



Our reference
F19/13/03-D21/26182

19 October 2022

First Meeting (Inaugural) of Council

Notice is hereby given that an First Meeting of Council will be held in the **Council Chambers, Stratford District Council, 63 Miranda Street, Stratford** on **Tuesday 25 October 2022** to follow the pōwhiri which will begin at 1.00pm.

Timetable for 25 October 2022 as follows:

1.00pm	Pōwhiri for Elected Members - Please be gathered in front of the Stratford District Council by 1.00pm.
2.00pm	Afternoon tea
2.30pm (approx.)	First Meeting of Council

Yours faithfully

Sven Hanne
Chief Executive

2022 - First Meeting of Council - October

25 October 2022 01:00 PM



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AGENDA

First Meeting of Council



F22/55/05 – D22/37027

A pōwhiri for the Mayor, Councillors and Guests will be held in front of the Council Administration Building beginning at 1.00pm.

Date: Tuesday 25 October 2022 at 2.30 PM (approx.)
Venue: Council Chambers, 63 Miranda Street, Stratford

1. Welcome

- 1.1 **Opening Karakia**
D21/40748 Page 7
- 1.2 **Health and Safety Message**
D21/26210 Page 8

2. Apologies

3. Announcements

4. Declarations

4.1 District Mayor

The Chief Executive will receive the individual declaration of the District Mayor.

"DECLARATION BY MAYOR

"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 Stratford District, the powers, authorities, and duties vested in, or imposed upon, me as Mayor of the Stratford District Council by virtue of the Local Government Act 2002, the Local Government Official Information and Meetings Act 1987, or any other Act."

4.2 Elected Members

The District Mayor will receive the individual declarations of the Elected Members.

"DECLARATION BY MEMBER

"Ko ahau, ko _____, e oati ana ka whai ahau i te pono me te tōkeke, i runga hoki i te mutunga kē mai nei o āku pūkenga, o āku whakatau hoki kia whakatutuki, kia mahi anō hoki i te mana whakahaere, te mana whakatau me ngā momo mahi kua uhia ki runga i a au kia whiwhi painga mō te takiwā o Te Whakaahurangi hei kaikaunihera o te Kaunihera ā Rohe o Whakaahurangi, e ai hoki ki te Ture Kāwanatanga-ā-Taiao 2002, ki te Ture Kāwanatanga-ā-Taiao Whakapae me te Hui 1987, me ētahi Ture anō rānei"

"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 Stratford District, the powers, authorities, and duties vested in, or imposed upon, me as a member of the Stratford District Council by virtue of the Local Government Act 2002, the Local Government Official Information and Meetings Act 1987, or any other Act."

5. Decision Report - Appointment of Deputy Mayor
D22/38411 Page 12

Recommendations

1. THAT the report be received.
2. THAT the Council notes that under Section 41A of the Local Government Act 2002 the Mayor has the power to appoint the Deputy Mayor.
3. THAT the Council notes the Mayor's decision whether to exercise his power to appoint the Deputy Mayor or leave this task to Council.

If the mayor exercises his power to appoint:

4. THAT the Council notes that the Mayor has appointed Councillor _____ as Deputy Mayor.
5. THAT the Council endorses the appointment of Councillor _____ as Deputy Mayor.

If the mayor does not exercise his power to appoint:

6. THAT where there is more than one candidate for the position of Deputy Mayor, Council choose voting system A or B to decide the successful appointee.
7. THAT the Council elects Councillor _____ as Deputy Mayor of the Stratford District Council.

Recommended Reason

The Local Government Act requires the appointment of the Deputy Mayor in the first meeting of Council following an election. Under Section 41A of the Local Government Act 2002 the Mayor has the power to appoint the Deputy Mayor. If the Mayor decides not to exercise his power to appoint, Council has the responsibility to appoint the Deputy Mayor.

/
Moved/Seconded

6. Decision Report - Establishment of Committees
D22/38429 Page 17

Recommendations

1. THAT the report be received.
2. THAT the Council notes the Committee structure established by the Mayor as follows:

Committee	Chairperson
Policy and Services Committee	The Deputy Mayor
Executive Committee	The Mayor
Audit and Risk Committee	External (<i>currently Philip Jones</i>)
Sport New Zealand Rural Travel Fund Committee	Councillor XXXX
Council Farm and Aerodrome Committee	Councillor XXXX
3. THAT the Committee structure and Chairpersons appointed to each Committee be confirmed.

Recommended Reason
Under Section 41A Subsection 3 of the Local Government Act 2002 the Mayor has the power to establish committees, and to appoint the Chairperson of each of those committees. The Mayor has chosen to exercise this power. Council has however got the ability to discharge or reconstitute the committees established by the Mayor or to discharge a chairperson appointed by the Mayor. The confirmation sought as per point 2 above serves to ensure the robustness of the proposed structure and appointments.

/ Moved/Seconded

Meeting to adjourn.

7. Information Report - General Explanation of Various Acts
D22/38408 Page 22

Recommendations

1. THAT the report be received.
2. THAT the Council notes the general explanation of various Acts pursuant to Section 21 of Schedule 7 of the Local Government Act 2002 as provided by the Chief Executive.

Recommended Reason
Elected members should be informed of various statutory matters that impact on their responsibilities.

/ Moved/Seconded

8. Decision Report - Setting of Date of First Meeting of Council
D22/38427 Page 223

Recommendations

1. THAT the report be received.
2. THAT Council confirms the first meeting of Council will be held on Tuesday 8 November at 3.30pm.

Recommended Reason
Meetings are required to be held to effectively and efficiently conduct Council business in a clear and open manner. The Local Government Act requires the fixing of the date and time of the first meeting of the local authority or the adoption of a schedule of meetings at its first meeting.

/ Moved/Seconded

9. Decision Report - Appointments to External Bodies
D22/38430 Page 228

Recommendations

1. THAT the report be received.
2. THAT the Council appoints primary and alternative representatives as per Option 1 contained in this report.
3. THAT the Council appoints the following primary and alternative representatives to the following Taranaki Regional Council Committees and Joint Committees:

Committee	Appointment	Alternative Appointment
Taranaki Regional Council Policy and Planning Committee		
Regional Land Transport Committee		
Civil Defence Emergency Management Group (CDEM)		
Taranaki Regional Solid Waste Management Committee		
Central Landfill Joint Committee		

Recommended Reason
At the beginning of each triennium of Council, Council needs to appoint its representatives to external bodies. Council representation on these is important to enable it to fulfil its statutory roles.

/ Moved/Seconded

10. Questions

11. Closing Karakia
D21/40748 Page 233



Our reference
F19/13/03-D21/40748

Karakia

Kia uruuru mai
Ā hauora
Ā haukaha
Ā haumāia
Ki runga, Ki raro
Ki roto, Ki waho
Rire rire hau Paimārire

I draw in (to my being)
The reviving essence
The strengthening essence
The essence of courage
Above, Below
Within, Around
Let there be peace.



Our reference
F19/13/03-D22/17082

Health and Safety Message

In the event of an emergency, unless guided to an alternative route by staff, please exit through the main entrance. Once outside the building please move towards the War Memorial Centre congregating on the lawn area outside the front of the council building.

If there is an earthquake, please drop, cover and hold where possible. Remain indoors until the shaking stops and you are sure it is safe to exit or remain where you are until further instruction is given.



Our reference
F22/55/03-D22/40634

25 October 2022

**Declaration By Mayor, Or Chairperson, Or Member
2022**

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 Stratford District, the powers, authorities, and duties vested in, or imposed upon, me as Mayor of the Stratford District Council by virtue of the Local Government Act 2002, the Local Government Official Information and Meetings Act 1987, or any other Act."



Our reference
F22/55/03-D22/40634

25 October 2022

**Declaration By Mayor, Or Chairperson, Or Member
2022**

Ko ahau, ko _____, e oati ana ka whai ahau I te pono me te tōkeke,
I runga hoki I te mutunga kē mai nei o āku pūkenga, o āku whakatau hoki kia
whakatutuki, kia mahi anō hoki I te mana whakahaere, te mana whakatau
me ngā momo mahi kua uhia ki runga I a au kia whiwhi painga mō te takiwā
o Te Whakaahurangi hei kaikaunihera o te Kaunihera ā Rohe o
Whakaahurangi, e ai hoki ki te Ture Kāwanatanga-ā-Taiao 2002, ki te Ture
Kāwanatanga-ā-Taiao Whakapae me te Hui 1987, me ētahi Ture anō rānei.



Our reference
F22/55/03-D22/40634

25 October 2022

**Declaration By Mayor, Or Chairperson, Or Member
2022**

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 Stratford District, the powers, authorities, and duties vested in, or imposed upon, me as member of the Stratford District Council by virtue of the Local Government Act 2002, the Local Government Official Information and Meetings Act 1987, or any other Act."

DECISION REPORT



F22/55/04 – D22/38411

To: Council
From: Chief Executive
Date: 25 October 2022
Subject: Appointment of the Deputy Mayor

Recommendations

1. THAT the report be received.
2. THAT the Council notes that under Section 41A of the Local Government Act 2002 the Mayor has the power to appoint the Deputy Mayor.
3. THAT the Council notes the Mayor's decision whether to exercise his power to appoint the Deputy Mayor or leave this task to Council.

If the mayor exercises his power to appoint:

4. THAT the Council notes that the Mayor has appointed Councillor _____ as Deputy Mayor.
5. THAT the Council endorses the appointment of Councillor _____ as Deputy Mayor.

If the mayor does not exercise his power to appoint:

6. THAT where there is more than one candidate for the position of Deputy Mayor, Council choose voting system A or B to decide the successful appointee.
7. THAT the Council elects Councillor _____ as Deputy Mayor of the Stratford District Council.

Recommended Reason

The Local Government Act requires the appointment of the Deputy Mayor in the first meeting of Council following an election. Under Section 41A of the Local Government Act 2002 the Mayor has the power to appoint the Deputy Mayor. If the Mayor decides not to exercise his power to appoint, Council has the responsibility to appoint the Deputy Mayor.

/
Moved/Seconded

1. Purpose of Report

- 1.1 To enable the Mayor to announce his decision whether to exercise his discretionary power in terms of Section 41A of the Local Government Act 2002 to appoint the Deputy Mayor, or leave it to Council to appoint the Deputy Mayor.
- 1.2 To complete the process of appointment of the Deputy Mayor by applying the relevant process pending the initial decision by the Mayor.

2. Executive Summary

2.1 To receive the Mayor’s decision as to whether he chooses to exercise his powers regarding the appointment of the Deputy Mayor and to subsequently follow the appropriate, legally prescribed processes to complete the appointment process..

3. Local Government Act 2002 – Section 10

Under section 10 of the Local Government Act 2002, the Council’s purpose is to “enable democratic local decision making by and on behalf of communities; as well as promoting the social, economic, environmental, and cultural well-being of communities now and into the future”			
Does the recommended option meet the purpose of the Local Government 4 well-beings? And which:			Yes
Social	Economic	Environmental	Cultural
✓	✓	✓	✓

There are no Local Government Act 2002 Section 10 implications associated with the content of this report as these relate to the delivery of Council services rather than the appointment of the Deputy Mayor. Establishing a functioning governance team however provides the basis for the delivery against the 4 well-beings as well as the objectives of Section 10 of the LGA.

4. Background

4.1 Changes introduced in the Local Government Amendment Act 2012 came into effect on 12 October 2013. These changes gave the Mayor the power to do the following:

- lead the development of council plans, policies and budgets
- appoint the Deputy Mayor
- establish Council Committees
- appoint chairs to Council Committees.

4.2 Central Government saw that by further empowering Mayors it would enable Mayors to build an effective leadership team and strengthen the leadership and capability of the Council within the community.

4.3 Section 41A Role and Powers of Mayors states:

“(1) The role of a mayor is to provide leadership to

- *“(a) the other members of the territorial authority; and*
- *“(b) the people in the district of the territorial authority.*

“(2) Without limiting subsection (1), it is the role of a mayor to lead the development of the territorial authority’s plans (including the long-term plan and the annual plan), policies, and budgets for consideration by the members of the territorial authority.

“(3) For the purposes of subsections (1) and (2), a mayor has the following powers:

- *“(a) to appoint the deputy mayor:*
- *“(b) to establish committees of the territorial authority:*
- *“(c) to appoint the chairperson of each committee established under paragraph (b), and, for that purpose, a mayor—*
- *“(i) may make the appointment before the other members of the committee are determined; and*
- *“(ii) may appoint himself or herself.*

“(4) However, nothing in subsection (3) limits or prevents a territorial authority from—

- “(a) removing, in accordance with clause 18 of Schedule 7, a deputy mayor appointed by the mayor under subsection (3)(a); or
- “(b) discharging or reconstituting, in accordance with clause 30 of Schedule 7, a committee established by the mayor under subsection (3)(b); or
- “(c) appointing, in accordance with clause 30 of Schedule 7, 1 or more committees in addition to any established by the mayor under subsection (3)(b); or
- “(d) discharging, in accordance with clause 31 of Schedule 7, a chairperson appointed by the mayor under subsection (3)(c).

“(5) A mayor is a member of each committee of a territorial authority.

“(6) To avoid doubt, a mayor must not delegate any of his or her powers under subsection (3).

“(7) To avoid doubt,—

- “(a) clause 17(1) of Schedule 7 does not apply to the election of a deputy mayor of a territorial authority unless the mayor of the territorial authority declines to exercise the power in subsection (3)(a):
- “(b) clauses 25 and 26(3) of Schedule 7 do not apply to the appointment of the chairperson of a committee of a territorial authority established under subsection (3)(b) unless the mayor of the territorial authority declines to exercise the power in subsection (3)(c) in respect of that committee.”

5. Consultative Process

5.1 Public Consultation - Section 82

There are no consultation requirements associated with this report.

5.2 Māori Consultation - Section 81

There are no Māori consultation requirements associated with this report.

6. Risk Analysis

Refer to the Council Risk Register - available on the Council website.

- Does this report cover any issues that relate to any risks on the Council Risk Register, and if so which risks and what are the impacts and likelihood of eventuating?
- Does this report cover any issues that may lead to any new risks that are not on the Council Risk Register, and if so, provide some explanation of any new identified risks.
- Is there a legal opinion needed?

- 6.1 Elected Members – Decision Making – failure to elect a deputy mayor would be in breach of cl. 17 Schedule 7, Local Government Act.

7. Decision Making Process – Section 79

7.1 Direction

	Explain
Is there a strong link to Council’s strategic direction, Long Term Plan/District Plan?	The undertaking of these activities is essential to the operation of council.
What relationship does it have to the communities current and future needs for infrastructure, regulatory functions, or local public services?	The undertaking of these activities is essential to the operation of council.

7.2 **Data**

- | |
|--|
| <ul style="list-style-type: none"> • Do we have complete data, and relevant statistics, on the proposal(s)? • Do we have reasonably reliable data on the proposals? • What assumptions have had to be built in? |
|--|

Not applicable.

7.3 **Significance**

	Yes/No	Explain
Is the proposal significant according to the Significance Policy in the Long Term Plan?	No	
Is it:	No	
• considered a strategic asset; or	No	
• above the financial thresholds in the Significance Policy; or	No	
• impacting on a CCO stakeholding; or	No	
• a change in level of service; or	No	
• creating a high level of controversy; or	No	
• possible that it could have a high impact on the community?	No	

In terms of the Council's Significance Policy, is this proposal of high, medium, or low significance?		
High	Medium	Low
	✓	

7.4 **Options**

- | |
|---|
| <p>An assessment of costs and benefits for each option must be completed. Use the criteria below in your assessment.</p> <ol style="list-style-type: none"> 1. What options are available? 2. For each option: <ul style="list-style-type: none"> • explain what the costs and benefits of each option are in terms of the present and future needs of the district; • outline if there are any sustainability issues; and • explain if the outcomes meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions? 3. After completing these, consider which option you wish to recommend to Council, and explain: <ul style="list-style-type: none"> • how this option is the most cost effective option for households and businesses; • if there are any trade-offs; and • what interdependencies exist. |
|---|

The Mayor has the option to exercise or decline to exercise his authority to appoint the Deputy Mayor.

Depending on the Mayor's choice regarding the exercising of his powers to appoint the Deputy Mayor, the following options arise for Council:

If the Mayor exercises his power to appoint the Deputy Mayor:

Council will be given the opportunity to endorse the Mayor's appointment of the Deputy Mayor. The endorsement sought is to ensure robustness of the process. Refusal of council to endorse has no material impact and Council retains the ability to remove the Deputy Mayor appointed by the Mayor.

If the Mayor declines to exercise his power to appoint the Deputy Mayor:

Council has no option but to appoint the Deputy Mayor.

A nomination of candidates process is followed by voting based on one of the two voting systems below. It is Council's choice which one to apply.

Voting System

Under the Local Government Act 2002 (Clause 25, Schedule 7), and detailed in clause 5.6 of Standing Orders) the Council must decide before it makes appointments whether it will use voting System A or System B for the process if there is more than one candidate.

Put simply, System A aims for an absolute majority and may feature several rounds of voting with an unsuccessful candidate dropping off in each round.

System B works by simple majority and has only one round of voting, and if candidates tie, the decision is made by lot.

Following the completion of the voting process, Council shall appoint the successful candidate.

7.5 Financial

- Is there an impact on funding and debt levels?
- Will work be undertaken within the current budget?
- What budget has expenditure come from?
- How will the proposal be funded? eg. rates, reserves, grants etc.

There are no financial implications associated with the content of this report.

7.6 Prioritisation & Trade-off

- Have you taken into consideration the:
- Council's capacity to deliver;
 - contractor's capacity to deliver; and
 - consequence of deferral?

The decisions inherent in this report do not affect Council's overall ability to deliver on its commitments.

7.7 Legal Issues

- Is there a legal opinion needed?
- Are there legal issues?

There are no legal implications associated with the content of this report.

7.8 Policy Issues - Section 80

- Are there any policy issues?
- Does your recommendation conflict with Council Policies?

There are no policy implications associated with the content of this report.



Sven Hanne
Chief Executive

Date 18 October 2022

DECISION REPORT



F22/55/04 – D22/38429

To: Council
From: Chief Executive
Date: 25 October 2022
Subject: Establishment of Committees

Recommendations

1. THAT the report be received.
2. THAT the Council notes the Committee structure established by the Mayor as follows:

Committee	Chairperson
Policy and Services Committee	The Deputy Mayor
Executive Committee	The Mayor
Audit and Risk Committee	External (<i>currently Philip Jones</i>)
Sport New Zealand Rural Travel Fund Committee	Councillor XXXX
Council Farm and Aerodrome Committee	Councillor XXXX

3. THAT the Committee structure and Chairpersons appointed to each Committee be confirmed.

Recommended Reason

Under Section 41A Subsection 3 of the Local Government Act 2002 the Mayor has the power to establish committees, and to appoint the Chairperson of each of those committees. The Mayor has chosen to exercise this power. Council has however got the ability to discharge or reconstitute the committees established by the Mayor or to discharge a chairperson appointed by the Mayor. The confirmation sought as per point 2 above serves to ensure the robustness of the proposed structure and appointments.

/
Moved/Seconded

1. Purpose of Report

- 1.1 To advise the Council that the Mayor has exercised his discretionary power in terms of Section 41A Subsection 3 of the Local Government Act 2002 to establish the committees of Council and to advise the appointment of Chairpersons to those committees; and
- 1.2 For Council to confirm the establishment of the committees of Council and the appointment of Chairpersons to those committees.
- 1.3 The determination of the membership of those committees, and the terms of reference and delegation of authority for each committee will be considered separately by Council.

2. Executive Summary

- 2.1 Chairpersons to such committees made by the Mayor, or, if desired by Council determine an alternative structure and or chairmanship(s).
- 2.2 The determination of the membership of those committees, and the terms of reference and delegation of authority for each committee will be considered separately by Council.

3. Local Government Act 2002 – Section 10

Under section 10 of the Local Government Act 2002, the Council’s purpose is to “enable democratic local decision making by and on behalf of communities; as well as promoting the social, economic, environmental, and cultural well-being of communities now and into the future”			
Does the recommended option meet the purpose of the Local Government 4 well-beings? And which:			Yes
Social	Economic	Environmental	Cultural
✓	✓	✓	✓

There are no Local Government Act 2002 Section 10 implications associated with the content of this report as these relate to the delivery of Council services rather than the setting of committee structures and appointments. These decisions however create the foundation for council decision making across all areas of council responsibilities.

4. Background

- 4.1 Changes introduced in the Local Government Amendment Act 2012 came into effect on 12 October 2013. These changes gave the Mayor the power to do the following:
 - lead the development of council plans, policies and budgets;
 - appoint the Deputy Mayor;
 - establish Council Committees; and
 - appoint chairs to Council Committees.
- 4.2 Central Government saw that by further empowering Mayors it would enable Mayors to build an effective leadership team and strengthen the leadership and capability of the Council within the community.
- 4.3 Section 41A Role and Powers of Mayors states:
 - “(1) *The role of a mayor is to provide leadership to*
 - *“(a) the other members of the territorial authority; and*
 - *“(b) the people in the district of the territorial authority.*
 - “(2) *Without limiting subsection (1), it is the role of a mayor to lead the development of the territorial authority’s plans (including the long-term plan and the annual plan), policies, and budgets for consideration by the members of the territorial authority.*
 - “(3) *For the purposes of subsections (1) and (2), a mayor has the following powers:*
 - *“(a) to appoint the deputy mayor;*
 - *“(b) to establish committees of the territorial authority;*
 - *“(c) to appoint the chairperson of each committee established under paragraph (b), and, for that purpose, a mayor—*
 - *“(i) may make the appointment before the other members of the committee are determined; and*
 - *“(ii) may appoint himself or herself.*

- “(4) However, nothing in subsection (3) limits or prevents a territorial authority from—*
- “(a) removing, in accordance with clause 18 of Schedule 7, a deputy mayor appointed by the mayor under subsection (3)(a); or*
 - “(b) discharging or reconstituting, in accordance with clause 30 of Schedule 7, a committee established by the mayor under subsection (3)(b); or*
 - “(c) appointing, in accordance with clause 30 of Schedule 7, 1 or more committees in addition to any established by the mayor under subsection (3)(b); or*
 - “(d) discharging, in accordance with clause 31 of Schedule 7, a chairperson appointed by the mayor under subsection (3)(c).*

“(5) A mayor is a member of each committee of a territorial authority.

“(6) To avoid doubt, a mayor must not delegate any of his or her powers under subsection (3).

“(7) To avoid doubt,—

- “(a) clause 17(1) of Schedule 7 does not apply to the election of a deputy mayor of a territorial authority unless the mayor of the territorial authority declines to exercise the power in subsection (3)(a):*
- “(b) clauses 25 and 26(3) of Schedule 7 do not apply to the appointment of the chairperson of a committee of a territorial authority established under subsection (3)(b) unless the mayor of the territorial authority declines to exercise the power in subsection (3)(c) in respect of that committee.”*

5. Consultative Process

5.1 Public Consultation - Section 82

There are no consultation requirements associated with this report.

5.2 Māori Consultation - Section 81

There are no Māori consultation requirements associated with this report.

6. Risk Analysis

Refer to the Council Risk Register - available on the Council website.

- Does this report cover any issues that relate to any risks on the Council Risk Register, and if so which risks and what are the impacts and likelihood of eventuating?
- Does this report cover any issues that may lead to any new risks that are not on the Council Risk Register, and if so, provide some explanation of any new identified risks.
- Is there a legal opinion needed?

6.1 There is no risk associated with this report.

7. Decision Making Process – Section 79

7.1 Direction

	Explain
Is there a strong link to Council’s strategic direction, Long Term Plan/District Plan?	The undertaking of these activities is essential to the operation of council.
What relationship does it have to the communities current and future needs for infrastructure, regulatory functions, or local public services?	The undertaking of these activities is essential to the operation of council.

7.2 **Data**

- | |
|--|
| <ul style="list-style-type: none"> • Do we have complete data, and relevant statistics, on the proposal(s)? • Do we have reasonably reliable data on the proposals? • What assumptions have had to be built in? |
|--|

Not applicable.

7.3 **Significance**

	Yes/No	Explain
Is the proposal significant according to the Significance Policy in the Long Term Plan?	No	
Is it:	No	
• considered a strategic asset; or	No	
• above the financial thresholds in the Significance Policy; or	No	
• impacting on a CCO stakeholding; or	No	
• a change in level of service; or	No	
• creating a high level of controversy; or	No	
• possible that it could have a high impact on the community?	No	

In terms of the Council's Significance Policy, is this proposal of high, medium, or low significance?		
High	Medium	Low
	✓	

7.4 **Options**

- | |
|---|
| <p>An assessment of costs and benefits for each option must be completed. Use the criteria below in your assessment.</p> <ol style="list-style-type: none"> 1. What options are available? 2. For each option: <ul style="list-style-type: none"> • explain what the costs and benefits of each option are in terms of the present and future needs of the district; • outline if there are any sustainability issues; and • explain if the outcomes meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions? 3. After completing these, consider which option you wish to recommend to Council, and explain: <ul style="list-style-type: none"> • how this option is the most cost effective option for households and businesses; • if there are any trade-offs; and • what interdependencies exist. |
|---|

Council has the options to either:

Option 1 **Confirm the Committee structure** set and appointment of Chairpersons to such committees made by the Mayor, or

Option 2 **Not to confirm the Committee Structure.** If this option was to be chosen, Council could utilise its powers in accordance with the relevant clauses of the Local Government Act to appoint additional or to discharge committees established by the Mayor or discharge chairpersons appointed by the Mayor.

The determination of the membership of those committees, and the terms of reference and delegation of authority for each committee will be considered separately by Council.

7.5 **Financial**

- Is there an impact on funding and debt levels?
- Will work be undertaken within the current budget?
- What budget has expenditure come from?
- How will the proposal be funded? eg. rates, reserves, grants etc.

The most notable financial implication of this report is the decision to appoint and external chair to the Audit and Risk Committee. While chairpersons from within elected members are remunerated via a fixed pool, the appointment of an external chair requires additional remuneration. This is however considered best practice and represents good value for money given the independence and additional skills and insights an external chair can bring to the committee.

7.6 **Prioritisation & Trade-off**

- Have you taken into consideration the:
- Council's capacity to deliver;
 - contractor's capacity to deliver; and
 - consequence of deferral?

The decisions inherent in this report do not affect Council's overall ability to deliver on its commitments.

7.7 **Legal Issues**

- Is there a legal opinion needed?
- Are there legal issues?

There are no legal implications associated with the content of this report.

7.8 **Policy Issues - Section 80**

- Are there any policy issues?
- Does your recommendation conflict with Council Policies?

There are no policy implications associated with the content of this report.



Sven Hanne
Chief Executive

Date 18 October 2022

INFORMATION REPORT



F22/55/04 – D22/38408

To: Council
From: Chief Executive
Date: 25 October 2022
Subject: General Explanation of Various Acts

Recommendations

1. THAT the report be received.
2. THAT the Council notes the general explanation of various Acts pursuant to Section 21 of Schedule 7 of the Local Government Act 2002 as provided by the Chief Executive.

Recommended Reason

Elected members should be informed of various statutory matters that impact on their responsibilities.

Moved/Seconded

1. Purpose of Report

To inform Elected members of various statutory matters that impact on their responsibilities.

2. Executive Summary

2.1 Section 21 of Schedule 7 of the Local Government Act 2002 requires a general explanation (to be given or arranged by the Chief Executive) of:

- The Local Government Official Information and Meetings Act 1987, and

Other laws affecting members, including:

- The Local Authorities (Members Interests) Act 1968,
- Sections 99, 105 and 105A of the Crimes Act 1961,
- The Secret Commissions Act 1910, and the
- The Financial Markets Conduct Act 2013.

2.2 In addition to the above laws, we have included a general explanation of three further key statutes, being:

- The Health and Safety at Work Act 2015,
- The Public Records Act 2005 Act, and
- The Local Government (Pecuniary Interests Register) Amendment Act 2022

3. Local Government Act 2002

Under section 10 of the Local Government Act 2002, the Council's purpose is to "enable democratic local decision making by and on behalf of communities; as well as promoting the social, economic, environmental, and cultural well-being of communities now and into the future"			
Does the recommended option meet the purpose of the Local Government 4 well-beings? And which:		The legislation covered by this report underpins all council deliberations and decision making, it therefore impacts all aspects of council business.	
Social	Economic	Environmental	Cultural
✓	✓	✓	✓

3. Local Government Official Information and Meetings Act (LGOIMA) 1987

3.1 The two main aspects of the Local Government Official Information and Meetings Act are concerned with:

- official information, its availability; and
- public access to meetings of Local Authorities.

3.2 The purpose of the Act is:

- “(a) To provide for the availability to the public of official information held by local authorities, and to promote the open and public transaction of business at meetings of local authorities, in order:*
- (i) to enable more effective participation by the public in the actions and decisions of local authorities, and*
 - (ii) to promote the accountability of local authority members and officials, and thereby to enhance respect for the law and to promote good local government in New Zealand;*
- (b) To provide for proper access by each person to official information relating to that person;*
- (c) To protect official information and the deliberations of local authorities to the extent consistent with the public interest and the preservation of personal privacy.”*

The over-riding principle of the Act is that information is to be made available unless there is good reason to withhold it. In this regard the Act specifies:

- (a) Conclusive reasons for withholding information, if its availability would be likely to prejudice maintenance of the law or to endanger the safety of any person; and
- (b) Other good reasons for withholding information, such as:
 - to protect personal privacy;
 - to avoid disclosing a trade secret or prejudice to a commercial position;
 - to protect an obligation of confidence (qualified by the Act in some detail);
 - to avoid prejudice to public health or safety;
 - to avoid prejudice to measures to mitigate material public loss;

- to maintain free and frank expression of opinions by, or between members, officers and others;
- to protect members and officers from improper pressure or harassment;
- to maintain legal professional privilege;
- to avoid prejudice or disadvantage to the authority's commercial activities or negotiations;
- to prevent the use of official information for improper gain or advantage.

The Ombudsman recently announced that he is carrying out an investigation into the way Councils make decisions under the Local Government Official Information and Meetings Act 1987 (LGOIMA).

The investigation will look at Councils' actions and decisions when holding Council meetings, to determine whether our Council's approach to meetings and the use of workshops, briefings and informal meetings held from the start of the previous electoral term (12 October 2019) meets the legal requirements and purposes of Part 7 of LGOIMA. A particular focus of the Chief Ombudsman's investigation will be to consider whether Councils' practices and decisions or recommendations made to hold meetings and workshops, briefings and informal meetings are reasonable, correct and consistent with the provisions and purposes of LGOIMA to '...promote the open and public transaction of business at meetings of local authorities in order –

(i) to enable more effective participation by the public in the actions and decisions of local authorities; and

(ii) to promote the accountability of local authority members and officials...'

The investigation will involve consideration of Councils' supporting administrative structures, leadership and culture, policies, processes, practices, decision making and record keeping.

Once the findings from this investigation become available, we will review our own practices against the findings and resulting recommendations. In the meantime we are making sure that we follow good practice. Council's Standing Orders provide guidance regarding this.

5. Local Authorities (Members Interests) Act 1968 (Refer Auditor-Generals Guides of "Managing Conflicts of Interest")

5.1 This Act has two underlying purposes:

- ensuring that members are not affected by personal motives when they participate in authority matters; and
- in contracting situations, preventing members from using their position to obtain preferential treatment from the authority.

5.2 With respect to contracts, it is stated that no person shall be capable of being elected or appointed to the Local Authority or a Committee thereof if he or she, or their partner, has an interest in a contract made on behalf of the Local Authority which exceeds \$25,000 including GST in any one year.

5.3 Where a member's interest in a contract arises through membership of an incorporated company, the Act applies to him in the following circumstances:

- (a) The member or spouse singly or between them own directly or through a nominee ten percent or more of the issued capital of the company or any company controlling that company;
- (b) The member or spouse is a member of the company and either of them is also the managing director or general manager (by whatever names they are called) of that company or of any company controlling that company.

The above does not apply where:

- (a) The member and spouse are living apart;

- (b) The member did not know and had no reasonable opportunity of knowing that the spouse owned any part of the issued capital of the company or of any company controlling that company, or held any offices set out in (b) above.
- 5.4 With respect to pecuniary interest, the Act prohibits a member voting or taking part in the discussion of any matter before the Council or a Committee thereof if that person has directly or indirectly any pecuniary interest, other than an interest in common with the public.
- 5.5 A member is deemed to have a pecuniary interest in the matter if:
 - (a) The member or spouse singly or between them own, either directly or through a nominee, ten percent or more of the issued capital of the company or of any other company controlling that company;
 - (b) The member or spouse 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;

and either the member or spouse is the managing director or the general manager (by whatever names they are called) of that controlling company.
- 5.6 The Act lists a number of exceptional circumstances which may exempt members from disqualification on both of the grounds listed above.
- 5.7 Failure to disclosure pecuniary interest can lead to conviction with a fine not exceeding \$100. If the conviction is not successfully appealed, the Councillor or committee member is automatically disqualified from office.
- 5.8 The Audit Office has a primary role in applying and taking action under this Act.
- 5.9 The guide, written by the Auditor-General, provides greater detail on this particular act, and the matter of pecuniary and non-pecuniary conflicts of interest in general. The last matter is probably the greatest risk to an elected member and the decision making process in general, and the advice is to always err on the side of caution.
 - (c) The member or spouse is a member of a company controlling the company having a pecuniary interest in the matter before the Council or its Committee,

6. Section 99, 105 and 105A Crimes Act 1961

The below offences under the crimes act, these are criminal offences and are covered by a maximum of two years imprisonment.

- 6.1 Section 105 of the Crimes Act states “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 himself or any other person in respect in any act done or admitted to be done or admitted by him in his official capacity”.
- 6.2 Every one is liable to imprisonment for a term not exceeding three years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any official in respect of any Act or remission by him in his official capacity.

In essence, Section 105 covers bribery and corruption of judicial officers, including persons who are members of any tribunal authorised by law.
- 6.3 Section 105A provides that every official is liable to imprisonment for a term not exceeding seven years who, whether within New Zealand or elsewhere, corruptly uses any information acquired by him in his official capacity to obtain directly or indirectly an advantage to pecuniary gain for himself or any other person.
- 6.4 Section 99 of the Act defines a bribe as “bribe means any money, valuable considerations, office or employment or any benefit whether direct or indirect”.

- 6.5 Official means “any member or employee of any local authority or public body”. Therefore Sections 105 and 105A apply to employees and members of the Stratford District Council.

7. Secret Commissions Act 1910

The Secret Commissions Act sets out offences associated with the actions of either giving or receiving gifts or other considerations by Councillors or Officers as agents of Council. A “secret commission” refers to bribery and corruption-style offences relevant to the private sector. The key corruption offence criminalises the bribing of an agent (an inducement or reward) for doing or forbearing to do something in relation to the principal's affairs or business. The act also covers the act of accepting such a bribe by an agent (in this case councillors or council staff).

Like offences under the crimes act, these are criminal offences with a maximum of two years imprisonment.

- 7.1 The Secret Commissions Act prohibits secret commissions.
- 7.2 Gifts to an agent without the consent of the principal are an offence under the Act if they are corruptly given or offered as an inducement or reward for doing any act in relation to the principal's affairs or having shown favour or disfavour to any person in relation to the principal's affairs.
- 7.3 Likewise the acceptance of a gift by an agent who corruptly accepts any gift or consideration as an inducement or reward for doing any act in relation to the principal's affairs or business, or for showing favour or disfavour to any person in relation to the principal's affairs or business is an offence.
- 7.4 It is also an offence for an agent who makes a contract on behalf of his principal and fails to disclose to his principal at the time of making the contract any pecuniary interest which the agent has in making the contract.
- 7.5 Every officer or member of a local authority, Board, Council or Committee is deemed, under the Act to be an agent of that local authority, Board, Council or Committee.
- 7.6 The full Act is available for inspection by any Councillor.

8. Financial Markets Conduct Act 2013

- 8.1 The Financial Markets Conduct Act governs how financial products are created, promoted and sold, and the ongoing responsibilities of those who offer, deal and trade them. It also regulates the provision of some financial services.
- 8.2 The principal objective behind the Act is to facilitate capital market activity, in order to help businesses to grow and to provide individuals with opportunities to develop their personal wealth.
- 8.3 For this objective to be achieved, investors need to be satisfied that they and their advisers have the information required to make confident and informed decisions, that there will be appropriate governance arrangements in place and that obligations on issuers and others will be enforced. Issuers need investor participation in capital raisings to be successful, and regulation needs to achieve the desired objectives at minimum cost.

9. Health and Safety At Work Act 2015

- 9.1 The Health and Safety At Work Act provided a significant change to New Zealand's health and safety legislation and was a response to the scrutiny placed on New Zealand's health and safety practices following the Pike River tragedy.
- 9.2 The Act allocates duties to those people who are in the best position to control risks to health and safety as appropriate to their role in the workplace, and for the person conducting a business or undertaking (PCBU) (i.e. the Council) to ensure, as far as is reasonably practicable, the safety of workers and others who may be impacted by the work the business undertakes.

9.3 One of the significant changes is the introduction of “Officers”, who is any person occupying a position in relation to the business or undertaking, that allows the person to exercise significant influence over the management of the business or undertaking.

9.4 For the purposes of the Act, elected Council members (which include the Mayor and Councillors) and the Chief Executive are by default identified as “Officers”. However the elected Council members do not have a duty to exercise due diligence to ensure compliance by any council-controlled organisations with its duties or obligations under the Act unless that member is also an officer of the council-controlled organisation.

Officers have obligations of due diligence, which are:

- (a) to acquire, and keep up-to-date, knowledge of work health and safety matters; and
- (b) to gain an understanding of the nature of the operations of the business or undertaking of the PCBU, and generally of the hazards and risks associated with those operations; and
- (c) to ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
- (d) to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information; and
- (e) to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act; and
- (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

9.5 Elected members are exempt from the liabilities of failure to meet the due diligence duty. The focus of any liability is on the Council as the PCBU.

10. Public Records Act 2005

10.1 The Public Records Act’s purpose is to provide a framework to keep central and local government organisations accountable by ensuring records are full and accurate, well maintained and accessible. The Act provides for the continuity of the National Archives and the role of the Chief Archivist. The Act enables accountability by ensuring that full and accurate records of the affairs of local government are created and maintained. It also provides a framework within which local authorities create and maintain their records and has a role in enhancing public confidence in the integrity of local authority records.

10.2 The definition of a record includes information, whether in its original form or otherwise, and is not limited to just written information. The definition also includes (but is not limited to) a signature, a seal, text, images, sound, speech, or data in any medium and recorded or stored by any electronic device or process.

10.3 In the conduct of their affairs elected members may receive information directly, for example from constituents. Members will need to consider whether that information meets the definition of a local authority record and if so will need to ensure it is included in the Council’s records.

11. The Local Government (Pecuniary Interests Register) Amendment Act 2022

11.1 The Local Government (Pecuniary Interests Register) Act 2022 will come into force on 20 November 2022. It inserts a new set of requirements and obligations into the Local Government Act 2002, all of which relate to elected members’ pecuniary interests.

Once in place, every council will be required to keep a register of its members' pecuniary interests, and to make a summary of it publicly available. Each council must appoint a registrar to maintain the register, and provide advice and guidance to members.

Elected members are obliged to provide annual returns, which are to be included on the registers, and to subsequently advise of any errors or omissions in those returns. Any failure to comply with these obligations amounts to an offence.

Guidance provided by Simpson Grierson is attached to this report as **Appendix 1**.

