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**Committee**            **Council**  
**Author**                **David Harmer Policy Analyst**

## **Laws affecting councillors**

### **1. Purpose**

To provide a general explanation of some of the laws that regulate the conduct of elected members.

### **2. Background**

Clause 21(5)(c) of Schedule 7 to the Local Government Act 2002 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:

- the Local Government Official Information and Meetings Act 1987;
- the Local Authorities (Members' Interests) Act 1968;
- sections 99, 105 and 105A of the Crimes Act 1961;
- the Secret Commissions Act 1910; and
- the Securities Act 1978.

### **3. Comment**

There are certain legal provisions that councillors must be aware of because breaching the rules can have the consequence of loss of office. These provisions are contained in the:

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

Other enactments such as the Local Government Act 2002 and Local Government Official Information and Meetings Act 1987 deal with the role and function of the Council and councillors, and with the conduct of meetings.

The following summary of these enactments and other provisions that govern the conduct of the Council's affairs is taken from advice provided to Auckland City Council by Simpson Grierson.

### **3.1 Secret Commissions**

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 (see also the discussion of the Local Authorities (Members' Interests) Act 1968 below). 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 two years, or a fine not exceeding \$1,000. 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.

### **3.2 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 then goes on to make it an offence, once again 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.

### **3.3 Members' Interests**

The Local Authorities (Members' Interests) Act 1968 is one of the most important statutes governing the conduct of councillors. It has two main aspects. The first is the prohibition of certain contracts between local

authorities and their members. The second prevents voting on or discussing questions in which a member has a pecuniary interest.

As to the first aspect, the Act 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 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 me so that I can ensure that proper advice is obtained.

The penalty for breach of these provisions (which are contained in section 3 of the Act) is immediate loss of office and there is also the possibility of a fine being imposed (sections 4 and 5).

Section 6 of the Act 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.

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. A more detailed discussion of the principles of Natural Justice is included as **attachment 2** to this report.

### **3.4 Meetings**

The Local Government Official Information and Meetings Act 1987 governs the custody and release of official information. The fundamental principle in the Act is that information held by the Council is publicly available, unless one or more specified withholding grounds apply.

The Act also deals with local authority meetings, in Part VII. I draw your attention to a number of points in this latter part of the Act, namely:

- (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 (see Standing Order 124(c)).

- (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)).)

### **3.5 Securities and Insider Trading**

The Council has wide borrowing powers under Part 6 of the Local Government Act 2002. One of the ways the Council can borrow is by issuing stock or other forms of debt instruments. If such debt instruments are offered to the public the Council must comply with the Securities Act 1978. What constitutes “offering to the public” is given a very wide meaning (section 3 of the Securities Act).

The Securities Act regulates the offering of securities to the public. Local authority debt instruments are securities for the purposes of the Act. If the Council intends offering its debt instruments to the public it will have to

produce a prospectus and an investment statement complying with the requirements of the Securities Act and the Securities Regulations 1983. In addition any advertisements relating to the offer will have to comply with certain requirements imposed by the Securities Act governing the advertising of public offers of securities. Certificates would also have to be issued to investors, and certain information relating to the Council and the securities would have to be sent periodically to the holders of the Council's securities.

The Securities Act contains wide provisions establishing civil liability and criminal offences where a member of the public purchasing securities relies on untrue statements made in an advertisement (including an investment statement) or in a registered prospectus. In addition, there are general offences which apply to persons who do not otherwise comply with the provisions of the Act.

Elected members are deemed "directors" of the local authority for the purposes of the Securities Act and the Regulations made under it. As such they are potentially personally liable to investors if a registered prospectus or an investment (including an investment statement) contains an untrue statement. Members may also be criminally liable if the requirements of the Act or Regulations are not met. Some offences carry penalties that would also give rise to disqualification from office.

The Securities Markets Act 1988 includes prohibitions against insider trading and "tipping" in the securities of a "public issuer" – which the Council would be if any of its debt securities were listed on a stock exchange. If Councillors pass on non-public, price sensitive information to any person (tip) or use it themselves (by trading) then they may be liable under this Act for civil penalties.

### **3.6 Councillors' Personal Liability**

Generally speaking, councillors are indemnified in respect of their actions as a councillor. Section 43 of the Local Government Act 2002 provides for this indemnity (by the Council) in relation to:

- (a) civil liability (both for costs and damages) if the Councillor is acting in good faith and in pursuance of the responsibilities or powers of the Council; and
- (b) costs arising from any successfully defended criminal action relating to acts or omissions in his or her capacity as a Councillor.

However, there is a theoretical personal exposure on the part of councillors in certain circumstances - where the Auditor-General has reported on a "loss" incurred by the Council, for which the Council has not been compensated (sections 44 to 46). The loss must arise out of one of the following actions or omissions:

- (a) money belonging to, or administrable by, the Council being unlawfully expended; or

- (b) an asset being unlawfully sold or otherwise disposed of by the Council; or
- (c) a liability being unlawfully incurred by the Council; or
- (d) the Council intentionally or negligently failing to enforce the collection of money it is lawfully entitled to receive.

If the Auditor-General has made such a report, then that loss is recoverable as a debt due to the Crown (which in turn must be paid back to the Council) from each councillor jointly and severally. However, a Councillor has a defence to such a claim if he or she can prove that the act or failure giving rise to the loss occurred:

- (a) without the Councillor's knowledge;
- (b) or with the Councillor's knowledge but against his or her protest made at or before the time when the loss occurred; or
- (c) contrary to the manner in which the Councillor voted on the issue at a meeting of the Council; or
- (d) in circumstances where, although being a party to the act or failure to act, the Councillor acted in good faith and in reliance on reports, statements, financial data, or other information prepared or supplied, or on professional or expert advice given, by any Council officer or professional advisor in relation to matters which the Councillor believed on reasonable grounds to be within that person's competency.

