

24. 11. 2011

19. COUNCIL SUBMISSION ON REVIEW OF LOCAL AUTHORITIES (MEMBERS' INTERESTS) ACT 1968



General Manager responsible:	General Manager Regulation and Democracy Services, DDI 941-8462
Officer responsible:	Legal Services Manager
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PURPOSE OF REPORT

1. The purpose of this report is to ask the Council to approve the attached draft submission on the Department of Internal Affairs' Discussion Document "*Managing Conflicting Interests in Local Government: The Local Authorities (Members' Interests) Act 1968 and Associated Issues*". The Council's submission needs to be lodged with the Department of Internal Affairs by 30 November 2011.

EXECUTIVE SUMMARY

2. The Department of Internal Affairs has released a discussion document on the Local Authorities (Members' Interests) Act 1968 ("the Members Interests Act") and has invited submissions. A copy of the Member's Interests Act is attached to this report as **Attachment C**, and the Discussion Document is **Attachment B**. This is the first stage of the review of the Members' Interests Act.
3. Staff have prepared a draft submission, see **Attachment A**. The submission addresses the various questions in the discussion document and also makes some general comments.
4. The main points of the submission are that the Council supports–
 - The repeal of the Members' Interests Act and the introduction of a new Act that would cover both pecuniary and non pecuniary conflicts of interest:
 - The adoption of a register system where members are required to disclose interests. A register system is provided for in the Crown Entities Act 2004 and the New Zealand Public Health and Disability Act 2000:
 - Covering both pecuniary and non-pecuniary interests to the extent reflected in section 62 of the Crown Entities Act 2004:
 - Using a similar process to that set out in clause 36 of Schedule 3 of the New Zealand Public Health and Disability Act 2000 for managing conflicts of interest:
 - Giving the Auditor-General the power to rule on whether or not a conflict of interest exists:
 - Giving local authorities the ability to exclude members from participating in a decision-making process where the Auditor-General has issued a binding ruling that a conflict of interest exists:
 - Abolishing the criminal sanctions that are currently contained in the Members' Interests Act.

FINANCIAL IMPLICATIONS

5. Depending on the outcome of the review, there may be some financial implications for the Council in that it may need to introduce a new regime for managing members' conflicts of interest. However, there are no immediate financial implications for the Council in making a submission on this matter.

Do the recommendations of this Report Align with 2009-19 LTCCP budgets?

6. This is not a matter that would normally be provided for in the LTCCP budgets.

LEGAL CONSIDERATIONS

7. A summary of the Members' Interests Act is set out in the background to this report.

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Have you considered the legal implications of the issue under consideration?

8. The draft submission addresses the legal implications for the Council.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

9. The LTCCP provides that democracy and governance is a council activity and, with respect to city governance and decision-making, provides that the Council tries to achieve, amongst other things, Council and community board decisions that comply with statutory requirements, and take into account Council policy and delegations granted by the Council, as well as a transparent decision-making process.

Do the recommendations of this report support a level of service or project in the 2009-19 LTCCP?

10. Yes.

ALIGNMENT WITH STRATEGIES

11. The Council's Code of Conduct for Mayor and Councillors includes a discussion about financial and non-pecuniary interests and how conflicts of interest are to be managed.

Do the recommendations align with the Council's strategies?