12. Risk Mitigations in place

Legislation	Risk	Mitigation
Local Government Official Information and Meetings Act	Ombudsman investigation	All LGOIMA requests are handled centrally within council. Standing Orders Council provided IT and email for elected members
Local Authorities (Members Interests) Act	An elected member fails to declare a pecuniary interest in a council decision and participate in discussion or voting.	Conflict of interest register and reminder at every meeting to declare conflicts with any matters on the agenda. Elected member induction and training, including this explanation of legislation.
	An elected member has an actual, or perceived bias due to their own statements or conduct indicating a predetermined decision before hearing all the relevant information.	
	An elected member has an actual, or perceived bias due to a close relationship or involvement with an individual or organisation affected by the decision.	
Section 99, 105 and 105A Crimes Act	Actions of an elected member being influenced by a gift or reward.	Anti-fraud and corruption policy Procurement policy
	Use of information gained as part of council business for their own or someone else's gain.	Conflict of interest register and reminder at every meeting to declare conflicts with any matters on the agenda. Elected member induction and training, including this explanation of legislation.
Secret Commissions Act	Elected member (or staff) advise someone to enter a contract with a third party and receive a gift or reward in return, or presents false receipts to council.	Anti-fraud and corruption policy Procurement policy Conflict of interest register and reminder at every meeting to declare conflicts with any matters on the agenda. Elected member induction and training, including this explanation of legislation.
Financial Markets Conduct Act	If council chose to offer stock to the public, elected members may be personally liable for the accuracy and correctness of investment documents.	To date council has not offered stock to the public. Mitigations would be considered if this situation was to arise.
Health and Safety At Work Act	Officers (includes elected members and staff) not fulfilling their obligations or due diligence.	H&S Policy and Manual Pre-qualification of contractors Full-time H&S advisor Regular reporting of H&S to A&R

Legislation	Risk	Mitigation
Public Records Act	Records do not meet requirements regarding completeness, accuracy and maintenance of public records.	Information Management Policy Secure storage of physical and electronic documents. Ongoing staff training regarding document management obligations.
Local Government (Pecuniary Interest Register) Amendment Act	Elected member fails to provide annual returns within the statutory timeframe or provides inaccurate or incomplete information.	Appointment of registrar Provision of advice and reminders by staff Pecuniary Interest Register published online.
	Elected member fails to inform the registrar upon becoming aware of an error or omission in their returns as soon as practicable.	

The legislation in this report can be accessed via the following links:

- [Local Government Official Information and Meetings Act 1987](#)
- [Local Authorities \(Members Interests\) Act 1968](#)
- [Section 99, 105 and 105A Crimes Act 1961](#)
- [Secret Commissions Act 1910](#)
- [Financial Markets Conduct Act 2013](#)
- [Health and Safety At Work Act 2015](#)
- [Public Records Act 2005](#)
- [The Local Government \(Pecuniary Interests Register\) Amendment Act 2022](#)

Attachments:

- Appendix 1** Local Government (Pecuniary Interest Register) Amendment Act: Simpson Grierson – Guidance for councils on registers of members’ pecuniary interests
- Appendix 2** Secret Commissions Act & Crimes Act: Global Legal Insights – Bribery & Corruption
- Appendix 3** LGOIMA: Equip – Ethics, Values, Integrity and Trust
- Appendix 4** OAG: Managing conflicts of interest: A guide for the public sector
- Appendix 5** OAG: Local Authorities (Members’ Interests) Act 1968: A guide for members of local authorities on managing financial conflicts of interest
- Appendix 6** Health and Safety At Work Act: Worksafe: Quick Reference Guide.

Sven Hanne
Chief Executive

Date 18 October 2022



Guidance for councils on registers of members' pecuniary interests

Prepared by Simpson Grierson for Taituarā

July 2022



Foreword

The Local Government (Pecuniary Interests Register) Amendment Act 2022 passed on 20 May 2022, and will come into force on 20 November 2022. It inserts a new set of requirements and obligations into the Local Government Act 2002 (LGA 02), all of which relate to members' pecuniary interests.

The purpose of the new provisions is to increase transparency, trust and confidence in local government by keeping and making publicly available, information about members' pecuniary interests. It is largely modelled on the regime that applies to members of Parliament, but has been tailored to reflect particular aspects of local government.

Moving forward, every council (including all territorial authorities, unitary authorities, and regional councils) will be required to keep a register of its members' pecuniary interests, and to make a summary of it publicly available. Each council must appoint a Registrar to maintain the register, and provide advice and guidance to members.

Members are obliged to provide annual returns, which are to be included on the registers, and to subsequently advise of any errors or omissions in those returns. Any failure to comply with the new obligations amounts to an offence, and so it is important that members understand and comply with these new provisions, and that they are provided with necessary guidance (including from council staff).

The purpose of this guidance is to help councils understand the new requirements and obligations. Given the Registrar's role of providing advice and guidance to members, this guidance also discusses members' obligations. The guidance also discusses the relationship between the new provisions and other legislation, including the Local Authorities (Members' Interests) Act 1968, the Privacy Act 2020, and the Local Government Official Information and Meetings Act 1987. Finally, this guidance provides a checklist designed to help councils identify and satisfy the new requirements and obligations.

This guidance is not intended as legal advice. If and when particular issues arise, councils should consider obtaining specific legal advice that addresses their particular circumstances.



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Part A: Councils and Registrars' Obligations

A1 Summary of councils' obligations

1. There are four main obligations for Councils. They must:
 - (a) keep a register of members' pecuniary interests (the Register);¹
 - (b) appoint a Registrar, who will compile and maintain the Register for the council² – the appointment is discussed at A2, and the Registrar's role is discussed at A3 and A4;
 - (c) make a summary of the information contained in the Register publicly available³ – discussed at A5; and
 - (d) ensure that information contained in the Register is:
 - (i) only used or disclosed in accordance with the purpose of the Register,⁴ and
 - (ii) retained for 7 years after the date on which a member provides the information, and is then removed from the Register.⁵
2. The obligations in paragraph (1)(d) will help guide councils' compliance with the Privacy Act 2020 in terms of handling personal information contained on the Register. They will also be relevant to councils' handling of requests for information included on any Register, which could be made under section 10 of the Local Government Official Information and Meetings Act 1987. The relationship between the new pecuniary interests provisions and these other Acts is discussed at C2 (Privacy Act) and C3 (LGOIMA).

A2 Appointment of Registrar

3. Each council must appoint a Registrar. The person appointed will need to be suited to engaging directly with members, and be well placed to make judgements about the advice to be given to members.
4. The power to appoint the Registrar sits with the full council, but is capable of being delegated.⁶ Councils should check if existing delegations to chief executives are sufficient to capture this power, or if a specific delegation might be required from the full Council (assuming that the chief executive is to make the appointment).
5. The LGA 02 makes clear that the council's chief executive may be appointed as the Registrar.⁷ This is not a requirement – some councils might consider it more appropriate for the Registrar to be a general manager or senior governance advisor.
6. Given the Registrar may need be involved in potential offending by members (due to any failure to comply with the new obligations), it may be considered preferable for the members themselves not to be closely involved in that decision, so as to avoid any potential suggestion of the Registrar being seen as favourable to members.

1 Section 54A(1) of the LGA 02.

2 Section 54G(1) of the LGA 02.

3 Section 54A(3)(a) of the LGA 02.

4 Section 54A(3)(b)(i) of the LGA 02.

5 Section 54A(3)(b)(ii) of the LGA 02.

6 Under clause 32(1), Schedule 7 of the LGA 02.

7 Section 54G(2) of the LGA 02.

Part A: Councils and Registrars' Obligations

A3 Registrars' obligation to compile and maintain the Register

7. Registrars are tasked with the compilation and maintenance of the Register.⁸ In practice, Registrars will look after the Register on a day-to-day basis, thereby helping to ensure the council satisfies its obligation to keep a register.
8. The Registrar will need to ensure that a Register is complete. Under the LGA 02, the Register is to comprise all pecuniary interest returns filed by members **and** any corrections made by members.⁹ "Corrections" are the notifications given to the Registrar advising of an error or omission in a return.¹⁰
9. Registrars are specifically obliged to "correct" the Register when advised of an error or omission.¹¹ This suggests that any correction received must be somehow linked to the original return in question, so that anyone accessing the original return will be made aware of the correction.
10. In compiling and maintaining the Register, Registrars will need to ensure there is compliance with the Privacy Act 2020 – which is discussed at C2.
11. The LGA 02 provides some boundaries for Registrars when compiling and maintaining the Register. It states that a Registrar is **not** required to:¹²
 - (a) obtain a return from a member;
 - (b) notify a member if they fail to make a return by the due date; or
 - (c) notify a member if there is any error or omission in their return.
12. The lack of any proactive role for the Registrar makes it clear that the intention of these new provisions is that members must take personal responsibility for ensuring that they satisfy their obligations. It is not for the Registrars to make sure they do so.
13. Despite this, it would be good practice for Registrars to remind members, and provide appropriate guidance, about the need to provide a return, the due dates for returns, and the ongoing obligation to notify the Registrar of any error or omission with their returns. Assisting members to understand how to fulfil their obligations will ultimately make Registrars' jobs easier.

A4 Registrars' obligation to provide guidance and advice

14. Registrars are also tasked with providing advice and guidance to members in connection with their obligations.¹³
15. While Registrars should endeavour to help members who seek advice, but there may be some practical limits to how much a Registrar can help. A Registrar cannot be expected to provide definitive advice on the application of the new provisions for every situation. There will be some areas of uncertainty, although this should lessen over time (likely through auditing processes, and potentially case law).
16. If Registrars are unsure about any compliance related or interpretation issues, legal advice can be sought. If that is not feasible for whatever reason, the Registrar could recommend to the member that they obtain their own legal advice.

8 Section 54G(1)(a) of the LGA 02.

9 Section 54A(2) of the LGA 02.

10 Made under section 54D of the LGA 02.

11 Section 54D.

12 Section 54H(2).

13 Section 54G(1)(b) of the LGA 02.

Part A: Councils and Registrars' Obligations

17. Practically, when in doubt, a Registrar would be sensible to always advise a member to err on the side of disclosure – an over-disclosure of interests will not trigger any of the new offences, but an under-disclosure might.

A5 How to make a summary of the Register publicly available

18. Each council must make “a summary of the information contained in the Register publicly available”.¹⁴
19. The term “publicly available” is defined in the LGA 02.¹⁵ It requires a council to take reasonable steps to:
- (a) ensure that the summary is accessible to the general public in a manner appropriate to its purpose, including, where practicable, on the council’s Internet site; and
 - (b) publicise, in a manner appropriate to the purpose and significance of the summary, both the fact that the summary is available and the manner in which it may be accessed.
20. Good practice would be for councils to put a copy of the summary on their website (eg on the same page as where elected members bios are available), and to also have a copy (electronic or hard-copy) available at the front counter in appropriate council offices.
21. The LGA 02 does not provide any detail about what should be included in a “summary” of the register. As a result, councils will need to make a judgement call about how much to include. In doing so, they should look to strike an appropriate balance between members’ privacy and the purpose of the Register. The purpose of the Register is described as:¹⁶
- to record members’ interests so as to provide transparency and to strengthen public trust and confidence in local government processes and decision-making.
22. This statutory purpose suggests that the public should be given enough information about a pecuniary interest so that they can understand how it could impact any Council process or decision-making, and why it ought to have been disclosed, but no more than that.
23. For example, a summary should reference the name of a relevant entity and the general nature of the member’s interest in that entity, such as “XYZ Trust (beneficial interest)”. This should provide sufficient information for people to identify relevant interests, but without providing excessive details about a member’s personal affairs.
24. The pecuniary interests’ regime for members of Parliament (on which the new LGA 02 provisions are largely based) provides a helpful example. That regime also requires that a summary of the MPs’ register be published (both online and in a hardcopy booklet form).¹⁷ While the interests required for disclosure vary somewhat between MPs and council members, the online version of the MPs’ register provides a useful indication of the level of information that should be included in a summary. The current Parliamentary register is available at: <https://www.parliament.nz/en/mps-and-electoralates/members-financial-interests/mps-financial-interests/2022-current-register-of-members-pecuniary-and-other-specified-interests/>
25. In the event of uncertainty as to how much should be disclosed in a summary, it would be good practice for the Registrar to consult the member concerned, but it will ultimately need to be the Registrar (for the Council) that decides how it will satisfy the requirement to publish a summary. Councils could seek legal advice in problematic situations.
26. If a member of the public is unhappy with the level of disclosure in any summary, it will be open to them to request the additional information held on the Register under the Local Government Official Information and Meetings Act 1987. The relationship with that Act is discussed further at C3.

14 Section 54A(3)(a) of the LGA 02.

15 See section 5(3) of the LGA 02.

16 Section 54B.

17 Parliamentary Standing Orders, Appendix B, clauses 18 and 19.

Part B: Members' Obligations

B1 New regime applies to elected, not appointed, members

27. The new requirements and obligations will apply to the following members:¹⁸
- (a) members of the council;
 - (b) members who have been elected under the Local Electoral Act 2011 to a community board that is part of the council; and
 - (c) members who have been elected under the Local Electoral Act 2011 to a local board that is part of the council.
28. Appointed members will **not** be subject to these requirements and obligations. For example, individuals who have been appointed as a member of a council committee due to their skills, attributes, or knowledge will not need to provide annual returns to the Registrar.

B2 Summary of members' obligations

29. The key obligations for members are to:
- (a) make annual returns that contain information on certain pecuniary interests to the Registrar, within the statutory timeframe;¹⁹
 - (b) ensure that the information contained in their returns is accurate;²⁰ and
 - (c) in the event of becoming aware of an error or omission in their returns, advise the Registrar of that as soon as practicable.²¹
30. If a member does not comply with these obligations, they will commit an offence, which is punishable by a fine of up to \$5,000. Offences and prosecutions are discussed at B7.

B3 Members are responsible for fulfilling their obligations, but can seek advice

31. The LGA 02 explicitly states that it is the responsibility of each member to ensure that they fulfil their obligations.²²
32. It also makes clear that the Registrar is not required to obtain returns from members, or to notify members about any failure to make a return by the due date or of any error or omission in a return.²³ So while a Registrar might choose to provide helpful notification to members, they are not obliged to do so.
33. It is implicit that members are expected to take personal responsibility for making sure that they satisfy their own obligations.
34. Where members have any questions about making returns, or their obligations more generally, they can seek advice from the Registrar. It will also be open to members to obtain their own legal advice, if they consider that would be helpful.

¹⁸ Section 54A(1) of the LGA 02.

¹⁹ Section 54C of the LGA 02.

²⁰ Section 54D(1) of the LGA 02.

²¹ Section 54D(2) of the LGA 02.

²² Section 54H(1) of the LGA 02.

²³ Section 54H(2) of the LGA 02.

Part B: Members' Obligations

B4 Due dates for returns

35. In each triennium, the due dates for a return are:²⁴
- (a) **Year 1:** the day that is 120 days after the date on which the member comes into office under section 115 of the Local Electoral Act 2001;
 - (b) **Year 2:** the last day of February in the second year of the triennium; and
 - (c) **Year 3:** the last day of February in the third year of the triennium.
36. Calculating the due date for Years 2 and 3 should be straight-forward – it will typically be 28 February of the relevant year. However, in any leap year, the due date will typically be 29 February.
37. If 28 February (or 29 February in a leap year) falls on a weekend, then the due date will be the next working day.²⁵ For example, if 28 February (in a non-leap year) is a Saturday, then the due date will be Monday, 2 March.
38. Calculating the Year 1 due date is more complicated. Under section 115 of the LEA, a member comes into office the day after public notice of the final election result is given under section 86 of the LEA. So the 120 day period should be calculated from the date that is one day after the public notice.
39. Note that the date that is one day after the public notice should not be counted in calculating the 120 day period – rather the day that is two days after the public notice is 'day 1' of the 120 days.²⁶ The date that is 'day 120' should be the due date for members' returns.
40. Weekends and public holidays should be included in the 120 days – but if the 120th day falls on a weekend (or public holiday), then the due date will be the next working day.²⁷
41. The following example may assist:

Date	Event
8 October 2022	Polling day
15 October 2022	Public notice of the final election result is given, under section 86 of the LEA (note that this date can vary ²⁸)
16 October 2022	Members come into office
17 October 2022	'Day 1' of the 120 day period
13 February 2023²⁹	Due date for members' returns ('day 120')

42. Due dates will likely vary between councils, as final election results may be publicly notified on different days. Due dates could even vary between members on the same council in some situations. For instance, a member whose election was dependent on a recount, or who is elected in a by-election within the first year of the triennium, could have a significantly later due date for their Year 1 return.

²⁴ Section 54C(2) of the LGA 02.

²⁵ See section 55 of the Legislation Act 2019, and the definition of "working day" in section 13 of that Act.

²⁶ Section 54 of the Legislation Act 2019, see Item 2 in that section.

²⁷ Section 55 of the Legislation Act 2019.

²⁸ Typically, public notice of the final result for the 2022 election will be given perhaps a week or so after polling day. With the change to the "public notice" definition applying to the 2022 triennial elections, it is possible that the public notice might be given even sooner, perhaps just a matter of days after polling day. The change to the "public notice" definition results from the Local Electoral Act 2002 not including any definition for "public notice". As a result, councils have previously relied on the definition of "public notice" that was in the Interpretation Act 1999 (which required publication of notices in local newspapers). However, the Interpretation Act was repealed in late 2021, and replaced by the Legislation Act 2019. The definition of "public notice" in that Act provides for either publication in local newspapers, or simply through a council's website. Obviously, publication through a website can be achieved more quickly than publication through newspapers, meaning that section 86 public notices may potentially be made sooner than the usual one week or so.

²⁹ 13 February 2023 happens to be a Monday, thus a working day.

Part B: Members' Obligations

43. The due date will end at midnight on the relevant day (ie members will have the entire day in which to provide their returns). So, assuming Registrars allow for return via email, members will be able to send in a return after business hours on the due date, but before midnight, and still satisfy the statutory deadline. Returns emailed after midnight on the due date will fall outside the deadline.
44. Although the return obligations are a member's responsibility, it would be good practice for a Registrar to advise members well in advance of the due date for a return (and specify the final return date), and to send a reminder a few weeks beforehand. This will be especially important for Year 1 returns, given the calculation of the due dates in Year 1 is more complicated.

B5 The time period that a return must cover

45. Returns are made in respect of a 12 month period.³⁰ This means that any relevant pecuniary interests that existed at any point during this 12 month period must be disclosed in the member's return. It is not necessary for an interest to have existed for the full 12 month period.
46. The exact dates of the 12 month period will depend on the due date for the particular return. Specifically, the period will be the 12 months that ended on the day that is one month before the due date.³¹
47. So the practical steps involved in identifying the 12 month period are:
- (a) What is the due date for the return? This is your starting point for calculating the 12 month period.
 - (b) What is the date that is one calendar month before that due date? That date is the final day in the relevant 12 month period.
 - (c) What is the date that is one calendar year before that 'final day'? The day after that date is the first date in the relevant 12 month period.
48. Taking the upcoming triennium as an example (building on the example given for calculating a Year 1 due date in the section above), the dates are:

Year of triennium	Due date for return	12 month time period covered by return
Year 1 – 2023	13 February 2023 ³²	14 January 2022 to 13 January 2023
Year 2 – 2024 (leap year)	29 February 2024 ³³	30 January 2023 to 29 January 2024
Year 3 – 2025	28 February 2025 ³⁴	29 January 2024 to 28 January 2025

49. This example illustrates that the 12 month periods for returns will not always align. There is the potential for reporting on some of the same days in two returns, eg both the Year 2 and 3 returns will need to report on 29 January 2024.
50. There is also the potential for some short periods not to be covered by any return, eg no return will report on the period from 14 January 2023 to 29 January 2023. Gifts or payments received during such windows of time will not need to be disclosed in any return made under the LGA 02. Councils may, however, choose to address such potential 'loopholes' through non-statutory reporting. This is further discussed at C1.

³⁰ Section 54C(1) of the LGA 02.

³¹ Section 54C(1) of the LGA 02.

³² This date is based on the example set out in the due date section of this guidance. It assumes the public notice of the final election result (given under section 86 of the Local Electoral Act 2001) was given on 15 October 2023.

³³ 29 February 2024 will be a Thursday, thus a working day.

³⁴ 28 February 2025 will be a Friday, thus a working day.

Part B: Members' Obligations

51. Reporting on the right 12 month period is a member's responsibility. However, as with the due date, it would be good practice for a Registrar to advise members of the 12 month period that a return must cover (specifying the relevant dates).

B6 Information to be disclosed in members' returns

52. There are two broad categories of information that members need to disclose in their returns:
- (a) information relating to the member's position (covered in section 54E of the LGA 02); and
 - (b) information relating to the members' activities (covered in section 54F of the LGA 02).
53. Within these two broad categories are numerous specific types of interests that need to be disclosed.
54. Appendix A sets out each of the specific types of interests that need to be disclosed, and includes a brief explanation of, and examples for, each type.
55. Appendix B sets out a series of flow charts, which members can work through when completing their returns to ensure they have addressed all relevant interests.
56. Note that it is only the members' interests that need be disclosed – interests of spouses, partners, and other close family members do not need to be disclosed under the LGA 02.³⁵

B7 Prosecutions against members and councils' potential role

57. New offences have been created that will apply where members fail to comply with their obligations. Specifically, a member will commit an offence if they:³⁶
- (a) fail to file a return that includes all relevant information by the due date;
 - (b) file an inaccurate return; or
 - (c) do not advise the Registrar of any error or omission in a return as soon as practicable after they become aware of it.
58. Each offence is punishable by a fine of up to \$5,000.³⁷
59. Prosecution for these offences will follow the procedure for existing offences under section 235 of the LGA 02, which relate to a member acting while disqualified or unqualified.³⁸ It will typically be up to the Secretary for Local Government to file a charging document and prosecute members who have committed an offence.³⁹ The Secretary for Local Government is the Chief Executive of the Department of Internal Affairs. (Note that parties other than the Secretary are not prevented from bringing a private prosecution.⁴⁰)
60. For offences where members have acted while disqualified or unqualified, the Secretary is obliged to bring proceedings.⁴¹ However, no equivalent obligation exists for the offences relating to the members' returns, which

35 The fact that the LGA 02 provisions do not capture any interests of a member's whanau creates issues with using the register for helping to ensure compliance with the Local Authorities (Members' Interests) Act 1968. The potential to supplement the register with additional disclosure requirements is discussed at C1.

36 See sections 54C and 54D(1) and (2), and section 235, of the LGA 02.

37 Section 242(2) of the LGA 02.

38 See section 235 of the LGA 02, which has previously provided for offences for acting while disqualified or unqualified, and now also applies to breaches of sections 54C and 54D(1) and (2).

39 It is evident that this is the role of the Secretary from section 235(2) and also from clause 3(1), Schedule 7 of the LGA 02.

40 Clause 3(2), Schedule 7 of the LGA 02.

41 Clause 3(1), Schedule 7 of the LGA 02.

Part B: Members' Obligations

suggests the Secretary for Local Government should have some discretion in deciding whether or not to bring proceedings against members for these offences.

61. The LGA 02 is silent on whether councils are required to report possible offences to the Secretary for Local Government, although it is difficult to see how else the Secretary would identify potential offences. There is the potential for the Secretary to issue guidance or an indication about when and how they would expect to be notified of any potential offences by councils.
62. In the absence of such guidance, it would be good practice for councils to develop their own policies about when they will refer potential offences to the Secretary for Local Government. If a strict approach were adopted, councils may decide to refer every potential offence identified to the Secretary, with members notified of the referral as soon as possible afterwards.
63. Alternatively, councils may decide that discretion is appropriate, eg providing that potential offences will be referred to the Secretary unless there is good reason not to do so. Council policies could provide a disputes process first, and if no resolution is reached, a member will then be notified of an intention to make a referral to the Secretary, and be given a reasonable opportunity to put forward information that would be relevant to there being 'a good reason' not to make the referral.
64. It would be unlawful to adopt a policy that precludes referral of any potential offences to the Secretary.
65. The most likely officers to make referrals would be the Chief Executive and/or the Registrar. The council should ensure that appropriate delegations are in place for any officers who may need to make referrals to the Secretary.
66. It would be good practice for elected members to have some involvement in the development of any internal policy, and for them to formally adopt it via resolution. Copies of the policy should be given to members in advance of returns being due (or form part of a fuller set of guidance material), so that they understand the consequences of failing to meet their obligations.

Part C: Relationship with Other Legislation

C1 Relationship with LAMIA and supplementing the new statutory framework

67. The Local Authorities (Members' Interests) Act 1968 (**LAMIA**) governs some conflict of interest issues for members, notably those involving pecuniary interests. In particular:
- (a) the **contracting rule** prohibits members from being interested in any contracts (eg being a director of a company who is party to the contract, being a sub-contractor of an entity who is party to the contract) with the council that have a combined value of more than \$25,000 in a financial year – unless the Auditor-General approves the arrangement; and⁴²
 - (b) the **participation rule** prohibits members from participating in any council decision-making in which the member has a pecuniary interest that is not one held in common with the public – unless the Auditor-General has pre-approved such participation.⁴³
68. The LGA 02 sets out two specific clarifications about the relationship with LAMIA.⁴⁴ It provides:
- (a) a member's obligations under the LGA 02 in relation to the Register are in addition to any obligations under LAMIA, and do not affect the application of LAMIA; and
 - (b) a pecuniary interest that a member has declared under the LGA 02 regime is not necessarily an interest for the purposes of LAMIA.
69. These clarifications suggest that LAMIA and the new LGA 02 provisions will, in practice, need to operate separately from one another.
70. Despite this, there is some potential for overlap between the relevant requirements – in that the Register may help to identify interests that might be relevant to triggering either of the contracting or participation rules under LAMIA. For example, before entering into a contract with a party, it would be sensible for the council to check that that party is not mentioned on the Register.
71. That said, the Register will not provide a comprehensive approach to identifying interests relevant to LAMIA compliance. There are two main reasons for this.
72. First, the pecuniary interests reported under the LGA 02 are unlikely to capture the full range of interests that can sometimes create problems under LAMIA. For instance, LGA 02 returns do not need to cover:
- (a) a member's spouse's or dependents' pecuniary interests;
 - (b) details of a member's debtors and creditors;
 - (c) any contracts with the council in which the member is interested; or
 - (d) any non-financial interests that the member may have.
73. Second, the LGA 02 does not require any ongoing reporting of new interests as they arise between annual returns.
74. The practical result of these differences is that the Register will be of some, but limited, use to councils in managing conflicts of interest under LAMIA.
75. As a result, councils may want to consider if and how they might supplement the LGA 02 in a manner that assists with on-going compliance with LAMIA. For instance, councils could choose to request additional disclosures by

42 See section 3 of LAMIA.

43 See section 6 of LAMIA.

44 Section 54H(3) of the LGA 02.

Part C: Relationship with Other Legislation

members, capturing the types of interests listed above. They might also want to impose an ongoing obligation on members to notify interests as they arise (eg 4 or 6 monthly updates to returns), and perhaps extend some or all of this system to their appointed members. Such a supplementary regime could address any periods of time that are not already covered by returns under the LGA 02 (see the 'loophole' issue discussed at B5).

76. Councils who are minded to supplement the statutory regime will need to carefully consider the best way for them to do this (eg will they add questions to the statutory return form, or adopt a separate process). They will also need to consider what, if anything, about these additional interests they will proactively make publicly available.
77. Any supplementary disclosure regime should be incorporated into a council's code of conduct for its elected members. This will allow the regime to be enforced through code of conduct complaints.
78. Many councils already have existing disclosure regimes. These councils will need to consider whether to retain these regimes once the new LGA 02 provisions are engaged and, if so, how they might need to be modified to accommodate the LGA 02 requirements.

C2 Privacy compliance needed

79. The Register will contain members' personal information.⁴⁵ As a result, the information privacy principles (IPPs) in the Privacy Act 2020 will apply to this information.⁴⁶
80. To help ensure compliance with the Privacy Act, a council should consider how it will comply with each of the IPPs in relation to the Register. This could be done by way of a privacy impact assessment.⁴⁷
81. In carrying out a privacy impact assessment, there are some matters the council should bear in mind:
 - (a) IPP 3 requires members to be informed of certain matters at the time of collection of their personal information. For this purpose, a draft privacy statement is included in the template return form set out in Appendix C.
 - (b) The LGA 02 states that council must ensure information contained in the Register is retained for 7 years from when the member provides the information, after which it is to be removed from the Register.⁴⁸ This will be relevant to IPP 9, which addresses how long a council may keep personal information for.
 - (c) The LGA 02 also requires councils to ensure that the information in the Register is only used or disclosed in accordance with the purpose of the Register.⁴⁹ This will be relevant to compliance with IPPs 10, 11 and 12.

C3 LGOIMA requests can still be made

82. The Register will constitute "official information" in terms of the Local Government Official Information and Meetings Act 1987 (LGOIMA).⁵⁰ As a result, members of the public will be able to request information held on the Register. Practically, the publication of the summary of the Register should significantly reduce the likelihood of such LGOIMA requests being made, but they remain a possibility if someone considers that the summary does not provide sufficient detail.

⁴⁵ See the definition of "personal information" in section 7 of the Privacy Act 2020.

⁴⁶ The information privacy principles are set out in section 22 of the Privacy Act 2020.

⁴⁷ Information about privacy impact assessments is available on the Privacy Commissioner's website, here: <https://www.privacy.org.nz/publications/guidance-resources/privacy-impact-assessment/>

⁴⁸ Section 54A(3)(b)(ii) of the LGA 02.

⁴⁹ Section 54A(3)(b)(i) of the LGA 02.

⁵⁰ "Official information" is defined in section 2 of LGOIMA as meaning "any information held by a local authority", which would clearly capture the Register.

Part C: Relationship with Other Legislation

83. Any LGOIMA requests for information relating to the Register (which is not already available in the summary of the Register) will need to be considered on a case-by-case basis.
84. The LGA 02 states that councils are required to ensure the information in the Register is only disclosed in accordance with the purpose of the Register.⁵¹ The purpose of the Register is described in the LGA 02 as:⁵²
- to record members' interests so as to provide transparency and to strengthen public trust and confidence in local government processes and decision-making.
85. Accordingly, if a LGOIMA request were to be made that was not in accordance with the purpose of the Register, it would be open to the council to refuse the request on the basis that making the information available would be contrary to the LGA 02.⁵³ It seems very unlikely, however, that this will occur in practice, given the very wide scope of the purpose of the Register.
86. Another possible withholding ground that a council would need to consider is protection of privacy.⁵⁴ Almost all the information in the Register will be personal information, so this ground is likely to be relevant.
87. Members' privacy will, however, need to be balanced against public interest considerations favouring disclosure.⁵⁵ Whether such public interest considerations exist, and the weight that should be afforded to them, is likely to depend on the circumstances of the particular LGOIMA request (eg who has made the request? Why do they want the information? What is the information in question? Is there a particular council process or decision that the information requested is relevant to?).
88. Depending on the particular request, there might possibly be other potential withholding grounds to consider. For example, a possible ground is where withholding the information is necessary to protect people (including members) from improper pressure or harassment, so that the effective conduct of public affairs can be maintained.⁵⁶

51 Section 54A(3)(b)(i) of the LGA 02.

52 Section 54B of the LGA 02.

53 See section 17(c)(i) of LGOIMA.

54 See section 7(2)(a) of LGOIMA.

55 See section 7(1) of LGOIMA.

56 Section 7(2)(f)(ii) of LGOIMA.

Part D: Pecuniary Interests Checklist for Councils

Being ready for the new LGA 02 provisions will require:

- ✓ Officers to prepare advisory materials to be given to members following the 2022 elections, which provide practical guidance on how to file a return, the due dates for the triennium and the applicable 12 month periods for the returns
- ✓ Officers to prepare a return form (hard-copy and/or electronic), which members can use to complete their annual returns (a template form is included in Appendix C)
- ✓ Officers to undertake some form of privacy impact assessment in relation to the personal information to be held on the Register, to ensure compliance with the information privacy principles in the Privacy Act 2020
- ✓ Council (or anyone with the requisite delegated authority) must appoint a Registrar (this can be done before 20 November 2022 if necessary, due to section 43(1)(c) of the Legislation Act 2019)
- ✓ Council to consider whether to adopt policies that address and clarify when referrals of potential prosecutions should be made to the Secretary for Local Government
- ✓ Council to determine whether to supplement the LGA 02 with additional disclosure requirements and, if so, what that supplementary regime will involve, plus ensure the code of conduct provides for this regime

It would be good practice to inform members before the 2022 elections about these new requirements and obligations, and the preparatory work that is being undertaken.

It is up to councils to determine how to package these matters. But one approach could be to develop a 'one-stop-shop' guidance document for members, which captures their obligations under the LGA 02, information about due dates and 12 month periods, and also the council's approach to dealing with the referral of potential offences to the Secretary for Local Government or any potential disagreements between members and the council or Registrar.

APPENDIX A: Table of Interests and Examples

Interests relating to the Member's position		
Section reference	Explanation of interest and required disclosure	Example
Section 54E(1)(a)	<p>Members must disclose the name of any company in which they are a director, or in which they hold or control more than 10% of the voting rights.</p> <p>Members are required to provide a description of the main business activities of the company. This could be relatively brief, but must accurately represent what activities or services the company undertakes or provides.</p>	<p>Matthew is a director of his family business, being a company that owns and leases commercial property. He is also elected to the local council. Matthew will need to declare his directorship, by providing both the name of the company and a description of its main business activities in his return. He describes the business activities as “developer and landlord of commercial properties”.</p> <p>Caitlin is a shareholder in her sister’s ice cream company. She holds 10 voting shares out of the total 80 voting shares the company has issued. As a result she owns 12.5% of the voting shares in the company and will need to declare her shareholding by providing both the name of the company and its main business activities in her return. She describes the business activities as “sells ice-cream through retail shops in Auckland and Wellington”.</p>
Section 54E(1)(b)	<p>Members must disclose the name, and describe the main business activities, of any other company or business entity in which they hold a pecuniary interest.</p> <p>‘Business entities’ mean any separate body or organisation, whether incorporated or unincorporated, that carries on any profession, trade, manufacturing, or undertaking for pecuniary profit, and includes a business activity carried on by a sole proprietor, but does not include any blind trust. Such entities can include joint ventures, partnerships, sole proprietors or other arrangements that are not companies.</p> <p>There is a clear exception for any managed investment scheme, such as Kiwisaver or an index fund, which do not need to be disclosed. A</p>	<p>Emiria is a partner at a law firm. She must disclose the name of the law firm and give a description of its main activities (eg “provider of legal services”).</p>

APPENDIX A: Table of Interests and Examples

Interests relating to the Member's position		
Section reference	Explanation of interest and required disclosure	Example
	<p>"managed investment scheme" has the same meaning as in section 9(1), (2) and (4) of the Financial Markets Conduct Act 2013.</p> <p>A member will not have a pecuniary interest in a company merely because they have an interest in that company's 'parent' company or its subsidiary.</p>	
Section 54E(1)(c)	<p>Members must disclose the name of any employer, and describe the main business activities of that employer(s). This could include permanent, fixed term or casual employment under an employment agreement (or contract of service).</p> <p>It will not include services provided as a freelancer or contractor under a contract for service (which is likely to be captured by section 54E(1)(ca) or (b) if the member is acting through some form of business entity, or perhaps through section 54F(1)(c) if acting personally). It will also not include holding the position of elected member of a council, local board, or community board, or any other position for which the member concerned would not be qualified unless he or she held their role as an elected member.</p>	Meilin has a part time job as a lecturer in environmental studies at City University. She must disclose that she is employed at City University and that their main activities are providing higher education and research.
Section 54E(1)(d)	Members must disclose any beneficial interest they have in a trust and the name of the trust. Having a beneficial interest means that they are a "beneficiary" of the trust (and are typically listed as such in the trust deed). There is no cap or requirement on the amount or type of beneficial interest, so members will need to disclose any beneficial interest that they have in a trust.	Melanie is a beneficiary of her parents' family trust: the Jack and Jill trust. She is also aware that she is an uri (descendant) of a local iwi. The iwi's settlement assets are held in a trust and the trust's beneficiaries are all uri (descendants) of the iwi's tupuna (ancestors). Melanie will need to disclose the name of both trusts.
Section 54E(1)(e)	Members must disclose if:	Frank is on the board of a charitable cycling organisation Bikes4U. Bikes4U applied for a council grant to run cycle repair workshops, as

APPENDIX A: Table of Interests and Examples

Interests relating to the Member's position		
Section reference	Explanation of interest and required disclosure	Example
	<p>(a) they are a member of an organisation, or a member of the governing body of an organisation, or a trustee of a trust; and</p> <p>(b) that organisation or trust receives funding from, or has applied to receive funding from, the local authority, local board, or community board to which the member has been elected.⁵⁷</p> <p>For this interest, the member must disclose the organisation or trust's name and a description of its main activities.</p> <p>If the organisation concerned is a council-controlled organisation (CCO), then the member does not need to provide a description of the CCO's main activities. The member could instead simply give the CCO's name and note it is a CCO.</p>	<p>part of encouraging active transport. Frank will therefore need to disclose that he is on the board of Bikes4U and provide a description of Bikes4U's main activities.</p>
Section 54E(1)(f)	<p>Members must disclose the title and description of any organisation to which they are appointed by virtue of being an elected member.</p> <p>The statutory language used is somewhat confusing. All other interests in section 54E require disclosure of the "name" of a company/entity/employer etc. It is arguable that the reference to "title" is meant to require a member to disclose the title of the role they hold.</p>	<p>Emily is the mayor of a large city council, and as part of that role serves as the chair of a network of Mayors that is called the Council Employment Advocacy Group (CEAD). Emily should disclose that she is the chair of CEAD, and that CEAD aims to encourage youth employment in council jobs.</p>

57 If a member has an interest to disclose under section 54E(1)(e), this is an interest that is likely to constitute a pecuniary interest under section 6 of the Local Authorities (Members' Interests) Act 1968, and possibly prevent them participating in any decision-making relevant to the organisation concerned.

