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Author	Francis Ryan, Manager, Democratic Services

## Laws affecting Councillors

### 1. Purpose

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

### 2. Background

Clause 21(5)(c) of Schedule 7 to the Local Government Act 2002 requires that, at the first meeting of the Council following a triennial general election, the Chief Executive must give or arrange for a general explanation of certain laws affecting members, including:

- the Local Government Official Information and Meetings Act 1987
- the Local Authorities (Members' Interests) Act 1968
- sections 99, 105 and 105A of the Crimes Act 1961
- the Secret Commissions Act 1910
- the Financial Markets Conduct Act 2013.

### 3. Comment

There are certain legal provisions that Councillors must be aware of because breaching the rules may result in loss of office, fines, or imprisonment. These provisions are contained in the:

- Secret Commissions Act 1910
- Crimes Act 1961
- Local Authorities (Members' Interests) Act 1968
- Financial Markets Conduct Act 2013.

Other enactments such as the Local Government Act 2002 and the Local Government Official Information and Meetings Act 1987 deal with the role and function of the Council and Councillors, and with the conduct of meetings. Recent changes to health and safety laws in New Zealand also introduce new due diligence obligations for Councillors. These matters will be discussed in upcoming legal briefings to Councillors.

The following is a brief summary of these enactments and other provisions that govern the conduct of the Council's affairs.

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

Under the Secret Commissions Act 1910, Councillors are deemed to be agents of the Council (section 16(1)(b)) and can be criminally liable for bribery and corruption offences. Under this Act, Councillors may be liable, for:

- Accepting inducements or rewards for doing or forbearing to do something in relation to the Council's affairs (section 4(1)).
- Showing or having shown favour or disfavour to any person in relation to the Council's affairs or business (section 4(1)).
- Diverting, obstructing, or interfering with the proper course of the affairs or business of the Council with intent to obtain any gift or other consideration from any person interested in the affairs or business of the Council (section 4(2)).
- Failing to use due diligence in the prosecution of its affairs or business, with intent to obtain any gift or other consideration from any person interested in the affairs or business of the Council (section 4(2)).
- Not disclosing to the Council his or her pecuniary interest (which includes the pecuniary interest of a parent, spouse/partner, or child) in a contract when making a contract on behalf of the Council (see also the discussion of the Local Authorities (Members' Interests) Act 1968 below).
- Aiding or abetting, or being in any way directly or indirectly concerned in, or privy to, the commission of any offence against the Act (section 9).

Conviction of an offence under this Act carries with it the possibility of imprisonment for any period not exceeding seven years. Such a conviction will have the consequence of loss of office, in terms of clause 1 of Schedule 7 of the Local Government Act 2002.

### **3.2 Crimes Act 1961**

Councillors also come under the definition of an official in section 99 of the Crimes Act 1961. Section 105(1) of the Act states:

Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her official capacity.

Put simply, it is an offence to seek or obtain a reward for performing one's official duties as a Councillor.

Section 105A sets out that it is an offence for an official to use any information acquired by him or her in an official capacity to obtain, directly or indirectly, an advantage or a pecuniary gain for himself or herself, or any other person.

Conviction of an offence under both section 105, and section 105A carries with it the possibility of an imprisonment for a term not exceeding seven years.

### **3.3 The Local Authorities (Members' interests) Act 1968**

The Local Authorities (Members' Interests) Act 1968 is one of the most important statutes governing the conduct of Councillors. It has two main aspects:

- (a) Councillors must not hold an interest in a council contract with a value greater than \$25,000 (GST inclusive) in a single year, which has not been approved by the Office of the Auditor-General (section 3(1)).

This Act includes contracts made by the Council directly with the person concerned, and also contracts made by the Council in which the Councillor is concerned or interested. Special provisions deal with companies in which a member or his or her spouse/partner is interested either as a shareholder, or as a member of the company, or by virtue of certain management positions.

- (b) Councillors must not vote or take part in a council discussion if they have a pecuniary interest in the discussion (section 6(1)).

Again, there are special provisions dealing with a pecuniary interest in the context of the interests of the member or his or her spouse/partner in a company.

There are exceptions to these rules but, in case of any doubt, a Councillor should refer the matter to the Office of the Auditor-General or seek independent legal advice.

The penalty for breach of these provisions (section 3) includes immediate loss of office (section 4) and the possibility of a fine (section 5). The penalty for discussing or voting when there is a pecuniary interest will only result in loss of office upon conviction of an offence (section 7).

Related to these statutory provisions is the common law principle of natural justice, which includes obligations to listen to both sides and not to be a judge in one's own cause.

### **3.4 Local Government Official Information and Meetings Act 1987**

The Local Government Official Information and Meetings Act 1987 governs the custody and release of official information as well as access to local authority meetings.

### *Information*

The fundamental principle in the Act is that information held by the Council is publicly available, unless one or more specified withholding grounds apply. Information held by elected members in their *official capacity* is deemed to be held by the Council itself.

The Act sets out a framework for dealing with requests for information and provides that requestors may complain to the Ombudsman if they have concerns about an agency's response to their request.

### *Meetings*

Local authority meetings must be open to the public (section 47), unless there are statutory reasons for public exclusion (section 48). Conclusive reasons for excluding the public exist where inclusion of the public would:

- prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
- endanger the safety of any person.

The public may also be excluded where the subject matter of discussion is one in respect of which a right of appeal exists to any Court or Tribunal against the decision made by the Council (section 48(2)). Other grounds for exclusion are provided for in section 7 of the Act.

In excluding the public, the Council must make a resolution (in the form set out at Schedule 2A to the Act) stating the subject of each matter to be considered while the public is excluded, and the statutory grounds for excluding the public.

### *Other matters*

The Act makes the following further important points, related to matters of availability and privilege at local authority meetings:

- Items which are not on an agenda for a meeting may be dealt with if the meeting resolves to do so and the chairperson explains in open meeting why the item is not on the agenda and why consideration of it cannot be delayed to a subsequent meeting (section 46A(7)). (If the item is a minor matter relating to the general business of the Council then it may be discussed without the meeting having resolved to do so, so long as the chair explains at the beginning of the meeting, and when it is open to the public, that the item will be discussed; but in that case no resolution, decision or recommendation may be made except to refer the item to a subsequent meeting for further discussion (section 46A (7A)).
- All statements made at meetings of the Council and any publications resulting from a meeting of council (i.e. agendas/minutes) are "privileged". A statement that is regarded as "privileged" cannot support a cause of action for defamation (even though that statement might be untrue or

misleading). An exception to this rule exists if the statement, or defamatory publication is proven to have been predominantly motivated by ill will (section 52, section 53).

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

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

The Act also prohibits any member who has information about a listed company that is not generally available to the market, from trading in that company's shares or from disclosing that information.

The penalties for providing false or misleading statements in disclosure documents and insider trading carry the possibility of imprisonment.

## **4. The decision-making process and significance**

No decision is being sought in this report.

## **5. Engagement**

No engagement is required.

## **6. Recommendations**

*That the Council:*

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

Report prepared by:

**Francis Ryan**  
Manager, Democratic  
Services

Report approved by:

**Luke Troy**  
General Manager, Strategy