

ATTACHMENT: LAWS AFFECTING ELECTED MEMBERS

Summary of Core Legal Requirements

1. Local Government Act 2002

The Local Government Act 2002 (**Local Government Act**) is the main Act that establishes the general legal framework for all local authorities in New Zealand, including Auckland Council. The Act underpins a great deal of what the council does.

Elected members have a duty to enable council to perform its various powers and functions in accordance with the statutory purpose of local government, as set out in the Local Government Act:

- to enable democratic local decision-making and action by, and on behalf of, communities; and
- to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.¹

The Local Government Act also gives the council its power of general competence, which broadly allows the council to make decisions that an ordinary person or body corporate could make, while carrying out the council's role and purpose, within any statutory limits.²

2. Local Government (Auckland Council) Act 2009

Elected members also make decisions in accordance with the Local Government (Auckland Council) Act 2009 (**the Auckland Council Act**) which applies uniquely to Auckland Council. If there is ever any conflict between the Auckland Council Act and the Local Government Act, the Auckland Council Act takes precedence.

The Auckland Council Act creates Auckland Council as a unitary authority, with decision-making responsibilities shared between the governing body (the mayor and 20 councillors) and 21 local boards.³

The governing body focuses on the region-wide, strategic decisions, making the most of the council's size and ability to deliver regionally. There are some decisions that only the governing body can make, including setting rates, appointing the chief executive, making bylaws or adopting the council's ten-year budget (the long-term plan).

The 21 local boards represent their local communities and make decisions on local issues, activities and facilities. Decisions made regionally by the governing body will inevitably have local impacts, and when making decisions, the governing body will consider views and preferences expressed by local boards.

The governing body and the local boards collectively comprise Auckland Council, and together with council-controlled organisations, comprise the Auckland Council group.

The Auckland Council Act also sets out the responsibilities of Auckland Transport, Watercare (as an Auckland water organisation) and the Independent Maori Statutory Board.

¹ Section 10 Local Government Act 2002.

² Section 12(2) Local Government Act 2002.

³ Section 7 Local Government (Auckland Council) Act 2009.

3. Local Government Official Information and Meetings Act 1987

The Local Government Official Information and Meetings Act 1987 (**LGOIMA**) determines how council meetings are conducted (including in relation to excluding the public from meetings) and how the council uses and releases the information that it holds. The council's standing orders also govern how meetings are to be conducted.

The process for members of the public to request information is also set out in LGOIMA. There are limited grounds on which the council can decline such a request. LGOIMA provides a process for members of the public to complain to the Ombudsman if they are dissatisfied with the council's response to a LGOIMA request.

4. Health and Safety at Work Act 2015

The purpose of the Health and Safety at Work Act 2015 is to protect the health and safety of workers at their workplaces. It sets out key health and safety duties for the council and for people in positions of leadership, influence, or responsibility in the workplace and for workers and other people. The Health and Safety at Work Act sets out some compulsory health and safety requirements, and creates offences and penalties for failing to meet those requirements.

Due diligence

Elected members have a personal and individual duty of due diligence to ensure that the council complies with its obligations under the Health and Safety at Work Act. This is analogous to what might be expected of a company director with a company's financial statements. An elected member cannot delegate the exercise of this duty to anyone else. There are six aspects to the due diligence duty:

- to be familiar and keep up to date with health and safety knowledge and matters for the council;
- understand the council's operations and the associated hazards and risks;
- ensure that the council has appropriate resourcing and processes to eliminate or minimise risks to health and safety;
- ensure the council has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding to the information in a timely way;
- ensure the council has and implements processes for complying with its duties; and
- verify the provision and use of resources and processes through reviews and audits.

Staff support elected members to comply with their duty of due diligence. Part of that support includes training and regular health and safety information reporting at governing body committee meetings and local board meetings.

5. Local Authorities (Members' Interests) Act 1968

The Local Authorities (Members' Interests) Act 1968 deals with financial conflicts of interest. It prohibits elected members from taking part in discussion or voting in situations where an elected member has a direct or indirect financial interest, other than an interest in common with the general public.