APPENDIX A: Table of Interests and Examples

Interests relating to the Member's position		
Section reference	Explanation of interest and required disclosure	Example
	<p>Given this uncertainty (and in light of the purpose of the new provisions), it will be prudent to disclose the title of the role that the member has been appointed to and the name of the organisation concerned, as well as providing a description of that organisation's activities.</p>	
Section 54E(1)(g)	<p>Members must disclose the location of any real property that they have any legal interest in, outside of an interest as a trustee. "Real property" is property that consists of land and/or buildings.</p> <p>A member will have a legal interest in land if they own or lease it.</p> <p>A licence to occupy, or having a caveat or encumbrance, will not constitute having a legal interest in property. Also, being a director or shareholder in a company that owns land will not constitute having a legal interest in that land.</p> <p>Members are required to disclose the location of the property. This requires disclosure of the general location (eg suburb and city), but does not require disclosure of the street address.</p> <p>Members must also provide a description of the nature of the property. For instance, it might be "family home", "holiday home", "investment property", or "commercial property".</p>	<p>Mariama leases her family home, jointly with her husband, at 123 Main Road in a small town called Fairtown. Her disclosure is: "Family home – Fairtown (leasehold interest)". Mariama is not obliged to disclose that her interest in the property is a leasehold one, but chooses to provide this for clarity.</p>

APPENDIX A: Table of Interests and Examples

Interests relating to the Member's position		
Section reference	Explanation of interest and required disclosure	Example
Section 54E(1)(h)	<p>If a member is a beneficiary of a trust (and they ought reasonably to know that they are a beneficiary), they must disclose the location and description of any real property held by the trust. "Real property" is property that consists of land and/or buildings.</p> <p>There are two exceptions. A member does not need to make any disclosure if the trust is:</p> <ul style="list-style-type: none"> • a unit trust for which the member has already made a disclosure under section 54E(1)(d); or • a retirement scheme whose membership is open to the public. <p>Members are required to disclose the location of the property. This requires disclosure of the general location (eg suburb and city), but does not require disclosure of the street address.</p> <p>Members must also provide a description of the nature of the property. For instance, it might be "residential property", "investment property", or "commercial property".</p>	<p>James is a beneficiary of a trust established by his aunt and uncle. The home James lives in, which is in Karori in Wellington, is owned by the trust. James leases the house from the trust. James' disclosure in relation to this trust will be "Residential property – Karori, Wellington". (James will already have disclosed the name of the trust under section 54E(1)(d) of the LGA 02, and disclosed his leasehold interest in the property as a "family home" under section 54E(1)(g) of the LGA 02.)</p> <p>Evan is a longstanding member of his local Church in Small Town. The Church runs a charitable trust to provide financial support to Church members for living costs or education costs. All members of the Church are beneficiaries. The Church building is held by the trust. Evan will need to disclose in relation to the trust: "Church property and building – Small Town". (Evan will have already disclosed the name of the trust under section 54E(1)(d) of the LGA 02.)</p>

Interests relating to the Member's activities		
Section Reference	Explanation of interest and required disclosure	Example

APPENDIX A: Table of Interests and Examples

<p>Section 54F(1)(a) and section 54F(2)</p>	<p>Members must disclose if:</p> <ul style="list-style-type: none"> (a) they have travelled to a country other than New Zealand; and (b) their travel costs and/or accommodation costs were not paid in full by the member and/or a member of their family. <p>“Member of their family” includes only the member’s spouse, partner, parent, grandparent, child, stepchild, foster child, grandchild or sibling. It does not include a member’s wider family or whānau.</p> <p>In particular, the member must disclose:</p> <ul style="list-style-type: none"> (a) the name of the country; (b) the purpose of travelling to the country; and (c) the name of each person who contributed fully or partially to travel costs to/from the country; and (d) the name of each person who contributed fully or partially to the member’s accommodation costs while in the country. 	<p>Hemi was sponsored by the Rotary Club to go on a trip to Japan to promote New Zealand as a great place to study and work. The Rotary Club paid for his flights and half of his accommodation. Hemi will therefore need to disclose that he went to Japan, that the purpose of the trip was to promote New Zealand as a location for business and study, and that the Rotary Club contributed to both his travel and accommodation costs.</p>
--	---	---

APPENDIX A: Table of Interests and Examples

<p>Section 54F(1)(b) and section 54F(3)</p>	<p>Members must disclose gifts received if a gift is worth more than \$500, or if all gifts from one donor have a combined value of more than \$500.</p> <p>The value of gifts is the “estimated market value in New Zealand”.</p> <p>Gifts will include hospitality and donations of cash or in kind.</p> <p>There are two exceptions. No disclosure is needed if:</p> <ul style="list-style-type: none"> • the gift is a donation made to cover expenses in an electoral campaign;⁵⁸ or • the gift was from a member of the member’s family and the member does not consider that information about the gift should be included in the return taking the purpose of the register into account. <p>In terms of the second exception, “family” includes only the member’s spouse, partner, parent, grandparent, child, stepchild, foster child, grandchild or sibling. It does not include a member’s wider family or whānau.</p> <p>Also, according to section 54B of the LGA 02, the purpose of the register “is to record members’ interests so as to provide transparency and to strengthen public trust and confidence in local government processes and decision-making”.</p> <p>Where disclosure is required, the member must provide:</p>	<p>Claire’s cousin Alfred is a hairdresser. He gifts her a \$600 voucher to his salon to celebrate her being elected to the council. Claire must disclose the gift, and includes the following in her return: “Hair salon voucher – Alfred Smith”.</p> <p>Claire also receives a congratulatory gift from her brother Antoni. Antoni is a wine-seller and gives Claire seven boxes of wine. The wine would be worth \$800 if bought from a retail shop. Antoni lives in the council’s district, and is likely to be significantly impacted by some proposed changes to the council’s district plan. While Antoni is her brother (and so comes within the definition of “family”), Claire decides that it is prudent to disclose the gift and Antoni’s identity, taking the purpose of the register into account.</p>
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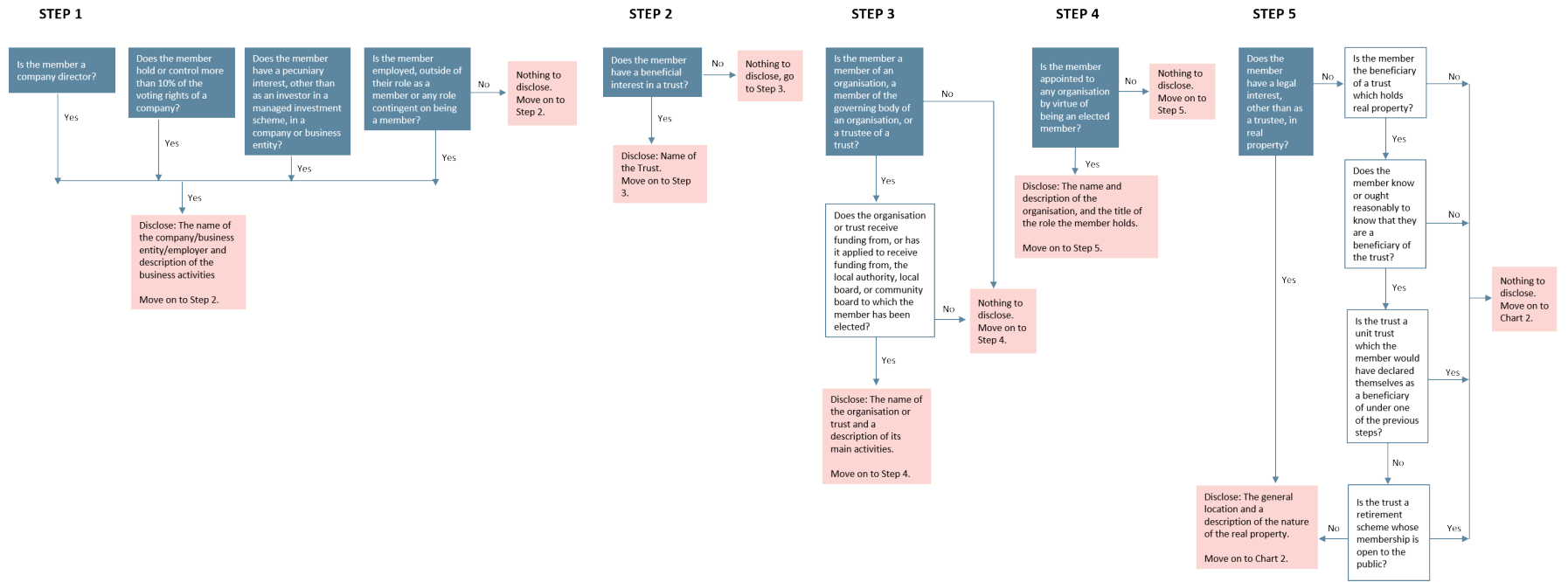
58 Members will of course need to make appropriate disclosures about their election donations as part of returns that they submit under the Local Electoral Act 2001.

APPENDIX A: Table of Interests and Examples

	<ul style="list-style-type: none"> • a description of each gift; and • the name of the donor of each gift, if known or reasonably ascertainable by the member. 	
Section 54F(1)(c)	<p>Members must describe each payment they have received for activities in which the member is involved.</p> <p>There are several important exceptions to this. No disclosure is needed for:</p> <ul style="list-style-type: none"> • salary or allowances paid to the member under the Remuneration Authority Act 1977 or the LGA 02; • payment received from an interest already required to be disclosed under section 54E of the LGA 02; or • payment in respect of any activity that the member ceased to be involved in before becoming a member. 	<p>Chantelle occasionally gives speeches at conferences about her life experiences, and usually receives a speaker’s fee for doing so. Her speaking roles are on a freelance one-off basis. Chantelle does this in her own name, without using any business entity or company. Chantelle will need to disclose the payment, and includes the following in her return: “\$300 fee for speaking at <i>Life 2022 Conference</i>.”</p> <p>Amy is a member of the city council and also a novelist. She recently wrote a popular book. Amy receives annual royalties under her contract with the book’s publisher, which she entered into in her own name, without using any business entity or company. Amy will need to include the following in her return: “\$1,234 annual royalties for novel <i>Flying to the Moon</i>”.</p>

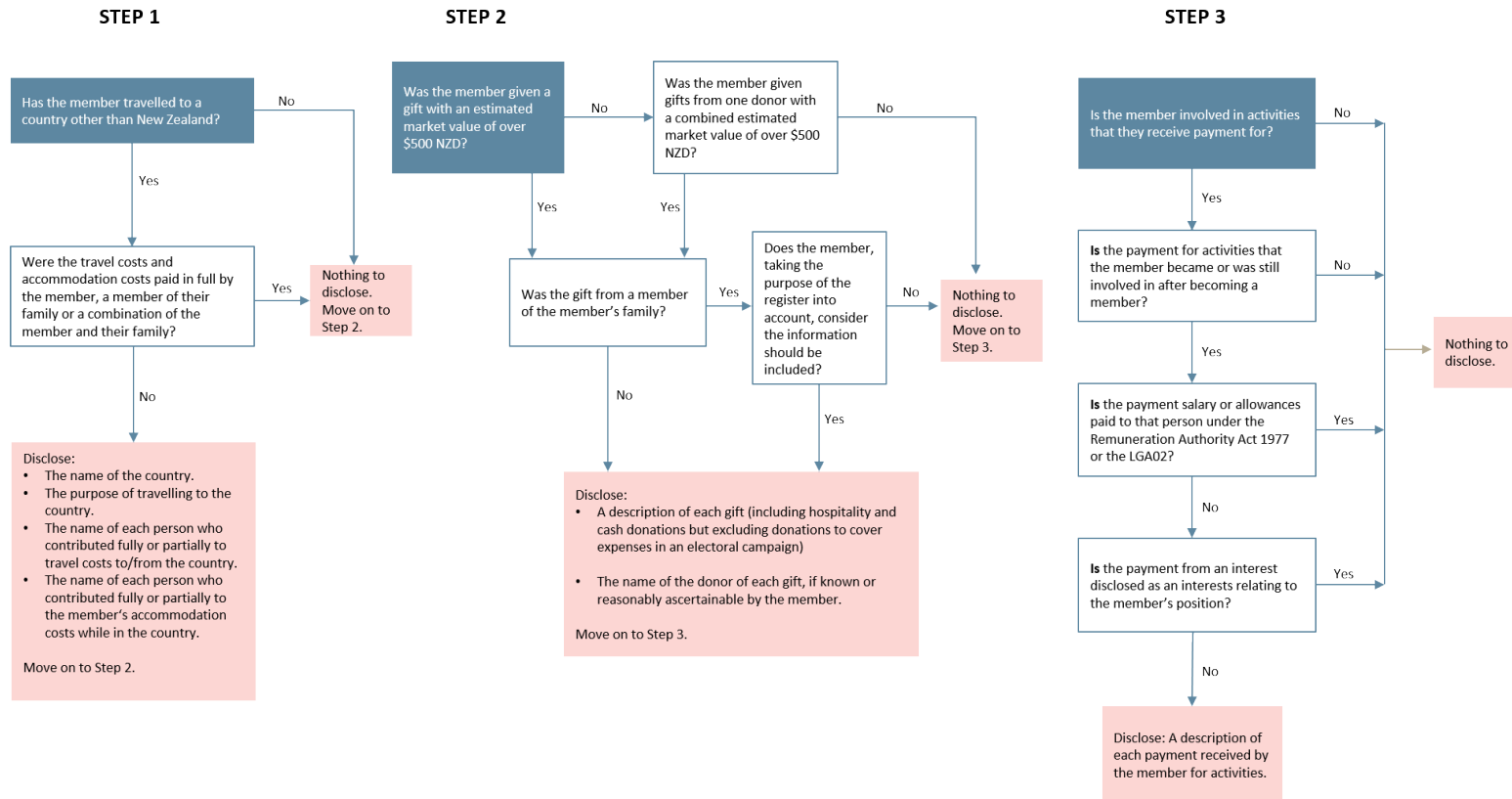
APPENDIX B: Flowcharts of Members' Interests

Chart 1: Information relating to a member's position



APPENDIX B: Flowcharts of Members' Interests

Chart 2: Information relating to a members' activities



APPENDIX C: Template Pecuniary Interest Return Form

Pecuniary Interests Return Form

Information for members:

Sections 54A to 54I of the Local Government Act 2002 (**LGA**) requires members to provide annual returns of certain pecuniary interests. You can use this form to provide your return.

You are responsible for complying with your obligations under the LGA relating to this return.

You can, however, seek advice and guidance from the Registrar of the members' pecuniary interests register on how to complete your return.

How to file this return:

You can file your completed return form with the Registrar by *[insert details of possible means for filing that are available, eg give email address, online portal information, postal, or information about how to file in person]*.

The due date for the return is *[insert date]*.

Privacy statement:

Your personal information is being collected so that the Council and the Registrar can comply with their obligations under the LGA, particularly those in sections 54A and 54G.

You are required to provide this information under sections 54C to 54H of the LGA. Failure to do so will constitute an offence under section 235 of the LGA.

Your personal information will be used and disclosed in accordance with the purpose of the register set out in section 54B of the LGA, which is to record members' interests so as to provide transparency and to strengthen public trust and confidence in local government processes and decision-making. The information will be retained for 7 years from the date on which you provide it, and will then be removed from the register.

A summary of your personal information will be made publicly available by the Council, in accordance with section 54A of the LGA. In addition, your personal information will constitute official information, and so is subject to the Local Government Official Information and Meetings Act 1987.

You have the right to access and seek correction of your personal information under the Privacy Act 2020. This can be done by contacting *[insert contact details]*.

APPENDIX C: Template Pecuniary Interest Return Form

Return:

This return is made under section 54C of the Local Government Act 2002, providing information required under sections 54E and 54F of that Act.

Member's name:

12 month period covered by this return:

- | | Yes | No |
|--|--------------------------|--------------------------|
| 1. Are you the director of a company?
(section 54E(1)(a)) | <input type="checkbox"/> | <input type="checkbox"/> |

If yes, please provide the name of the company (or companies) and a description of their main business activities:

- | | Yes | No |
|---|--------------------------|--------------------------|
| 2. Do you hold or control more than 10% of the voting rights in a company?
(section 54E(1)(a)) | <input type="checkbox"/> | <input type="checkbox"/> |

If yes, please provide the name of the company (or companies) and a description of their main business activities:

APPENDIX C: Template Pecuniary Interest Return Form

3. Do you have a pecuniary interest in any other company or business entity (except as an investor in a managed investment scheme)?
(section 54E(1)(b))
- | Yes | No |
|--------------------------|--------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> |

If yes, please provide the name of the company (or companies) or business entity (or entities) and a description of their main business activities:

4. Are you employed?
(section 54E(1)(c))
- | Yes | No |
|--------------------------|--------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> |

If yes, please provide the name of your employer(s) and a description of their main business activities:

5. Do you have a beneficial interest in a trust?
(section 54E(1)(d))
- | Yes | No |
|--------------------------|--------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> |

If yes, please provide the name of the trust(s):

APPENDIX C: Template Pecuniary Interest Return Form

6. Are you a member of an organisation, a member of the governing body of the organisation, or a trustee of the trust **and** that organisation or trust receives, or has applied to receive, funding from the Council, local board or community board to which you are elected?
(section 54E(1)(e))
- | Yes | No |
|-----|----|
| | |

If yes, please provide the name of the organisation(s) or trust(s) and a description of their main business activities:

7. Are you appointed to any organisation by virtue of being an elected member?
(section 54E(1)(f))
- | Yes | No |
|-----|----|
| | |

If yes, please provide the title for your appointed role(s), the name of the organisation(s), and a description of them:

8. Do you have a legal interest, other than as a trustee, in any real property?
(section 54E(1)(g))
- | Yes | No |
|-----|----|
| | |

If yes, please provide the location of the real property (eg suburb and city, or town) and a description of the nature of property (eg. family residence, rental property, or commercial property):

APPENDIX C: Template Pecuniary Interest Return Form

9. Are you the beneficiary of a trust that holds real property (but excluding a trust that is a unit trust you have already disclosed under question 5 or a trust that is a retirement scheme whose membership is open to the public)? Yes No
(section 54E(1)(h))

Yes	No
<input type="checkbox"/>	<input type="checkbox"/>

If yes, please provide the location of the real property (eg suburb and city, or town) and a description of the nature of property (eg. family residence, rental property, or commercial property):

10. Have you travelled to any country (other than New Zealand) where your travel and accommodation costs were not paid in full by you and/or a member of your family? Yes No
(section 54F(1)(a))

Yes	No
<input type="checkbox"/>	<input type="checkbox"/>

(In this question, "family" means the member's spouse, partner, parent, grandparent, child, stepchild, foster child, grandchild, or sibling.)

If yes, please provide the name of the country, the purpose of travelling to the country, the name of each person who contributed (in whole or in part) to the costs of travel to or from the country to or any accommodation costs incurred by the member while in the country (if more than one country was travelled to, provide all of this information for each country):

APPENDIX C: Template Pecuniary Interest Return Form

	Yes	No	
<p>11. Have you received any gift (other than a gift from a family member, unless you consider that gift should be disclosed taking into account the purpose of the members’ pecuniary interests register) that:</p> <ul style="list-style-type: none"> • has an estimated market value in New Zealand of over \$500; or • when combined with all other gifts from the same donor, have a total estimated market value in New Zealand of over \$500? <p><i>(section 54F(1)(b))</i></p> <p><i>(In this question: “gift” includes hospitality and donations in cash or kind, but excludes electoral expenses, and “family” means the member’s spouse, partner, parent, grandparent, child, stepchild, foster child, grandchild, or sibling.)</i></p> <p>If yes, please provide a description of the gift(s) and the name of the donor of the gift(s) (if known or reasonably ascertainable by you):</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>	<table border="1" style="width: 100%; height: 40px; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%;"></td> </tr> </table>		

	Yes	No	
<p>12. Have you received any payment for an activity in which you are involved, excluding:</p> <ul style="list-style-type: none"> • any salary or allowance paid to you under the Remuneration Authority Act 1977 or the Local Government Act 2002 • any payment received from an interest that has already been disclosed in this return; or • any payment made in respect of an activity that you ceased to be involved in before becoming a member? <p><i>(section 54F(1)(c))</i></p> <p>If yes, please provide a description of the payment(s) received by you:</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>	<table border="1" style="width: 100%; height: 40px; border-collapse: collapse;"> <tr> <td style="width: 50%;"></td> <td style="width: 50%;"></td> </tr> </table>		

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Appendix 2



Bribery & Corruption

Third Edition

Contributing Editors: Jonathan Pickworth & Jo Dimmock
Published by Global Legal Group

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New Zealand

Ben Upton
Simpson Grierson

Overview of the law and enforcement regime

Sources of law

New Zealand law treats bribery and corruption as criminal matters. Two principal statutes apply:

- the Crimes Act 1961 (Part 6, sections 99 to 106) (**Crimes Act**); and
- the Secret Commissions Act 1910 (**Secret Commissions Act**).

The Crimes Act contains criminal offences related to, among other things, the corrupt use of official information and the corruption and bribery of the Judiciary, Ministers of the Crown, Members of Parliament, law enforcement officers and public officials. Penalties include terms of imprisonment of up to 14 years for the most serious cases.

The Secret Commissions Act contains bribery and corruption-style offences relevant to the private sector. Penalties range from NZD2,000 to two years' imprisonment.

New Zealand law also contains many other offences covering corruption-style crimes. These include money laundering (under the Crimes Act) and fraud (under the Serious Fraud Office Act 1990), as well as civil sanctions under the Securities Market Act 1978 relating to insider trading and market manipulation. There is also an offence under the Income Tax Act 2012, which is targeted at the bribery of local and foreign tax officials. Electoral laws also require disclosure of donor support to politicians.

Certain international treaties to which New Zealand is a signatory require New Zealand's law makers (Parliament) to ensure that local statutes are consistent with international norms. International treaties may also impose obligations on New Zealand to assist other nations in criminal and non-criminal investigations and proceedings. Relevant treaties to which New Zealand is a signatory are:

- The OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions (signed 1997, ratified 2001).
- The United Nations Convention Against Corruption (signed 2003, not yet ratified, but see proposed reforms below which should enable ratification soon).
- The United Nations Convention Against Transnational Organized Crime (signed 2000, ratified 2002).

This commentary will focus on the principal local law offences under the Crimes Act and Secret Commissions Act.

Bribery and corruption under the Crimes Act

The offences under the Crimes Act essentially cover the corrupt bribery of judges, parliamentarians and other public officials (**Public Servants**) and foreign officials, and the corrupt use of official information.

Bribery of Public Servants

In relation to bribes, it is an offence for a Public Servant to corruptly accept or obtain, agree or offer to accept or attempt 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 in his capacity as a Public Servant.

It is also an offence for any person to corruptly give or offer or agree to give any bribe to any person with intent to influence any Public Servant in respect of any act or omission by that Public Servant in his capacity as a Public Servant.

“*Bribe*” is defined to mean “*any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect*”.

Bribery of foreign public officials

With regard to a foreign public official, it is an offence to corruptly give or offer or agree to give a bribe to a person with the intention of influencing a foreign public official in respect of any act or omission by that foreign public official in his or her official capacity in order to obtain or retain business, or obtain any improper advantage in the conduct of business. This applies whether or not the bribery of the foreign public official occurs within or outside of New Zealand. However, if the act is lawful in the country of the foreign public official involved, it is not an offence.

It is not an offence if the primary or sole purpose of the act or omission was to ensure that a routine government action was performed by that foreign public official and if the value of the benefit was small. Note that this ‘facilitation payment’ defence only applies to foreign public officials, not Public Servants (see more on this below).

There is a reform underway which should repeal this dual criminality exclusion and also make it an offence for a foreign public official to pay or offer to pay a bribe. At present the law only deals with the acts of people towards such officials, not the acts of the foreign public official himself (see below).

Corrupt use of official information

In relation to the corrupt use of official information, it is an offence for a public official to corruptly use or disclose any information acquired by him in his official capacity, to obtain, directly or indirectly, an advantage or a pecuniary gain for himself or any other person. Similarly, it is an offence for any person to use information obtained in this way in order to gain an advantage or pecuniary gain.

Bribery and corruption under the Secret Commissions Act

The Secret Commissions Act covers bribery offences in the private sector. Under that Act it is an offence (in general terms) to:

- corruptly give a gift to an agent (and for an agent to accept such a gift) without the consent of the principal, where the gift (or other consideration) is an inducement or reward for doing or forbearing to do something in relation to the principal’s affairs or business;
- fail to disclose (as an agent) to the agent’s principal a pecuniary interest in a contract;
- give an agent a false receipt or invoice (or for an agent to deliver a receipt or invoice he or she knows is false to his or her principal); and
- advise any person to enter into a contract with a third person and receive or agree to receive, without the person’s knowledge, a gift or consideration from that third person as an inducement or reward.

The maximum penalty for such offences is two years’ imprisonment.

‘Corruptly’

The word ‘corruptly’ is common to most bribery offences. New Zealand’s highest court (Supreme Court) opined on the meaning of that word in *Field v R* [2011] NZSC 129. This case involved a prosecution against a Member of Parliament (Mr Taito Philip Field) for corruptly receiving a bribe. There was evidence that he had benefitted through unpaid work undertaken by Thai immigrants on his private properties after he had provided assistance to those Thai immigrants in relation to applications for New Zealand residency. Mr Field’s defence was that the unpaid work undertaken by the Thai immigrants was a gift and not a *quid pro quo* for his activities on their behalf. That defence failed.

The Supreme Court, perhaps somewhat simplistically, resolved the matter by saying that Mr Field had acted corruptly because “... *it is simply wrong for an official to accept money or like benefits in return for what has been done in an official capacity*”.

This approach would suggest that receipt of any benefit other than salary will – save only for the exception about to be noted – always be received ‘corruptly’ because it is ‘simply wrong’ to receive the benefit.

The Supreme Court did, however, introduce a *de minimis* defence. That is one “*in relation to gifts of token value which are just part of the usual courtesies of life*” or where some “*unexceptional ... other benefit*” was received. The Supreme Court opined that in such an instance the transaction would be ‘innocent’ and therefore not corrupt. The example considered in the case was a Member of Parliament being given an item of sports club attire in return for attending the opening of that sports club’s premises.

There has been academic criticism of the Supreme Court’s approach as being circular and unclear. There has also been criticism that the *de minimis* defence amounts to an attempted amendment by the Court of the statute or the creation of a form of facilitation payment defence by stealth. Furthermore there will always be doubt as to what is *de minimis* and therefore permissible, and what is not.

OECD reporting has also commented that New Zealand legislators should consider removing reference to the term ‘corruptly’ from the offence provisions. They argue that this term is unnecessary given the ‘intent to influence’ element to the offences, and the possibility that the word ‘corruptly’ increases the evidential burdens placed on prosecutors.¹

The Serious Fraud Office, for its part, adopts an approach which defines corruption as: “*Behaviour on the part of officials in the public or private sector in which they improperly and unlawfully enrich themselves or those close to them, or induce others to do so, by misusing the position in which they are placed.*”²

Overview of enforcement activity and policy during the past two years

New Zealand is a small country (4.6 million people approximately) and has a reputation for a low level of local corruption.³ It follows that prosecutions in New Zealand for bribery and corruption are few.

The only relevant statistics available (which only show the position up until December 2012⁴) are as follows:

- Between 2006 and 2012 there have been 32 prosecutions for domestic bribery offences. These resulted in 17 convictions.⁵
- There have been no local prosecutions for foreign bribery offences.⁶

There have been prosecutions under the Secret Commissions Act.

Prosecutions tend to receive a good level of publicity and certain high-profile matters have been highlighted in the media and in wider public debate of recent date.⁷

Recent regulator statements and a recent 2013 OECD report,⁸ however, have suggested that there may be an under-reporting of bribery, particularly in relation to foreign bribery. This is largely because whereas other foreign nationals, from the United States and United Kingdom in particular, are being caught and prosecuted in jurisdictions where New Zealanders actively trade (such as China), no New Zealanders appear to have been caught or prosecuted.⁹ This has led to the following comment by OECD lead examiners:¹⁰

“... lead examiners ... are still seriously concerned that the level of foreign bribery enforcement actions remain low. They are also very concerned that outdated perceptions held by some individuals, including in the public sector, that New Zealand individuals and companies do not engage in bribery, may undermine detection efforts. The lead examiners recommend that New Zealand significantly step up efforts to detect, investigate and prosecute foreign bribery.”

The OECD report does indicate that certain cases have been investigated. Four are listed in the report. None have led to prosecutions, however.

A 2015 report by Deloitte¹¹, which focused on Australia and New Zealand, revealed that of those organisations surveyed, 23% had experienced one or more known instances of domestic corruption within the last five years. The survey also revealed that 40% of the organisations surveyed had operations in high-risk jurisdictions, with 35% of those having experienced some form of bribery or corruption incident within the last five years. A large number of organisations who did have overseas operations in high-risk jurisdictions did not, however, have formal compliance programmes and many had not conducted risk assessments in this area.

There is some concern that the rebuilding of Christchurch (New Zealand’s second largest city), after devastating earthquakes in 2010 and 2011, could increase corruption. This is due to the large amount of insurance money that has flooded into that region and the large amount of building and other service work that will be required over the next decade to rebuild the city.¹²

Notwithstanding these matters, there has been no indication from regulators or the Government that major policy changes are envisaged in the near term. Some law reform has been introduced, however (see further below).

Law and policy relating to issues such as facilitation payments and hospitality

Foreign public officials

In the case of the bribery of a foreign public official, the Crimes Act provides that there will be no bribery offence where the benefit given or offered was “*committed for the sole or primary purpose of ensuring or expediting the performance by a foreign public official of a routine government action and the value of the benefit is small.*”¹³

‘Routine government action’ is defined to include any decision about whether to award new business or whether to continue existing business, or the terms of new or existing business.

This provision appears to permit small or nominal facilitation payments or hospitality when it comes to the provision of benefits to foreign officials, even if that official is responsible for determining the award or continuation of business.

The OECD has been critical of this provision and has suggested that this facilitation payment exception make clear that it will not cover instances where the benefit provides undue material benefit to the person making the payment, or undue material disadvantage to any other person.¹⁴ There is no proposed reform in this area, however.

Local bribery offences

The facilitation payment exception available in respect of foreign public officials does not apply to New Zealand Public Servants.

What a local Public Servant can rely on is the *de minimis* defence suggested by the Supreme Court in *R v Field*. That is one “*in relation to gifts of token value which are just part of the usual courtesies of life*”, or where some “*unexceptional ... other benefit*” was received. However, this defence does not strictly refer to ‘facilitation payments’. Rather ‘thank you’ gifts, albeit that such a gift might facilitate an appearance or attendance at an event.

Key issues relating to investigation, decision-making and enforcement proceduresInvestigation and enforcement process

Bribery and corruption offences will usually be investigated and prosecuted by either the New Zealand Police (if it is a low level of criminal behaviour) or the Serious Fraud Office (for more serious, complex or high-profile matters).

The Office of the Ombudsman can also look into complaints about corrupt behaviour.

Prosecutions will be dealt with through the criminal courts. The Crimes Act offences will usually be dealt with by the High Court (the superior first instance court), although prosecutions can also be determined through the lower, first instance courts (District Courts).

Prosecutorial guidelines

Decisions to prosecute crimes in New Zealand are made by the Police or Serious Fraud Office with the Solicitor General’s Prosecution Guidelines in mind. These guidelines state that prosecutions are to be initiated or continued only where:

- the evidence that can be adduced in Court is sufficient to provide a reasonable prospect of a conviction; and
- prosecution is required in the public interest.

One aspect that is relevant to the public interest test is ‘where there is any element of corruption’.

It is expected, therefore, that where there is a case that has a reasonable prospect of conviction on the admissible evidence gathered, a prosecution will be brought against a person for a bribery and corruption offence. There are, however, further hurdles in terms of actually bringing a prosecution to trial. These are addressed in the next section.

Restrictions on prosecutions

Bribery and corruption under the Crimes Act involving judges, judicial officers, law enforcement officers, official information or foreign public officials cannot be prosecuted without the permission of the Attorney General who, before giving such permission, may make such enquiries as he thinks fit.

A prosecution against a senior (High Court) judge must also only be pursued if Parliament so resolves.

Where a prosecution involves a Minister of the Crown or Member of Parliament, then leave of the High Court must be obtained. The application for leave must be on notice to the proposed defendant who must have an opportunity to be heard against the application. In determining such matters, the High Court will apply the following guidelines:¹⁵

- Is prosecution being brought in good faith?
- The court will examine the strength and sufficiency of the evidence.
- Whether the public interest required a prosecution in the circumstances of the case.
- Are there other considerations that are relevant?

Extraterritoriality and international co-operation

Extraterritoriality

Even if the acts or omissions relevant to a bribery offence under the Crimes Act were committed wholly outside of New Zealand, proceedings may be brought against a person in New Zealand provided that person is a citizen or New Zealand incorporated company, ordinarily resident in New Zealand, or that has been found in New Zealand and not extradited.¹⁶

The New Zealand courts will also have jurisdiction to determine prosecutions where any act or omission forming part of an offence occurs in New Zealand or, alternatively, any event necessary to the completion of any offence occurred in New Zealand.¹⁷ In respect of the former, the act or omission must form part of the *actus reus* of the offence.¹⁸

Bribery outside of New Zealand of foreign public officials is specifically covered by provisions in the Crimes Act. It will not be an offence in New Zealand, however, if the act done outside of New Zealand was not, at the time of its commission, an offence under the laws of the foreign country where the foreign official influenced was located. That provision is the subject of proposed reform (see below).

Foreign cooperation

New Zealand law has provision for mutual legal assistance, as required by the OECD Convention on Combatting Bribery of Foreign Officials in International Business Transactions. This is covered by the Mutual Assistance in Criminal Matters Act 1992. Recent reporting records that no mutual legal assistance requests received by New Zealand up until 2013 concerned bribery or corruption offences.¹⁹

New Zealand also has a relatively developed extradition process which is covered by the Extradition Act 1999 and numerous international treaties.

Corporate liability for bribery and corruption offences

Bribery and corruption offences can be brought against both natural and corporate persons. A “person” under the Crimes Act includes both incorporated and unincorporated bodies of persons.²⁰

In relation to corporate liability, the New Zealand courts had previously tended to follow the English law approach established in *Tesco Supermarkets Limited v Natrass* [1972] AC 153 (HL). That is, where the courts will look at whether the natural persons involved were the ‘directing mind and will’ of the corporation involved.

However, the Privy Council decision in the New Zealand appeal concerning *Meridian Global Funds Management Asia v Securities Commission* [1995] UKPC 5 has most likely extended the identification theory, such that the Court is also encouraged to look at the purpose of the provisions creating the relevant offence. That case involved a regulatory offence where certain executives were delegated a reporting task, which was not complied with. In that instance, that delegation permitted the court to find the company liable for the non-reporting by reference to the purpose of the provisions and, due to the general principles of agency and vicarious liability, the knowledge of the employees was attributed to the company.

Such principles may be difficult to apply to bribery and corruption-type offences. It has to be expected that only where very senior levels of management or directors are involved in bribery that a company might also be charged. As such, the ‘directing mind and will’ test will most likely still remain relevant in this area.²¹

Proposed reforms discussed below, however, will, if introduced, clarify that if an employee commits an offence under the foreign public official provisions, then his corporate employer can be liable if the offence fell within that employee's scope of authority, the employer benefitted and the employer did not take reasonable steps to prevent the offence.

Proposed reforms / The year ahead

On 25th June 2014, the Organised Crime and Anti-Corruption Legislation Bill was introduced. The Bill is at the second of three stages required before being passed into law. Being a Government-backed Bill with cross-party support, it should be passed into law within the year.

The Bill, insofar as it deals with bribery, introduces amendments to the foreign bribery offences in the Crimes Act. It seeks to address recommendations from the OECD Working Group on Bribery, to include clarifying the circumstances in which a company is liable for foreign bribery.

More particularly, the proposed amendments would have the following effect if made law:

- A company will be liable for bribing a foreign public official if an employee of that company pays or offers to pay a bribe when acting within the scope of their authority as an employee, with the intent to benefit the company. There is a defence available to the company if it has taken reasonable steps to prevent the offence. The onus of proof in that respect is on the company.
- The creation of a new offence to criminalise the acceptance of a bribe by a foreign public official. At present the law is limited to the payment or offer of a bribe to such an official.
- The removal of the dual criminality requirement in relation to the corruption of or by foreign public officials. There is a provision which makes clear however, that if the defendant is a foreign public official, then he or she can still rely on any immunity laws that may apply in New Zealand.
- The creation of a new offence to criminalise the acceptance of a bribe in return for using one's influence over an official.
- An increase in the penalties for bribery and corruption in the private sector under the Secret Commissions Act (from two to seven years' imprisonment), to bring those offences into line with public sector bribery.
- The 'facilitation payments' defence in respect of the foreign public official's offences is updated to prevent abuse. Relevant definitions to this offence are also updated to ensure that foreign bribery offence applies to bribery in relation to the provision of foreign aid.
- Any small facilitation payments must now be disclosed by companies.
- There is reform to the Income Tax Act 2007 to make clear that no bribes are tax-deductible.

If passed, the above-mentioned amendments will allow New Zealand to ratify the United Nations Convention Against Corruption.

Select Committee reporting (which was published in 2015) has only suggested minor amendments to the Bill as introduced. Principal recommendations relate to the introduction of penalties which would allow fines to be imposed in addition to imprisonment; the only current option being to impose a fine or a prison sentence, not both. One minority political party (the Green Party) has expressed the strong view that any type of 'facilitation' payment should be outlawed. It is unlikely that the Bill will be changed to accommodate that view, although this cannot be ruled out at this time and does have support given OECD findings in respect of New Zealand's current laws.

* * *

Endnotes

1. This recommendation has not been followed in the proposed law reform (as to which see the last section of this chapter).
2. See Serious Fraud Office website (<http://www.sfo.govt.nz>) – “What is Corruption?” This definition is used by the Asia Development Bank.
3. New Zealand often features in reporting as one of the world’s least corrupt countries. It ranks as the World’s second least corrupt country (behind Denmark) in the Transparency International Corruption Perceptions Index 2014. New Zealand was previously ranked as the least corrupt country.
4. There are no other available statistics.
5. Phase 3 Report on Implementing the OECD Anti-Bribery Convention in New Zealand, October 2013 (**OECD Report 2013**), page 18, paragraph 42.
6. OECD Report 2013, page 16, paragraph 36.
7. Recent cases or prosecutions which have been publicised have involved several high-profile matters. These include: alleged attempts to bribe a local authority consenting office (*SFO v Li*); alleged bribery in the obtaining road maintenance contracts from a local body organisation (*SFO v Borlaze, George & anr.*); and receipt of a bribe by an immigration official (*R v Meng Tam & Kai Leng Pan*). There have also been matters before the courts involving alleged failures to declare political donations (*R v Banks*) and defrauding of local government bodies (*R v Sweney*), which whilst not strictly corruption matters, did highlight allegations around the probity of public officials. A recent scandal involving payments to a Saudi businessman by the New Zealand government has also attracted public debate around corruption issues.
8. OECD Report 2013.
9. OECD Report 2013, page 8, paragraph 8.
10. OECD Report 2013, page 8, paragraph 9.
11. Deloitte Bribery and Corruption Survey 2015 – Australia and New Zealand. The survey was conducted in November and December 2014. 269 respondents were involved, including some from listed companies.
12. This fact is also noted in the OECD reporting at page 8, paragraph 8. At the time it was reported that the Christchurch earthquakes represented one of the largest insurance events since 2000.
13. Crimes Act 1961, section 105C(3).
14. OECD Report 2013, page 12, paragraph 23.
15. *Burgess v Field*, HC Auckland, CIV-2007-404-3206, 5 October 2007, Randerson J.
16. Crimes Act 1961, section 7A.
17. Crimes Act 1961, section 7.
18. *Tipple v Pain* [1983] NZLR 257.
19. OECD Report 2013, page 39, paragraph 115.
20. Crimes Act 1961, section 2.
21. The OECD Report 2013 makes the same observation. See page 15, paragraph 30.



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Ben Upton is a partner in Simpson Grierson's Banking and Finance Litigation team. He regularly appears in all levels of the New Zealand courts and also practises in a number of Pacific Island jurisdictions. He advises many banks, financial institutions and listed companies.

He specialises in banking disputes, securities and debt enforcement, insolvency, money laundering and crisis management. He has also practised in England and Hong Kong where he was involved in several bribery and corruption investigations where his firm acted for local and international clients.

He is admitted as a barrister in the Cook Islands.

Simpson Grierson is New Zealand's largest law firm and is a member of Lex Mundi.

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Ethics, Values, Integrity and Trust

Workbook & Reference Guide



We are.
LGNZ.
Equip



1 point for each = 14 total for section

(check relevant boxes below)

Do you (know)

- What LGOIMA is?
- At least ten easy ways to accidentally leak confidential information?
- Why meetings are generally held in public?
- Why you need to work together as a team even if you campaigned on different issues?

Can you (do)

- Explain how the decision to release public excluded information is made?
- Describe high-risk environments and behaviours?
- Explain when a workshop becomes a meeting?
- Rise above how you feel about a person to work constructively with them?
- Describe any conflicts and interests you may have? (see Conflicts of Interest module)

Have you (done)

- Explained how the decision to release public excluded information is made to a member of the public?
- Reflected on whether you may have contributed to the release of confidential information?
- Discussed whether all persons who might have had an interest in a topic have had the opportunity to be present for the discussion?
- Had discussions with a colleague about behaviours that might be affecting your ability to trust or respect them?
- Regularly updated your interests and conflicts?

Total __ / 14

Ben is an experienced commercial lawyer and company director. Ben commenced his professional career working for a high profile barrister, before shifting focus to commercial and rural law with French Burt Partners, a well-established firm in Southland.

Ben regularly advises significant private and public entities on governance and their director and officer duties. He also acts as mediator for commercial, company, property and rural disputes. Ben has presented and developed courses on business law for the Southern Institute of Technology and Open Polytechnic for many years and has presented on fiduciary duties at conferences.

One of the challenges for councillors is the need to constantly upgrade their technical skills and knowledge to enable them to make well informed contributions as governors.

Equip's focussed digital modules and workshops will help elected members to grow their governance and related skills. These modules, based on the *Elected Member Skills and Knowledge Check*, will allow councils to provide a nationally consistent set of induction training modules on generic topics.

This Ethics, Values, Integrity and Trust module is one of the ten digital modules developed by Equip.

Each of the 10 video modules come with a set of questions and exercises to help participants and their councils to test the development of their knowledge and skills. Local governance support staff can oversee and sign off each module completion.

- > To enable councils to provide a nationally consistent set of induction training modules on general topics.
- > To build and measure technical skills and knowledge across all elected members.
- > To assist all elected members to be able to make informed decisions and contributions to effective council strategy and plans.

