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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
- 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, fines, or imprisonment. 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 is a brief summary of these enactments and other provisions that govern the conduct of the Council's affairs.

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 of the Act makes it an offence for a member not to disclose to the Council his or her pecuniary interest (which includes the pecuniary interest of a parent, spouse/partner, or child) 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 any period not exceeding two years, or a fine not exceeding \$1,000. Such a conviction may also have the consequence of loss of office, in terms of clause 1 of Schedule 7 of 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 seven 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 him or herself 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 seven 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 (GST incl) in any year (section 3(1)). 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/partner 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, a Councillor should refer the matter to the Office of the Auditor-General or seek independent legal advice.

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

Section 6(1) of the Act prohibits a member of a local authority or of a committee of it from voting on, or taking 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/partner 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.

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 7. There are a number of important 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 sections 6 and 7 (except section 7(2)(f)(i)) 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 (section 48(2)).
- (b) In excluding the public, the Council must make a resolution (in the form set out at Schedule 2A to the Act) 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).
- (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 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 2009. 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:

- civil liability (both for costs and damages) if the Councillor is acting in good faith and in pursuance (or intended pursuance) of the responsibilities or powers of the Council
- 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 potential 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 fully 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. This is a serious concern for members, who should always be alert to ensure that their decision-making is within the

bounds of the law. 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; or
- (b) 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 of 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.

3.8 Non-pecuniary conflict of interest

While the Local Authority (Members' Interests) Act 1968 deals with pecuniary interests, there are also legal rules about conflicts of interest, more generally, which apply to non-pecuniary conflicts of interest. Of key significance is the matter of bias – this is not limited to actual bias, but also relates to the appearance or possibility of bias. Situations of non-pecuniary bias commonly involve predetermination of a matter before hearing all relevant information or a close relationship or involvement with an individual or an organisation affected by the matter. Detailed guidance on the laws on conflict of interest is contained in the Controller and Auditor-General's publication *Guidance for members of local authorities about the Local Authorities (Members' Interests) Act 1968* which has been separately circulated to councillors.

At the commencement of each meeting councillors are expected to declare any conflicts of interest relevant to items on the meeting's agenda. A declaration may be in relation to a pecuniary interest (other than an interest in common with the public) or a non-pecuniary interest giving rise to a risk of bias. Councillors are advised to read Order Papers before a meeting to see whether they have an interest in any matters that are to be discussed or voted on. If there are, Councillors should, if possible, advise the relevant Committee Chairperson before the meeting starts that they are going to declare an interest in a particular matter. Once a conflict is declared, the Councillor will be required to abstain from discussion and voting, and should consider leaving the meeting for that item. In declaring a conflict of interest, a Councillor is not required to inform the meeting about the nature of the interest or why it exists.

3.9 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 purpose of local government set out in section 10 of the Local Government Act 2002, in combination with sections 11 and 12, sets the limits on lawful activity that the Council may undertake.

Section 10 of the Local Government Act 2002 sets out the purpose of local government; it states:

10 Purpose of local government

- (1) The purpose of local government is—
 - (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
 - [(b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.]
- [(2) In this Act, **good-quality**, in relation to local infrastructure, local public services, and performance of regulatory functions, means infrastructure, services, and performance that are—
 - (a) efficient; and
 - (b) effective; and
 - (c) appropriate to present and anticipated future circumstances.]

Section 11 sets out that the role of a local authority is to: give effect to the purpose of local government stated in section 10; and perform the duties, and exercise the rights, conferred on it by or under the Act and any other enactment. Section 11A sets out the core services to be considered by a local authority in undertaking its role.

Section 12 provides the powers that a local authority has in performing its role. Essentially this section gives a council full capacity to carry on or undertake any activity or business, do any act or enter into any transaction; and full rights, powers, and privileges. This power is subject to the Act's processes, the general law and local benefit.

Section 13 states that sections 10 and 12(2) (which sets out the powers listed above) apply to a local authority performing a function under another enactment to the extent that the application of those provisions is not inconsistent with the other enactment.

In performing its role, a council must act in accordance with certain principles in section 14 of the Act. In addition, section 39 of that Act sets out governance principles that apply to councils.

The Council is responsible and democratically accountable for the decision-making of the local authority (section 41(3)).

When making decisions, the Council must comply with the decision-making requirements set out in Part 6 of the Act.

3.10 Comparative roles of the Council and the Chief Executive

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 requires the Council to appoint a Chief Executive. The Chief Executive's responsibilities are set out in subsection 2, as follows:

- implementing the Council's decisions
- providing advice to members of the Council
- 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
- ensuring the effective and efficient management of the Council's activities
- maintaining systems to enable effective planning and accurate reporting of the Council's financial and service performance
- providing leadership for the Council's staff
- employing staff, on behalf of the Council (in accordance with any remuneration and employment policy)
- negotiating the terms of employment of the Council's staff (in accordance with any remuneration and employment policy).

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.

3.11 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 plan (LTP) which covers a period of at least 10 years and is reviewed every three years. The LTP 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 LTP is adopted, the financial statement and funding impact statement included in the LTP in relation to the first year is the annual plan (section 95(4)).

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

- 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)
- a decision to transfer the ownership or control of a strategic asset to or from the Council

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

The LTP must set out any steps that the Council intends to take to develop Māori capacity to contribute to the decision-making process over the period covered by the plan (Schedule 10, Pt 1, cl 8). The LTP 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, the establishment of council controlled organisations and the adoption of various policies. . 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.

These include the requirement to consider community views (section 78), and to encourage Māori contributions to the decision-making process (section 81).

4. Briefing for Councillors

A workshop for Councillors on their legal responsibilities has been arranged for 27 November 2013.

5. Communications

No communications are required.

6. The decision-making process and significance

No decision is being sought in this report.

7. Recommendations

That the Council:

1. ***Receives the report.***
2. ***Notes the content of the report.***

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