The Local Authorities (Members' Interests) Act also prohibits elected members from entering into contracts with the council (either the governing body or local boards, as applicable) valued at over \$25,000.

The same rules can apply where a spouse, partner, company (depending on shareholding levels or the member's position in the company) and possibly family trust, has a financial interest or is concerned or interested in a contract.

In some cases the Office of the Auditor-General can consider providing an exemption to an elected member so he or she may participate in a decision in which they have a financial interest or enter into a contract with the council valued at over \$25,000.

A failure to comply with the Local Authorities (Members' Interests) Act could result in an elected member being prosecuted and disqualified from office.

General public law rule against financial and non-financial conflicts of interest

A conflict of interest occurs when an elected member's personal interest (either financial or non-financial) interferes with his or her public duty. Elected members are required to follow the council's conflict of interest policy in the Code of Conduct for Elected Members and make full and complete annual declarations of interest.

The general legal test for a conflict of interest is whether a fair-minded observer would reasonably consider that the decision-maker might not bring an impartial mind to the relevant decision. That is, the decision-maker might unfairly regard with favour or disfavour any view or outcome, due to the non-financial or financial interest.

6. Crimes Act 1961

The Crimes Act 1961 makes it an offence for an elected member to "corruptly seek" or accept a bribe or reward for doing, or not doing, something in his or her official capacity as an elected member.⁴ It is also an offence for an elected member to obtain any advantage or financial gain from information received in that role.⁵ A conviction for either of these offences under the Crimes Act would result in an elected member being disqualified from office and could lead to imprisonment.

7. Secret Commissions Act 1910

The Secret Commissions Act 1910 makes it an offence for an elected member to take bribes, or use their position for improper gain. It is also an offence for an elected member not to disclose a direct or indirect financial interest he or she has in a council contract. A conviction under the Secret Commissions Act would result in an elected member being disqualified from office and could also lead to a fine or imprisonment.

8. Financial Markets Conduct Act 2013

The Financial Markets Conduct Act 2013 aims to promote a fair, efficient and transparent financial market. It imposes a number of responsibilities on those who offer, deal and trade in financial products (including bonds issued by the council), especially in relation to what sort of information must be provided to potential investors when investment offers are made. An elected member may be personally liable when approving council documents relating to offers of securities, if the documents contain false and materially misleading statements and the member knew this, or was reckless in approving any such documents.

The Act places limits on elected members using confidential information relating to certain proposed council transactions. For example, where council debt securities are listed on a registered stock exchange, then elected members cannot use (or benefit from) information that is not generally available to the public. This applies to the council's bonds listed on the NZX Debt Market.⁶ Elected members must consider the risks of insider trading and the failure to

⁴ Sections 99 and 105 Crimes Act 1961.

⁵ Sections 99 and 105A Crimes Act 1961.

⁶ For more information on the council's bonds, please refer to the council's investor centre information at: <http://www.aucklandcouncil.govt.nz/en/aboutcouncil/businessandconomy/pages/investorcentre.aspx>.

disclose relevant interests in the council's bonds. Failure to comply with the Financial Markets Conduct Act could lead to a criminal conviction and therefore disqualification from office.

9. Public law decision-making principles

There are public law principles that elected members must keep in mind when making decisions. These principles are enforced by the High Court by way of judicial review. Broadly, public decision-makers are required to act lawfully, fairly and reasonably.

The concept of acting lawfully includes:

- having the necessary power to make the decision;
- acting in accordance with the purpose of the power being exercised, and within the scope of the discretion granted to the decision-maker;
- taking into account all relevant considerations and ignoring any irrelevant considerations; and
- exercising independent judgement in making the decision rather than “rubber-stamping” the recommendation of another person.

The concept of acting fairly includes:

- ensuring a proper process is followed, including consulting where appropriate;
- being unbiased and free from conflicts of interest;
- fairly considering all relevant views put forward and not predetermining the decision (that is, making a decision before considering all relevant views or considerations);
- complying with the public's legitimate expectations (for example, keeping a promise to do something in a particular way that has been relied on); and
- complying with any applicable principles of natural justice.