- > The first key things you need to know as a councillor
- > The top 5 big issues for local government
- > What (and who) to ask
- > The most likely challenges you'll come up against



Ben Nettleton, Equip Facilitator

1. Governance 101
2. Financial Decision-Making and Transparency
3. Asset Management and Infrastructure
4. Quality Decision Making
5. Political Acumen
6. Cultural Awareness
7. Strategic Thinking
8. Ethics, Values, Integrity and Trust (this one)
9. Standing Orders
10. Conflicts of Interest

To demonstrate the importance of ethics, values, integrity and trust to the reputation and credibility of the council.

By the end of this module you will be able to:

- > explain what LGOIMA is and its importance to council behaviour;
- > describe why upholding the highest standards of integrity is a key part of council credibility; and
- > identify high-risk environments and behaviours in a council setting.

Governance is about being part of the conversation that sets the direction of your organisation.

Direction setting is done via you and your governance group's strategy development. To do this well requires:

- > participating respectfully – developing trust and confidence;
- > listening actively – understanding other points of view;
- > seeking input from management and the general public - consulting; and
- > being accountable – being transparent and honest.

Your role as a councillor is further complicated by the role being a representative one as well as a governance one.

It's worth remembering that it's impossible to please all of the people all of the time; therefore good governance and/or leadership is about being prepared to make some tough decisions.

1. Leader of community aspirations, direction and strategy
2. Collaborative culture, working to collective strengths while valuing individuals' input
3. Taking collective action for your community
4. Action and accountability as a good corporate citizen
5. Commitment to continuous improvement and personal development

Leader

As a leader of community aspirations, direction and strategy you have an advocacy role as well as an influencing role. You are contributing to the design of how community aspirations will be met, and with that settled; you are an advocate of those aspirations and the path that has been agreed to meet them. There may be a step in between if you are doing a consultation process – at which stage you are seeking input on a proposal rather than a decision. So your challenge is to listen to feedback rather than to try and justify the proposal. That bit comes when the proposal has become an agreed course of action.

Collaborative culture

The councils who work best for their communities are those who work collaboratively, enjoy high levels of trust, confidence and respect amongst themselves and with senior management.

Collective action

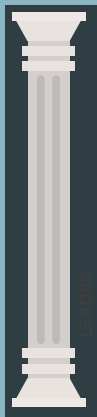
Taking collective action is about understanding the notion of collective responsibility. There will be times when you may not agree with the final decision that has been made – but the notion of collective responsibility requires that you accept the decision and work with it in the wider interests of the community.

Corporate citizenship

Good corporate citizenship entails being ethical, meeting your legal responsibilities, and being financially prudent.

Continuous improvement

This is about regularly evaluating your own performance as well as the performance of the council as a whole. There are plenty of tools to do this. Contact [\[link\]](#) to get started!



- > Ethics - from the ancient Greek *ēthikós* meaning "relating to one's character".
- > Ethics is "a set of concepts and principles" that guide us in determining good behaviour.
- > Your values are the important motivators in the way you live and work.
- > Integrity encompasses ideas of truth, honesty and good character.
- > Trust is essential to a well-functioning council - between members, between members and staff, and council and the public.

"Integrity is doing the right thing even when no one is watching."
 – C. S. Lewis

- > It is important to observe that 'tone at the top' is only part of the solution to ensuring the council is performing ethically.
- > Too many organisations fail to enquire whether the approach is consistent throughout the entity.
- > Unethical behaviour ultimately damages a council's reputation, credibility and staff.
- > This results in unhappy ratepayers, meaning that other inter-organisational relationships will be affected.
- > The loss of a hard-won, good reputation can take years to rebuild and some councils may never recover.
- > Conversely, managing a council with consistent integrity and high ethical values is simply good practice.
- > Such councils attract the best people and attract opportunities to the benefit of their region.
- > Goodwill, consistent good reputation and attraction of potential staff are all outcomes of ethical behaviour.
- > An ethical culture can also contribute to improving employee engagement and commitment as well as trust.
- > An elected member's trustworthiness and ethics will have a direct impact on how they are viewed by others and whether the council operates in a constructive way.

The LGOIMA is short for the Local Government Official Information and Meetings Act 1987.

- > It is one of the most referred to and relied upon pieces of legislation in Local Government.
- > It is the councillors' reference for meeting procedures and release of information.
- > Integrity has a particular meaning in governance as it relates to credibility.
- > It goes to the relationships between members of the governance bodies and their ability to rely upon each other.

The Act has six key parts:

Access to Information Principal (Part 1), Management of Requests for Information (Part 2), Publication of Certain Documents and Information (Part 3), Right of Access to Personal Information (Part 4), Review of Decisions (Part 5), Local Authority Meetings (Part 7).

The key purpose of the LGOIMA is to increase the availability of official information held by agencies. Also, to promote the open and public transaction of business at meetings in order to enable more effective public participation in decision-making, and promote the accountability of members and officials.

Parts 1-5 will usually be handled by council staff in the first instance, however, depending on the situation, council may from time to time be consulted and/or requested to make a decision around approving certain requests and releases.

This deals with the rights of the public to access information, including by request, rights of access by individuals to personal information and decisions made involving them, and the role of the ombudsman in reviewing decisions.

The LGOIMA essentially replicates the provisions of the Official Information Act 1982, which applies to government departments and agencies. Complaints and investigations are also handled by the Ombudsman, who is an officer of parliament.

See the back page for 10 ways information can (but should not!) be leaked.

- > Section 47 of LGOIMA provides, “Except as otherwise provided by this Part, every meeting of a local authority shall be open to the public”.
 - > Section 49 further provides that copies of the agenda shall also be made available to all such persons who request it. It is common practice for an electronic copy to be made available online.
 - > Section 46A provides that every member of the public may inspect the agenda two working days prior to the proposed meeting.
 - > Workshops while useful to gather information, carry risk because the public are not included in workshops. Therefore workshops can't be used to make decisions – this still needs to happen in a normal council table setting that the public can view.
 - > Reasons you might hold a public excluded meeting should be rare and only arise in certain circumstances. There must be a resolution that sets out the grounds for excluding the public. They might include things under the Official Information Act including protecting a person's privacy or commercial sensitivities.
-
- > There's no governing side and opposition side in local government - everyone has the same basic duties to discharge.
 - > Effective members ask hard questions and seek good answers from their peers.
 - > Constructive and positive dynamics help enable effective decision-making through robust and open debate.
 - > Exclusion is an indicator of dysfunction - councils are not well-served when a group excludes diverse thought and opinion around the table.
 - > All members have a responsibility for creating an inclusive culture that enables contribution with respect.
 - > A good indicator of an effective healthy debate is when you can offer an alternative opinion, and have a robust debate, ask probing questions and not feel that you are risking relationships around the table. Remember you are debating the issue – not the personality or person.
 - > Collective responsibility means that once a decision is made – even if you didn't agree with it – everyone accepts the decision and moves on to the next decision with a 'fresh slate'.

Scenario

The council has recently decided to appoint Sally Sharp as a new director of a council-controlled company which operates the stadium.

Barry Bravado, who was not appointed, is very unhappy about the council's decision and asks for a copy of the report that went to council when making this decision. He thinks that he is a better candidate than Sally and should have been appointed in her place.

In this situation, the council followed an Appointments Policy whereby it advertised, created a shortlist of people it interviewed, including Sally, Barry and one other, and then presented a recommendation from that shortlist to council.

The report was considered, and the decision made in a public excluded session of the council.

1) Should the council release a copy of this report to Barry and why?

Check what you got!

Here is a potential answer to the question in the previous section.

Scenario

1) Should the council release a copy of this report to Barry and why?

The Local Government Official Information and Meetings Act 1987 provides grounds on which information may be withheld - they include to protect an individual's (including someone who is deceased) privacy and commercially sensitive information.

The report that went to council most likely provides sensitive information about the skills, capability and background of the potential appointees.

The applicants are entitled to privacy, or high calibre candidates may not apply for such roles in the future.

If the report is released it will need to be heavily redacted, removing references to all personal information relating to the other candidates.

1. Explain how the decision to release public excluded information is made.

See previous scenario and question.

2. Describe high-risk environments and behaviours.

What are some of the risky environments and behaviours that elected members need to be aware of?

3. Explain when a workshop becomes a meeting.

The councillors have been aggressively lobbying in the community to build a new community pool in the outer suburbs. Three councillors, in the ward where the pool is proposed, are pushing for it particularly hard. When the item of business was considered at the last council meeting, discussion became tense, and the term "pork barrel politics" was thrown around.

To keep the peace, the Mayor organised a councillor's workshop, inviting along council staff, consultants who undertook the feasibility project, and a community group spearheading the pool project to present more detailed information.

The workshop was well-facilitated by the Mayor, with all participants presenting useful and detailed information for the councillors to consider.

Towards the end of the workshop however, one of the three councillors stated that, *"now everyone has more information, it was time for cards on the table and an indication of whether the project would get the green light at the next council meeting.... and no one could leave until this was clear"*.

a) What parts of the workshop are acceptable?

b) What parts of the workshop are not acceptable?

c) What should the mayor or councillors have done in this situation?

4. How could you rise above any personal feelings to work constructively with your fellow councillors?

A council where there is a good culture and processes, usually results in far less conflict. The chair or mayor may lead this, but all councillors have a responsibility for creating an inclusive culture that enables contribution with respect.

An effective council champions debate, diversity, thoughtful challenge and constructive dissent.

Inadequate council processes, including poorly run meetings, can frustrate councillors and mean that councils don't function efficiently and effectively.

Good processes include having:

- > a yearly plan scheduling key events
- > a meeting agenda that sets out clear objectives for the meeting
- > well-presented papers with the right information (and boards should be given enough time to consider the papers)
- > regular and well-run meetings
- > minutes that 'tell the story' of the meeting sufficiently and explain the reasons decisions were taken. They should be circulated soon after meetings.

Communication skills are essential in building relationships, respect and trust and can help prevent and resolve conflict. Councillors should reflect on how they communicate with other councillors, management and staff inside and outside meetings.

In particular, consider:

- > their body language in meetings
- > how they come across in emails
- > whether they treat others as they would like to be treated
- > whether they seek first to understand and then to be understood, and
- > whether they play the issue and not the person.

Some good strategies for councillors to adopt include:

- > expressing your views but being prepared to modify your position
- > making sure that your dissent on any item, if you feel strongly enough about it, is recorded
- > seeking the attendance of professionals at board meetings if you think their advice is necessary or desirable
- > seeking a second opinion if you think that advice provided to the board has been unduly influenced by management.

Questions

a) If you are unhappy with a recommendation on a council agenda, you should (pick one):

- > Outline your opposition on Facebook
- > Voice your concerns and ask questions of management about the recommendation
- > Phone other councillors and form a group to vote it down.

b) You are concerned about some advice council has been given by management on a decision – you should (pick one):

- > Request the council seek an external opinion to ensure it is acting legally
- > Issue a press release claiming council are acting illegally
- > Phone your lawyer and see what they think.

c) You and another councillor are at complete opposites on an important issue and your relationship is strained – you should (pick one):

- > Call them out and tell them to be more professional
- > Summarise what has happened on Facebook, so the public know what sort of person they are
- > See if you can arrange to meet informally with the councillor and better understand each other's respective positions.

> Can you do?

You might recall these questions from the *Ethics, Values, Integrity and Trust Skills and Knowledge Check*. Suggested answers are on the following pages.

1. Explain how the decision to release public excluded information is made.

Answer in previous scenario section.

2. Describe high-risk environments and behaviours.

- > Sarcastic quips and interjections during council meetings
- > Personal attacks on other councillors in the media
- > Talking to media about publicly excluded business
- > Forming a group to determine how to vote on issues
- > Leaving council agendas and documents in a shared workspace
- > See also 'Ten ways information can be leaked'.

3. Explain when a workshop becomes a meeting.

a) What parts of the workshop are acceptable?

The invitation to a workshop with more detailed presentations and the opportunity to question ideas is perfectly acceptable.

b) What parts of the workshop are not acceptable?


The demands made by the councillor at the end, no matter how they have tried to frame them, essentially amount to a request that the councillors take a vote or at least take a step that makes the vote a mere formality - this is contrary to the purposes of LGOIMA.

c) What should the mayor or councillors have done in this situation?


The mayor or councillors need to reaffirm that the councillor's request is not appropriate and that they will not be participating in such activity.

4. How could you rise above any personal feelings to work constructively with your fellow councillors?


a) If you are unhappy with a recommendation on a council agenda, you should (pick one):

- > Outline your opposition on Facebook
- > Voice your concerns and ask questions of management about the recommendation 
- > Phone other councillors and form a group to vote it down.

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- > Call them out and tell them to be more professional
- > Summarise what has happened on Facebook, so the public know what sort of person they are
- > See if you can arrange to meet informally with the councillor and better understand each other's respective positions. 

Maintaining effective relationships is important. Three years is a long time, so you shouldn't compromise your ability to work effectively as a council over one issue.

> Wrap Up

(More about Ethics, Values, Integrity and Trust)

What is the LGOIMA?

The LGOIMA is short for the Local Government Official Information and Meetings Act 1987.

Questions to ask yourself

- > Are we making decisions in this workshop (that we should defer to a council meeting)?
- > Is it reasonable to exclude the public from this matter of business and, if so, what is the basis for this decision?
- > Am I just going with the consensus view because I don't want to 'rock the boat'?
- > Is my decision consistent with my values – have I given assurance to others that I'm going back on?

How the four concepts of *Ethics, Values, Integrity and Trust* relate to Equip's Five Foundations:

1. Leader of community aspirations - making decisions which involve the community in an informed and meaningful way - the LGOIMA underpins this.
2. Collaborative means running meetings in a way which allow all members to contribute and providing minutes and agendas which inform the public.
3. Collective action requires that all councillors take responsibility for the decisions councils make to ensure effective implementation.
4. Being a good corporate citizen means ensuring council meetings are available to the public wherever possible.
5. Continuous improvement should motivate all councillors to be well-informed of the LGOIMA and its application to their role.



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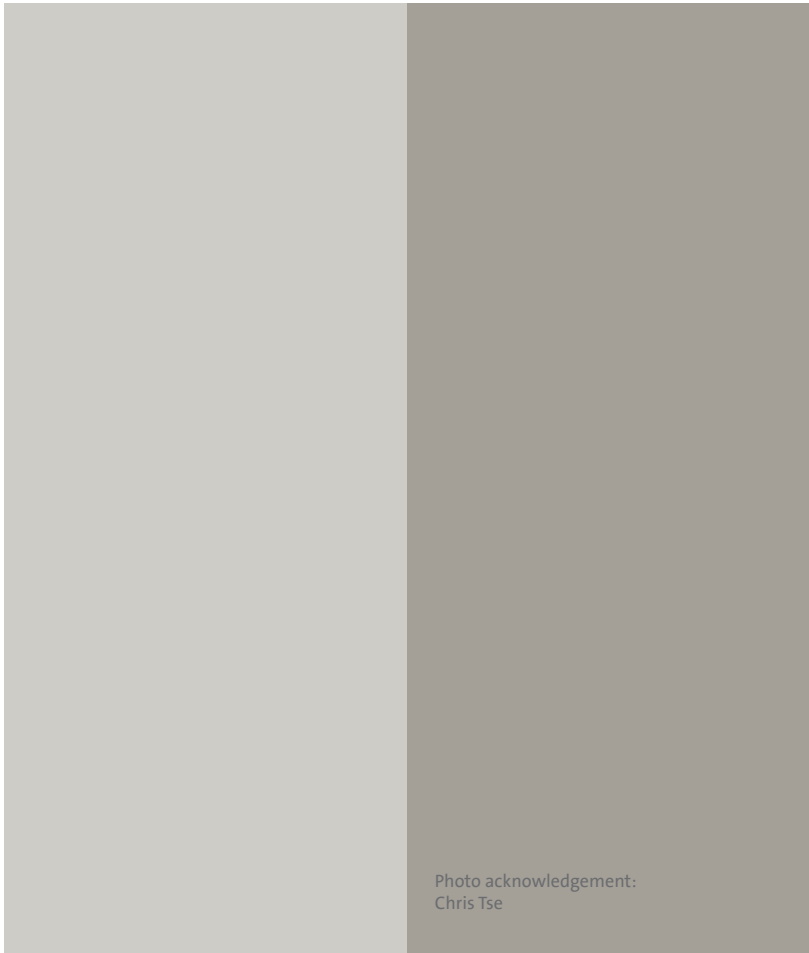
Equip is LGNZ's Centre of Excellence. We deliver tailored services, best practice guidance, business solutions, and governance and management support to strengthen the local government sector.



Appendix 4

Managing
conflicts of
interest: A
guide for the
public sector





Managing conflicts of interest: A guide for the public sector

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Auditor-General's overview

E ngā mana, e ngā reo, e ngā karangarangatanga maha o te motu, tēnā koutou.

If you work in the public sector, it does not matter what your role is or how senior you are. In a small country like ours, there is a good chance you will have a conflict of interest at some point in your working life.

A conflict of interest is where the responsibilities you have as an employee or office holder in a public organisation are affected by some other interest you have in your private life. That other interest could be a relationship, a role in another organisation, or a business interest.

Having a conflict of interest does not necessarily mean you have done anything wrong. If the conflict is handled well, it does not have to be a problem. Conflicts can arise in many situations. Some are serious, some less so, and some are unavoidable. But, in any situation where activities are carried out in the public interest or paid for out of public funds, the public needs to be confident that decisions:

- are made impartially and for the right reasons; and
- are not influenced by personal interests or ulterior motives.

That means, if you are working in the public sector, you need to be able to:

- identify the different interests you have;
- recognise if you might have a conflict;
- understand how serious it is and what risks it gives rise to, for both you and the organisation you work for; and
- understand what to do about it.

That is what this guide is about – identifying interests and managing conflicts, so the public can be confident that people making decisions and spending public funds on their behalf are doing so in the public interest, not to benefit their family, friends, business associates, or themselves.

To manage conflicts of interest, there are usually both legal and ethical questions that need to be taken into account. Some public organisations are subject to specific legal requirements governing how conflicts are managed. Most will have policies or processes that people are required to comply with. This guide is not intended to replace any of these sector or organisation-specific legal or policy requirements.

Instead, this guide takes a principles-based approach, intended to complement those requirements. It outlines the basic rules that apply to different types of conflicts, points you in the direction of the rules that are likely to apply to you, and provides some principles and guidance on best practice to help you judge

Auditor-General's overview

how best to manage a conflict, when the rules, by themselves, do not provide an obvious answer. It also includes several scenarios to help show how these principles might be applied in practice.

Nāku noa, nā

A handwritten signature in black ink, appearing to read 'JMR Ryan', with a stylized flourish at the end.

John Ryan
Controller and Auditor-General

24 June 2020

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Introduction

- 1.1 Every employee or office holder has several professional and personal interests and roles. Conflicts of interest sometimes cannot be avoided and can arise without anyone being at fault. They need not cause problems as long as they are promptly disclosed and well managed.
- 1.2 In this guide, we describe conflicts of interest in the public sector, and how to identify, disclose, and manage them. We do not lay down rules but instead suggest an approach for dealing with issues when they arise.¹ This guide represents our view of what constitutes good practice in the public sector.
- 1.3 This guide will be useful for everyone who works in the public sector. We also publish a separate good practice guide about the legal requirements under the Local Authorities (Members' Interests) Act 1968.²
- 1.4 There are several aspects to managing conflicts of interest effectively:
- Public organisations and employees and office holders need to understand what a “conflict of interest” is, and be aware of the different ways in which one can arise (see Parts 2 and 3).
 - Employees and office holders should identify and disclose a conflict of interest as soon as it arises (see Part 4).
 - In every instance, the public organisation (or, sometimes, the employee or office holder concerned) needs to consider what action (if any) is necessary to manage the conflict of interest. This might include publicly disclosing significant conflicts of interest in the interests of public transparency (see Part 4).
 - Public organisations should establish policies and procedures to help them and their employees to identify and deal with conflicts of interest (see Part 5).
 - Public organisations need to understand the main legal and ethical considerations that are likely to apply to managing conflicts of interest and the possible consequences of breaching the applicable rules (see Part 6).

Guiding principles

- 1.5 Public business should be conducted with a spirit of:
- integrity;
 - impartiality;
 - accountability;
 - trustworthiness;

1 For organisations in the State services, please also see the State Services Commission's *Model Standards on Conflicts of Interest*. They outline the State Services Commissioner's minimum expectations for staff and organisations in the State services to support effective reporting and management of conflicts of interest.

2 The Local Authorities (Members' Interests) Act 1968 applies to members of city councils, district councils, regional councils, community boards, and a range of other public bodies.

Part 1
Introduction

- respect; and
- responsiveness.

1.6 In our view, these principles should guide any decisions about conflicts of interest.

Our role with conflicts of interest

1.7 The Auditor-General does not have an explicit statutory role with regard to conflicts of interest.³

1.8 The Auditor-General cannot “rule” on whether someone has a conflict or whether it was lawful for them to participate in a particular matter. Nor can we take enforcement action against someone who might have acted unlawfully or inappropriately because of a conflict of interest. These are matters for the courts.

1.9 However, under the Public Audit Act 2001, the Auditor-General is the auditor of all public organisations and, as such, has an interest in supporting them to carry out their activities lawfully and in a way that inspires public confidence. The proper management of conflicts of interest is a fundamental part of maintaining public confidence in the public sector. Therefore, the Auditor-General has a strong interest in supporting good practice.

1.10 This guide is one of the ways we aim to support good practice in managing conflicts of interest in the public sector. Other ways we might look at conflicts of interest are:

- **As part of our annual audit work:** The Auditor-General appoints auditors to carry out annual audits of public organisations. Under section 15 of the Public Audit Act, auditors can look at an organisation’s systems and processes for managing conflicts of interest as part of the annual audit. Auditors also monitor some types of disclosures about conflicts of interest as part of the annual audit.
- **When carrying out an inquiry:** The Auditor-General has the power to examine concerns about conflicts of interest as part of an inquiry into a public organisation’s use of its resources under section 18 of the Public Audit Act.
- **When carrying out a performance audit:** The Auditor-General can examine a public organisation’s compliance with any statutory or internal policy requirements about conflicts of interest, in the course of carrying out a performance audit under section 16 of the Public Audit Act.

³ Except in the case of the Local Authorities (Members’ Interest) Act 1968, where the Auditor-General has statutory functions under the Act.

The nature of conflicts of interest

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What is a conflict of interest?

- 2.1 A conflict of interest is any situation where your duties or responsibilities as an employee or office holder in a public organisation conflict, or could be seen to conflict, with some other interest you might have outside of work.
- 2.2 The other interest or duty might be:
- holding another public office;
 - being a current or (recent) former advisor, director, or partner of another business or organisation;
 - being a member of a club, society, or association;
 - having a professional or legal obligation to someone else (such as being a trustee);
 - having a beneficial interest in a trust;
 - owning or occupying a piece of land;
 - owning shares or some other investment or asset;
 - having received a gift, hospitality, or other benefit from someone;⁴
 - owing a debt to someone; or
 - being a relative or close friend of someone who has one of these interests, or who could otherwise be personally affected by a decision of the public organisation.

Having an interest does not necessarily mean you have a conflict of interest

- 2.3 Having a personal interest, on its own, is not what causes a conflict. Everyone has multiple roles and interests at work, at home, in their extended families, or in the community. A potential conflict of interest arises only where your duties or responsibilities as an employee or office holder in a public organisation overlap with one of your other roles or interests.
- 2.4 For example, you are an elected member of a local council and also involved in running a business, on the committee of a local sports club, and a member of a voluntary organisation. Your involvement in the business, role on the committee, and membership of the voluntary organisation are all interests that you have as well as your role as an elected member of the council.

⁴ Here, issues about conflicts of interest overlap with the management of sensitive expenditure. See our good practice guide, *Controlling sensitive expenditure: Guidelines for public entities*.

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The nature of conflicts of interest

- 2.5 These other interests do not necessarily mean you have any conflicts of interest. An interest becomes a potential conflict of interest only if it overlaps in some way with your role as an elected member. For example, your interest might result in a potential conflict of interest if:
- your business puts in a bid to provide goods or services to the council;
 - the sports club is located on land leased from the council; or
 - the voluntary organisation seeks funding from the council to help fund its activities.

Why might having a conflict of interest be a problem?

- 2.6 Having a conflict of interest does not mean you have done anything wrong, and it is not necessarily a problem if it is managed properly. Conflicts can arise in all sorts of situations, as the list above shows. Some conflicts are serious, some less so. Some are unavoidable, especially in a small country like ours.
- 2.7 However, in any situation where activities are paid for out of public funds or carried out in the public interest, the public needs to be confident that decisions:
- are made for the right reasons; and
 - are not influenced by personal interests or ulterior motives.
- 2.8 The risk with having a conflict of interest – at least, one that is not properly managed – is that you will be seen to be advancing your own interests or the interests of others you feel a sense of loyalty or obligation to, rather than the interests of your role as a public servant.
- 2.9 Even if you have no intention of acting improperly, and are confident that you can think and act impartially, **if it looks like** you might be influenced by personal interests or ulterior motives when making a decision, you risk undermining public confidence in the integrity of that decision. You can also potentially expose the organisation you work for to legal, commercial, political, or reputational risk.

Why managing conflicts is particularly important in the public sector

- 2.10 Conflicts of interest can arise in all walks of life, including the private sector. However, there are higher expectations about conflicts of interest in the public sector because it is public money that is being spent, and public powers that are being exercised.

- 2.11 Where activities are paid for out of public funds, or decisions are made exercising public powers, members of the public rightly expect the people making those decisions to act impartially, without any possibility that they could be influenced by favouritism or improper personal motives, or that public resources could be misused for private benefit.
- 2.12 Also, unlike private organisations, public organisations are subject to specific legal rules that require their decision-making processes to be procedurally fair. Any decision of a public organisation that is tainted by bias, or the appearance of bias, is potentially subject to legal challenge.
- 2.13 This means that conduct that might be allowed in the private sector is not necessarily acceptable in the public sector. For example, under the Companies Act 1993, company directors are required to disclose when they have a personal interest in a transaction, but might then be permitted to discuss and vote on that transaction, despite having an interest in it. Similarly, small businesses in the private sector often employ and contract with family members as a matter of course. Such practices might be unacceptable – or, at the very least, require more careful management – in a public organisation.

Conflicts of interest and corrupt conduct

- 2.14 Corrupt conduct can arise when a conflict of interest is intentionally concealed, understated, mismanaged, or abused.
- 2.15 Experience shows that many, if not most, forms of corrupt conduct involve a conflict of interest. It is also possible to engage in corrupt conduct to do with another person's conflict of interest.
- 2.16 Examples of conduct that could be corrupt include:
- concealing or failing to disclose a conflict of interest;
 - making false or understated declarations about a conflict of interest;
 - favouring another interest over public duty;
 - improperly influencing others to favour a personal interest;
 - misusing resources to favour a personal interest;
 - improperly accessing, using, or disclosing information about a conflict of interest;
 - acting improperly to favour another person's personal interests; and
 - improperly allowing others to conceal a conflict of interest.

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Different types of conflicts of interest

- 3.1 The seriousness of a conflict, and the type of risks it gives rise to, for you personally and the organisation you work for, will vary depending on the nature of the conflict and the context in which it arises. Conflicts of interest can arise in a wide variety of ways. In all cases, the underlying concern is the same – that is, ensuring that decisions are made impartially, and managing the risk of bias, or the appearance of bias.
- 3.2 To work out how to manage a conflict, it can be helpful to categorise it as a:
- financial conflict;
 - non-financial conflict;
 - conflict of roles; or
 - predetermination.
- 3.3 The situation you are facing might not fall neatly into one category. There are also situations where you might have more than one type of conflict. But, if you are trying to figure out whether you have a conflict and, if so, what to do about it, analysing your situation by putting it in one of these four categories can be a useful starting point.
- 3.4 In addition to these four categories, you also need to consider potential conflicts created by the possession of official information. The Serious Fraud Office often sees among public sector employees a failure to appreciate that it can be an offence to use information acquired in an official capacity for the personal benefit of that official or another.⁵ As we noted earlier, public sector officials are often held to a higher standard than in the private sector and it is important that officials do not take advantage of information acquired in their official role to make a gain either for themselves or others.
- 3.5 In all situations, your conflict might be actual or perceived – that is, you might have an actual conflict, or there could be no conflict, but to an outside observer it looks like there is.
- 3.6 Members of the public do not often have access to all the relevant facts, and cannot know what is in your mind or what your motivations are. They can judge only by appearances and information in the public domain. That means perceived conflicts are often as risky as actual conflicts, and you need to take just as much care to identify and manage them.

Financial conflicts of interest

- 3.7 A financial conflict of interest is any situation where you stand to gain or lose financially from a decision you are asked to make.

- 3.8 Financial interests might be direct or indirect. There are also situations where you might be deemed to share the same financial interests as another person or organisation. For example, you might be deemed to share any financial interests your spouse or partner has, or those of any business you are involved in.
- 3.9 A financial interest need not involve cash changing hands directly. It could, for example, be an effect on the value of land or shares that you own, or the turnover of a business you are involved in.
- 3.10 Financial conflicts of interest are often treated more strictly than non-financial conflicts of interest. For example:
- Under the common law, any financial conflict of interest (except one that is trivial) automatically disqualifies a public official from participating in a decision.
 - The Local Authorities (Members' Interests) Act prohibits members of local authorities and office holders in other specified public organisations⁶ from discussing or voting on any matter in which they have a financial interest, unless their interest is "in common with the public".
- 3.11 If you have a financial conflict of interest:
- you should treat it seriously, even if it seems trivial to you; and
 - you need to make sure you are familiar with any specific rules that apply to the management of financial conflicts of interest in the organisation you work in.

Non-financial conflicts of interest

- 3.12 A non-financial conflict of interest is any situation where you are not affected financially by a decision but are affected in some other way that might make you biased or appear to be biased.
- 3.13 A non-financial conflict of interest might arise, for example, from a family relationship, friendship, or any other sort of personal relationship.
- 3.14 Non-financial conflicts can also arise if you are a member of, or involved with, an organisation outside of your work.
- 3.15 Under the common law, a non-financial conflict of interest does not automatically exclude you from participating in a decision. It will depend how serious the conflict is. That does not mean non-financial interests are always less serious than financial conflicts. However, because there is not an automatic assumption of bias, there is generally more room for judgement about how serious the conflict is and how it should be managed.

⁶ For a list of organisations, see our good practice guide, *Local Authorities (Members' Interests) Act 1968: A guide for members of local authorities on managing financial conflicts of interest*.

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Different types of conflicts of interest

Interests of relatives and friends

- 3.16 Considering the interests of relatives and friends requires careful judgement. If they have an interest that overlaps with the duties of an employee or office holder, then there might be a conflict of interest.
- 3.17 Specific statutory rules might also apply. For example:
- for members of local authorities covered by the Local Authorities (Members' Interests) Act, the financial interests of a spouse, civil union partner, or de facto partner are regulated; and
 - for matters covered by the Crown Entities Act 2004, the interests of a spouse, civil union partner, de facto partner, child, or parent are regulated.
- 3.18 In general, for situations not covered by specific statutory rules, we consider that, at least, the interests of any dependants or relatives who live with the employee or office holder must be treated as effectively the same as if the interest was held by the employee or office holder. In other words, if interests held by these relatives overlap with an employee or office holder's official duties, there will be a conflict of interest.
- 3.19 For other relatives, it will depend on the closeness of the relationship and the degree to which the public organisation's decision or activity could directly or significantly affect them. (Part 4 covers assessing the seriousness of a conflict of interest.)
- 3.20 Close relationships can vary. A relationship could be close because of the directness of the blood or marriage link, or because of the amount of association. There are no clear rules but it will usually be wise not to participate if relatives are significantly affected.
- 3.21 Some cultures, including Māori culture, have a broad concept of family. In our view, a conflict of interest will not often arise where the connection is a common ancestor, such as another iwi or hapū member. Sometimes an iwi connection could create a conflict of interest in and of itself. For example, if the person is working for a public organisation on a Treaty settlement where they are likely to end up as a beneficiary, this might create a conflict of interest. In this situation, the interest is personal.
- 3.22 Questions of judgement and degree also arise when considering friends and other associates. However, in our view, it is unrealistic to expect the employee or office holder to have absolutely no connection with or knowledge of the person concerned. New Zealand is a small and interconnected society. Simply being acquainted with someone, having worked with them, or having had official dealings with them is not something we would consider to cause a problem. However, a longstanding, close, or recent association or dealing might do.

- 3.23 Care should also be taken with interests held by people who have funded the election campaigns of elected members.
- 3.24 Where the public organisation's decision or activity affects an organisation that a relative or friend works for, it could be reasonable to take into account the nature of their position. For example, it might be material whether they are a senior executive or owner, on the one hand, or whether they are a junior staff member who is not personally involved in the matter and who would not be personally affected by the decision, on the other.

Conflict of roles

- 3.25 A conflict of roles can arise in any situation where you are a decision-maker for two different organisations about the same matter.
- 3.26 In some ways, a conflict of roles is just another type of non-financial conflict. We have given it its own category because a conflict of roles is likely to prompt different issues than other types of conflicts. The question you need to consider is not so much whether your interests conflict, but whether the interests of the two organisations you work for do.
- 3.27 A conflict of roles is also more likely to prompt questions about conflicting duties. For example:
- If both organisations are involved in the same project or transaction, and you owe a duty of confidentiality to both, can you be effectively involved in making decisions for both organisations about that project or transaction?
 - Can you fulfil a fiduciary duty to one organisation (for example, as a company director or trustee) when deciding something if you owe a fiduciary duty, or some other sort of duty of loyalty, to the other organisation?
- 3.28 Sometimes you might be involved in a second organisation quite deliberately. You might have been appointed specifically to represent the first organisation or hold office in another organisation because of your position in the first organisation. For example, if you are an employee of a Crown entity, you might have been appointed as its representative on a community trust that the Crown entity funds.
- 3.29 In those situations, it might be consistent with your role to participate at meetings of the first organisation in some matters that concern the second organisation, especially if that second role gives you specialised knowledge that it would be useful to contribute. This might be legitimate – and mutually beneficial – because for many matters there will be no risk that you could advance any private interest, show partiality, or otherwise act in a way that was not in the first organisation's best interests.

Part 3

Different types of conflicts of interest

- 3.30 However, you must be careful not to assume that this is always so. Conflicts of interest could still arise with some decisions. This is especially likely where you might be under a legal duty (for example, as a director or trustee) to act in the best interests of one organisation. For example, a conflict of interest might arise when one organisation is making a decision about funding the other, its continued existence, or on a formal submission it has made.
- 3.31 The main points to consider with a conflict of roles are that:
- you need to be clear in your own mind what your obligations are to each role or organisation;
 - you need to be confident that both organisations are clear about what your obligations are to each of them and, if necessary, have a protocol that explains this; and
 - you need to always be alert for situations where the interests of the two organisations might conflict, even if they generally do not.

Predetermination

- 3.32 Predetermination is any situation where you are making a decision about something and there is a risk that people will think you made up your mind before you considered all of the evidence. Suggestions of predetermination usually arise because of something you have previously said or done.
- 3.33 Technically, predetermination is not a form of conflict of interest. However, the concept of predetermination is derived from the common law on bias, so we have covered it in this guide. The underlying risk with predetermination is the same as for conflicts of interest – that is, the risk that you will “taint” a decision you are involved in making because you are biased or appear to be biased.
- 3.34 As a public sector employee or officeholder, you are entitled to have your own personal views. Indeed, you might often be expected to use your opinions or ideas in carrying out your work.
- 3.35 However, sometimes having strong views about a matter can create a risk of prejudice or predetermination. You might be treated as biased if your behaviour, beliefs, or what you say indicates that you made up your mind about a matter before it came to be heard or deliberated on – in other words, if you have a “closed mind” or fixed position and are not willing to fairly consider all relevant information and arguments.
- 3.36 The seriousness of the risk will depend on the context, such as what your role is and what sort of decision you are being asked to make.

- 3.37 For quasi-judicial decisions, decision-makers are held to an exacting standard of impartiality and objectivity. Quasi-judicial decisions are those that directly affect the legal rights, interests, and obligations of an individual or small group of individuals. Quasi-judicial decisions can be, for example, a decision to grant a permit, confer a specific benefit, or impose a punishment.
- 3.38 In other situations, it might nevertheless be acceptable for employees or officeholders to bring personal or previously formed views to decision-making – for example, when:
- discussing issues and exchanging ideas with members of the public;
 - developing a preliminary position, especially where a proposal is being consulted on or where the public organisation is expected to perform an advocacy role;
 - already holding – and perhaps having expressed – strong personal views about the matter, for decisions that are made by an elected or representative body and are political in nature or involve high-level policy-making;
 - promoting a particular view during debate in public hearings on a matter; and
 - drawing on your own knowledge or experience, especially for decisions that are entrusted to particular people because of their special expertise in the subject.
- 3.39 General personal factors, such as an employee's or officer holder's ethnicity, religion, national origin, age, political, or philosophical leanings, wealth, or professional background, will not usually constitute predetermination, unless they give rise to a strongly held personal belief that directly relates to the matter being considered.
- 3.40 When dealing with predetermination:
- You are expected to have an open mind, but that does not mean an empty mind.
 - Pay particular attention to the type of decision you are being asked to make. You need to be particularly careful about predetermination in situations where you are making decisions that will affect the legal rights, interests, and obligations of an individual or small group of individuals, as opposed to broad policy decisions that do not have an immediate effect on individuals.
 - Unlike many types of conflicts, the risks associated with predetermination are nearly always under your control. It is generally about managing what you do or say, so you do not later put yourself in a situation where your participation in a decision will put that decision at risk.

4

Dealing with conflicts of interest when they arise

- 4.1 There are two important aspects to dealing with conflicts of interest when they arise:
- identifying and disclosing the conflict of interest (primarily the responsibility of the employee or office holder concerned); and
 - deciding what action, if any, is necessary to best avoid or mitigate any effects of the conflict of interest (primarily the responsibility of the public organisation).

Identifying and disclosing a conflict of interest

- 4.2 Conflicts of interest can arise at any time. You might know from the outset, when you start in a role with a public organisation, that you have an outside interest that could result in a conflict of interest. Or you might take on a new role or appointment outside of work that could lead to a conflict at work. Or something might crop up, or your role at work might change, so that something that was not a conflict before becomes a potential conflict.
- 4.3 In short, everyone in the public sector needs to remain alert to the possibility of conflicts at all times.

Responsibility to identify and disclose conflicts of interest

- 4.4 The primary responsibility for identifying and disclosing conflicts of interest to the relevant people in a timely and effective manner rests with the person concerned.
- 4.5 This is because it is the individual person who will always have the fullest knowledge of their own affairs. They will be in the best position to realise whether and when something at work has a connection with another interest of theirs.
- 4.6 Managers and other senior personnel should remain generally alert for issues affecting other people that might create a problem. All public organisations need to be aware of any separate obligation they might have to disclose certain types of interests and potential conflicts (for example, under financial reporting standards).

Identifying conflicts of interest

- 4.7 In Parts 2 and 3, we discuss in detail the nature of conflicts of interest and the types of other interest that can give rise to a conflict of interest. The main question that must always be addressed is:

Whether an employee's or office holder's duties or responsibilities to a public organisation could be affected, or could be perceived to be affected, by some other interest or duty that the employee or office holder may have.

- 4.8 It is important to focus on the overlap between the two interests: that is, whether the person's other interest has something to do with the particular matter that is being considered or carried out by the public organisation.
- 4.9 It is better to err on the side of openness when deciding whether something should be disclosed. Many situations are not clear-cut. If you are not sure whether something constitutes a conflict of interest, it is safer and more transparent to disclose the interest anyway. The matter is then out in the open. Others with more expertise can judge whether the situation constitutes a conflict of interest, and whether the situation is serious enough to warrant any further action.
- 4.10 Disclosure promotes transparency and is always better than trying to manage the situation yourself.