12. Depending on the outcome of the review, changes may need to be made to the Council's Code of Conduct in due course.

CONSULTATION FULFILMENT

13. On 26 October 2011, staff from the Legal Services Unit held an Elected Member Workshop (ie Councillors and Community Board Members) on the review of the Members' Interests Act. The workshop was attended by 6 Community Board members. The questions that were discussed included
- Declare potential conflicts of interest at election time? Is this workable?
 - Keep a register of interests? How would this work?
 - Keep the contracting rule and increase the threshold or get rid of the contracting rule?
 - Are there other ways the "contracting rule" issues can be managed, e.g a robust procurement process?
 - What interests should be covered by a statute if there is one? e.g just pecuniary interests?
 - Should there be official guidelines for managing conflicts of interest?
 - Is third party oversight needed? e.g by the OAG?
 - What if any should be the consequences of breaching the rules?
 - Should there be the ability to exclude members who have a conflict?
 - Should members who have a conflict receive all information provided to other members about the matter in question?
 - Should there be an ability to hold agenda items over until a conflict of interest issue is resolved?
14. The general view of the workshop participants was that it would be appropriate to introduce a new regime that deals with both pecuniary and non-pecuniary conflicts of interest. Some support was expressed for the conflict of interest provisions that apply to district health board members (as set out in the New Zealand Public Health and Disability Act 2000). Other disclosure regimes were also discussed such as those that apply to crown entities, Members of Parliament and Cabinet Ministers.
15. Staff from the Legal Services Unit also attended a Local Government New Zealand Workshop on the Members Interests Act review. A copy of the Local Government New Zealand submission is attached to this report as **Attachment D**.

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STAFF RECOMMENDATION

It is recommended that the Council:

- (a) Receives this report; and
- (b) Approves the draft submission (to be signed by the Mayor and the Chief Executive) for lodging with the Department of Internal Affairs.

BACKGROUND (THE ISSUES)*Background information about the Members' Interests Act*

- 16. There are two main components of the Members' Interests Act. The 'contracting rule' (section 3) prohibits a member of a local authority being involved in contracts with the authority under which total payments exceed \$25,000 in any financial year. Exemptions from the rule are possible with approval from the Auditor-General. The penalty for breaching the rule is automatic disqualification from membership of the local authority. The member may also be prosecuted for a criminal offence.
- 17. The 'discussing and voting rule' (section 6) prohibits members of local authorities from voting or taking part in local authority business on any matter in which they have a pecuniary interest, unless their interest is 'in common with the public' or one of the other statutory exemptions applies. Breaching the rule is a criminal offence, and a conviction results in vacation of office. The Members' Interests Act also requires a member to declare any pecuniary interest at relevant meetings and for the minutes to record the declaration.
- 18. As noted in the discussion document, the discussing and voting rule is a partial codification of the common law relating to bias in public body decision-making. The discussing and voting rule applies to financial interests only. Non-financial interests are governed by the common law. The contracting rule is not strictly speaking part of the law about bias (because it is not connected to participating in decision-making). It does however reflect concerns about the potential for a member to profit from his or her public position.
- 19. In terms of the common law that applies to non-pecuniary conflicts of interest, administrative law requires that a decision be made fairly, lawfully and reasonably. The law relating to bias or predetermination is directed to ensuring fairness in decision-making. In general, bias or predetermination will arise where a decision-maker has an interest, such as a pecuniary interest, that will mean that he or she cannot appear to act impartially, or where a decision-maker has committed to a certain outcome before the time that the decision should be made (eg before hearing and considering submissions).
- 20. A review of the Members' Interests Act has been on the cards for a good number of years. Again as noted in the discussion document, *"the main problems with [the Members' Interests Act] are that the way it deals with issues and the drafting style are both out of date. As a result, its provisions have proved difficult to understand and to apply in today's circumstances."* The discussion documents goes on to state that

"The OAG has experienced difficulties administering [the Members' Interests Act] – relating both to its obligations and to the perverse outcomes that its application can have for local bodies and individual members.

In the case of the contracting rule, the low monetary limits impose unnecessary compliance costs on the bodies subject to [the Members' Interests Act] in seeking exemptions and impose significant costs for the OAG from the number of applications for exemptions that must be considered. The limits may deter some candidates from seeking election to local government.

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In the case of the discussing and voting rule, the OAG has observed that [the Members' Interests Act] is not well designed to meet the decision-making needs of modern local authorities and has become increasingly difficult to operate in practice. There has been a steadily increasing number of applications for exemptions and complaints in recent years. This may be in part due to a heightened awareness of, and sensitivity about, conflict of interest issues in the public sector generally rather than as a result of issues unique to the local government sector."