The concept of acting reasonably includes:

- ensuring the decision is rational, based on legitimate reasons and one that a reasonable decision-maker could make; and
- ensuring the decision is proportionate to the purpose being served by the decision.

These obligations vary according to the context and the nature of the decision being made.

10. Council decision-making requirements

The Local Government Act and the Auckland Council Act set out the basic procedural decision-making requirements applying to council decision-making. For each decision, the governing body and local boards can decide how to fulfil these requirements.⁷ The more significant a decision is, the stricter the compliance should be.

These requirements are (in summary):

⁷ Sections 79(1) and 82(3) of the Local Government Act 2002.

- to identify all reasonably practicable options for achieving the decision's purpose and assess the advantages and disadvantages;⁸
- to consider the views and preferences of people likely to be affected by, or have an interest in, the decision (this does not require the council to undertake consultation);⁹
- to conduct any consultation in accordance with the principles outlined in the legislation;¹⁰
- to identify any significant inconsistency between the decision and any of the council's policies or plans, and to provide reasons for the inconsistency;¹¹
- to establish processes to provide opportunities for Māori to contribute to decision-making, including providing relevant information for that purpose;¹²
- for the governing body to consider the views and preferences of local boards if the decision may affect their responsibilities or operation or the well-being of their communities;¹³ and
- for local boards to cooperate with each other when the interests of their areas are better served by doing so.¹⁴

11. Personal liability of elected members

Members of the council (including local board members and appointees to council committees or other subordinate decision-making bodies) are indemnified by the council for the following:

- costs and damages for any civil liability, as long as the member was acting in good faith and was carrying out responsibilities or powers of the council (or relevant committee or other subordinate decision-making body); and
- costs arising from any successfully defended criminal action relating to acts or omissions in his or her capacity as a member.¹⁵

Personal liability for losses incurred

Elected members may be liable (jointly and separately) for the losses of the council where the governing body or local board has:

- unlawfully spent money;
- unlawfully sold or disposed of an asset;
- unlawfully incurred a liability; and / or
- intentionally or negligently failed to enforce the collection of money it is lawfully entitled to receive.¹⁶

⁸ Section 77(1)(a) and (b) Local Government Act 2002.

⁹ Section 78 Local Government Act 2002.

¹⁰ Section 82 Local Government Act 2002.

¹¹ Section 80 Local Government Act 2002.

¹² Section 81 Local Government Act 2002.

¹³ Section 15(2)(c) Local Government (Auckland Council) Act 2009.

¹⁴ Section 16 Local Government (Auckland Council) Act 2009.

¹⁵ Section 43(1) Local Government Act 2002.

¹⁶ Sections 44(1) and 46(1) Local Government Act 2002 and section 11A(1) Local Government (Auckland Council) Act 2009.

Members are only liable for these types of losses if the Auditor-General issues a report on the loss to the Minister of Local Government.¹⁷ The Auditor-General has not issued a report on losses incurred by a local authority since the Local Government Act was enacted in 2002 (although the possibility has been considered).¹⁸

An elected member will have a defence (and will not be liable) if they can prove the act (or failure to act) that resulted in the loss occurred:

- without their knowledge;
- with their knowledge but against their protests made at or before the time when the loss occurred;
- contrary to the manner in which they voted on the issue at a meeting; or
- in circumstances where they acted in good faith and relied on reports, information, or professional / expert advice given by a council staff member or a professional adviser or expert on matters that the elected members reasonably believed were within the person's competency.

A local board member can be liable only in respect of a matter that is the responsibility of their local board.¹⁹

Further advice

As an elected member, you can seek advice from Legal Services on any of the laws relating to a particular decision or council issue. For further legal advice or assistance, please contact Katherine Anderson, Director Legal and Risk, at legalservices@aucklandcouncil.govt.nz.

¹⁷ Sections 44(1) and 46(1) Local Government Act 2002.

¹⁸ Auditor-General *Kaipara District Council: The Auditor-General's decision on requests to make a report under section 44 of the Local Government Act 2002* (19 August 2015).

¹⁹ Section 11A(2) Local Government (Auckland Council) Act 2009.