### **3.7 Code of Conduct**

The Council has a Code of Conduct for Councillors (as required by clause 15 of Schedule 7 to the Local Government Act 2002). The Code of Conduct sets out (amongst other things) understandings and expectations about the manner in which Councillors may conduct themselves while acting as Councillors, including behaviour toward one another, staff, the public, and the disclosure of information. Under clause 15(4), Councillors must comply with the Code.

Councillors will be asked to review or reconfirm the Code of Conduct at a meeting early in the new triennium.

### **3.8 Purpose, Role And Powers Of The Council**

Because it underpins everything which the Council, and thus the Councillors, do, it is useful to briefly describe the general statutory framework within which the Council operates.

The Local Government Act 2002 sets out the following purpose of local government (section 10):

- (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
- (b) to promote the social, economic, environmental, and cultural wellbeing of communities, in the present and for the future.

The Council's role is (section 11) to give effect to that purpose of local government in relation to its region and to perform the duties and exercise the rights conferred on it by law.

Except where another law provides otherwise, the Council has full capacity to carry on or undertake any activity or business, or do any act, or enter into any transaction (section 12(2)). However, the Council must exercise its powers wholly or principally for the benefit of the Wellington region (section 12(4)). That does not prevent two or more Councils engaging in joint or co-operative activities.

In performing its role, a Council must act in accordance with certain principles in section 14 of the Local Government Act 2002. In addition, section 39 of that Act sets out governance principles that apply to councils. The text of sections 14 and 39 is attached as **appendix 1** to this report.

When making decisions, the Council must comply with the decision-making requirements set out in part 6 of the Act. These requirements are not set out here, as the Council will be asked to consider a decision-making procedure at a meeting early in the new triennium. The associated report will describe the requirements of part 6 of the Act in some detail.

### **3.9 Comparative Roles of the Council and the Chief Executive/Council Staff**

This is a brief summary of the legal provisions relevant to the respective roles of the Chief Executive and the Council.

Section 42(1) of the Local Government Act 2002 obliges the Council to appoint a Chief Executive. The Chief Executive's responsibilities are set out in subsection (2), as follows:

- (a) implementing the Council's decisions;
- (b) providing advice to members of the Council and its community boards;
- (c) ensuring that all responsibilities, duties and powers delegated to him or her or to any person employed by the Council, or imposed or conferred by an Act, regulation or bylaw are properly performed or exercised;
- (d) ensuring the effective and efficient management of the Council's activities;

- (e) maintaining systems to enable effective planning and accurate reporting of the Council's financial and service performance;
- (f) providing leadership for the Council's staff;
- (g) employing staff, on behalf of the Council;
- (h) negotiating the terms of employment of the Council's staff.

It is important to emphasise that the Chief Executive's responsibilities in relation to staff are to be exercised to the exclusion of the Council. The Council's role is limited to the appointment of the Chief Executive; all other appointments are for the Chief Executive to make, on the Council's behalf.

Overall, section 42 demonstrates a legislative intent that the Chief Executive should be responsible for managing, with the staff he or she appoints, the affairs of the Council. Although the dividing line will sometimes be difficult to draw, the Council's role should be in the establishment of policy and associated decision-making. Actual implementation of the decisions, administration and management should be in the hands of the Chief Executive and his or her staff.

### **3.10 The Council's Planning Process and Consultation**

The Local Government Act 2002 requires the Council to adopt a number of planning and other policy and financial management documents. The principal planning document is the long-term Council community plan (LTCCP) which covers a period of at least 10 years and is reviewed every 3 years. The LTCCP can be amended at any time, but this requires use of the special consultative procedure (see below). In addition, prior to the beginning of each financial year the Council must have adopted an annual plan for that year (although for those years where a new LTCCP is adopted, the first year of that LTCCP is the annual plan).

Under section 97 of the Local Government Act 2002, certain decisions may only be made if they are provided for in the LTCCP. These are:

- (a) a decision to alter significantly the intended level of service provision for any significant activity carried out by or on behalf of the Council (including a decision to commence or cease any such activity);
- (b) a decision to transfer the ownership or control of a strategic asset to or from the Council;
- (c) a decision to construct, replace, or abandon a strategic asset;
- (d) a decision that will, directly or indirectly, significantly affect the capacity of the Council, or the cost to the Council, in relation to any activity identified in the LTCCP.

Strategic assets are defined in the Act, partly by reference to assets listed in the Council's policy on significance.



The LTCCP and the annual plan, as well as many other formal policy documents must be adopted using the special consultative procedure (SCP). This procedure is also required for, amongst other things, the adoption or amendment of bylaws, and where there is a proposed change in the mode of delivery of certain significant activities. The SCP involves:

- (a) preparation of a statement of proposal, which must be included on the agenda for a meeting of the Council;
- (b) preparation and distribution of a summary of that proposal;
- (c) public notice;
- (d) the opportunity for the public to make submissions and to be heard in relation to that submission;
- (e) deliberation and the making of a final decision on the proposal.

Court decisions relating to "consultation" have stressed that bodies or persons having a statutory obligation to consult must go into the process with an open mind, that is, a mind capable of persuasion having fairly considered the submissions.

In addition, and quite apart from those decisions requiring use of the SCP, the Local Government Act 2002 contains detailed provisions which govern more generally the Council's required approach to decision-making and consultation.

#### **4. Communications**

No communications are required.

#### **5. Recommendations**

*That the report be received and its contents noted.*

Report prepared by:

Report prepared by:

**David Harmer**  
Policy Analyst

**Wayne Hastie**  
Council Secretary

**Attachment 1** – Local Government Act 2002, sections 14 and 39

**Attachment 2** – Procedural fairness