Disclosing conflicts of interest internally

- 4.11 If a matter where a person has an interest arises at a formal meeting, the person should declare to the meeting that they have an interest in the matter before the matter is discussed. The declaration should be recorded in the minutes of the meeting.
- 4.12 In other situations, the matter should be raised and discussed with a relevant person as soon as the potential for a conflict of interest is identified. For most staff, the relevant person will be their manager (or another designated person in the public organisation). For a chief executive, the relevant person might be the board chairperson, responsible Minister, or another senior person in the public organisation. Board members should make a disclosure to the chairperson or deputy chairperson.
- 4.13 There might be an applicable law or internal policy that requires a disclosure to be lodged in a register. It is always wise to record any disclosure in writing anyway.
- 4.14 If something significant changes about the official role or the other interest, or the nature of the connection between them, the person should make a further disclosure, in case it is necessary to reconsider any decisions about how to deal with the conflict of interest.

Disclosing conflicts of interest externally

- 4.15 A public organisation might be under an obligation to disclose some types of interests and potential conflicts of interest publicly.
- 4.16 For example, an organisation might be required to disclose some matters in its financial statements, to comply with relevant accounting and auditing standards:

Part 4

Dealing with conflicts of interest when they arise

PBE IPSAS 20 *Related Party Disclosures* (Public sector Standards), NZ IAS 24 *Related Party Disclosures* (For-profit Standards), and ISA (NZ) 550 *Related Parties*. Those standards require the disclosure of transactions with related parties. In short, a “related party” is someone who has the ability, directly or indirectly, to control or exercise significant influence over the other party.

- 4.17 Even if there is no legal requirement to publicly disclose an employee or officeholder’s interest or conflict of interest, we recommend that public organisations consider the benefits of doing so. We recognise it is unrealistic for a public organisation to publicly disclose all conflicts of interest it is required to manage, and obviously any public disclosure would need to be balanced against the individual’s right to privacy.
- 4.18 However, the value of public transparency should not be underestimated – particularly for those public organisations that spend substantial sums of public money through procurement or grant allocation processes, or in any situation where public trust and confidence is fundamental to that public organisation’s ability to continue functioning successfully.
- 4.19 Many of the complaints made to us about a conflict of interest could have been avoided if the organisation had been more open about the conflict that had arisen and been willing to explain publicly what it was doing about it.
- 4.20 Options public organisations might want to consider include establishing their own threshold for public disclosure of significant conflicts of interest or disclosing conflicts in the context of significant or high-profile projects or transactions. Also, or alternatively, it might choose to make its policies on dealing with conflicts of interest publicly available.

Deciding on further action

- 4.21 Simply declaring a conflict of interest is not usually enough. Once the conflict of interest has been identified and disclosed, the public organisation might need to take further steps to remove any possibility – or perception – of public funds or an official role being used for private benefit.
- 4.22 In our view, responsibility rests with those “at the top” of the organisation. Leaders and senior managers need to model behaviour to the highest standard. It is not enough to have clear policies and processes. These must be seen to be strictly observed and enforced by those in senior positions.
- 4.23 The public organisation should carefully consider what, if anything, needs to be done to adequately avoid or mitigate the effects of the conflict of interest.

Responsibility to decide next steps

- 4.24 Usually, it is the public organisation's responsibility to determine the appropriate next steps (and to direct the affected employee or office holder accordingly). It is a matter of risk management. The decision-maker will usually be the person's manager (or other relevant person in relation to disclosure), acting on behalf of the public organisation. The public organisation's chairperson, chief executive, legal advisors, human resources staff, and other managers might need to help make decisions or offer advice to decision-makers. For convenience, we refer to the decision being made by "the public organisation".
- 4.25 Sometimes the decision about what the person needs to do will be straightforward, because there might be a clear legal requirement or other written rule covering the situation. An example is where there are statutory rules about participating in meetings that apply to members of a governing body. The onus to be aware of the rule, and to comply with it, lies with the person concerned. The judgement is theirs to make.

Action that should be taken to avoid or mitigate

- 4.26 For each potential conflict, it is important for the public organisation to consider whether something more ought to be done after disclosure. In doing so, the organisation should have regard to the principles (see paragraph 1.5) and the risk of how outside observers might reasonably perceive the situation. It is not safe to assume that a disclosure, and no further action, is always adequate.
- 4.27 First, if any legal requirement applies, then compliance with that is critical and overriding. For example, where the situation involves a legal requirement about a board member participating in a meeting, the law will usually require the member to refrain from participating in discussions and voting on the matter. There is usually no scope to decide on some lesser mitigation option.
- 4.28 Secondly, the public organisation should consider whether any relevant policy of the organisation contains a clear rule covering the situation.
- 4.29 Thirdly, if no relevant legal requirement or policy applies (or after any such rule has been complied with), then the public organisation should also consider whether anything more needs to be done. This is where there might be scope for a range of options. This assessment is a matter of judgement. In especially difficult situations, it might be necessary to seek professional advice and/or consult other published sources of guidance.

Part 4

Dealing with conflicts of interest when they arise

4.30 In exercising judgement, the public organisation needs to assess carefully:

- the seriousness of the conflict of interest;
- the level of risk the conflict gives rise to; and
- the range of possible mitigation options.

Assess the seriousness of a conflict of interest

4.31 Several factors might need to be considered in assessing the seriousness of the conflict of interest. They include:

- the type or size of the person's other interest;
- the nature or significance of the particular decision or activity being carried out by the public organisation;
- the extent to which the person's other interest could specifically affect, or be affected by, the public organisation's decision or activity; and
- the nature or extent of the person's current or intended involvement in the public organisation's decision or activity.

4.32 Seriousness is a question of degree. It involves a spectrum of directness and significance – how close and how big. Directness (and its opposite, remoteness) is about how closely or specifically the two interests concern each other. Significance is about the magnitude of the potential effect of one on the other.

4.33 The public organisation might judge that the overlap of the two interests is so slight that it does not really constitute a conflict of interest. In other words, there is no realistic connection between the two interests, or any potential connection is so remote or insignificant that it could not reasonably be regarded as a conflict of interest.

4.34 However, it must be remembered that this judgement is not primarily about the risk that misconduct will occur. It is about the seriousness of the connection between the two interests.

4.35 Similarly, an interest might not be seen as serious if it is a generic interest held in common with the public. That is, the interest is substantially the same kind and size as the interest held by all members – or a large segment – of the public.⁷

Determining appropriate mitigation options

4.36 Judgements made about the seriousness of any conflict of interest will inform the suitable mitigation option. It might also be necessary to take into account the practicability of any options for avoiding or mitigating the conflict.

⁷ See our good practice guide, *Local Authorities (Members' Interests) Act 1968: A guide for members of local authorities on managing financial conflicts of interest*, for a discussion of the concept of "interest in common with the public" in the context of members of local authorities.

- 4.37 There is a broad range of options for avoiding or mitigating a conflict of interest. The options (listed roughly in order of lowest to highest severity) include:
- taking no action;
 - asking whether all affected parties will agree to the person's involvement;
 - seeking a formal exemption to allow participation (if such a legal power applies);
 - imposing additional oversight or review over the person;
 - withdrawing from discussing or voting on a particular item of business at a meeting, or taking some other steps to limit influence or decision-making powers (for example, they might not take part in decisions but could still provide advice);
 - exclusion from a committee or working group dealing with the issue;
 - re-assigning certain tasks or duties to another person;
 - agreement or direction not to do something;
 - withholding certain confidential information;
 - placing restrictions on access to information (including, if applicable, post-employment restrictions, such as restrictions under a restraint of trade agreement);
 - transferring the person (temporarily or permanently) to another position or project;
 - relinquishing the private interest;
 - refraining from having further dealings with a person or organisation; and
 - resignation or dismissal from one or other position or organisation.
- 4.38 If the public organisation determines that a situation does not really amount to a conflict of interest after all, or is too indirect or insignificant, it might formally record or declare the disclosure and assessment in some form but take no further action. However, it should not be assumed that this will always be enough. The risk to be assessed is not just the risk of actual misconduct by the person involved but the risk that the public organisation's capacity to make decisions lawfully and fairly might be compromised or its reputation damaged. In making this assessment, the public organisation needs to consider how the situation could reasonably appear to an outside observer.
- 4.39 It might sometimes be necessary for a person to stay involved in a matter despite having recognised a conflict of interest if the conflict is inevitable and unavoidable and the matter cannot reasonably be dealt with without the person's involvement. That should be rare (and other mitigation options might need to be considered, too). One example is where all the people involved have a conflict of interest.

Part 4

Dealing with conflicts of interest when they arise

- 4.40 Ensuring that the conflicted person is no longer involved in the public organisation's work on the particular matter, through withdrawal, removal, or reassignment, is the most typical mitigation option. Taking one of those steps will usually be enough to adequately manage a conflict of interest.
- 4.41 Occasionally a conflict of interest might be so significant or pervasive that the person will need to consider giving up one or other interest or role. However, these cases are likely to be uncommon. The other interest needs to be considered in relation to a particular matter coming before the public organisation, so it will not often be necessary to ask, in a general sense, whether a conflict of interest is so great that the person should not remain working for the public organisation at all.
- 4.42 However, giving up an interest or role might not always deal with a conflict of interest if it happens at a very late stage.⁸ In other words, sometimes it might be too late for the person to choose to withdraw from one role or interest in order to be able to carry on with the other one.
- 4.43 If circumstances change, a decision about whether there is a conflict of interest or how to manage it should be reviewed and might need to change.
- 4.44 Many situations are not clear-cut and a range of possible judgements could be reasonable. The decision about what to do in any particular case is an internal matter. It is for the public organisation to determine (except if there is a legal obligation on the affected person to determine). But, in the interests of openness and fairness (and to minimise the risk of the public organisation having to defend itself against an allegation of impropriety), it is always safer to be cautious. Once a conflict of interest is recognised, the most common response should be withdrawal or exclusion from considering the matter.
- 4.45 It is wise to make a written record about any decision.⁹ This might include details of the facts, who undertook the assessment, and how and what action was taken as a result. Sometimes risk management might be helped by also considering whether to make an announcement to certain other people, or even publicly, about the conflict of interest and how it has been dealt with.

⁸ See for example *Collinge v Kyd* [2005] 1 NZLR 847 and *Auckland Casino v Casino Control Authority* [1995] 1 NZLR 142.

⁹ The State Services Commission's *Model Standards on Conflicts of Interest* require State service agencies to keep formal documentation of mitigation plans, see page 4.

Policies and procedures for managing conflicts of interest

5

Policies and procedures

- 5.1 All public organisations should establish policies and procedures as a tool for helping them and their employees and office holders identify and deal with conflicts of interest.
- 5.2 Managing conflicts of interest can never be as simple as creating and enforcing a set of rules. Nevertheless, robust policies and procedures are a useful starting point. They are where people should look first when they are working out whether they have a conflict of interest and what they need do to about it.
- 5.3 Policies and procedures can provide clear rules for simple and predictable situations, and establish a process for dealing with the more difficult ones. They help reaffirm the public organisation's commitment to the principles associated with managing conflicts of interest, and encourage organisational transparency.

Focus on the public organisation's particular circumstances

- 5.4 In preparing its policies and procedures, a public organisation needs to take into account the nature of its own particular structure, functions and activities, and any applicable statutory requirements. It needs to consider what its operations are, what fields it operates in, and what sorts of problems or risks might typically arise. For example, does the public organisation do a lot of:
 - procurement and contracting;
 - allocating grants;
 - public consultation; or
 - quasi-judicial or regulatory decision-making?
- 5.5 A blanket policy or process will not necessarily work well for all these functions.
- 5.6 The public organisation might need to think carefully about who a policy should apply to. Some parts of the policy might be relevant only for board members or certain employees, such as those involved in any of the functions listed above. Some parts might not need to apply to all staff. It might also be prudent to require certain types of contractors or consultants to comply with the policy, even though they are not employees.

Part 5

Policies and procedures for managing conflicts of interest

- 5.7 Some situations will be foreseeable and the answer straightforward. For those situations, clear rules could be established in a policy. For example, a public organisation might, depending on the nature of its operations, prohibit employees and office holders from:
- being involved in a decision to appoint or employ a relative;
 - conducting business on behalf of the organisation with a relative's company;
 - owning shares in or working for particular types of organisation that have dealings with or are in competition with the public organisation;
 - making submissions in a public consultation process (on matters that directly relate to the organisation's work);
 - deliberating on a public consultation process where the employee or office holder has made a personal submission;
 - accepting gifts in connection with their official role; or
 - influencing or participating in a decision to award grants or contracts where the employee or office holder is connected to a person or organisation that submitted an application or tender.

Periodic declarations of interests

- 5.8 One method many public organisations use is to require employees or office holders to regularly (for example, yearly) complete and submit a declaration listing specified personal interests. This is sometimes called an "interests register".¹⁰
- 5.9 A declaration in an interests register is not, in itself, a declaration of a conflict of interest. In most cases, it is simply a declaration that someone has an interest that could give rise to a conflict.
- 5.10 However, an interests register enables relevant managers to be aware of most relevant ongoing interests, and acts as a reminder to people of the need to be alert for conflicts of interest. The register, if reviewed and updated regularly, helps people to monitor situations that could give rise to a conflict of interest, and to identify conflicts of interest at an early stage.
- 5.11 Placing interests on record is also consistent with the principle of transparency. An interests register can be used to document any agreed mitigations, especially for predictable situations, so that there is a record, if needed later, that both the individual and the organisation have thought about the risks and taken appropriate steps to manage them.

¹⁰ See, for example, the interests registers required for Ministers and members of Parliament by the *Cabinet Manual* and the *Standing Orders of the House of Representatives* respectively.

What to cover in policies and procedures

- 5.12 Policies and procedures should:¹¹
- state principles or values that emphasise the organisation’s commitment to addressing conflicts of interest and the importance of people in the organisation being alert for such situations;
 - establish rules for the most important and obvious actions that people must or must not take;
 - establish a mechanism (such as an interests register) for recording those types of ongoing interests that can commonly give rise to a conflict of interest and a procedure for putting this into effect and updating it regularly;
 - set out a process for identifying and disclosing instances of conflicts of interest as and when they arise, including a clear explanation of how someone should disclose a conflict of interest and to whom;
 - set out a process for managing conflicts of interest that arise, including who makes decisions and perhaps detailing the principles, criteria, or options that will be considered;
 - provide avenues for training and advice;
 - provide a mechanism for handling complaints or breaches of the policy; and
 - specify the potential consequences of non-compliance.
- 5.13 However, policies and procedures are not enough and cannot anticipate every situation. Also, the seriousness of some situations will be a question of degree and not amenable to a rule. Policies and procedures might need to allow for some flexibility for judgement in individual cases. A policy should not state or suggest that the specific situations it covers are an exhaustive list. Some situations will need to be the subject of discretionary judgements as and when they arise.

¹¹ Some of the publications listed in Appendix 1 contain more detailed guidance on preparing and implementing policies and procedures. See, in particular, the State Services Commission’s *Model Standards on Conflicts of Interest*, the Independent Commission Against Corruption’s *Managing Conflicts of Interest in the Public Sector in NSW*; and the Organisation for Economic Co-operation and Development’s *Managing Conflict of Interest in the Public Service: A Toolkit*.

6

What are the rules?

- 6.1 Rules and expectations about conflicts of interest might be derived from any or all of:
- legislation;
 - common (judge-made) law; and
 - general standards and expectations.
- 6.2 In this Part, we outline some of the main legal and ethical considerations that are likely to apply to managing conflicts of interest and the possible consequences of breaching the applicable rules.

Statutory rules

- 6.3 Some public organisations are subject to statutory rules that apply to managing conflicts of interest.
- 6.4 Statutory rules generally regulate conflicts of interest of members of an organisation's governing body, rather than the organisation's employees. If you are on the governing body of an organisation that is subject to one of these Acts, you need to be familiar with the rules that apply to conflicts under that Act.
- 6.5 Statutory rules commonly do one or more of the following:
- prohibit members from discussing and voting at meetings on matters in which they have an interest;
 - require members to disclose interests before appointment, in a register of interests and/or at relevant meetings;
 - prohibit members from having an interest in certain contracts with their organisation;
 - prohibit members from signing documents relating to matters in which they have an interest; and
 - provide mechanisms for seeking exemptions from the general rules.
- 6.6 Some important statutory rules can be found in the:
- Crown Entities Act 2004;
 - New Zealand Public Health and Disability Act 2000;
 - Companies Act 1993;
 - Local Authorities (Members' Interests) Act 1968; and
 - Education Act 1989.
- 6.7 Appendix 2 sets out summaries of the relevant statutory provisions.

Common law rules

- 6.8 Conflicts of interest are also regulated under the common law, as part of the general requirement that all public decision-making must be procedurally fair, including being free from the taint of bias and predetermination.
- 6.9 The common law's rule against bias has 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.
- 6.10 The rule against bias operates both to avoid actual bias and to avoid any appearance of bias. The principle is that justice should not only be done but it should also be seen to be done.
- 6.11 The courts usually approach bias by asking the following question:
- Would a fair-minded observer reasonably think that the decision-maker or member of the decision-making body might not bring an impartial mind to the decision, in the sense that they might unfairly treat someone's case with favour or disfavour?*¹²
- 6.12 Also, under the common law, a person who has a fiduciary obligation towards someone else (such as a trustee of a trust or director of a company) is not allowed to put themselves in a position where their official role conflicts with their personal interests.
- 6.13 The principles that have been developed through the common law are relevant to managing conflicts of interest, even where there is a statutory rule in place, because the common law is likely to influence how the statutory rule is interpreted.
- 6.14 Appendix 3 sets out a list of some New Zealand court cases that consider conflicts of interest.

General standards and expectations

- 6.15 As stated in Part 1, public business should be conducted with a spirit of:
- integrity;
 - impartiality;
 - accountability;
 - trustworthiness;
 - respect; and
 - responsiveness.

¹² *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35; [2010] 1 NZLR 76.

Part 6

What are the rules?

- 6.16 As well as legal requirements, all decisions about conflicts of interest need to be guided by ethical principles. A lack of integrity in relation to conflicts can impact the culture of an entire team. At an extreme end, the normalising and acceptance of conflicts can permeate throughout a team and facilitate criminal corruption.¹³
- 6.17 There is no single source of rules or expectations specifying what constitutes ethical behaviour for all situations or all public organisations. Any rules or expectations applying to a particular situation might come from a variety of sources, including:
- the organisation's founding or constituting document;
 - the organisation's code of conduct or relevant internal policies and procedures, such as those about procurement decisions;
 - other sets of mandatory requirements that apply to the public sector or a particular part of it (such as the *Code of Conduct for the State Services*, the *Cabinet Manual*, the *State Services Commission's Board Appointment and Induction Guidelines*, or the *Government Procurement Rules*);
 - relevant clauses in an employment agreement or contract for services;
 - rules of conduct or codes of practice applying to members of a profession or industry;
 - general guidance or good practice guides (such as this one);
 - customary practice and behaviour in the public sector or a particular part of it;
 - commonplace understandings of the concepts of integrity, impartiality, accountability, trustworthiness, respect, and responsiveness; and
 - analogies drawn from legal rules that apply to similar situations.
- 6.18 Appendix 1 sets out a list of other useful sources of guidance.

Consequences if the rules or expectations are breached

- 6.19 A poorly managed conflict of interest can have consequences for both you and the organisation you work for.
- 6.20 If you are a member of a governing body, breaching a statutory rule might constitute grounds for your removal from office. It might constitute an offence. Sometimes, the law provides that a transaction of the public organisation might be able to be cancelled. Some matters might adversely affect the public organisation's audit report.

¹³ *R v Borlase & Noone* [2016] NZHC 2970. In this case, the court found that there were adequate conflicts of interest policies, but they were not appropriately observed. This led to "the insidious corruption of officials" noted by Fitzgerald J at [131].

- 6.21 If an organisation's decision is tainted by bias, the courts may declare the decision invalid or may prevent a person from exercising a power. The risk, delay, and expense in defending a decision against a legal challenge can be significant.
- 6.22 More often, if a conflict of interest is not handled well, there is a risk that you, your managers, and the organisation you work for might become the subject of public criticism by politicians, the media, or members of the public. A regulatory agency may conduct a formal inquiry into the public organisation. If you are an employee, the organisation might have grounds for taking disciplinary action against you.
- 6.23 A public scandal could be severely damaging to the public organisation's reputation and could lead to people losing their jobs.

7

Conflicts of interest in everyday life

- 7.1 In this Part, we show how conflicts of interest can arise in our everyday lives and provide guidance about the matters that should be considered:
- Scenario 1: Funding for a club
 - Scenario 2: Family connection to a tenderer for a contract
 - Scenario 3: Employment of a relative
 - Scenario 4: Public statements suggesting predetermination
 - Scenario 5: Decision affecting land
 - Scenario 6: Gifts and hospitality
 - Scenario 7: Making a public submission in a private capacity
 - Scenario 8: Mixing public and private roles
 - Scenario 9: Personal dealings with a tenderer for a contract
 - Scenario 10: Duties to two different organisations
 - Scenario 11: Professional connection to a tenderer.
- 7.2 The scenarios are intended to show the range of situations that can occur and the issues that might need to be considered in assessing their seriousness and deciding how to manage them. They are examples, not rules. In reality, sometimes a small difference in context or detail can make a critical difference. People will have to use their own judgement.
- Scenario 1: Funding for a club**
- 7.3 Sam is a grants officer for a Crown entity that funds environmental projects in the community. In her role, she does the initial assessment of applications and writes reports for the committee that will consider and decide on each funding round. She also monitors the use of the funding.
- 7.4 Sam is also a member of a small local residents' association. The association has applied for funding to clean up a local stream and plant native shrubs.
- 7.5 Normally, this application would be one that Sam would deal with in her work.
- 7.6 There is a conflict of interest here. Someone could reasonably allege that Sam's likely desire for her association to be successful in its bid might mean that she will not be completely impartial in the way she analyses this application (and the other applications that are competing for the same pool of money). The decision to be made is specifically about the residents' association, and probably affects its funding in a significant way.
- 7.7 Sam should tell her manager about her personal connection to this application. Sam's manager should consider the nature of Sam's role in processing these sorts

of applications, whether her position has a significant influence on decision-making, and whether someone else in the organisation could work on the particular application.

- 7.8 It might be prudent for Sam's manager to ensure that all of the applications for this particular set of funding (including the applications from others) are processed by someone else. If the manager takes this view, it might also be preferable that the other person is not someone Sam manages. If the application from Sam's association is successful, Sam might also need to be excluded from administering that grant.
- 7.9 Alternatively, it could be that no steps are warranted because Sam's role is a low-level administrative one and all the substantive analysis is done by others. Another possibility is that the above steps are impracticable, because Sam is the only person in the organisation who can do the work. In that case, some other option (such as carrying out an additional peer review of her work on the matter) might have to be used.
- 7.10 In this scenario, there is a conflict of interest even though Sam is not one of the leaders of the residents' association, did not prepare the application, does not personally have a financial interest in the matter, and believes she could still consider all applications fairly and professionally. The association is small, so Sam is likely to know its leaders well and work closely with them. However, the situation might be different if the association was a large nationwide organisation like Rotary, and the application was from a different branch of that organisation.

Scenario 2: Family connection to a tenderer for a contract

- 7.11 Hoani is a project manager for a district health board (DHB). The DHB contracts out some functions to private providers. As part of his role, Hoani is running a tender process to find a new provider of certain health services.
- 7.12 Hoani's brother-in-law, who he knows well, is the managing director and a significant shareholder of one of the private companies that is tendering for the contract.
- 7.13 There is a conflict of interest here. It is not a financial conflict of interest, because Hoani is not involved in the tendering company and is not financially dependent on his brother-in-law. But the family connection to the company is a reasonably close one, and the decision to be made by the DHB directly relates to the company. Hoani is likely to have feelings of loyalty to his brother-in-law (or at least this would be a likely perception).
- 7.14 Hoani should tell his manager about his personal connection to the tendering company, and the manager should get someone else to manage this tender

Part 7

Conflicts of interest in everyday life

process. It might also be prudent to take steps to ensure that Hoani does not have access to information about the other tenders or any confidential information about this tender process.

- 7.15 It matters that Hoani's relative has an important role at the tendering company. The approach might be different if the relative was in a much more junior position and was not personally involved in the company's tender, especially if the company was a large one. The approach might also be different if the person involved was a distant relative whom Hoani had met only a few times in his life. Assessing the closeness of a personal connection to someone (or the appearance of such closeness) requires careful judgement.

Scenario 3: Employment of a relative

- 7.16 Stephanie is the principal of a secondary school in a small town. She takes a leading role in hiring staff.
- 7.17 A vacancy has arisen for the position of finance manager and Stephanie's husband is interested in applying for the position.
- 7.18 Stephanie has a conflict of interest here. The school needs to employ staff on merit, and must avoid perceptions of undue influence or preferential treatment in appointment decisions.
- 7.19 Stephanie needs to tell the chairperson of the school's board of trustees about the situation. The board should ensure that this appointment process is handled entirely by others, and that Stephanie has no involvement in the process. Because of Stephanie's own position, the board needs to take extra care to ensure that the process is truly transparent and competitive, so that all suitably qualified people are able to apply and be fairly considered, and that there can be no reasonable suggestion that Stephanie might have influenced the decision from behind the scenes.
- 7.20 But managing the appointment is not the only type of conflict of interest that needs to be considered carefully by the school. Issues are also likely to arise in the ongoing working relationship, where there are matters that directly affect or involve both Stephanie and her husband.
- 7.21 It is a fact of life that there will be times when two people who are related – or who are in a personal relationship – will work for the same organisation. That is not usually improper in itself. Indeed, it would often be wrong for someone to be disadvantaged simply because of who they are related to, especially in a large organisation where the two people do not work closely together each day.

- 7.22 However, sometimes – and depending on the nature of the position – appointing someone who is a relative could cause difficulties, even where a fair process has been followed. This is because it can create a risk of a lack of independence, rigour, and professionalism in ongoing decision-making. In a public organisation, it would usually be unwise for relatives to hold two of the most senior positions, or to hold positions that are in a direct reporting relationship.
- 7.23 In Stephanie’s husband’s situation, the school’s board should consider whether it would be able to manage the frequent and significant conflicts of interest that would be likely to arise if Stephanie’s husband were to be appointed. The two roles are senior ones and likely to involve a direct reporting relationship (or at least a lot of working closely together on managing the school’s finances).
- 7.24 It can be difficult to decide the fairest course of action in these situations. Here, the board might well decide not to appoint the husband because it would be too difficult and complicated to manage the likely ongoing conflicts of interest.

Scenario 4: Public statements suggesting predetermination

- 7.25 Ruth is an elected member of a district council. She sits on the council’s planning hearings committee, which considers and decides on resource consent applications.
- 7.26 During the last election campaign, Ruth pledged to oppose an ice-skating rink that a developer hoped to build in town. One of her published campaign pledges was “Ruth will sink the rink”. Later, she declared in the local newspaper that the proposal would succeed “over my dead body”. The developer has now applied to the council for resource consent to build the rink, and the application is about to be considered by the planning hearings committee.
- 7.27 Ruth’s previous comments are likely to mean that she is biased. Even if she is not biased, there will certainly be a strong public perception that she is. If she takes part in decisions about the resource consent application, the developer could argue that it has not had a fair and impartial hearing, because one of the decision-makers had a predetermined view. The council’s decision could be open to legal challenge on the grounds of bias.
- 7.28 Ruth should stand down from the planning hearings committee when it considers this application. (If she refused to do so, and the council was concerned about the legal risk to its decision that her involvement would cause, the council might be able to resolve to remove her from the committee.)
- 7.29 Although local body politicians can be expected to take office with pre-existing views and policies on a wide range of matters, their role sometimes requires them

Part 7

Conflicts of interest in everyday life

to act judicially. When acting in that capacity, they should take extra care not to express views in a way that suggests their mind is firmly made up about such a matter before having heard all views, or that their position is so fixed that they are unwilling to fairly consider the views of others, or that they are not prepared to be persuaded by further evidence or argument.

- 7.30 The type of function being exercised is relevant to whether the line has been crossed. In Ruth's case, a strict standard needs to be applied because the council is acting in a regulatory capacity, and because a resource consent grants the holder a legal right. The council needs to follow a fair process and make its decision on lawful grounds that comply with the Resource Management Act 1991, because it is making a decision that could be appealed to the Environment Court or be subject to judicial review by the High Court.

Scenario 5: Decision affecting land

- 7.31 Tom is a civil engineer and works for a State-owned enterprise (SOE) that is responsible for a national infrastructure network of gas pipes. The SOE is planning to build a major pipeline to increase supply capacity from a refinery to a large city.
- 7.32 The pipeline has to cross a distance of 300 kilometres, and the SOE has come up with several different options for the route of the pipeline, which the SOE will now consider in more detail. The SOE has to acquire land – compulsorily if necessary – along its chosen route. The project is opposed by many people who live along the possible routes, who fear the pipeline will adversely affect the natural environment and devalue their remaining land. Tom has worked on a number of areas of the project, and has now been appointed to the Route Options Working Group that will assess the route options and make a recommendation to the board.
- 7.33 Tom is also part-owner of a farm that lies directly in the path of one of the route options.
- 7.34 Tom has a conflict of interest here. He has a personal stake in the decision about which route to choose, because his land could be affected. Although the working group does not make the final decision, it has an important role in analysing the route options and making a recommendation.
- 7.35 Tom needs to tell his manager that he has an interest in a property affected by one of the options. Tom's role will have to be considered carefully. It might be that Tom does not mind whether the pipeline ends up crossing his land – he might not share any of the concerns of the project's opponents. He might believe that he could contribute conscientiously to the working group to help it arrive at the

best technical answer. But his manager should bear in mind the risk that, if Tom's personal connection becomes publicly known, others might easily think that it could affect his views or actions.

- 7.36 His manager might have to remove him from the working group and assign him to other tasks. (There might be other aspects of the project that Tom could work on, which have no connection to the question of which route to choose.) It might also be wise to ensure that Tom does not have access to confidential information about the decision before it is made public, in case he is considering selling his land.
- 7.37 Alternatively, Tom's expertise might be indispensable to the project, or he might have a small part in the overall process. Some other options might therefore need to be considered (such as only partly limiting his role, or imposing extra supervision).

Scenario 6: Gifts and hospitality

- 7.38 Rawiri works in the corporate services division of a government department. As part of his role, he manages the department's contractual relationship with its rental car provider. The arrangement with this supplier has been in place for several years, so the department has decided to re-tender the contract. Rawiri has told the current provider that he will soon be inviting expressions of interest for a new contract.
- 7.39 Rawiri has regular relationship management meetings with the current provider. At a recent meeting, the provider offered to fly him to another city to inspect a new fleet of cars that will shortly be available, and said that Rawiri could have complimentary corporate box tickets to a rugby test match that happened to be on that night, and stay on for the weekend in a downtown hotel.
- 7.40 This situation creates risks at any time, but especially given the imminent tender process. Rawiri might not be seen as impartial if he is involved in choosing the new supplier. A competitor could allege that Rawiri is being given an inducement or reward in the implicit expectation that he will look more favourably on the current provider in the coming tender round (or that he will receive further gifts if the current provider is successful).
- 7.41 Rawiri should discuss the offer with his manager, and carefully consider the department's policy on gifts and hospitality.¹⁴ Given the circumstances, it would not be appropriate to accept the offer of the sports tickets and hotel accommodation. With the offer to be flown to another city to inspect the new fleet of cars, careful consideration should be given to whether business reasons

¹⁴ Most organisations will have an internal policy that sets out in detail what is or is not acceptable in this area. See also our publication *Controlling sensitive expenditure: Guidelines for public entities* (available at oag.parliament.nz), and the State Services Commission's 2018 publication *Chief Executive Gifts, Benefits and Expenses* (available at ssc.govt.nz).

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Conflicts of interest in everyday life

can justify the visit. (If it goes ahead, the public organisation might decide to offer to pay the cost of it.) If other forms of gift or hospitality have already been accepted, the appropriateness of Rawiri having a role in the coming tender process might need to be reconsidered, too.

- 7.42 This does not mean that gifts must always be refused. It is reasonable to consider the value or nature of the gift and extent of personal benefit (for example, it might be acceptable to accept a gift that is inexpensive and widely distributed). The context and reason or occasion for the gift is relevant, too. For an organisation that operates in a more commercial environment, some types of gift or hospitality might be seen as a necessary element in maintaining relationships with stakeholders and clients. However, in Rawiri's case, the risk is higher because of the proximity to the coming tender round where a strict and fair process will need to be followed and be seen to be followed (and because the justification for at least some elements of the offer appears dubious).

Scenario 7: Making a public submission in a private capacity

- 7.43 Ken is an elected member of a city council. The council is proposing to adopt a new bylaw on the location of brothels. As it is required to carry out a formal public consultation process on its draft bylaw, the council has invited written submissions and will hold a public hearing where submitters can make an oral presentation to a council committee. The adoption of the bylaw will be decided by a vote of the full council.
- 7.44 Ken feels strongly about the draft bylaw, and wishes to lodge a submission.
- 7.45 This situation might create a conflict of interest for Ken.
- 7.46 Some public organisations will have a code of conduct or policy that prohibits their members or officials from making public submissions to the organisation in a private capacity.¹⁵
- 7.47 Assuming that Ken will not be breaching the council's code of conduct, he will be entitled to exercise his democratic right to make a submission, like any other private citizen. But, if he does so, he should not participate in the council's decision on whether to adopt the draft bylaw; nor should he sit on the committee that hears and considers the submissions. Otherwise, his behaviour could indicate predetermination.
- 7.48 Ken would create the perception that he is attempting to act as both an interested party and a decision-maker on the same matter or, in other words, acting as a

¹⁵ In particular, senior officials – or officials who work in policy roles – in the public service need to take extra care to maintain their political neutrality.

judge in his own cause. The council's decision could be open to legal challenge on the ground of bias.

Scenario 8: Mixing public and private roles

- 7.49 Antonia is a senior scientist working for a Crown research institute (CRI). The CRI has developed a new product that has significant revenue-earning potential, and Antonia has worked on the product as part of her role in the CRI. However, the CRI needs help in manufacturing and marketing the product on a large scale, so plans to enter into a joint venture with a private company. The CRI is considering appointing Antonia as one of its representatives on the governing body of the joint venture.
- 7.50 Coincidentally, Antonia is also a shareholder in the private company that will be the CRI's joint venture partner (although she had no role in the CRI's selection of it).
- 7.51 The situation creates a conflict of interest for Antonia. She stands to benefit from the financial success of the private company. The fact that there might be no direct disadvantage to the CRI (because the joint venture partners are working together, hopefully for their mutual benefit) does not remove the conflict of interest. Her interests in both the CRI and the private company could create confusion about her role and primary loyalty. She could be accused of using her official position in a way that advances her own private interests.
- 7.52 Antonia needs to tell her manager. It will probably be necessary for Antonia not to be given any major role in governing or managing the joint venture while she has an interest in the private company.
- 7.53 Antonia's manager might also need to think carefully about what other work, if any, it is appropriate for Antonia to do on the project in her capacity as a CRI employee. This decision might not be clear-cut. Antonia might be the best person in the CRI to carry out certain tasks, but the risk is that she could be regarded as spending a large part of her time as an employee of a public organisation, and using the CRI's resources, to carry out work that has a significant element of private benefit for her.
- 7.54 Antonia's manager might judge that some involvement in the project is acceptable (or even necessary), but it might also be desirable to confine this. For example, Antonia's role could be changed so that she does not have the ability to influence decisions about how the joint venture and project are run. Alternatively, Antonia might be asked to give up one of her roles – that of employee or that of shareholder.

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- 7.55 If circumstances changed to a point where the CRI and the private company became direct competitors with each other, then Antonia's situation might become even more difficult (especially if she remains in a senior position at the CRI, or is still involved in this particular area of work). In that case, it might become necessary for Antonia's manager to insist on divestment of one or other role – either that she relinquish her private interest or leave her job.¹⁶

Scenario 9: Personal dealings with a tenderer for a contract

- 7.56 Sandra is a consultant who specialises in project management. Her services have been engaged by a government department to help it carry out a new building project. As part of this role, Sandra has been asked to analyse the tenders for the construction contract and provide advice to the department's tender evaluation panel.
- 7.57 Sandra has a lot of personal knowledge about one of the tenderers for the construction contract. She used that firm to build her own house last year, and she is currently using it to carry out structural alterations on several investment properties that she owns. Because of this, she knows the directors of the company very well, and has a high regard for their work.
- 7.58 This situation might create a conflict of interest for Sandra. She is expected to impartially and professionally assess each of the tenders, yet she could be regarded as being too close to one of the tenderers.
- 7.59 In Sandra's case, it is probably unwise for her to play a role in selecting the tenderer. (This might or might not require ending the consultancy arrangement altogether, depending on what else Sandra has been engaged to do.) Her dealings with the firm are recent and significant. The risk is that, if this firm wins the contract, Sandra's personal connections with it might allow someone to allege that the department's decision is tainted by favouritism.
- 7.60 These sorts of situations are not always clear-cut. Particularly in small or specialised industries, people often have had some degree of personal knowledge of, or previous dealings with, other people or organisations that they have to make decisions about. That is not necessarily wrong. Indeed, they will often be chosen for this role precisely because of their experience or expert knowledge, and that might include general impressions about the reputation or competence of others. So, sometimes, these sorts of connections might be judged to be too remote or insignificant. For instance, in this case, the response would probably be different if the firm's private work for Sandra had been a single, smaller job carried out several years ago.

¹⁶ If the private company regularly carries on business in the same general industry as the CRI, the CRI might have an internal policy prohibiting Antonia from being involved in such a company anyway.

- 7.61 To take another similar example, careful judgement would also be necessary if the connection was instead that the tendering firm was run by a friend or acquaintance of Sandra. For example, it might be improper for Sandra to be involved in assessing the tenders if the firm was run by a friend she had known for many years and who had attended her wedding. By contrast, there might not be any problem if Sandra simply knew the person in a casual way through membership of the same sports club.
- 7.62 Further careful judgements might be necessary if Sandra had worked for the firm. For instance, the situation might be problematic if she had been a full-time employee in the last year, or was also currently providing significant consultancy advice to the firm on another matter. On the other hand, it might not be problematic if she had worked for the firm several years ago, or if she had provided only occasional pieces of consultancy advice in the past.
- 7.63 This scenario also shows that public organisations need to think about whether and how to manage conflicts of interest that arise for someone who is not a member or employee, but is instead a consultant or contractor. Sandra's role is important to the department and affects an important decision it has to make, and so can expose the department to legal and political risk. She should be required to agree to abide by the relevant conflict of interest policy for staff. The departmental manager who oversees her work should ensure that she understands the policy, and should monitor her in the same way as an employee.

Scenario 10: Duties to two different organisations

- 7.64 Jean-Paul is a member of the council of a tertiary education institution (TEI). The TEI has some contracting arrangements with private organisations to help to deliver some educational courses. One of those arrangements is with a charitable trust, under which the trust is funded by the TEI to prepare, administer, and teach the course on behalf of the TEI. However, the TEI is now about to decide whether to discontinue this arrangement.
- 7.65 Jean-Paul also happens to be one of the trustees of the charitable trust.
- 7.66 Jean-Paul has a conflict of interest in this decision. He might not be affected personally by the decision, but the trust will be, and he is closely associated with the trust. (The conflict of interest might be particularly acute if the course is a significant source of the trust's funding and ongoing viability.)
- 7.67 Also, as a member of the governing body of the TEI, Jean-Paul has a duty to act in the best interests of the TEI, but, as a trustee, he also has a duty to act in the best interests of the trust. In this scenario, the best outcome for one organisation might not be the best outcome for the other, and so it might be impossible for Jean-Paul to faithfully give effect to his obligations to both organisations.

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Conflicts of interest in everyday life

- 7.68 Jean-Paul should declare a conflict of interest at relevant meetings of the TEI's council, and refrain from discussing or voting on the TEI's decision. It might be wise for him not to be provided with confidential information about the matter. Jean-Paul might also need to consider whether he has a conflict of interest in the matter at meetings of the trust.

