehicle mileage.</p> <p>Alternatively, the Mayor may provide his/her own vehicle, in which case the Mayor may claim vehicle mileage for travel on Council Business.</p> <p>Mileage will only be paid upon receipt of a completed Claim for Meeting and Travel Expenses form detailing the nature of the travel.</p>
c. Entertainment and hospitality	The Mayor holds a purchasing card to pay directly for any entertainment or hospitality expenses which must be used in accordance with Council's Credit Card Expenditure Policy.

- |   |   |
|---|---|
| d. Telephone costs                              | <p>The Council will provide a mobile phone for the Mayor and cover all expenses associated with the use of that phone on Council business. The phone remains the property of the Council.</p> <p>If the Mayor's home residence does not have reliable mobile service, landline services will also be provided through Council's corporate account to provide best value for the ratepayer.</p>  |
| e. Travel and conferences, courses and seminars | <p>The prior approval of the Chief Executive Officer and the Chief Financial Officer is required for travel within New Zealand for Council business. The prior approval of the Council is required for all international travel.</p> <p>Where the Mayor or the Mayor's authorised representative is accompanied by his/her partner on international travel, Council will meet the cost of their travel, accommodation, and incidental costs if the partner's involvement <u>directly</u> contributes to a clear business purpose.</p> |

## 5.8 ADOPTION OF FAR NORTH DISTRICT COUNCIL'S FORMAL MEETING SCHEDULE NOVEMBER TO DECEMBER 2019

**File Number:** A2721324

**Author:** Aisha Huriwai, Team Leader Governance Support

**Authoriser:** William J Taylor MBE, General Manager - Corporate Services

### PURPOSE OF THE REPORT

To note the schedule of Council meetings for the remainder of the 2019 calendar year.

### RECOMMENDATION

**That Council note the formal Council meetings calendar for the remainder of the 2019 calendar year:**

<b>Ordinary Council Meeting</b>	<b>19 November 2019</b>	<b>10.00 am</b>
<b>Ordinary Council Meeting</b>	<b>19 December 2019</b>	<b>10.00 am</b>

### 1) BACKGROUND

In the 2016-2019 year, Council and Committee meetings were held on an eight week cycle, four weeks apart. The Bay of Islands-Whangaroa and Te Hiku Community Board meetings were held on a six weekly cycle and Kaikohe-Hokianga Community Board meet monthly.

This report asks the Council to note the Council meeting dates for the remainder of the year.

The Community Boards are responsible for setting their own schedule of meetings and Staff recommend that Community Boards follow the same frequency for ease and cohesion in the decision making process from one meeting to the next.

### 2) DISCUSSION AND OPTIONS

A workshop is scheduled for 20 November 2019 to have a discussion with Council about what the committee structure will look like in 2020. As part of these discussions Council will need to consider how often they would like to meet.

The proposed November and December dates are suggested based on staff current demand for decisions, and times set as 10am as a continuation of the 2019 meeting start times to provide members travelling from Kaitaia sufficient time to travel to Kaikohe.

Similar reports have been prepared for the Community Boards. Staff will prepare reports for the December meetings of Council and Community Boards to adopt a meeting schedule for future dates.

Previously, Council meetings have taken place on a Thursday, Bay of Islands-Whangaroa Community Board meetings have been held on Mondays, Te Hiku Community Board meetings have been held on a Tuesday and Kaikohe-Hokianga Community Board meetings on Wednesdays.

#### Reason for the recommendation

To present a schedule for Council's formal meeting schedule for the remainder of the 2019 calendar year.

### 3) FINANCIAL IMPLICATIONS AND BUDGETARY PROVISION

There are no financial implications or the need to budgetary provision as a result of this report.

**ATTACHMENTS**

**Nil**

**Compliance schedule:**

Full consideration has been given to the provisions of the Local Government Act 2002 S77 in relation to decision making, in particular:

1. A Local authority must, in the course of the decision-making process,
  - a) Seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
  - b) Assess the options in terms of their advantages and disadvantages; and
  - c) If any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water sites, waahi tapu, valued flora and fauna and other taonga.
2. This section is subject to Section 79 - Compliance with procedures in relation to decisions.

Compliance requirement	Staff assessment
State the level of significance (high or low) of the issue or proposal as determined by the <a href="#">Council's Significance and Engagement Policy</a>	This report is of low significance.
State the relevant Council policies (external or internal), legislation, and/or community outcomes (as stated in the LTP) that relate to this decision.	The Local Government Act 2002 and Local Government Official Information and Meetings Act provides rules for the notification of meeting dates as a minimum requirement.
State whether this issue or proposal has a District wide relevance and, if not, the ways in which the appropriate Community Board's views have been sought.	The Community Boards are responsible for setting their own meeting calendar.
State the possible implications for Māori and how Māori have been provided with an opportunity to contribute to decision making if this decision is significant and relates to land and/or any body of water.	Not applicable.
Identify persons likely to be affected by or have an interest in the matter, and how you have given consideration to their views or preferences (for example – youth, the aged and those with disabilities).	Not applicable.
State the financial implications and where budgetary provisions have been made to support this decision.	There are no financial implications or the need for budgetary provision arising from this report.
Chief Financial Officer review.	The Chief Financial Officer has not reviewed this report.

**6 MEETING CLOSE**