Draft submission

21. Following staff attendance at the Local Government New Zealand workshop and the comments received from elected members at the Council's own elected member workshop, staff have prepared a draft submission which suggests that the Members' Interests Act be repealed and a new system be introduced that covers both pecuniary and non-pecuniary interests. A summary of the main points of the submission is contained in paragraph 4 above.
22. It should be noted that the submission proposes that the statutory rules should cover both pecuniary and non-pecuniary interests to the extent reflected in section 62 of the Crown Entities Act 2004. Section 62 provides as follows:

"62 When interests must be disclosed

 - (1) *In this section, **matter** means—*
 - (a) *a statutory entity's performance of its functions or exercise of its powers; or*
 - (b) *an arrangement, agreement, or contract made or entered into, or proposed to be entered into, by the entity.*
 - (2) *A person is **interested** in a matter if he or she—*
 - (a) *may derive a financial benefit from the matter; or*
 - (b) *is the spouse, civil union partner, de facto partner, child, or parent of a person who may derive a financial benefit from the matter; or*
 - (c) *may have a financial interest in a person to whom the matter relates; or*
 - (d) *is a partner, director, officer, board member, or trustee of a person who may have a financial interest in a person to whom the matter relates; or*
 - (e) *may be interested in the matter because the entity's Act so provides; or*
 - (f) *is otherwise directly or indirectly interested in the matter.*
 - (3) *However, a person is not interested in a matter—*
 - (a) *only because he or she is a member or an officer of a wholly-owned subsidiary of the entity or of a subsidiary that is owned by the entity together with another parent Crown entity or entities; or*
 - (b) *because he or she receives an indemnity, insurance cover, remuneration, or other benefits authorised under this Act or another Act; or*
 - (c) *if his or her interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence him or her in carrying out his or her responsibilities under this Act or another Act; or*
 - (d) *if an entity's Act provides that he or she is not interested, despite this section."*
23. Paragraph 13 of the submission also proposes that the regime that applies to district health board members should also apply to local authority members. Clause 36 of Schedule 3 of the New Zealand Public Health and Disability Act 2000 provides as follows:

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“36 Disclosure of interests

- (1) *A member of a board of a DHB who is interested in a transaction of the DHB must, as soon as practicable after the relevant facts have come to the member's knowledge, disclose the nature of the interest to the board.*
- (2) *A member of a board who makes a disclosure under this clause must not (unless subclause (4) applies, or the Minister, by a waiver or modification of the application of this subclause under clause 37, permits)—*
 - (a) *take part, after the disclosure in any deliberation or decision of the board relating to the transaction; or*
 - (b) *be included in the quorum required by clause 25 for any such deliberation or decision; or*
 - (c) *sign any document relating to the entry into a transaction or the initiation of the transaction.*
- (3) *A disclosure under this clause must be recorded in the minutes of the next meeting of the board concerned and entered in a separate interests register maintained for the purpose.*
- (4) *However, a member of the board who makes a disclosure under this clause may take part in any deliberation (but not any decision) of the board relating to the transaction concerned if a majority of the other members of the board permits the member to do so.*
- (5) *If subclause (4) applies, the board must record in the minutes of its next meeting—*
 - (a) *the permission and the majority's reasons for giving it; and*
 - (b) *what the member says in any deliberation of the board relating to the transaction concerned.*
- (6) *Every member of a board of a DHB must ensure that—*
 - (a) *the statement completed by the member under section 31(1)(c) of the Crown Entities Act 2004 or clause 6 of Schedule 2 is incorporated in the interests register maintained under subclause (3); and*
 - (b) *any relevant change in the member's circumstances affecting a matter disclosed in that statement is entered in that register as soon as practicable after the change occurs. ...”*

THE OBJECTIVES

24. The Council needs to determine whether it wants to make a submission on the review of the Members' Interests Act and the terms of that submission.

THE OPTIONS

25. There are two options. These are to make a submission or not make a submission on the review.

THE PREFERRED OPTION

26. The preferred option is to make a submission on the review. Issues about conflicts of interest routinely arise in dealing with Council business and this review provides an opportunity for the Council to help shape the future law. The Council has successfully sought an extension from the Department of Internal Affairs to be able to make its submission by 30 November 2011 (instead of 18 November 2011).