Scenario 11: Professional connection to a tenderer

- 7.69 Viliami works for a large multi-disciplinary professional services firm. Viliami, through his firm, has been engaged by an SOE to help it choose a contractor to manage a major land development project. Viliami is the person who will provide expert advice to the panel that considers tenders.
- 7.70 Another division of Viliami's firm wishes to submit a tender for the project.
- 7.71 There is a conflict of interest here. Viliami will be providing advice about a matter that affects his own firm. Viliami does not personally have two conflicting roles, but his firm does, and that creates a problem for him.
- 7.72 In some situations involving organisational connections, different individuals in the organisation can be managed by insisting on a separation of roles and information. Because this process is not always entirely satisfactory, it is best reserved for situations when the connection is almost inevitable or the risk is very low. In this scenario, the connection is fairly direct, even though Viliami will not be one of the individuals managing the project. Another tenderer might object that he is unlikely to be impartial. The risk of challenge could be high, especially if the project is worth a lot of money.
- 7.73 Viliami should discuss the matter with the relevant manager in the SOE. If his firm's tender is to be considered, it is likely that Viliami will not be able to continue with his role. Alternatively, when it first engaged Viliami's services, the SOE could have insisted on a condition that his firm would not be permitted to tender for the project.

Appendix 1

Other sources of guidance

Some of the material listed here comes from other countries. Although it is useful, the overseas material has been written for an environment that might have different legal rules or public expectations.

New Zealand

- State Services Commission (2007), *Code of Conduct for the State Services*, Wellington (available at www.ssc.govt.nz).
- State Services Commission (2019), *Conflicts of Interest*, Wellington (available at www.ssc.govt.nz).
- State Services Commission (2015), *Board Appointment and Induction Guidelines*, Wellington (available at www.ssc.govt.nz).
- Cabinet Office (2017), *Cabinet Manual*, Wellington, paragraphs 2.53-2.81 (available at www.dpmc.govt.nz).
- Controller and Auditor-General (2020), *Local Authorities (Members' Interests) Act 1968: A guide for members of local authorities on managing financial conflicts of interest*, Wellington (available at www.oag.parliament.nz).
- House of Representatives (2017), *Standing Orders of the House of Representatives*, Wellington, Standing Orders 163-166 and Appendix B (available at www.parliament.nz).

Australia

- Australian Public Service Commission (2017), *Values and Code of Conduct in Practice*, Canberra (available at www.apsc.gov.au).
- Independent Commission Against Corruption (2019), *Managing Conflicts of Interest in the Public Sector in NSW*, Sydney/Brisbane (available at www.icac.nsw.gov.au).
- Independent Commission Against Corruption/Crime and Misconduct Commission (2004), *Managing Conflicts of Interest in the Public Sector: Guidelines*, Sydney/Brisbane (available at www.integrity.qld.gov.au).
- Independent Commission Against Corruption/Crime and Misconduct Commission (2004), *Managing Conflicts of Interest in the Public Sector: Toolkit*, Sydney/Brisbane (available at www.integrity.qld.gov.au).
- Integrity Coordinating Group (2011), *Conflict of interest guidelines*, Perth (available at www.opssc.wa.gov.au).
- New South Wales Ombudsman (2017), *Recognising and managing conflict of interests*, Sydney (available at www.ombo.nsw.gov.au).

Appendix 1

Other sources of guidance

Canada

- Government of Canada (2011), *Values and Ethics Code for the Public Service*, Ottawa (available at www.tbs-sct.gc.ca).
- Government of Canada (2015), *Apparent Conflicts of Interest*, Ottawa (available at www.tbs-sct.gc.ca).

OECD

- Organisation for Economic Co-operation and Development (2003), *OECD Guidelines for Managing Conflict of Interest in the Public Service*, Paris (available at www.oecd.org).
- Organisation for Economic Co-operation and Development (2005), *Managing Conflict of Interest in the Public Service: A Toolkit*, Paris (available at www.oecd.org).

Appendix 2

Some important statutory rules about conflicts of interest

The descriptions that follow provide a summary of some important statutory provisions, and enable a comparison between them. They are necessarily brief and general in nature, and involve some paraphrasing. They are not a comprehensive statement of the relevant law. Readers wanting to apply the rules to a particular situation should refer to the wording of the relevant statute or seek legal advice.

The Acts discussed in this Appendix are the:

- Crown Entities Act 2004;
- New Zealand Public Health and Disability Act 2000;
- Companies Act 1993;
- Local Authorities (Members' Interests) Act 1968; and
- Education Act 1989.

Crown Entities Act 2004

The relevant provisions in this Act apply to members of boards of statutory entities (as that term is defined in the Act), except for district health boards.¹⁷

Before appointment, a prospective member must disclose to the Minister the nature and extent of all interests that they have, or are likely to have, in matters relating to the organisation.

A member who is “interested in a matter” relating to the organisation must disclose the nature and value (or extent) of the interest. The disclosure must be made in the interests register, and to the chairperson (or deputy or Minister, in some cases). Standing disclosures (disclosures with ongoing effect) may be made. The member must not vote or take part in any discussion or decision of the board or any committee relating to the matter, nor otherwise participate in an activity of the organisation that relates to the matter, nor sign related documents.

A member is “interested” in a matter if they (or their spouse, civil union partner, de facto partner, child or parent) might derive a financial benefit from it; or if they may have a financial interest in (or are a partner, director, officer, board member or trustee of) a person to whom the matter relates; or if they are otherwise directly or indirectly interested in the matter. Certain exceptions apply, including where the member is a member or officer of a subsidiary, or where the interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence them in carrying out their responsibilities.

¹⁷ See sections 7, 10, 31, 53, 59, and 62-72.

Appendix 2

Some important statutory rules about conflicts of interest

The board must notify the Minister of a failure to comply with these provisions, and the member might be removed from office. In some cases, the organisation may be able to cancel a transaction that was entered into in breach of the conflict of interest rules.

The chairperson (or deputy or Minister, in some cases) may grant written permission for one or more members to act despite their interest in a matter. Such permission must be disclosed in the organisation's annual report.

For more information about these provisions, see the State Services Commission's 2015 publication *Board Appointment and Induction Guidelines*.

New Zealand Public Health and Disability Act 2000

The relevant provisions in this Act apply to members of boards of district health boards (DHBs).¹⁸

Before appointment or election, a prospective member must disclose to the Minister or electoral officer, and in the interests register, all conflicts of interest that they have, or are likely to have, in matters relating to the DHB. A person who fails to disclose a material conflict of interest before accepting nomination as a candidate for election is disqualified from membership.

A member who is "interested" in a transaction of the DHB must disclose the nature of the interest to the board. The disclosure must be recorded in the minutes and in the interests register. The member must not vote or take part in any deliberation or decision of the board relating to the transaction, nor sign related documents. (The definition of being "interested in a transaction" is similar to the definition of being "interested in a matter" under the Crown Entities Act. One difference is that it excludes an interest in a party that is – or is owned by – a publicly owned health and disability organisation.)

A member who fails to comply with these provisions might be removed from office.

The other members of the board may decide to permit the member to participate in the board's deliberations (but not its decision) about the transaction. Certain matters about the permission must be recorded in the minutes.

The Minister may waive or modify the prohibition on participation for particular members or transactions or classes of transactions. A copy of any such waiver or modification must be presented to the House of Representatives.

¹⁸ See sections 6, 21, and 29, clauses 6 and 17 of Schedule 2, and clauses 36-37 of Schedule 3. In addition, section 31 of the Crown Entities Act 2004 applies to appointed members. Sections 53 and 59 of that Act also apply to members.

Companies Act 1993

This Act applies to company directors.¹⁹

A director who is interested in a transaction or proposed transaction with the company must disclose the nature and value (or extent) of the interest (unless the transaction is between the director and the company and is in the ordinary course of business on usual terms and conditions). The disclosure must be made in the interests register and to the board. Standing disclosures may be made.

A director is “interested” in a transaction if they:

- are party to it or may derive a material financial benefit from it;
- have a material financial interest in another party to it;
- are a director, officer, trustee, parent, child, spouse, or civil union partner or de facto partner of another party to it (or person who may derive a material financial benefit from it); or
- are otherwise directly or indirectly materially interested in the transaction.

Certain exceptions apply, including in relation to subsidiaries and remuneration.

It is an offence for a director to fail to comply with these provisions. In some cases, the company might be able to cancel a transaction in which a director was interested.

Subject to the constitution of the company, a director who is interested in a transaction may vote on a matter relating to it (and do other things relating to it in their capacity as a director).²⁰

Local Authorities (Members’ Interests) Act 1968

This Act applies to members of the governing bodies of city councils, district councils, regional councils, community boards, and a range of other public bodies. It also applies to members of their committees.

A person is disqualified from being a member of the local authority (or a committee) if they are concerned or interested in contracts with the authority under which the total payments made, or to be made, by or on behalf of the authority exceed \$25,000 in any financial year.

It is an offence for the person to act as a member of the local authority while disqualified.

¹⁹ See sections 139-144. In relation to Crown entity companies, see also section 90 of the Crown Entities Act 2004 about disclosures before appointment.

²⁰ However, this provision does not override the duty under section 131 to act in good faith and in the best interests of the company: see *Hedley v Albany Power Centre (No. 2)* (2006) 9 NZCLC 264,095.

Appendix 2

Some important statutory rules about conflicts of interest

The Auditor-General may grant prior approval and, in limited cases, retrospective approval, of a member's interest in contracts, which has the effect of suspending the contracting rule in relation to that case.

A member of the local authority (or a committee) must not vote on, or take part in the discussion of, a matter before the authority in which they have a financial interest, other than an interest in common with the public (the non-participation rule). Certain exceptions apply. When the matter is raised at a meeting, the member must declare that they have a financial interest in it and the minutes must record the fact of the disclosure and abstention.

It is an offence for a member to breach the non-participation rule and, if convicted, they automatically vacate office.

The Auditor-General may grant an exemption or declaration, in a limited range of situations, which allows a member to participate in a matter in which they have a financial interest.

In some cases, a member who is associated with a company is deemed to share any interests of that company. A member can also have a deemed interest through their spouse, civil union partner or de facto partner.

For more information about this Act, see our 2020 publication *Local Authorities (Members' Interests) Act 1968: A guide for members of local authorities on managing financial conflicts of interest* (available at oag.parliament.nz).

Education Act 1989

The relevant provisions in this Act apply to members of school boards of trustees,²¹ and TEI councils²².

Before appointment or election, a prospective school board trustee must confirm that they are eligible to be a trustee.

A person is disqualified from being a trustee of the board (or member of a committee) if they are concerned or interested in contracts with the board under which the total payments made, or to be made, by or on behalf of the board exceed a specified amount (currently \$25,000) in any financial year.

In some cases, a trustee who is associated with a company is deemed to share any interests of that company.

The Secretary for Education may grant approval of a contract, which has the effect of suspending the contracting rule in relation to that case.

²¹ See sections 103, 103A, and 103B, and clause 40 of Schedule 6.

²² See sections 174 and 175.

A trustee must be excluded from any meeting of the board while it discusses, considers, or decides on a matter in which they have a financial interest or any interest that might reasonably be regarded as likely to influence them in carrying out their duties and responsibilities. However, they may attend to give evidence, make submissions, or answer questions.

Members of TEI councils are required to disclose their financial interests in any matters being considered by the council, and cannot participate in discussions or decisions on the matter unless the council decides otherwise. The council may dismiss a member who, without reasonable excuse, breaches that provision.

Appendix 3

Leading New Zealand court cases that consider conflicts of interest

- *Auckland Casino v Casino Control Authority* [1995] 1 NZLR 142 (CA)
- *Back Country Helicopters v Minister of Conservation* [2013] NZHC 982; [2013] NZAR 1474
- *Calvert & Co v Dunedin City Council* [1993] 2 NZLR 460 (HC)
- *Collinge v Kyd* [2005] 1 NZLR 847 (HC)
- *Diagnostic Medlab v Auckland District Health Board* [2007] 2 NZLR 832 (CA)
- *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541; [2019] 2 NZLR 501
- *Erris Promotions v Commissioner of Inland Revenue* (2003) 16 PRNZ 1014 (CA)
- *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC)
- *Howe v Keown* [2011] NZAR 764 (HC)
- *Man O'War Station v Auckland City Council (No 1)* [2002] 3 NZLR 577 (PC)
- *Meadowvale Stud Farm v Stratford County Council* [1979] 1 NZLR 342 (HC)
- *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA)
- *NZI Financial Corporation v NZ Kiwifruit Authority* [1986] 1 NZLR 159 (HC)
- *Otago University Students Association v University of Otago* [2009] 2 NZLR 38 (HC)
- *Pratt Contractors v Transit New Zealand* [2005] 2 NZLR 433 (PC)
- *R v Borlase & Noone* [2016] NZHC 2970
- *Riverside Casino v Moxon* [2001] 2 NZLR 78 (CA)
- *Save Chamberlain Park Inc v Auckland Council* [2018] NZHC 1462
- *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35; [2010] 1 NZLR 76 (SC).

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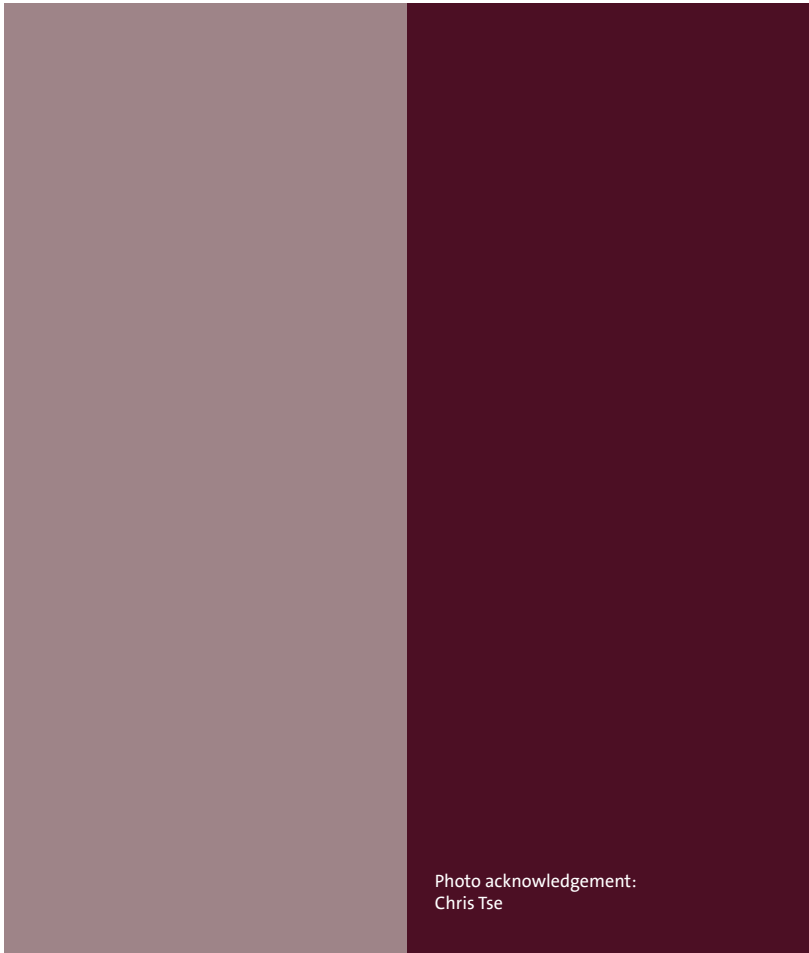
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Appendix 5

Local Authorities
(Members'
Interests) Act
1968: A guide for
members of local
authorities on
managing
financial conflicts
of interest





Local Authorities
(Members'
Interests) Act 1968:
A guide for
members of local
authorities on
managing financial
conflicts of interest

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

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Auditor-General's overview

E ngā mana, e ngā reo, e ngā karangarangatanga maha o te motu, tēnā koutou.

The Local Authorities (Members' Interests) Act 1968 (the Act) helps protect the integrity of local government by ensuring that local authority members cannot take advantage of their official position for personal financial gain.

Although the principle underlying the Act is relatively simple, the detail of the rules and the various exemptions are complex. The Act is somewhat out of date and difficult to understand, and the rules are not always easy to apply in a modern local government context. However, local authorities and their members need to understand the Act, because breaching its rules can lead to a criminal conviction or disqualification from office.

That is why we have written this plain English guide. We want members who are covered by the Act, and those advising them, to be aware of the Act's rules and the steps they need to take to ensure that they do not inadvertently breach them. This guide also explains our statutory functions under the Act – specifically, how we consider requests for approvals, exemptions, and declarations – and the information that we need to respond to requests promptly.

The previous edition of this guide covered non-financial interests and predetermination. When it comes to conflicts of interest, our statutory role is only under the Act, and the Act covers only the financial interests of members. Because of this, our guidance about non-financial interests and predetermination is now in our separate good practice guide *Managing conflicts of interest: A guide for the public sector*. That guide is intended for all public sector organisations, including local authorities, and covers other types of interests that might affect a member's ability to participate in their local authority's decision-making. I strongly recommend that you read both guides.

Nāku noa, nā,



John Ryan
Controller and Auditor-General

24 June 2020

1

Introduction

- 1.1 In this Part, we discuss:
- whether the Local Authorities (Members' Interests) Act 1968 applies to you;
 - why you should read this guide;
 - the Auditor-General's role; and
 - some points about this guide.
- 1.2 This is a guide to the Local Authorities (Members' Interests) Act 1968 (the Act). It is intended for members of territorial authorities, regional councils, community boards, and local boards.
- 1.3 This guide will also be relevant for elected or appointed officials in several other public bodies that are covered by the Act. These include cemetery trusts, administering bodies, and licensing trusts. To check whether the Act applies to you, see Appendix 1.
- 1.4 Officers and staff of local authorities are not subject to the Act. However, they might find this guide useful when providing advice to members on how to comply and applying for contract approvals (these applications must be made by the local authority, not the member).
- Summary of the Local Authorities (Members' Interests) Act 1968**
- 1.5 The purpose of the Act is to ensure that elected members of local authorities, and anyone else to whom the Act applies, are not able to take advantage of their official position for personal financial gain.
- 1.6 The Act has two main rules:
- Members cannot benefit from contracts with the local authority if payments made under those contracts are more than \$25,000 in any financial year.¹ We refer to this as **the contracting rule**.
 - Members cannot participate in matters before their local authority in which they have a financial interest, other than an interest in common with the public.² We refer to this as the **non-participation rule**.
- 1.7 The contracting rule applies to candidates for election as well as elected members, but it applies in a different way. In Part 2, we explain the application of the contracting rule to those who have already been elected or appointed. If you are not yet an elected member but are thinking of standing for election, or are being considered for appointment, you should read Part 3.

1 Section 3(1) of the Act.

2 Section 6(1) of the Act.

- 1.8 In Part 4, we explain how the non-participation rule applies.
- 1.9 The Act also provides some exceptions and exemptions to these rules. For example, local authorities can apply to the Auditor-General for approval of a contract, and members can apply to the Auditor-General for approval to participate in decision-making that might otherwise be prohibited by the Act. This is covered in Parts 2 and 4.

Does the Local Authorities (Members' Interests) Act 1968 apply to you?

- 1.10 The Act applies to members of city councils, district councils, regional councils, community boards, local boards, and a range of other public bodies (see Appendix 1). The Act uses the term "local authority" to cover all these public bodies.³ We do the same in this guide.
- 1.11 The Act also applies to members of committees of those local authorities (regardless of whether a committee member is also a member of the local authority).⁴ In this guide, we refer to all people to whom the Act applies as "members".
- 1.12 The Act does not apply to:
- officers and staff of local authorities; or
 - council-controlled organisations, port companies, airport companies, energy companies, or tertiary education institutions.⁵
- 1.13 The Act regulates the actions of individual members of local authorities, not their local authorities. Members, not their local authorities, can be prosecuted for breaches of the Act.

Why you should read this guide

- 1.14 It is important for members to have a good understanding of how the rules in the Act work. Failure to comply with the rules can result in serious consequences, including criminal conviction and immediate loss of office.
- 1.15 We encourage you to read this guide carefully, take advantage of any training on the Act offered by your local authority, and ask for advice from staff if you have any questions or concerns about how the Act applies to you. In complex situations, you might need to seek legal advice.

³ See section 2(1) and Schedule 1 of the Act.

⁴ Sections 3 and 6 of the Act refer to committees of a local authority as well as the authority itself.

⁵ See section 176E of the Education Act 1989, which says a council of an institution is not a local authority for the purposes of the Local Authorities (Members' Interests) Act 1968.

Part 1
Introduction

The Auditor-General's role

- 1.16 The Auditor-General has certain statutory functions under the Act.
- 1.17 These statutory functions include:
- deciding whether to approve contracts worth more than \$25,000 in a financial year;
 - deciding whether to grant exemptions or declarations allowing members to discuss and vote where they have a financial interest; and
 - investigating and prosecuting alleged offences against the Act.
- 1.18 If we are asked to investigate a potential breach of the Act, we will make findings and reach a view on whether the Act has been breached. If we do conclude that the Act has been breached, we will make a decision on whether the individual should be prosecuted. However, we do not issue legal “rulings”. Only the courts can determine whether the Act has, as a matter of law, been breached. See Part 5 for more information on how we investigate and decide whether to prosecute possible breaches of the Act.
- 1.19 We can provide guidance to members and officers of local authorities to help them comply with the Act in particular situations. However, we cannot give legal advice. In more complex situations, we might recommend that you seek legal advice about whether you are at risk of breaching the Act.

Some points about this guide

This guide applies only to financial interests

- 1.20 This guide is about **financial** conflicts of interest and the specific rules that apply to the management of potential financial conflicts by members.
- 1.21 The Act is only a small subset of a much larger body of law, ethics, and good practice that regulates bias and conflicts of interest in the public sector. There are other types of conflicts of interest and rules about bias in decision-making that are not covered by the Act or this guide that might affect you as a public official.
- 1.22 Examples include conflicts of interest arising through personal relationships, conflicts arising because you hold roles in more than one organisation, and “predetermination”.⁶
- 1.23 If you read this guide and decide that you are not at risk of breaching the Act because you do not have a financial conflict of interest, you still need to think

⁶ Predetermination is any situation where you are making a decision about something, and there is a risk that people will think you made up your mind before you considered all of the evidence. Suggestions of predetermination usually arise because of something you have previously said or done. For more about predetermination, see our good practice guide *Managing conflicts of interest: A guide for the public sector* at oag.parliament.nz.

about whether you have some other sort of conflict of interest that might need to be managed. See our separate good practice guide – *Managing conflicts of interest: A guide for the public sector*.

- 1.24 You should refer to that guide in cases where there is no risk of breaching the Act (because your interest is not a financial one), but where there might still be doubts about whether the situation you are in might breach common law rules on conflicts of interest or is ethically appropriate in a public sector context.⁷ You might find it helpful to also refer to our *Quick guide to managing conflicts of interest*, which is available on our website.

This guide is not a substitute for the law

- 1.25 This guide outlines the main provisions of 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. It should not be treated as legal advice for specific situations.
- 1.26 In difficult situations, or if in doubt, we recommend that you refer to the actual wording of the Act, get advice from staff at your local authority, or seek legal advice, either from your local authority or your lawyer.

⁷ Common law refers to law that has been developed by the courts.

2

The contracting rule

- 2.1 In this Part, we discuss:
- what it means to be disqualified from office;
 - meaning of “contract”;
 - meaning of “concerned or interested”;
 - the \$25,000 limit on contracts;
 - how the contracting rule applies to subcontracts;
 - exceptions to the contracting rule;
 - the Auditor-General’s power to approve contracts; and
 - managing compliance with the contracting rule.
- 2.2 We also provide answers to some frequently asked questions about the contracting rule at the end of this Part.

Summary of the contracting rule

- 2.3 You will be automatically disqualified from office if:
- you are “concerned or interested” in a contract or contracts with your local authority; and
 - the total payments made, or to be made, by or on behalf of the local authority for the contract or contracts exceed \$25,000 in any financial year.
- 2.4 This contracting rule applies unless:
- you have approval from the Auditor-General for the contract(s); or
 - one of the exceptions in the Act applies.
- 2.5 If you are concerned or interested in any contract with your local authority, you cannot participate in any discussion or vote on that contract (see Part 4).
- 2.6 The contracting rule applies to you, not the local authority. The Act does not affect the local authority’s power to enter into contracts. The fact that a contract disqualifies you from membership does not invalidate the contract.
- 2.7 The contracting rule also applies to candidates standing for election to the local authority, but in a different way to members. If you are considering standing for election and want to understand how the contracting rule applies to you, see Part 3.

What it means to be disqualified from office

- 2.8 You are disqualified automatically if you are “concerned or interested” in a contract in breach of the contracting rule (see paragraphs 2.16 to 2.20).

- 2.9 Disqualification means that you cannot hold office as a member of the local authority or any committee of the local authority.⁸
- 2.10 A disqualification lasts until the next local government elections or the next opportunity for appointment to the local authority.
- 2.11 It is an offence under the Act for you to act as a member of the local authority (or a committee of the local authority) while disqualified.⁹
- 2.12 The only way to avoid disqualification is to apply for retrospective approval from the Auditor-General for the contract (see paragraphs 2.46 to 2.49). There is no guarantee that retrospective approval will be given. That is why it is important for you to understand the contracting rule, and to closely monitor any contracts with the local authority that you could benefit from.

Meaning of “contract”

- 2.13 Contract means a contract made by any person directly with the local authority. The Act defines it to include any relationship with the local authority that is intended to constitute a contract even if it is not an enforceable contract.¹⁰ This broad definition potentially covers transactions or relationships that are not typically thought of as “contracts”, for example, grants and committee appointments. See the frequently asked questions about the contracting rule at the end of this Part.
- 2.14 The contracting rule also applies to subcontracts (see paragraphs 2.26 to 2.28).¹¹
- 2.15 The contracting rule does not apply to a contract for the employment of any person as an officer or servant of the local authority.¹²

Meaning of “concerned or interested”

- 2.16 You are concerned or interested in a contract if you are a party to the contract.
- 2.17 You are also concerned or interested in a contract if the contract is between your local authority and another person or organisation, and:
- you benefit financially from the contract; or
 - the Act deems you to be concerned or interested in the contract (see paragraphs 2.19 and 2.20).

8 Section 4 of the Act.

9 Section 5 of the Act.

10 Section 2 of the Act.

11 Section 3(3)(b) of the Act.

12 Section 2 of the Act.

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- 2.18 It is difficult to be precise about what is or is not a concern or interest in a contract. Each case has its own circumstances. While the Act provides certainty in two common types of cases (see paragraphs 2.19 and 2.20), it is important to note that you can be concerned or interested in a contract in other ways – for example, your family trust has a contract with your local authority and you are a beneficiary of that trust.

Deemed interest through your spouse or partner

- 2.19 If your spouse or partner (that is, civil union partner or de facto partner) is concerned or interested in a contract, you are deemed to also be concerned or interested in that contract, unless:
- the two of you are living apart; or
 - you did not know, and did not have a reasonable opportunity of knowing, that they were concerned or interested in the relevant contract.¹³

Deemed interest through company

- 2.20 If your local authority enters into a contract with a company in which you or your spouse or partner have some interest or involvement, the contracting rule applies if 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;
 - is a shareholder of the company, or another company that controls it, and one of you is the managing director or general manager (by whatever name you are actually called) of the company or the controlling company; or
 - is the managing director or general manager (by whatever name you or they are actually called) of the company and one of you is a shareholder of another company that controls it.¹⁴

The \$25,000 limit on contracts

The limit is for the total value of all contracts, not for each contract

- 2.21 The limit is based on payments for contracts made, or to be made, totalling more than \$25,000 in any financial year.¹⁵
- 2.22 If you have an interest in more than one contract, the limit is based on the value of all payments made for all contracts in which you are interested during the financial year, not for each contract.

¹³ Section 3(2A) of the Act.

¹⁴ Section 3(2) of the Act.

¹⁵ Section 3(1) of the Act. The monetary limit for the contracting rule was last increased in 1982.

- 2.23 The \$25,000 limit does not apply only to the amount of profit you expect to make or the portion you will personally receive. It applies to all payments made for the contract(s).

The limit includes goods and services tax

- 2.24 The \$25,000 limit is GST-inclusive.

Meaning of “financial year”

- 2.25 We use the local authority’s financial year as the relevant time period (for example, 1 July to 30 June for territorial authorities and regional councils and 1 April to 31 March for cemetery trusts).

How the contracting rule applies to subcontracts

- 2.26 The contracting rule also applies to subcontracts.
- 2.27 That means if you are concerned or interested in a contract with your local authority as a subcontractor, the contracting rule applies in the same way as if you had an interest in the head contract. However, the limit of \$25,000 applies to the value of the subcontract, not the head contract.¹⁶
- 2.28 Under the Act, the term subcontract has a wider meaning than what is generally understood. It extends to any “subsidiary transaction”.¹⁷ For example, if you are involved in a contract with a local authority as an agent for the other contracting party (such as a real estate agent for a property transaction), the arrangement for your remuneration as an agent falls within the definition of a subcontract.

Exceptions to the contracting rule

- 2.29 There are some situations in which you will not be disqualified, even if you are concerned or interested in contracts that exceed the \$25,000 limit.

If the Auditor-General has approved the contract

- 2.30 You will not be disqualified by entering into a contract that causes the \$25,000 limit to be exceeded if the Auditor-General has approved the contract. Approval must generally be obtained before the contract is entered into (prior approval), although the Auditor-General can give retrospective approval in limited circumstances.¹⁸
- 2.31 For more information about criteria for approval for a contract, and how to apply, see paragraphs 2.41 to 2.57.

¹⁶ Section 3(3)(b) of the Act.

¹⁷ Section 2 of the Act.

¹⁸ Section 3(3)(a) and 3(3)(aa) of the Act.

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If you were not aware of the contract

- 2.32 You will not be disqualified by a contract that causes the \$25,000 limit to be exceeded if:
- the contract was entered into, under delegated authority, by a committee of which you were not a member or by an officer; and
 - you did not know, and did not have a reasonable opportunity of knowing, about the contract at the time it was made.

- 2.33 However, in this case, your local authority must notify us as soon as you or your local authority becomes aware of the contract. The local authority must write to us to verify that you did not know and did not have a reasonable opportunity of knowing about the contract. We might also ask you to verify this in writing. The local authority's letter must confirm that the committee or person who entered into the contract was properly authorised to do so.¹⁹

If your interest is as an administrator or trustee

- 2.34 You will not be disqualified by a contract that causes the \$25,000 limit to be exceeded if your interest in the contract arises as:
- an administrator or a trustee of any estate or trust (as long as you are not also a beneficiary); or
 - the manager appointed under the Protection of Personal and Property Rights Act 1988.²⁰

Exempt interests and contracts

- 2.35 The following types of interests and contracts are not subject to the contracting rule.²¹ This means that you can be concerned or interested in the following types of contracts without being disqualified:
- a loan raised (received) by the local authority (whether on security or otherwise);
 - a payment for an advertisement from the local authority in any newspaper;
 - a lease granted to the local authority;
 - a compensation payment under the Public Works Act 1981; and
 - the supply of goods or services during a civil defence emergency (subject to some constraints).

¹⁹ Section 3(3)(ab) of the Act.

²⁰ Section 3(3)(h) of the Act.

²¹ Section 3(3)(d) of the Act. The Act also includes several 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.

The Auditor-General's power to approve contracts

- 2.36 The Auditor-General can grant approval for contracts that exceed the \$25,000 limit in any financial year if certain criteria are satisfied.
- 2.37 The local authority must generally obtain approval **before** the contract is entered into, although we can give retrospective approval in limited circumstances.
- 2.38 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.
- 2.39 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 enough. Where the approval is for an ongoing arrangement, our usual practice is to grant approval for only one financial year at a time.
- 2.40 We consider it a good idea to seek approval for a contract that does not exceed the \$25,000 limit by itself but could when combined with other small contracts. Similarly, where several similar small contracts might 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

Getting approval before the contract is entered into

- 2.41 The Act requires the existence of a “special case” before prior approval can be granted.²² This requires a full assessment of the circumstances to determine whether approval should be given.
- 2.42 We consider whether the process followed by your local authority in awarding or agreeing to the contract is fair and transparent and whether its reasons for selecting you as its preferred contractor are justifiable. We must be satisfied that there is no risk that you might have received preferential treatment from your local authority or that you might have had an undue influence on the decision.
- 2.43 For a single contract (usually for a larger amount), the questions we are likely to ask are:
- Has your local authority taken all reasonable steps to ensure that all potentially interested parties had an opportunity to tender or quote for the contract?
 - Has your local 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?

²² Section 3(3)(a) of the Act.

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- Has your local 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 your local authority?

- 2.44 For multiple contracts for smaller amounts, such as day-to-day purchases of supplies, it will usually be necessary for a local 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.
- 2.45 You cannot assume we will give prior approval. We must be satisfied that the criteria set out above are met and that any risk of undue influence or preferential treatment has been addressed.

Retrospective approval

- 2.46 We have limited power to grant retrospective approval, that is, approval for contracts already entered into.
- 2.47 When considering an application for retrospective approval, we apply the same criteria as for an application for prior approval. However, we must also be satisfied that:
- there is a sufficient special reason why prior approval was not obtained; and
 - prior approval would have been given if it had been sought.²³
- 2.48 When applying for retrospective approval, the local authority will need to be able to explain and justify why approval was not sought before the contract was entered into.
- 2.49 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, you cannot assume we will give approval.

How to apply for approval

- 2.50 The local authority, rather than you, must apply for approval to enter into the contract. Usually the local authority will hold the relevant information that we need to determine whether the criteria have been satisfied.
- 2.51 The application must be made in writing. We recommend that the local authority use the form on our website. Alternatively, the application can be emailed to LAMIA@oag.parliament.nz.
- 2.52 The local authority should let us know if the application is urgent and the reasons why.

When to apply for approval

- 2.53 Your local authority should apply for approval as soon as there is a possibility that the contracting limit might be exceeded.
- 2.54 For a series of small contracts over a period of time that would not individually require approval but that, cumulatively, might 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 the limit will be exceeded.
- 2.55 For tenders for contracts, a local authority does not need to seek approval as soon as tenders are invited. 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 you (or your company or your spouse or partner); or
 - immediately after the local authority has resolved to accept the tender, subject to the Auditor-General's approval.

Information we need in the application

- 2.56 Your local authority needs to provide us with information about:
- the reasons the local authority wishes to use the proposed contractor for this work (for example, how the local authority justifies its choice on the basis of, for example, cost, performance, quality, expertise, or experience);
 - the process the local authority has followed in selecting the proposed contractor (including whether other potential contractors were considered or had the opportunity to quote or tender, whether the local 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 local authority decisions about the contract; and
 - the monetary amount for which approval is sought.
- 2.57 See Appendix 3 for a full checklist of the information we need to consider an application for approval.

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Managing compliance with the contracting rule

- 2.58 Both you and the local authority will need to take steps to ensure that you comply with the Act.

Make your local authority aware of your potential contracting interests

- 2.59 You are responsible for letting your local authority know about any interests you have that might result in you benefitting from contracts, either directly or indirectly (for example, through your spouse or partner or through a business you are involved in).
- 2.60 Although it is not a legal requirement, we encourage local authorities to establish a register of members' interests to support compliance with the Act and to ensure that relevant staff are aware of its contents. If your local authority has one, you should ensure that any business interests you or your spouse or partner have that might result in contracts with the local authority are recorded in the register. This helps ensure that you have been transparent about your interests, and that staff at the local authority who need to know can monitor contracts or contracting processes in which you might have an interest.

Make your spouse, partner, or business aware of the contracting rule

- 2.61 You should ensure that your spouse or partner, and relevant people in your business, are aware of the contracting rule, particularly the \$25,000 limit, and that you will be disqualified from office if you breach the contracting rule.
- 2.62 This is particularly important, for example, if you have an interest in a business, but are not involved in its day-to-day operations and so might not be aware of situations where your business decides to put in a tender to provide services to the local authority.

Monitoring contracts and payments under contracts

- 2.63 It is your responsibility, and the responsibility of the local authority, to keep track of payments under any contracts or subcontracts in which you are concerned or interested.
- 2.64 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 on the accumulating value of contracts.

- 2.65 Particular vigilance might be necessary for subcontracts, because they can often “slip under the radar”, especially if it is decided only after a head contract has been awarded who the subcontractors will be.

Seeking extensions to an approved limit

- 2.66 You and your local authority need to monitor contracts that we have approved to ensure that payments do not exceed the amount approved. Contracts are often varied or extended. But if the approved amount is exceeded, the consequence is the same as for exceeding the \$25,000 limit – you are disqualified.
- 2.67 This problem can be avoided by applying to us for an extension to the previous approval, to take account of the additional payments. This application should be made, and the extension obtained, before the payments exceed the amount we originally approved. Inadvertent breach of an approved amount requires retrospective approval, which should not be assumed.

Frequently asked questions about the contracting rule

- 2.68 **I stand to benefit from a contract with the local authority, but the contract is not for a fixed amount or for a fixed quantity of goods or services, so I do not know at this point whether payments will exceed the \$25,000 limit. Do I need an approval?**

There is no requirement at this point to get an approval. You could wait and see how much the local authority is spending under the contract, and the local authority could apply to us for approval if it is getting close to the \$25,000 limit.

However, there is a risk with that approach. If you do not keep track of payments and they exceed \$25,000, you will be in breach of the Act and automatically disqualified. The local authority would then need to apply to us for retrospective approval. Before we can grant that, the Act requires us to be satisfied that there was good reason why the local authority did not apply for prior approval.

In situations where you do not know how much the contract is worth at the start, but there is a good chance it will be more than \$25,000, we recommend that the local authority estimate the amount it is likely to pay under the contract and apply for approval for that amount before the contract is entered into.

If we approve the contract, you and the local authority will still need to monitor payments to make sure you do not go over the approved amount.

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- 2.69 **The local authority buys goods from my business from time to time, but there's no "contract" as such. We just invoice them at the time. If the local authority spends more than \$25,000 in a financial year, would I be in breach of the Act?**

Yes. The term "contract" in the Act has a broad definition and potentially includes an agreement, in any form, that creates legally enforceable obligations, including casual, one-off purchases, even if those are not documented in a formal contract.

The \$25,000 limit applies to all payments made in a financial year, not for each contract. Therefore, if the local authority makes multiple small purchases during a financial year, you and the local authority will need to keep track of payments, and apply to us for approval if there is a risk that the payments made will go over the \$25,000 limit.

- 2.70 **I have approval for a contract. The contract is coming to an end, but it looks like it might be renewed or rolled over. Do I need another approval?**

Yes. We give approval for the term of the contract or for a fixed period. The approval does not cover any renewal period. If the contract is renewed or "rolled over" the local authority should check whether it needs to apply for another approval from us.

- 2.71 **I potentially stand to benefit from a grant from the local authority to a community organisation because the grant will be used to pay for the services I provide to that organisation. Does a grant count as a contract?**

Technically a grant is not a contract because grants and contracts create different sorts of legal obligations. But the line between a grant and a contract can be blurred. Also, the Act defines contract in quite a broad way. It includes any sort of agreement that creates legally enforceable obligations.

If you stand to benefit from a grant from the local authority, we suggest you talk to local authority staff about whether the grant falls under the contracting rule. After considering the nature of the grant, the local authority might want to apply to us for approval.

- 2.72 **My company has a contract with the Council. I am a member of a community board, but not the Council. Does the contracting rule apply to my company's contract with the Council?**

No. The contracting rule applies only to contracts with the local authority of which you are a member. Community boards are subject to the Act in their own right, separate from their "parent" authority.

That means, if you are a member of a community board but not a member of the “parent” city or district council, the contracting rule will not apply to any contracts you have with the “parent” city or district council.²⁴

2.73 I am a member of a local board in Auckland, and my company has a contract with Auckland Council. Does the contracting rule apply to my company’s contract with Auckland Council?

Potentially yes. Auckland Council has a two-tier governance structure made up of its governing body and the local boards in Auckland. The decision-making responsibilities of Auckland Council are shared between the governing body and the local boards. The Local Government (Auckland Council) Act 2009 provides that a local board cannot enter into contracts because it does not have separate legal standing from Auckland Council. However, local boards are subject to the Local Authorities (Members’ Interests) Act in their own right. Our view is that the contracting rule applies to contracts between Auckland Council and a local board member where their local board has decision-making responsibilities in respect of that contract.

2.74 Are payments made by a council to an appointed committee member for meeting attendance and transport costs covered by the contracting rule?

Potentially yes. Because the term “contract” in the Act has such a wide definition, we consider that it potentially also captures any relationship that has the features of a binding contract – such as certainty of terms, consideration, and an intention to be bound.

Although council employment contracts are specifically excluded from the definition of “contract”, appointments to council committees are not.

Although the position is not without doubt, we suggest the Council err on the side of caution, and seek approval for payments made to appointed committee members for their meeting attendance and transport costs, where there is a possibility that those payments will exceed the \$25,000 limit. However, where the payments have been determined by a third party, such as the Remuneration Authority, we do not think the contracting rule applies.

2.75 I am not a member but I have a contract with the Council and I want to stand for election. Can the Auditor-General give me an exemption from the contracting rule to allow me to stand?

No. The Auditor-General has no power under the Act to grant candidates an exemption from the contracting rule. So you will need to check if the contract

²⁴ The Act includes an exception for members of community boards (see section 3(3)(j), (3A), and (4)) that is no longer relevant. We treat this exception as redundant because community boards are no longer committees of local authorities.

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you are party to is subject to the contracting rule and, if so, whether any of the exceptions to the rule apply. See Part 3.

If you are unsure, contact us, and we will provide guidance if we can. If your situation is particularly complicated, you might need to seek legal advice.

2.76 What happens to an approval in an election year? If I am re-elected, do I have to re-apply for approval for the contract?

No. If an election falls within the financial year and you are re-elected or re-appointed, the Act continues to apply as if your membership is unbroken.

In other words, the \$25,000 limit continues for the entire financial year and any approvals granted for that year continue to apply.

2.77 If I am disqualified because I have breached the contracting rule, can I stand for election again?

Yes. Re-election or re-appointment overcomes any disqualification from the previous term. However, you could still be prosecuted for acting as a member while disqualified during the previous term.

3

How the contracting rule applies to candidates standing for election

- 3.1 In this Part, we explain how the contracting rule applies to candidates standing for election or appointment. In particular, we discuss:
- exceptions to the contracting rule as it applies to candidates; and
 - the Auditor-General's role.
- 3.2 You cannot be elected or appointed to a local authority if you are concerned or interested in a current contract with that local authority that exceeds \$25,000 at the time of the election. This contracting rule is the same as for existing members (see Part 2).
- 3.3 Every candidate should consider whether they might be ineligible under this rule. You should consider what contracts you have with the local authority in the financial year of the election and the value of payments to be made in that year.

Exceptions to the contracting rule

- 3.4 There are several exceptions to the contracting rule as it applies to candidates.²⁵
- 3.5 You will not be disqualified from standing for election or appointment if any of the following situations apply:
- Your obligations in relation to the contract have all been performed before the election or appointment, and the amount to be paid by the local authority has been fixed. It does not matter whether the amount has been paid, as long as the amount has been fixed.
 - Your obligations under the contract have not all been performed before the election or appointment, but the amount to be paid by the local authority is already fixed (subject to amendments and additions as allowed for in the contract). It does not matter whether the amount has been paid, as long as the amount has been fixed.
 - Your obligations under the contract have not all been performed before the election or appointment, but:
 - the term of the contract is 12 months or less; or
 - you relinquish the contract (with the local authority's consent) within a month of becoming a member and before you start to act as a member.

²⁵ Section 3(3)(f) and (g) of the Act.

Part 3

How the contracting rule applies to candidates standing for election

The Auditor-General's role

- 3.6 We cannot give approval for contracts between a candidate and a local authority. The Act does not allow us to do that.
- 3.7 If you are a candidate with an interest or concern in current contracts with the local authority that exceed \$25,000 before the election, you cannot be elected (or appointed) unless the contract falls within one of the exceptions in the Act or you are no longer concerned or interested in the contract.
- 3.8 We can provide guidance to candidates to help them work out whether the contracting rule might prevent them from standing for election, and what their options are if that is a possibility. If your situation is particularly complicated, you might need legal advice.

4

The non-participation rule

4.1 In this Part, we explain the non-participation rule and how it affects your ability to discuss or vote on matters in which you have a financial interest. In particular, we discuss:

- some points about the non-participation rule;
- how to determine whether you have a financial interest;
- the meaning of “financial interest”;
- how to determine at which stage in the decision-making process you have a financial interest;
- the meaning of “interest in common with the public”;
- exceptions to the non-participation rule;
- the Auditor-General’s role to grant exemptions or issue declarations; and
- managing compliance with the non-participation rule.

4.2 We also provide answers to some frequently asked questions about the non-participation rule at the end of this Part.

Summary of the non-participation rule

4.3 You must not take part in the discussion of, or vote on, any matter before your local authority in which you have a financial interest unless:²⁶

- your interest is “in common with the public”;
- one of the exceptions to the non-participation rule applies;
- you apply to us and are granted an exemption allowing you to participate; or
- you apply to us and we issue a declaration authorising you to participate.

4.4 It is an offence under the Act to discuss or vote on any matter before the local authority in breach of the non-participation rule. If convicted, you will be automatically disqualified from office.²⁷ You will have a defence if you can prove that, when you took part in the discussion of, or voted on, the matter, you did not know and had no reasonable opportunity of knowing that you had a financial interest in that matter other than an interest in common with the public.

Some points about the non-participation rule

The non-participation rule is stricter than the equivalent rule in other legislation

4.5 It is important to understand that the non-participation rule under the Act is stricter than the equivalent rule in other legislation such as the Companies Act 1993 or the Crown Entities Act 2004.

²⁶ Section 6(1) of the Act.

²⁷ Section 7 of the Act.

Part 4

The non-participation rule

4.6 For example, under the Companies Act, directors of a company must declare their interests, but they are not necessarily prohibited from participating in decisions about matters they have an interest in.

4.7 This is not the case for those to whom the Act applies. Under the Act, if you have a financial interest in a matter, it is not enough to declare it. You also cannot participate in any discussion or voting on the matter unless one of the conditions in paragraph 4.3 applies.

The non-participation rule applies only to financial interests, but that does not necessarily mean you can participate if your interest is not financial

4.8 The Act covers only financial interests. Although other types of interest are not covered by the Act, they are still subject to the common law rules that regulate conflicts of interest and bias in the public sector.

4.9 This means that you do not have to worry about the non-participation rule if you have a non-financial interest in a matter. However, you still need to consider whether it is lawful and appropriate for you to participate in the local authority's decision-making under the common law and/or as a matter of ethics and good practice.

4.10 For guidance on non-financial conflicts of interest, and how they might affect your ability to participate in decision-making, see our good practice guide *Managing conflicts of interest: A guide for the public sector*.

Determining whether you have a financial interest

4.11 When determining whether you have a financial interest in a matter that might prohibit you from discussing or voting on it, you should ask yourself these questions:

- What is the matter under discussion or what is the decision I am being asked to make?
- Do I have a financial interest in that matter or decision?
- Is my interest in common with the public?
- Do any of the exceptions in the Act apply?
- Do I have grounds to apply to the Auditor-General for an exemption or declaration that would allow me to participate?

4.12 The first two questions in paragraph 4.11 are closely linked – you need to assess whether you have a financial interest in the matter under discussion or in the decision you are asked to make, not in the topic or subject matter generally.

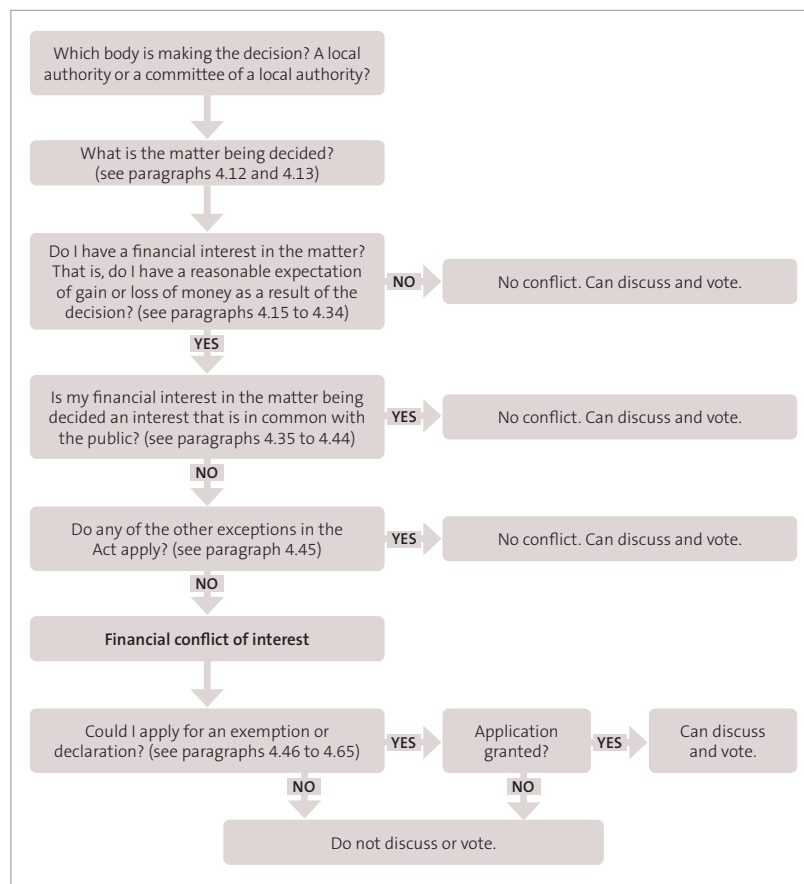
4.13 Having a potential financial interest in a matter does not necessarily mean you will have a financial interest in every discussion or every decision made in that

matter. It depends on the nature of the discussion or type of decision being made and how it might affect your potential financial interest.

4.14 Figure 1 provides a more detailed flowchart that shows what you need to consider when assessing whether the non-participation rule applies.

Figure 1
Flowchart to assess whether the non-participation rule applies to you

This figure is a flowchart with a series of yes-or-no questions about whether you have a financial interest in a matter before your local authority. Answering the questions will determine whether you have a financial interest and whether you are allowed to discuss and vote on the matter. The rest of Part 4 explains these questions in more detail.



Source: Office of the Auditor-General

Part 4

The non-participation rule

Meaning of “financial interest”

- 4.15 The Act does not define financial interest. Our interpretation, drawn from case law in New Zealand and overseas, is that a financial interest is “a reasonable expectation of financial loss or gain” from the particular decision.²⁸
- 4.16 A financial interest might be direct or indirect. It might, for example:
- be a quantifiable dollar amount;
 - involve cash changing hands;
 - relate to an increase or decrease in the value of something (for example, property or shares); or
 - be an effect on the turnover of a business.

Meaning of direct and indirect financial interest

- 4.17 Direct financial interest involves direct financial gain or loss to a member.
- 4.18 Indirect financial interest involves financial gain or loss to other people or organisations you are connected to, such that you are also treated as being interested in any financial gain or loss.
- 4.19 The Act does not specify all of the situations in which you might be considered to have an indirect financial interest in a matter. However, we describe two common scenarios that are specified in the Act.

Deemed interest through your spouse or partner

- 4.20 If your spouse or partner (that is, civil union or de facto partner) has a financial interest in a matter before the local authority, you are deemed, for the purposes of the Act, to have the same interest unless the two of you are living apart at the time of the discussion or vote.²⁹
- 4.21 The non-participation rule applies whether your spouse or partner’s interest is direct or indirect.

Deemed interest through company

- 4.22 If you or your spouse or partner is involved in a company that has a financial interest in a matter before the local authority, you are deemed, for the purposes of the Act, to have the same interest if 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;

²⁸ See the case of *Downward v Babington* in Appendix 2.

²⁹ Section 6(2A) and 6(2B) of the Act.

- is a shareholder of the company, or another company that controls it, and one of you is the managing director or general manager (by whatever name you are actually called) of the company or the controlling company; or
- is the managing director or general manager (by whatever name you or they are actually called) of the company, and one of you is a shareholder of another company that controls it.³⁰

4.23 The non-participation rule applies whether the company's interest is direct or indirect.

Other ways you might have an indirect financial interest

4.24 There are other ways you can have an indirect financial interest in a matter before your local authority. For example, you might have an indirect financial interest in a matter if you are a beneficiary of a family trust that has a financial interest in that matter. Figure 2 sets out comments made by a judge about indirect financial interests.

Figure 2

Comments made by a judge about indirect financial interest

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

The judge in *Calvert & Co v Dunedin City Council* made the following comments about indirect financial interest:

An indirect financial interest under section 6 of the Act may cover a wide variety of factual situations.

The indirect financial interest may involve an interest arising from a relationship and not from any specific contract or monetary connection.

An indirect financial interest may include a potential benefit or potential liability.

A decision as to whether a particular factual situation amounts to an indirect financial 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 financial interest.

Situations where you potentially have both a direct and indirect financial interest

4.25 It is possible to have both a direct and indirect financial interest in a matter.

4.26 For example, you are one of several landowners who form a company to develop a community asset in partnership with the local authority in the surrounding area. If matters come up for discussion regarding that asset, you might have an indirect financial interest in those discussions as a result of your shareholding in that company. You might also have a separate and direct interest as a landowner because your land might increase in value as a result of the development of the community asset.

³⁰ Section 6(2) and 6(2B) of the Act.

Part 4

The non-participation rule

- 4.27 You need to be careful in these types of situations, even if your involvement in the company is insufficient to meet the “deemed interest” test. You might still be prohibited from participating in discussions because of your potential direct financial interest as a landowner.

Determining at which stage in the decision-making process you have a financial interest

- 4.28 When assessing whether you have a financial interest, you need to make that assessment for the particular matter under discussion and the particular decision being made, as opposed to the subject matter in general. The fact that you have a potential financial interest in a subject does not mean you necessarily have a financial interest in every decision that is made in relation to that subject. The nature and context of the particular decision will be important.
- 4.29 This is particularly true in local government, where a local authority might make several decisions during a period of time for a particular subject. It is sometimes helpful to view the different decisions a local authority can make as different stages: the first stage might be discussing a general idea, the second stage might be developing and consulting on that idea, the third stage might be developing a firm proposal, and then the last stage might be taking steps to implement the proposal.³¹ A member with a potential interest in the subject at the outset will not necessarily be affected financially by all of the stages during the decision-making process.
- 4.30 There might be a general possibility of a financial benefit or loss at the first stage, but nothing concrete enough to amount to an expectation of financial gain or loss. There might also be situations where the decision being made is procedural or more general, which does not affect the member’s interest in the same way as a decision to agree to a specific proposal.
- 4.31 As a general rule, early decisions to commission work on options or to consult are unlikely to have a financial effect and so the non-participation rule would not apply. However, that is likely to change as the matter moves towards a fully developed proposal ready for adoption and implementation. A later decision to confirm a particular option might have a clear financial effect on the member and so the non-participation rule would apply. Figure 3 describes a situation where a proposed decision was at such an early stage as to make any financial interest of the member uncertain.

³¹ For the recognition of these different stages in a different context, see *Easton v Wellington City Council* [2009] NZCA 513 at [14].

Figure 3
Effect of decision not sufficiently certain

Ashburton District Council decided to designate land for a future bridge project, and one of the members owned land in an adjacent area. The designation did not apply to the member's property, but it did increase the chance that at some future time a significant road might be developed near the member's land as part of the project.

We thought that the possible effect of the designation decision on the value of the member's land was not sufficiently certain or significant enough at that point to constitute a financial interest under the Act. This was because attempting to assess the nature and scale of any change to the value of the member's land would be highly speculative. Construction of the road was not planned for 12 years and was contingent on several other factors and steps in the process; it was still possible that it might not proceed at all.

- 4.32 You need to be able to recognise when a matter reaches the stage where it can reasonably be expected to affect your interests. At that point, you should no longer participate in the decision-making process.
- 4.33 See Appendix 2 for summaries of several cases in which the courts have discussed financial interests. We suggest that you refer to these case summaries for guidance.
- 4.34 If you are unsure whether you have a financial interest, check with local authority staff. You might also want to consider whether you could, or should, apply to us for an exemption or declaration that would allow you to participate.

Meaning of "interest in common with the public"

- 4.35 You are not prohibited from discussing or voting on a matter you have a financial interest in if it is an "interest in common with the public".
- 4.36 Having an interest in common with the public means your interest is no different in kind or degree to the general public's interest in it. Whether your interest is in common with the public will depend on the circumstances of the case, and it is always a question of degree. The exception needs to be applied in a realistic and practical way. Figure 4 provides an example of an interest in common with the public.

Figure 4
Example of an interest in common with the public

If you are a dog owner, and the local authority is proposing to increase dog licensing fees, your interest in the local authority's decision will probably be in common with the public because it is an interest shared by all other "dog owners", and dog owners are a group large enough that they could be reasonably said to constitute "the public".

On the other hand, if you are a property developer, and the local authority is considering changes to district or regional plans or its development contributions policy, you might not have an interest in common with the public. This is because, as a property developer, your interest in the local authority's decision is different in kind to most other residents or "ordinary" property owners.

Part 4

The non-participation rule

- 4.37 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 direct or indirect);
 - the size of the group of people who are also affected and whether that group is big enough to constitute “the public”; and
 - whether your interest and the group’s interests are affected in a similar way.

What is the nature of your interest?

- 4.38 The nature of your interest, and how it compares 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, and others indirectly affected by flow-on effects from the decisions. The effect on one person’s interest might be substantial, while the effect on another person’s interest might be slight.

Is the group affected big enough to constitute the public?

- 4.39 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 local area. It is enough for a large group of people have an interest.
- 4.40 However, 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.
- 4.41 Although the size of the group is important, there is no objective measure that can be used to determine how big a group should be to constitute the public. An overall judgement is required.

Is the public affected in a similar way, and to a similar degree, as you?

- 4.42 For the “interest in common with the public” exception to apply, not only must the public be affected, but they must be affected in a similar way to you.
- 4.43 However, you do not need to be affected in **exactly** the same way as the public. There can be some variation in the degree to which you and the public are affected.
- 4.44 The question to ask yourself is whether the matter affects you in a different way, or to a materially greater degree, than most other people. We acknowledge that, in answering this question, it is not always easy to draw a clear line. The examples in Figure 5 might help.

Figure 5
Is your interest in common with the public?

Scenario	Is your interest in common with the public?
The local authority is discussing the adoption of a general rate. You are a ratepayer, but have no special interest other than that.	Probably yes. The mere fact that you are affected slightly differently by the adoption of a general rate because of the value of your property does not generally prevent you from having an interest that is in common with the public.
The local authority is discussing the adoption of a targeted rate. You are one of a small number of ratepayers affected by that rate.	Probably not. Your interest might not be in common with the public because it is not shared by a group large enough that it could be reasonably said to constitute “the public”. [*]
The local authority is considering increasing its charges for a particular type of permit. You are a permit holder. It is likely that, as a result of increasing the permit charge, there will be a corresponding slight decrease in rates.	Probably not. As a permit holder, you will be affected differently by the changes to the permit charges, even though you will be affected in the same way as other ratepayers by the corresponding decrease in rates. [†]
The local authority is considering providing special services or infrastructure, such as an irrigation scheme, to a group of landowners. You are one of the landowners.	Probably not, but it will depend on the size of the group affected. [‡]

* These examples are discussed in further detail in Office of the Auditor-General (2007), *Local government: Results of the 2005/06 audits*, Wellington, at oag.parliament.nz.

† Office of the Auditor-General (2009), *Investigation into conflicts of interest of four councillors at Environment Canterbury*, Wellington, at oag.parliament.nz.

‡ See Office of the Auditor-General (2016), *Application for an exemption or a declaration by Cr Hewitt*, Wellington, at oag.parliament.nz. About 2.9% of rating units in the region could potentially irrigate their land using water from the proposed irrigation scheme. The group affected was not large enough to constitute “the public”.

Exceptions to the non-participation rule

4.45 The Act sets out several matters where the non-participation rule does not apply. This means that you can participate in the matters below even if you have a financial interest:

- You were elected, or appointed, to represent a particular activity, industry, business, organisation, or group of persons, and your financial interest in a matter is no different from the interest of those you represent.³²
- 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.

³² This exception does not apply to councillors elected to represent general constituencies or wards. See Office of the Auditor-General (2009), *Investigation into conflicts of interest of four councillors at Environment Canterbury*, Wellington, at oag.parliament.nz.

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The non-participation rule

- 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.³³
- 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 plan under the Resource Management Act 1991, or any section of such a scheme,³⁴ 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.³⁵
- 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 1981.³⁶

The Auditor-General’s power to grant exemptions or issue declarations

- 4.46 You might be able to apply to us for an exemption or declaration that would allow you to participate if:
- you have a financial interest in a matter that the local authority is considering; and
 - your interest in the matter is not in common with the public.
- 4.47 You can apply for an exemption from the non-participation rule on the grounds that your interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence your voting or participation in discussing that matter.
- 4.48 You can apply for a declaration allowing you to participate on the grounds that:
- it would be in the interests of the people in the local authority’s area that the non-participation rule should not apply; or
 - applying the non-participation rule would impede the transaction of business by the local authority.

33 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. However, it would not apply to any subsequent discussion of the directors’ remuneration (see *Calvert & Co v Dunedin City Council*, discussed in Appendix 2).

34 This exception was applied in the case of *Auditor-General v Christensen* and is discussed in Appendix 2.

35 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 and plans made under that Act.

36 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.

- 4.49 You should note that:
- an application for an exemption or a declaration must be made **before** you participate. We cannot grant a retrospective exemption or declaration; and
 - we cannot grant an exemption or declaration for a **non-financial** interest, such as a conflict arising from a personal relationship or conflict of roles. This is because the Auditor-General's power to grant exemptions and declarations derives from the Act, and the Act applies only to financial interests.³⁷

Criteria we use to determine whether to grant an exemption

- 4.50 In determining whether it is appropriate to grant an exemption from the non-participation rule on the grounds that your financial interest is remote or insignificant, we consider:
- the relationship between your financial interest and the matter under consideration; and
 - the significance of the financial interest in terms of its possible influence on you when discussing or voting.
- 4.51 When we consider an application for an exemption, we need to understand:
- how directly the proposed decision is connected to your financial interest – that is, whether the interest is remote; and
 - how large or important the financial interest is.
- 4.52 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 for an individual person might not be so important if it is borne by a large business.
- 4.53 Under the Act, it is our opinion that determines whether your financial interest is remote or insignificant. The test is an objective one. Although your views about how significant the interest is, and whether it is influencing your position on the issue, are relevant, they are not determinative. Ultimately, we must assess how significant the interest looks to an outside observer. Figure 6 describes how we assessed requests for exemptions for councillors at Environment Canterbury.

³⁷ Your ability to participate in decisions in which you have a non-financial conflict of interest is governed by the common law. For information on how the law on non-financial conflicts applies to public officials, refer to our good practice guide *Managing conflicts of interest: A guide for the public sector* at oag.parliament.nz.

Part 4
The non-participation rule

Figure 6
Example of exemptions for members at Environment Canterbury

Environment Canterbury wanted to recover some of its water management costs through new charges on holders of certain types of consents. Four councillors had a financial interest in upcoming council decisions relating to the final shape of the charging scheme and its implementation, either because they were a consent holder or were deemed to share the interests of a consent holder. Each asked for an exemption to participate in the decisions. The effect of the decisions on each councillor was different; for one councillor, the financial effect was predicted to be under \$40; for another, between \$50 and \$300; for the third, between \$600 and \$1,800; and for the fourth, between \$1,200 and \$9,000. We considered these effects against the total expenses of each councillor's businesses. Because these were farming or rural businesses, the total outgoings were generally large.

For the first three councillors, we concluded in each case that the effect was insignificant in the context of the individual's financial situation, and could not reasonably be regarded as influencing the councillor's views. We gave exemptions allowing these three councillors to participate in the decisions. However, we decided we could not give an exemption in relation to the fourth councillor, because we regarded a potential charge of up to \$9,000 as significant enough that it could reasonably be regarded as influencing their views.

Criteria we use to determine whether to issue a declaration

- 4.54 We can issue a declaration allowing you to participate in a decision, despite your potential financial interest in it, if we are satisfied that:
- it would be in the interests of the people in the local authority's area for you to participate; or
 - not allowing you to participate would impede the transaction of business by the local authority.

Declaration in the interests of the people in the local authority's area

- 4.55 When deciding whether to issue a declaration on the grounds that it would be in the interests of the people in the local authority's area, we need information from you and your local authority on why your participation is important.
- 4.56 Relevant factors for why your participation is important could include:
- whether the matter justifies the involvement of all members because of its significance to the community as a whole – that is, the participation of all members is more important than any individual interests; or
 - whether you have any particular expertise in the matter under consideration or have an important link with people in a particular area, organisation, or community group, and if you did not participate then their views would not be adequately represented.

- 4.57 We might also take into account:
- how direct your financial interest is and its size and nature;
 - the extent to which your financial interest is quantifiable; and
 - the matter under discussion and the type of decision being made (for example, whether 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 local authority has only advocacy powers or the power to make recommendations).
- 4.58 Figure 7 provides examples of declarations that we have issued in the past.

Figure 7
Examples of declarations we have issued

Scenario	What we did
A local authority was discussing a submission it was proposing to make on another organisation's long-term plan. The relevant councillor lived in an area where the property values might be affected by aspects of the submission.	We issued a declaration allowing the councillor to participate even though the value of their property was potentially directly affected, on the grounds that: <ul style="list-style-type: none"> • the councillor provided an important link with, and voice for, the most affected section of the community; and • the local authority considered it an important part of its role in the consultation process to give voice to that community and saw that particular councillor as critical to that process.
A local authority was making a decision about a proposed irrigation scheme. The relevant councillor owned land that would be affected by the scheme.	We granted a declaration allowing the councillor to participate even though the value of their land was potentially affected, on the grounds that: <ul style="list-style-type: none"> • the benefits of allowing the councillor to participate outweighed the risk that their financial interest could be seen to unduly influence the outcome; and • the decision was an especially significant decision for the local authority and region, warranting all members being involved. <p>The councillor also had extensive expertise in the matter and represented the constituency that contained most affected landowners.*</p>

* See Office of the Auditor-General (2016), *Application for an exemption or a declaration by Cr Hewitt*, Wellington, at oag.parliament.nz.

Part 4

The non-participation rule

Declaration to prevent impeding the transaction of business

- 4.59 When deciding whether to issue a declaration on the grounds that it would impede the transaction of business by the local authority if you did not participate, we consider factors such as whether:
- the non-participation rule would prevent most members from participating;
 - the decision is minor or procedural in nature; or
 - the application of the non-participation rule could unduly distort the way in which the local authority deals with the matter.
- 4.60 To assess an application for a declaration, it is useful for us to get information on:
- how many members might be prevented from participating;
 - how significant the decision is for the community and the local authority; and
 - any other information that can help explain why it might be problematic if a member was not allowed to participate.

How to apply for an exemption or declaration

- 4.61 An application for an exemption or declaration must be in writing. It can be made by you or by your local authority on your behalf.
- 4.62 Before we can consider an application for an exemption or declaration, we need:
- information about the nature of the decision that is to come before the local authority. In practice, it is often helpful if the local authority is able to provide us with a draft paper of the matter that is to be considered;
 - information about the nature and extent of your financial interest in the decision;
 - an explanation of how that interest might be affected by the decision; and
 - a detailed explanation of why you consider there are necessary grounds for an exemption or declaration.
- 4.63 This information is important to enable us to assess whether there is a financial interest in the particular decision, and how significant the decision and the financial interest are.
- 4.64 We generally require detailed information before we can grant an exemption or declaration. However, we are able to receive an initial application and then ask the local authority staff or member for more information.
- 4.65 We recognise that these issues sometimes arise with urgency because the potential conflict might be identified only shortly before the meeting to make the decision. When a decision on an exemption or declaration is needed within a few days, it is helpful for the initial application to be as comprehensive as possible.

Managing compliance with the non-participation rule

- 4.66 There are several steps you and your local authority can take to ensure that possible conflicts of interests are managed smoothly and effectively before a matter comes before the local authority for decision.
- 4.67 When a matter in which you have a financial interest comes before your local authority, you must also ensure that the obligations in the Act, including the obligation to abstain from participating in the matter, are carefully observed.

Before meetings: local authority processes and assistance

- 4.68 Local authorities should consider implementing systems that allow for identifying and assessing possible conflicts of interest early. These might include:
- maintaining a register of interests for members;
 - ensuring that members have early and timely access to agenda papers so they can identify and assess whether they have a financial 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 financial interest in a particular matter that needs to be addressed; and
 - ensuring that there is opportunity for members to advise the mayor or chairperson of a financial interest before the relevant meeting.
- 4.69 As a member, you should be proactive about identifying and assessing possible conflicts of interest by using your local authority's systems for doing so – see paragraph 4.68. In particular, you should read agenda papers before a meeting, and seek assistance from local authority staff if you are unsure whether you have a financial interest in a matter to be discussed or voted on.

During meetings: declare, abstain, and record

- 4.70 If a matter comes before the local authority in which you have a financial interest, you must:
- declare to the meeting your financial interest;³⁸
 - abstain from discussion and voting; and
 - ensure that your disclosure and abstention are recorded in the meeting minutes.
- 4.71 You do not need to inform the meeting about the nature of your interest or why it exists.
- 4.72 The requirement to abstain from discussion and voting does not mean that you have to leave the meeting room. However, to avoid any doubt about your

³⁸ Section 6(5) of the Act.

Part 4

The non-participation rule

abstention, we consider that you should leave the table and sit in the public gallery while the matter is being discussed and voted on.

- 4.73 The quorum of the meeting (that is, the minimum number of people required to have a 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.³⁹

Frequently asked questions about the non-participation rule

- 4.74 **I think I might have an interest in a matter. How do I tell whether it is financial or non-financial?**

Ask yourself whether the decision you are being asked to make about the matter could reasonably give rise to an expectation of a gain or loss of money – either for you personally or, in the case of a deemed interest, for your spouse or partner or a company (see paragraphs 4.15 to 4.27).

- 4.75 **My council is considering some changes to our district plan. I own a property in the affected area. It is unclear whether the proposed changes will increase or decrease the value of my property and, if so, when or by how much. Do I have a financial interest?**

Possibly, yes. But it will depend on the type of decision you are being asked to make.

If there is a possibility that the decision will affect the value of your property, it does not matter whether the effect will be to increase or decrease its value, and it does not necessarily matter that you cannot quantify the effect in dollar terms. You potentially have a financial interest in the decision.

However, if the effect that the decision will have on the value of your property is speculative (that is, it might or might not have an effect) or the effect is contingent on several other events or decisions, or will not be for a long time, then it might not be enough to be classed as a financial interest under the Act.

This is a situation where focusing on the particular issue you are being asked to consider, or the decision you are being asked to make, is important. For example:

- If the proposed changes you are being asked to consider are at an early stage, and the decision you are being asked to make is whether to put those options out for consultation, it might be that you do not have a financial interest at that point. This is because deciding to consult on the options will not necessarily affect your property's value.

- However, if the decision you are being asked to make is to approve changes to the district plan, and the changes, if approved, will clearly affect the value of your property, then you probably have a financial interest in the decision and should not participate.

Deciding whether you have a financial interest in a decision that potentially affects the value of property, such as land, shares, or some other sort of interest in a business can be tricky. If you are unsure, we strongly recommend that you consult council staff.

If you have a potential financial interest, but consider it “too remote or insignificant” to influence the way you vote on a particular matter, you can apply to us for an exemption allowing you to participate (see paragraphs 4.50 to 4.53).

4.76 **I am a member of the district council, and also belong to various clubs throughout my district. Do I have a financial interest in every matter that comes before the council that relates to those clubs?**

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

A financial interest might also arise in the case of, for example, a golf club occupying land leased from the local authority where the lease rental significantly affects the members’ subscription or other fees.

In these sorts of situations, even if you do not have a financial interest, you might still have a non-financial interest (because of your association with the clubs) that would make it inappropriate for you to participate in these matters.

For guidance on non-financial conflicts of interest, see our good practice guide *Managing conflicts of interest: A guide for the public sector*.

4.77 **I am an employee of a company/organisation that has dealings with my local authority. Do I have a financial interest in any dealings that my company/organisation has with the local authority?**

As a general rule, no. An employment relationship, where you receive a fixed level of remuneration, does not, on its own, give rise to a financial interest.

Part 4

The non-participation rule

However, a financial interest might exist if there is any link between a decision the local authority is about to make and:

- the level of remuneration paid to you as an employee of the company/organisation; or
- whether you will continue to be employed by the company/organisation.

For example, if you were employed by an organisation that received funding from the local authority and the local authority was deciding on whether to stop funding that organisation, which could result in the loss of your job, you would have a financial interest in that decision.

As an employee, even if you do not have a financial interest, you might still have a non-financial interest (because of your employment) that would make it inappropriate for you to participate in these matters.

For guidance on non-financial conflicts of interest, see our good practice guide *Managing conflicts of interest: A guide for the public sector*.

4.78 Are financial interests treated more strictly than non-financial interests?

Generally, yes. Under the common law, a financial interest of any size can result in an automatic disqualification – in effect, a financial interest is a presumption of bias. This rule is reflected in the Act, which governs financial interests for members (subject to the powers of exemption and declaration set out in paragraphs 4.46 to 4.49).

Non-financial conflicts of interest involve a more discretionary judgement. You can consider all the circumstances of the situation to determine whether a reasonable observer would consider that a real danger of bias exists.

For guidance on non-financial conflicts of interest, see our good practice guide *Managing conflicts of interest: A guide for the public sector*.

4.79 Do the legal consequences of not declaring a financial or non-financial conflict of interest differ?

Yes. Breaching the non-participation rule can result in prosecution. If convicted, you will be disqualified from office and could be fined up to \$100.

Although failing to declare a non-financial conflict of interest is not an offence, it could result in legal proceedings that challenge the validity of the local authority's decision. Those proceedings would not directly affect you personally, but could seriously affect your and the local authority's reputations if your actions resulted in the local authority's decision being overturned by the courts.

For guidance on non-financial conflicts of interest, see our good practice guide *Managing conflicts of interest: A guide for the public sector*.

- 4.80 **Can the common law rule about bias apply to financial interests too?**
- Yes. Although the Act covers financial interests of members, the common law rule about bias could also be used to overturn a local authority's decision on the grounds of a member's financial interest.
- 4.81 **Can my local authority or chairperson order me not to participate on the grounds of a conflict of interest?**
- No. The decision about whether to participate is yours (although the local 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.
- It is an offence under the Act to discuss or vote on any matter before the local authority in breach of the non-participation rule. If convicted you will be automatically disqualified from office. You will have a defence if you can prove that, when you took part in the discussion of, or voted on, the matter you did not know and had no reasonable opportunity of knowing that you had a financial interest in that matter other than an interest in common with the public.
- 4.82 **My local authority has resolved that I do not have a financial interest in a particular matter. Does this mean that I can participate?**
- No. A resolution of a local authority that you do not have a financial interest in a particular matter is not an authoritative statement of the law. If, in fact, you do have a financial interest in the matter and you participate in discussion and voting on it, you will have committed an offence under the Act.
- However, if your local 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.
- 4.83 **I am fairly sure that I have a non-financial 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 do not have power to grant exemptions or declarations for non-financial 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 consult a lawyer if you want definitive advice.

Part 4

The non-participation rule

4.84 Am I breaching the non-participation rule if I have a financial interest, but vote to my disadvantage?

Yes. If you have a financial interest in the decision, the Act prohibits you from participating, even if you intend to vote against your interest. See the case *Brown and Others v Director of Public Prosecutions* in Appendix 2.

4.85 My company has an interest in some work that my council is deciding whether to invite tenders for. Can I participate if I decide that my company will not tender for that work?

No. Your company will still be in a position to be invited to tender for the work, and so you have financial interest. See the case *Rands v Oldroyd* in Appendix 2.

4.86 I know my business will benefit from an upcoming decision, but so will all the other businesses in my area. I am not voting for my benefit, but in the interests of the community. Can I participate?

Probably not. What matters is that you have a financial interest in the decision through your business. Your motives and good faith are irrelevant. However, you might have an interest in common with the public, depending on the size of the group affected by the decision. See the case *Re Wanamaker and Patterson* in Appendix 2.

5

Investigation and prosecution

- 5.1 In this Part, we discuss:
- offences under the Act;
 - deciding whether to investigate; and
 - how we investigate possible breaches of the Act.

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

- 5.2 The Act is enforced by prosecution. The Auditor-General is the sole prosecuting authority. That means we investigate allegations about possible breaches of the Act and decide whether prosecution is warranted. Figure 8 describes the two offences under the Act and their respective penalties.

Figure 8
The two offences under the Act

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 financial interest.	A fine not exceeding \$100 and, if the conviction is not successfully appealed, automatic disqualification from office.

- 5.3 Proceedings must begin within two years of the offence being committed.⁴⁰

Deciding whether to investigate

- 5.4 We can investigate a possible breach of the Act or related offence after receiving a complaint or at our own discretion.
- 5.5 To investigate a complaint, we must first be satisfied that there is enough evidence to justify an investigation. An allegation unsupported by evidence or a simple assertion that there has been a breach is not enough.
- 5.6 A complaint should be supported with enough evidence to warrant an investigation, such as:
- details about the alleged financial 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 reports.

⁴⁰ See section 40(2) of the Public Audit Act 2001.

Part 5

Investigation and prosecution

Investigating possible breaches

- 5.7 Any member of the public can complain or raise questions about a member's compliance with the Act. However, both the investigation and the final resolution of the matter are primarily between the member and the Auditor-General.
- 5.8 If we decide that a complaint made to us warrants further investigation, we will give you full details of the complaint and an opportunity to respond to it. However, we do not reveal the identity of the complainant. This is consistent with the approach all prosecuting agencies take. It is important that members of the public feel free to provide information about possible offences without fear of their identity being revealed.
- 5.9 We will investigate the complaint carefully to get the relevant facts and evaluate whether there has been a breach of the Act. This involves considering whether the factual circumstances reveal a breach, and whether any of the exclusions or defences can be relied on.
- 5.10 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.
- 5.11 Although we will give you full details of the complaint and an opportunity to respond, you do not have a formal right to be consulted about whether criminal charges are laid or not.
- 5.12 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
 - write to you about our findings.
- 5.13 We might also inform your local authority of our findings.
- 5.14 We decide for each case how much of our investigation to publicly report. In making this decision, we consider how publicly reporting the investigation will affect the member's reputation against the need for public accountability. 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.
- 5.15 We note that, in some cases, it better serves the public interest for us to report more fully on our investigations and conclusions.⁴¹ This particularly applies where we have investigated allegations of breaches of the Act that have attracted considerable public interest.
- 5.16 In these cases, we might also make a brief public statement about our investigation and findings. You are then accountable to the public for your conduct.

⁴¹ See, for example, Office of the Auditor-General (2009), *Investigation into conflicts of interest of four councillors at Environment Canterbury*, Wellington, at oag.parliament.nz.

- 5.17 If we consider that the circumstances warrant it, we might decide to begin criminal proceedings. The need to consider prosecution is itself a matter of serious concern. However, in any particular situation, we might form the view that, although an offence appears to have been committed, the circumstances do not warrant prosecution.
- 5.18 When deciding whether to begin criminal proceedings, we take account of the *Solicitor-General's Prosecution Guidelines* issued by the Crown Law Office.⁴² These guidelines are the accepted and authoritative description of how any prosecuting agency should exercise its discretion.
- 5.19 These guidelines require that:
- the facts provide evidence of a breach of the Act; and
 - it is in the public interest to bring a prosecution.
- 5.20 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 a local authority's decision in judicial review proceedings for bias. As well as needing to prove that there has been a breach, it must be clear that none of the exclusions or defences in the Act apply.
- 5.21 Even if there is evidence that can prove a breach, the public interest in any prosecution must also be considered. Factors relevant to the public interest include:
- whether it is more likely than not that a prosecution will result in conviction;
 - the size and immediacy of any financial 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;
 - 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.
- 5.22 This list is illustrative and is not exhaustive.

⁴² Crown Law (2013), *Solicitor-General's Prosecution Guidelines*, at crownlaw.govt.nz.

Appendix 1

Organisations with members subject to the Local Authorities (Members' Interests) Act 1968

Classes of organisations

- Administering bodies under the Reserves Act 1977
- Cemetery trustees
- Community arts councils
- Community boards
- Community trusts under the Sale and Supply of Alcohol Act 2012
- Licensing trusts under the Sale and Supply of Alcohol Act 2012
- Local boards
- Provincial patriotic councils
- Regional councils
- Territorial authorities (city and district 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 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

Illustrative cases on financial interests

A definition of “financial interest”

In *Downward v Babington* [1975] VR 872, the Supreme Court of Victoria, Australia, gave a useful definition of the term “pecuniary interest” (financial 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) of the Act.

Cases on the Local Authorities (Members’ Interests) Act 1968

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

In this case, the Court considered whether a council’s chairman and deputy chairman had financial interests in a decision to establish a rural water supply scheme in an area where they both owned land. The Court did not make findings on their interests, but importantly observed 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 previous cases, the judgment used the general rules of natural justice as the base on which to state a test for compliance with the non-participation rule in section 6(1) of the Act:

[W]ould 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 (HC)

In this case, the Court considered the procedures adopted at meetings for determining directors’ fees to be paid in relation to four local authority trading enterprises. The directors had previously been appointed and included various members of Dunedin City Council.

The Council considered reports on the setting of directors’ fees generally and a specific motion that, if passed, would have required councillor directors to remit their directors’ fees to the Council and receive in lieu a payment from the Council based on the usual allowances paid for local authority meetings.

Appendix 2

Illustrative cases on financial interests

That motion was dealt with by debating it separately in relation to each local authority trading enterprise.

Councillor directors withdrew when the part of the motion that concerned the local authority trading enterprise 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 local authority trading enterprises of which they were not directors.

The Court held that the non-participation rule in section 6 of the Act 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 on the basis that it amounted to a direct financial interest; and
- motions affecting directors' fees for local authority trading enterprises to which they were not appointed on that basis that it amounted to an indirect financial 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.

Auditor-General v Christensen [2004] DCR 524

In this case, a member was unsuccessfully prosecuted for breaching the non-participation rule in section 6 of the Act, with the Court ruling that the matter under discussion fell within one of the exceptions to the rule.

The local authority was considering a proposal to set up a booking system for the provision of sewerage connections to those seeking to subdivide land, giving priority to subdividers who paid cash in advance. The member owned a land development company that carried out subdivisions. Despite this, the member spoke against the proposed booking system.

When prosecuted for doing so, the Court accepted that the member had a financial interest in the decision because the booking system would have had a financial effect on him (if the booking system was implemented, he would either

have to make a cash payment in advance to guarantee a connection or take the risk that another subdivider would take priority).

However, the Court ruled that the financial interest was too remote for criminal liability because, at the stage at which discussions were taking place, no one could say with confidence what the fate of the proposal would be; whether there would be actual financial advantage depended on the decision of others on the proposal.

In any event, the Court also ruled that the decision fell within the exception in section 6(3)(e) of the Act, which provides that the non-participation rule does not apply to decisions relating to the preparation of district schemes.⁴³

Cases that consider financial interests in local government in other jurisdictions

Whether you have a financial interest if you vote to your potential disadvantage

In *Brown and Others v Director of Public Prosecutions* [1956] 2 All ER 189; [1956] 2 QB 369, an English court ruled that members of a local authority who were tenants in houses owned by the local authority had a financial interest in decisions made on the level of rents for council houses where there were subtenants or lodgers.

The Court said that members had a financial interest in the matter even though they voted to their potential disadvantage.

The Court also ruled that members had a financial interest even if, at that time of the decision, they did not 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.

Whether your intentions are relevant in determining whether you have a financial interest

In *Rands v Oldroyd* [1958] 3 All ER 344; [1959] 1 QB 204, a member of an English borough council who spoke to a motion about the letting of contracts for building council housing was ruled to have an indirect financial interest in the decision because he was managing director and majority shareholder of a building company that had a history of building for the council.

It did not matter that, when appointed to the relevant committee, he decided that his company would not tender in the future for any building contracts with the council; the Court said 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, thus creating an indirect financial interest.

⁴³ For our commentary on the court's decision, see Office of the Auditor-General (2005), *The Local Authorities (Members' Interests) Act 1968: Issues and options for reform*, Wellington, at oag.parliament.nz.

Appendix 2

Illustrative cases on financial interests

Whether your motives and good faith are relevant in determining whether you have a financial interest

In Re Wanamaker and Patterson (1973) 37 DLR (3d) 575, the mayor of a town council in Alberta, Canada, who also owned a coin laundry business in the town's shopping centre, was ruled to have an indirect financial interest in a decision on roads surrounding the 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 improved access to the shopping centre would be to increase the number of customers going to 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 financial interest.

It did not matter that he might have been acting in good faith and in the interests of the municipality.

Whether you have a financial interest if you are considering a matter in which one of your competitors has an interest

In R (James Robert Developments Ltd) v Holderness Borough Council (1993) 66 P & CR 46, the English Court of Appeal ruled that a member did not have a direct or indirect financial interest in development applications merely because he was a rival builder to the applicants.

Example of financial interest as a result of potential effect of decision on land value

In R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign [1996] 3 All ER 304, an English court considered financial interests of the chairman of an urban development authority relating to a rugby club that wanted to relocate its main sports field.

The rugby club wished to sell its main sports field and move to another location nearby but could realistically do so only 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: a piece of open land next to a large private property owned by the chairman.

The chairman's land was "green belt" land and it was well known that he believed his land should 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 this 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 financial 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 financial interest in the authority's later decisions about the existing site. His former interest did not negatively affect the authority's subsequent decisions.

Appendix 3

Checklist for applications for approvals of interests in contracts

Applications for approval for a member to be concerned or interested in a contract need to be made by the local authority on the member's behalf. In order to consider an application, we need:

- the member's name;
- the names of the parties to the contract (if the member is not a party to the contract, we need to know 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 local authority wishes to use the proposed contractor for this work (for instance, how the local authority justifies its choice on the basis of, for example, cost, performance, quality, expertise, or experience);
- the local authority's usual process for contracts of this type or value, and any policy or rules that apply;
- the process the local 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 local 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);
- to know whether this is a subcontracting situation where the local authority cannot control who the head contractor chooses to use;
- to know whether the member concerned has had any involvement in any local authority decisions about the contract; and
- to know whether the member declared an interest and abstained where necessary.

For retrospective approval applications, as well as needing the information listed above, we need to know why approval was not obtained before the contract was entered into. We need to be satisfied that there was "sufficient special reason" for this.

The application must be in writing. We recommend that you use the form on our website. Alternatively, you can email the application to: LAMIA@oag.parliament.nz.

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Appendix 6

QUICK REFERENCE GUIDE



Health and Safety at Work

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PURPOSE

This quick reference guide summarises the key components of the Health and Safety at Work Act 2015 (HSWA), including the roles and responsibilities of businesses, officers, workers and others in managing workplace health and safety risks.

For simplicity, **this guide generally uses the term 'business'** instead of 'person conducting a business or undertaking' (PCBU). Where this is used, it's intended to also encompass undertakings.

More detailed information, plus free tools and resources are available at www.worksafe.govt.nz/hswa

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01/

**THE HEALTH
AND SAFETY
AT WORK ACT**

QUICK REFERENCE GUIDE // HEALTH AND SAFETY AT WORK

The Health and Safety at Work Act 2015 (HSWA) is New Zealand's workplace health and safety law.

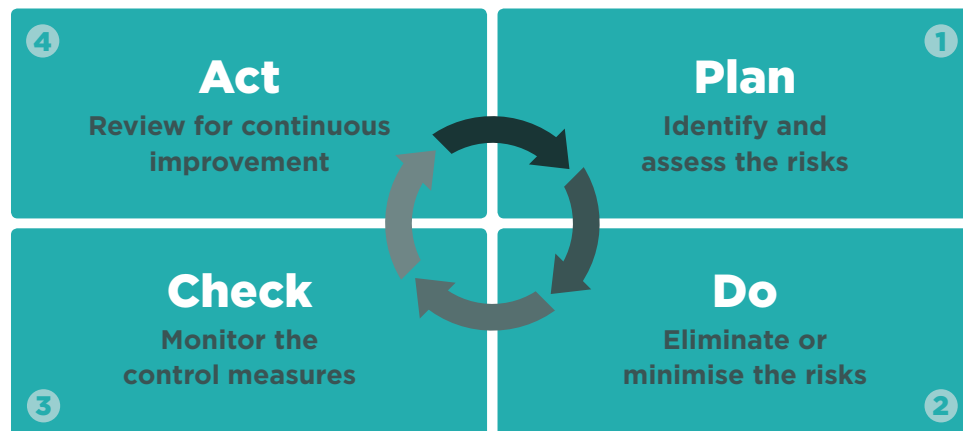
It introduces new responsibilities for managing the work-related risks that could cause serious injury, illness or even death. HSWA recognises that to improve our poor health and safety performance we all need to work together. Government, businesses and workers must establish better leadership, participation in, and accountability for people's health and safety.

Everyone who goes to work should come home healthy and safe. To achieve this, HSWA provides a new way of thinking.

The Health and Safety at Work Act:

- > ensures everyone has a role to play
- > makes everyone's responsibilities clear
- > focuses on managing work risk
- > requires those who create the risk to manage the risk
- > requires businesses to engage with workers and enable them to actively participate in health and safety
- > allows flexibility in managing health and safety risks.

MANAGING HEALTH AND SAFETY RISKS



SECTION 1.0 // THE HEALTH AND SAFETY AT WORK ACT

THE MEANING OF 'SO FAR AS IS REASONABLY PRACTICABLE'

Many duties under HSWA apply 'so far as is reasonably practicable'. It's an important concept that involves doing what is reasonably able to be done to ensure people's health and safety under the given circumstances.

- > Something is '**practicable**' if it is possible or capable of being done. '**Reasonably**' doesn't mean doing everything humanly possible to manage a risk. It means doing what other businesses would reasonably do in the same situation.

Different businesses have different risks - it all depends on the type of work you do.

What every business needs to understand is:

- > what its work-related health and safety risks are - particularly those that have the potential to cause workers **and others** serious injury or illness
- > the likelihood of those risks occurring
- > the degree of harm that could result from those risks
- > the options to eliminate the risks
- > the options to minimise the risks (where they can't be eliminated)
- > the associated costs.

Consideration of cost should only take precedence over safety when it is grossly disproportionate to the risk.

02/

**BUSINESS
RESPONSIBILITIES**

SECTION 2.0 // BUSINESS RESPONSIBILITIES

WHAT IS A PCBU?

- > A PCBU is a 'Person Conducting a Business or Undertaking'.
- > A PCBU may be a person if a sole trader or self-employed, however it usually refers to a business entity such as a company, or an undertaking such as a not-for-profit organisation.
- > The difference between a business and undertaking is:
 - **a business** is an enterprise usually conducted with a view to making a profit
 - **an undertaking** is usually not profit-making or commercial in nature.

Examples of a business:

- > a retailer or wholesaler
- > an importer on-selling imported goods
- > an owner-driver of a transport or courier business
- > a franchisor or franchisee
- > a self-employed person operating their own business
- > partners in a partnership.

Examples of an undertaking:

- > a government department or agency
- > a local council
- > a school
- > a charity like the SPCA or Barnardos.

The following are not PCBUs:

- > officers of a business or undertaking (see page 9)
- > workers (see page 13)
- > home occupiers, unless operating a business at home
- > volunteer associations (see page 18).

WHAT IS THE PRIMARY DUTY OF CARE?

- > A PCBU has the 'primary duty of care' - the primary responsibility for people's health and safety at work. It must ensure, so far as is reasonably practicable, the health and safety of:
 - its workers
 - any other workers it influences or directs.
- > The PCBU must also look after other people who could be put at risk by its work, for example, customers, visitors, children and young people, or the general public.
- > If you are self-employed then you must also ensure, so far as is reasonably practicable, your own health and safety as well as the health and safety of others who could be put at risk by the work you do.
- > The primary duty of care is a broad, overarching duty. It includes, so far as is reasonably practicable, the PCBU having effective practices in place for:
 - Providing and maintaining:
 - a work environment that is without risk to health and safety
 - safe plant and structures
 - safe systems of work
 - adequate facilities for the welfare of workers at work
 - Safe use, handling and storage of plant, substances and structures
 - The provision of information, training, instruction or supervision that is necessary to protect people from risks to health and safety arising from the work carried out
 - That the health of workers and the conditions at the workplace are monitored to prevent illness or injury to workers arising from the work carried out.

03/

**OFFICER
RESPONSIBILITIES**

SECTION 3.0 // OFFICER RESPONSIBILITIES

WHO IS AN OFFICER?

- > A person is an officer if they have a position that allows them to exercise significant influence over the management of a business. Typically, an officer is the director, chief executive, or a general partner in a limited partnership. A business can have more than one officer.
- > A person who merely advises or makes recommendations to a person in a senior position in a business is not considered an officer.
- > The role of an officer is to exercise **due diligence** to ensure that the business meets its health and safety obligations under HSWA. The difference between a business's primary duty of care and an officer's duty is that officers do not have to ensure the health and safety of workers.

WHAT IS DUE DILIGENCE?

Due diligence includes taking reasonable steps to:

- > acquire and keep up-to-date knowledge of work health and safety matters
- > gain an understanding of the nature of the operations of the business and generally of the hazards and risks associated with those operations
- > ensure the business has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety
- > ensure the business has appropriate processes for receiving, considering and responding in a timely way to information regarding incidents, hazards and risks
- > ensure the business has and implements processes for complying with its duties under HSWA
- > verify the provision and use of resources and processes.

The extent of an officer's due diligence duty will depend on the nature of the business' operations and the nature of the officer's role and responsibilities.

04/

**WORKING
WITH OTHER
BUSINESSES**

SECTION 4.0 // WORKING WITH OTHER BUSINESSES

Ensuring businesses work together for everyone's health and safety is a fundamental part of HSWA's design.

THE MEANING OF OVERLAPPING DUTIES

- > When two or more businesses operate together, for example at the same location or in a contracting arrangement, they must work together to fulfil their primary duties of care.
- > Where work overlaps, businesses need to communicate, consult, cooperate and coordinate activities to meet their health and safety responsibilities to workers and others, so far as is reasonably practicable.
- > A business cannot contract out its duties. However, reasonable arrangements can be made with the other businesses to fulfil its duty, taking into account the level of influence or control each has over the overlapping work.

WHY BUSINESSES NEED TO CONSULT

- > Under HSWA, businesses have responsibilities for all workers and others affected by their work - not just those they directly employ or engage. Issues arise when:
 - there is a lack of understanding about how the work of each business may add to the health and safety risks in the workplace as a whole or in a chain of work activities
 - one business assumes the other business is taking care of a particular health or safety issue
 - the business who manages the risk is not the one in the best position to do so
 - businesses do not know what other work is happening and when.

- > Consultation means businesses can avoid unnecessary duplication of effort and help prevent gaps in managing health and safety risks by establishing clear roles and responsibilities.

TIPS FOR EFFECTIVE CONSULTATION

- > Plan ahead, think about the stages of your work and who will be affected by it.
- > Identify the risks to be managed and together agree how to control those risks and who is best placed to do so.
- > Define roles, responsibilities and actions, and explain these to workers and other businesses so they know what to expect.
- > Carry out reasonable and proportionate monitoring to ensure health and safety risk management is maintained.

UPSTREAM ACTIVITIES

- > In addition to their primary duty of care, there are now specific duties on businesses that are upstream in the supply chain (eg architects, engineers, manufacturers and importers).
- > Upstream businesses who design, manufacture, import, supply or install plant, substances or structures must, so far as is reasonably practicable, make sure that what they provide to workplaces doesn't create health or safety risks.
- > Why? Because upstream businesses are in a strong position to eliminate or minimise risks to health and safety within the design and manufacturing process.

05/

**WORKERS
AND OTHERS**

SECTION 5.0 // WORKERS AND OTHERS

THE MEANING OF WORKERS

A worker is an individual who carries out work in any capacity for a business or undertaking, including:

- > employees, contractors or sub-contractors
- > employees of contractors or sub-contractors
- > employees of labour hire companies
- > apprentices or trainees
- > people doing work experience or work trial
- > outworkers (including home workers)
- > volunteer workers (see page 18).

THE MEANING OF OTHERS

Others in a workplace include:

- > visitors to a workplace
- > customers
- > members of the public who come into contact with a business' work activity
- > casual volunteers (see page 18).

WORKERS' AND OTHERS' RESPONSIBILITIES

Workers and others in a workplace must:

- > take reasonable care of their own health and safety and reasonable care that others are not harmed by something they do or don't do
- > follow any reasonable health and safety instructions given to them by the business, as far as they are reasonably able to.

And workers must:

- > cooperate with any reasonable business policy or procedure relating to the workplace's health and safety that they have been told about.

Note: Workers have the right to stop work if they believe it is unhealthy or unsafe.



06/

**WORKER
ENGAGEMENT,
PARTICIPATION AND
REPRESENTATION**

SECTION 6.0 // WORKER ENGAGEMENT, PARTICIPATION AND REPRESENTATION

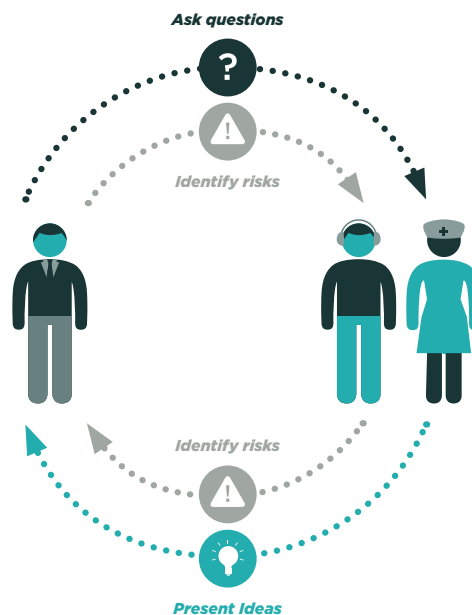
WHAT IS WORKER ENGAGEMENT AND PARTICIPATION?

- > Under HSWA all businesses must have worker engagement and participation practices, regardless of size, level of risk or the type of work carried out. Under HSWA, a business must:
 - ensure workers' views on matters that could affect their health and safety are asked for and taken into account (**engagement**)
 - have clear, effective and ongoing ways for workers to raise concerns or suggest improvements on a day-to-day basis (**participation**).
- > Workplaces have better health and safety outcomes when workers have a say about health and safety. Workers are the eyes and ears of the business and know where the health and safety pressure points are. Workers:
 - are directly affected by any risks created by the work a business does
 - are in the best position to know how a job is done and how it affects them
 - can provide practical solutions for improving work health and safety.
- > How a business decides to engage with workers and ensure their participation in health and safety will depend on the views and needs of workers, the size of the business, the nature of the risks, and how, when and where work is carried out.
- > The focus needs to be on effective practices rather than whether any particular system or processes are in place.

WHAT IS WORKER REPRESENTATION?

- > Worker representation is about having one or more people representing workers on health and safety matters. There are several well-established ways to do this, including Health and Safety Representatives (HSRs), Health and Safety Committees (HSCs), and unions.
- > Worker representation has a number of health and safety benefits, including:
 - giving workers a clear, well-known way to raise issues and suggest improvements
 - providing a link between workers and management
 - helping where it's not practical for the business to engage one-on-one with its entire workforce
 - providing a voice for workers who might not otherwise speak up.

WORKER ENGAGEMENT, PARTICIPATION AND REPRESENTATION



QUICK REFERENCE GUIDE // HEALTH AND SAFETY AT WORK

WHAT IS A HEALTH AND SAFETY REPRESENTATIVE?

- > A health and safety representative (HSR) is a person chosen by other workers to speak or act on their behalf about health and safety matters.
- > HSRs can benefit a business by:
 - working with the business to help to identify and manage risks
 - providing a different perspective given they are involved in day-to-day work activities
 - being knowledgeable about health and safety laws and everyone's rights and responsibilities.
- > Any worker can ask for an HSR and any business can choose to have an HSR.
- > Some businesses must arrange an election for an HSR if asked, including those with 20 or more workers or those in a high-risk sector or industry specified in the Health and Safety at Work (Worker Engagement, Participation, and Representation) Regulations 2016.

WHAT IS A HEALTH AND SAFETY COMMITTEE?

- > Health and safety committees (HSCs) bring together HSRs, workers and representatives of the business to improve health and safety at work.
- > The main functions of an HSC are to:
 - make it easy for the business and workers to cooperate on ways to ensure workers' health and safety
 - assist in developing standards, rules, and policies or procedures for work health and safety
 - make recommendations relating to work health and safety
 - carry out other tasks as agreed between the business and the HSC.
- > Five or more workers or an HSR can request that the business consider establishing an HSC.
- > Any business can choose to set up an HSC even if an HSR or workers have not asked for one.

07/

VOLUNTEERS

QUICK REFERENCE GUIDE // HEALTH AND SAFETY AT WORK

WHAT IS A VOLUNTEER ASSOCIATION?

- > A volunteer association is a group of volunteers working together for a community purpose with **no employees**. A volunteer association is not a PCBU and has no duty, responsibility or liability under HSWA.
- > If the group of volunteers has employees (even only one part-time) it is classed as a PCBU and therefore has duties under HSWA.
- > If the group of volunteers engages individuals to work for them under a contract for service instead of having employees, then it is classed as a volunteer association and is not a PCBU. Note that the contactor may be a PCBU and will have duties under HSWA.

THE MEANING OF VOLUNTEER WORKER

- > Volunteer workers are people who regularly work for a business or an organisation, with its knowledge and consent, on an ongoing basis, and are integral to the operation of the business or organisation. For example, volunteer firefighters.
- > Volunteer workers are covered by a business' primary duty of care to workers.
- > Even if a person fulfils the test of 'volunteer worker', they will not be classed as such if they are:
 - participating in a fundraising activity
 - helping with sports or recreation for an educational institute, sports or recreation club

- helping with activities for an educational institution outside the premises of the educational institution
- providing care for another person in the volunteer's home (for example care for a foster child in the foster parent's home).

THE MEANING OF CASUAL VOLUNTEER

- > Casual volunteers (those who do not meet the criteria of a volunteer worker) are covered by a business' primary duty to ensure others are not put at risk by its work.

08/

NOTIFICATIONS

QUICK REFERENCE GUIDE // HEALTH AND SAFETY AT WORK

NOTIFIABLE EVENTS

Under HSWA you must notify WorkSafe when certain work-related events occur, including:

- > a death
- > a notifiable injury or illness
- > a notifiable incident.

Under HSWA, you are required to:

- > notify us as soon as possible, when a notifiable event occurs
- > preserve the site of the incident until a WorkSafe inspector arrives, or you are otherwise directed by the regulator or the Police.
- > keep records of all notifiable events.

Notifications must be done by phone or in writing, and must be given by the fastest means possible in the circumstances.

Phone 0800 030 040 (24/7)
Online forms www.worksafe.govt.nz/forms

WHAT IS A NOTIFIABLE INJURY OR ILLNESS?

A notifiable injury or illness includes:

- > Any of the following injuries or illnesses that requires a person to have immediate treatment (other than first aid):
 - the amputation of any part of the body
 - a serious head injury
 - a serious eye injury

- a serious burn
- the separation of skin from underlying tissue (such as de-gloving or scalping)
- a spinal injury
- the loss of a bodily function
- serious lacerations.
- > An injury or illness that requires (or would usually require) a person to be admitted to a hospital for immediate treatment.
- > An injury or illness that requires (or would usually require) a person to receive medical treatment within 48 hours of exposure to a substance.
- > A person contracts a serious infection (including occupational zoonoses) to which the carrying out of work is a significant contributing factor, including any attributable to:
 - working with micro-organisms
 - providing treatment or care to a person
 - contact with human blood or bodily substances
 - handling or contact with animals, their hides, skins, wool or hair, animal carcasses or waste products
 - handling or contact with fish or marine mammals.
- > Any other injury or illness declared by regulations to be a notifiable injury.

For more detail, see our online notifiable events tool: www.worksafe.govt.nz/forms



SECTION 8.0 // NOTIFICATIONS

WHAT IS A NOTIFIABLE INCIDENT?

A notifiable incident is an unplanned or uncontrolled incident in a workplace that exposes a worker, or any other person, to a serious health or safety risk arising from an immediate or imminent exposure to one of the following categories of events:

- > a substance escaping, spilling or leaking
- > an implosion, explosion or fire
- > escape of gas or steam
- > escape of a pressurised substance
- > electric shock (from anything that could cause a lethal shock)
- > the fall or release from height of any plant, substance, or thing
- > collapse, overturning, failing or malfunction of, or damage to, any plant that is required to be authorised for use under regulations
- > the collapse or partial collapse of a structure
- > the collapse or failure of an excavation or any shoring supporting an excavation
- > the inrush of water, mud, or gas in workings in an underground excavation or tunnel
- > the interruption of the main system of ventilation in an underground excavation or tunnel
- > a collision between two vessels, a vessel capsize, or the inrush of water into a vessel*
- > any other incident declared in the regulations to be a notifiable incident.

Notifiable incidents do not include controlled activities that form part of the business or undertaking (eg the controlled release of water from a dam).

* Maritime New Zealand is the designated agency for ships as workplaces and work aboard ships.

09/

**WHERE TO
GET MORE
INFORMATION**

SECTION 9.0 // WHERE TO GET MORE INFORMATION

www.worksafe.govt.nz/hswa



MEET STEVE AND THE YAPPERS

These animated videos have been created to help you and your workers understand some of the key workplace health and safety concepts in a unique way.



Where's the risk?

Keeping healthy and safe at work is all about identifying and managing risk...



Is it practicable?

The new health and safety law is not about demanding the impossible...



We're all responsible

Work together and get home healthy and safe...



KNOW THE RISK

These animated videos and risk hot spots help contextualise risk management for different business types as well as some HSWA concepts.



Managing risk in manufacturing



Managing risk in construction



Knowing the risks in your industry



CASE STUDIES

These are just some of the case studies available providing great examples of what every day New Zealand businesses are doing to manage workplace health and safety.



Keeping it simple boosts on-site reporting

This approach is paying off for the family-owned and operated earthmoving business – Goodmans.



Worker participation in risk management improves efficiency

A strong ongoing focus on worker participation transformed the health and safety culture at Real Steel.



Involving everyone in learning reaps benefits for Contact Energy

Learning to 'fail safely' has transformed Contact Energy's health and safety culture.



QUIZZES

Test your HSWA knowledge in the following areas:

- > primary duty of care
- > directors' responsibilities
- > overlapping duties
- > worker engagement and participation
- > notifiable events.

DISCLAIMER

WorkSafe New Zealand has made every effort to ensure the information contained in this publication is accurate, but makes no guarantee of its completeness. WorkSafe may change the contents of this guideline at any time without notice.

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DECISION REPORT



F22/55/04 – D22/38427

To: Council
From: Committee Advisor and Executive Assistant
Date: 25 October 2022
Subject: Setting of Date – First Meeting of Council

Recommendations

1. THAT the report be received.
2. THAT Council confirms the first meeting of Council will be held on Tuesday 8 November at 3.30pm.

Recommended Reason

Meetings are required to be held to effectively and efficiently conduct Council business in a clear and open manner. The Local Government Act requires the fixing of the date and time of the first meeting of the local authority or the adoption of a schedule of meetings at its first meeting.

/
 Moved/Seconded

1. Purpose of Report

- 1.1 The purpose of this report is to confirm the first meeting of Council.

2. Executive Summary

- 2.1 The Local Government Act 2002 requires all Councils to fix a date and time for the first meeting of the Council, or adopt a schedule of meetings.
- 2.2 The Council is required to hold meetings for the good governance of the district.
- 2.3 The meetings must be called and conducted in accordance with the requirements set out in the Local Government Act 2002, Part VII of the Local Government Official Information and Meetings Act 1987, and the Standing Orders of the Council.

The meetings must be held at the time and place specified in the public notice of the meeting.

3. Local Government Act 2002 – Section 10

Under section 10 of the Local Government Act 2002, the Council's purpose is to "enable democratic local decision making by and on behalf of communities; as well as promoting the social, economic, environmental, and cultural well-being of communities now and into the future"

Does the recommended option meet the purpose of the Local Government 4 well-beings? And which:

Yes

Social	Economic	Environmental	Cultural
✓	✓	✓	✓

Democracy supports good quality decision making for all of the above well-beings.

4. Background

4.1 Council's Standing Orders, item 4.1 state:

Legal requirement to hold meetings

The local authority must hold meetings for the good government of its city, district or region.

The same requirement applies to local boards and community boards in respect of their communities. Meetings must be called and conducted in accordance with:

- (a) *Schedule 7 of the LGA 2002;*
- (b) *Part 7 of LGOIMA; and*
- (c) *These standing orders.*

A meeting can be adjourned to a specified time and day if required by resolution of the meeting.

4.2 Council's Standing Orders, item 4.6 state:

Requirements for the first meeting

The chief executive (or, in the absence of the chief executive, their nominee) must chair the first meeting until the Chairperson has made an oral declaration and attested the declaration (see cl. 21(4), Schedule 7 (LGA 2002)).

The business to be conducted at the first meeting following a general election must include the following:

- (a) *The making and attesting of the declarations required of the mayor (if any) and members under cl. 14, Schedule 7, (LGA 2002);*
- (b) *The election of the Chairperson (if any) and the making and attesting of the declaration required of the Chairperson under cl. 14 Schedule 7, (LGA 2002);*
- (c) *A general explanation, given or arranged by the chief executive, of:*
 - i. *LGOIMA; and*
 - ii. *Other laws affecting members, including the appropriate provisions of the Local Authorities (Members Interests) Act 1968; and sections 99, 105, and 105A of the Crimes Act 1961; and the Secret Commissions Act 1910; and the Financial Markets Conduct Act 2013.*
- (d) *The fixing of the date and time of the first meeting of the local authority, or the adoption of a schedule of meetings; and*
- (e) *The election of the deputy Mayor or deputy Chairperson in accordance with cl. 17 Schedule 7, (LGA 2002).*

cl. 21(5), Schedule 7, LGA 2002.

4.3 It is proposed that Council sets the first Ordinary Meeting of the Stratford District Council for Tuesday 8 November 2022 at 3.30pm.

4.4 Public forums are held prior to each Ordinary Meeting. Invitations for speakers are advertised with the monthly meeting schedule in Central Link. Speakers must have

approval from the Mayor or Chief Executive. Councillors will be advised when there is not a public forum.

- 4.4 A proposed schedule of meetings for the remainder of the 2022 calendar year and the 2023 calendar year will be brought to the first Ordinary Meeting for adoption. The schedule of meetings will be based on the committee structure adopted by Council.

5. Consultative Process

5.1 Public Consultation - Section 82

This does not require public consultation.

5.2 Māori Consultation - Section 81

No separate Māori consultation is required.

6. Risk Analysis

Refer to the Council Risk Register - available on the Council website.

- Does this report cover any issues that relate to any risks on the Council Risk Register, and if so which risks and what are the impacts and likelihood of eventuating?
- Does this report cover any issues that may lead to any new risks that are not on the Council Risk Register, and if so, provide some explanation of any new identified risks.
- Is there a legal opinion needed?

- 6.1 Elected Members – Decision Making – Failure to set a date for the first meeting would be in breach of the requirements of the Local Government Act.

7. Decision Making Process – Section 79

7.1 Direction

	.Explain
Is there a strong link to Council's strategic direction, Long Term Plan/District Plan?	Yes decisions need to be made at meetings.
What relationship does it have to the communities current and future needs for infrastructure, regulatory functions, or local public services?	Meetings are key to having decisions made.

7.2 Data

- Do we have complete data, and relevant statistics, on the proposal(s)?
- Do we have reasonably reliable data on the proposals?
- What assumptions have had to be built in?

There is no data included with this proposal.

7.3 Significance

	Yes/No	Explain
Is the proposal significant according to the Significance Policy in the Long Term Plan?	No	Administrative matter only
Is it:	No	
• considered a strategic asset; or	No	
• above the financial thresholds in the Significance Policy; or	No	
• impacting on a CCO stakeholding; or	No	
• a change in level of service; or	No	
• creating a high level of controversy; or	No	
• possible that it could have a high impact on the community?	No	

In terms of the Council's Significance Policy, is this proposal of high, medium, or low significance?		
High	Medium	Low
		✓

7.4 Options

An assessment of costs and benefits for each option must be completed. Use the criteria below in your assessment.

1. What options are available?
2. For **each** option:
 - explain what the costs and benefits of each option are in terms of the present and future needs of the district;
 - outline if there are any sustainability issues; and
 - explain if the outcomes meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions?
3. After completing these, consider which option you wish to recommend to Council, and explain:
 - how this option is the most cost effective option for households and businesses;
 - if there are any trade-offs; and
 - what interdependencies exist.

Option 1 Fix the date as presented 3.30pm, Tuesday 8 November 2022.

Option 2 Suggest an alternative date and time for the first meeting to be held.

7.5 Financial

- Is there an impact on funding and debt levels?
- Will work be undertaken within the current budget?
- What budget has expenditure come from?
- How will the proposal be funded? eg. rates, reserves, grants etc.

There are no financial impacts.

7.6 Prioritisation & Trade-off

- Have you taken into consideration the:
- Council's capacity to deliver;
 - contractor's capacity to deliver; and
 - consequence of deferral?

There is no trade-off required.

7.7 **Legal Issues**

- | |
|--|
| <ul style="list-style-type: none">• Is there a legal opinion needed?• Are there legal issues? |
|--|

There are no legal issues.

7.8 **Policy Issues - Section 80**

- | |
|---|
| <ul style="list-style-type: none">• Are there any policy issues?• Does your recommendation conflict with Council Policies? |
|---|

There are no policy issues.



Erin Bishop
Committee Advisor and Executive Assistant



[Approved by]
Sven Hanne
Chief Executive

Date 18 October 2022

DECISION REPORT



F22/55/04 – D22/38430

To: Council
From: Chief Executive
Date: 25 October 2022
Subject: Appointments to External Bodies

Recommendations

1. THAT the report be received.
2. THAT the Council appoints primary and alternative representatives as per Option 1 contained in this report.
3. THAT the Council appoints the following primary and alternative representatives to the following Taranaki Regional Council Committees and Joint Committees:

Committee	Appointment	Alternative Appointment
Taranaki Regional Council Policy and Planning Committee		
Regional Land Transport Committee		
Civil Defence Emergency Management Group (CDEM)		
Taranaki Regional Solid Waste Management Committee		
Central Landfill Joint Committee		

Recommended Reason

At the beginning of each triennium of Council, Council needs to appoint its representatives to external bodies. Council representation on these is important to enable it to fulfil its statutory roles.

/
Moved/Seconded

1. Purpose of Report

- 1.1 That Council considers and elects representatives to external groups and organisations

2. Executive Summary

- 2.1 At the beginning of each triennium of Council, Council needs to appoint its representatives on External Groups and Organisations. This report forms the basis for these decisions with subsequent reports likely as requests from other groups and organisations for council representatives may be received. While representation on some external bodies can be considered discretionary, representation on the bodies contained within this report is considered essential for the operation of council's core functions.

3. Local Government Act 2002 – Section 10

Under section 10 of the Local Government Act 2002, the Council's purpose is to "enable democratic local decision making by and on behalf of communities; as well as promoting the social, economic, environmental, and cultural well-being of communities now and into the future"			
Does the recommended option meet the purpose of the Local Government 4 well-beings? And which:			Yes
Social	Economic	Environmental	Cultural
✓	✓	✓	✓

There are no Local Government Act 2002 Section 10 implications associated with the content of this report as these relate to the delivery of Council services rather than the appointment to external bodies. The decisions contained in this report however, contribute directly to council delivering against the objectives of Section 10 of the LGA and form part of the foundation of council decision making.

4. Background

4.1 By statute the Council is obligated to appoint representatives to the Civil Defence Emergency Management Group and the Regional Transport Committee. There are no legal obligations to appoint Stratford District Council representatives to the other organisations listed. While representation on some external bodies can be considered discretionary, representation on the bodies contained within this report is considered essential for the operation of council's core functions.

5. Consultative Process

5.1 Public Consultation - Section 82

Need to show that the views of those likely to be affected, and/or interested parties, have been considered. Consultation Plan if any. *(Delete this box when public consultation is typed)*

There are no consultation requirements associated with this report.

5.2 Māori Consultation - Section 81

Need to show that the views of those of the land and/or bodies of water with regard to tangata whenua issues have been considered. *(Delete this box when māori consultation is typed)*

There are no Māori consultation requirements associated with this report.

6. Risk Analysis

Refer to the Council Risk Register - available on the Council website.

- Does this report cover any issues that relate to any risks on the Council Risk Register, and if so which risks and what are the impacts and likelihood of eventuating?
- Does this report cover any issues that may lead to any new risks that are not on the Council Risk Register, and if so, provide some explanation of any new identified risks.
- Is there a legal opinion needed?

By (a) not appointing representatives to external bodies or (b) only appointing representatives to these bodies as required by statute, council would (a) fail in its statutory obligations and or (b) compromise its ability to advocate on behalf of and fully represent its community on matters important to the well-beings of our community.

This relates to Risk 59, CCO and other Out-Sourced Functions in terms of ensuring these functions have appropriate council representation to monitor the key risk of these functions and mitigate potential for financial, environmental or health implications.

7. Decision Making Process – Section 79

7.1 Direction

	Explain
Is there a strong link to Council's strategic direction, Long Term Plan/District Plan?	The undertaking of these activities is essential to the operation of council.
What relationship does it have to the communities current and future needs for infrastructure, regulatory functions, or local public services?	The undertaking of these activities is essential to the operation of council.

7.2 Data

<ul style="list-style-type: none"> Do we have complete data, and relevant statistics, on the proposal(s)? Do we have reasonably reliable data on the proposals? What assumptions have had to be built in?
--

Not applicable.

7.3 Significance

	Yes/No	Explain
Is the proposal significant according to the Significance Policy in the Long Term Plan?	No	
Is it:	No	
• considered a strategic asset; or	No	
• above the financial thresholds in the Significance Policy; or	No	
• impacting on a CCO stakeholding; or	No	
• a change in level of service; or	No	
• creating a high level of controversy; or	No	
• possible that it could have a high impact on the community?	No	

In terms of the Council's Significance Policy, is this proposal of high, medium, or low significance?		
High	Medium	Low
		✓

7.4 Options

An assessment of costs and benefits for each option must be completed. Use the criteria below in your assessment.

1. What options are available?
2. For **each** option:
 - explain what the costs and benefits of each option are in terms of the present and future needs of the district;
 - outline if there are any sustainability issues; and
 - explain if the outcomes meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions?
3. After completing these, consider which option you wish to recommend to Council, and explain:
 - how this option is the most cost effective option for households and businesses;
 - if there are any trade-offs; and
 - what interdependencies exist.

Option 1

THAT the Council appoints primary and alternative representatives as required to the Taranaki Regional Council Policy and Planning Committee, the Regional Land Transport Committee, the Civil Defence Emergency Management Group (CDEM), the Taranaki Regional Solid Waste Management Committee, and the Central Landfill Joint Committee.

Option 2:

THAT the Council only appoints primary and alternative representatives as required by statute. This would cover the Civil Defence Emergency Management Group and the Regional Transport Committee.

No representatives would be appointed to the other organisations listed within this report. Staff advise strongly against this option.

7.5 Financial

- Is there an impact on funding and debt levels?
- Will work be undertaken within the current budget?
- What budget has expenditure come from?
- How will the proposal be funded? eg. rates, reserves, grants etc.

There are no financial implications associated with the content of this report.

7.6 Prioritisation & Trade-off

- Have you taken into consideration the:
- Council's capacity to deliver;
 - contractor's capacity to deliver; and
 - consequence of deferral?

The decisions inherent in this report do not affect Council's overall ability to deliver on its commitments.

7.7 Legal Issues

- Is there a legal opinion needed?
- Are there legal issues?

There are no legal implications associated with the content of this report.

7.8 **Policy Issues - Section 80**

- | |
|---|
| <ul style="list-style-type: none">• Are there any policy issues?• Does your recommendation conflict with Council Policies? |
|---|

There are no policy implications associated with the content of this report.



Sven Hanne
Chief Executive

Date 18 October 2022



Our reference
F19/13/03-D21/40748

Karakia

Kia uruuru mai
Ā hauora
Ā haukaha
Ā haumāia
Ki runga, Ki raro
Ki roto, Ki waho
Rire rire hau Paimārire

I draw in (to my being)
The reviving essence
The strengthening essence
The essence of courage
Above, Below
Within, Around
Let there be peace.