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LAMIA Feedback
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Managing Conflicting Interests in Local Government: The Local Authorities (Members' Interests) Act 1968 and Associated Issues - Discussion Paper

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Department of Internal Affairs Discussion Paper, *Managing Conflicting Interests in Local Government: The Local Authorities (Members' Interests) Act 1968 and Associated Issues* (Discussion Paper).

As the Minister says in his Foreword: "*I know the Act's out of date provisions have caused concern and confusion for some years*".¹ Indeed, it is generally accepted that the Local Authorities (Members' Interests) Act 1968 (LAMIA) is not particularly effective in the current environment.

While almost everything else about local government has been modernised at least once in the past two decades, this Act has remained rooted in the 1960s in both its language and its concepts. It has given the Office of the Auditor-General (Auditor-General) a lot of concern in recent years.²

"For a long time, we have considered that the Act is in need of an overhaul. The Act is 37 years old. Various initiatives to review and reform it were promoted in 1983-84, 1993, and 1996, but without success. Twice in recent years, we have expressed our view to Parliament that a modern restatement of the law is desirable."

The Discussion Paper sets out the problems with LAMIA, provides the context for the review, current LAMIA provisions and ends by identifying issues for consideration. This submission addresses each of the questions set out in the Discussion Paper.

Declaration of interests - candidates

Q1: Is it desirable to require local government candidates to declare any known conflicts or likely conflicts of interest they would have if elected?

Unlike District Health Boards or Crown Entities, the Law Society considers that local authorities are concerned with a very broad range of issues which makes it difficult for candidates to identify in advance all the possible conflicts of interest they might face.

¹ Department of Internal Affairs, *Managing Conflicting Interests in Local Government: The Local Authorities (Members' Interests) Act 1968 and Associated Issues* (2011), Foreword.

² Auditor-General, *The Local Authorities (Members' Interests) Act 1968: Issues and options for reform* (2005), paragraph 1.2

Q2: How practical would such a requirement be to implement and enforce?

The Law Society considers it would be difficult to implement and enforce such a requirement. Until a specific issue arises, elected members would find it difficult to know whether they might have a conflict (or not). Requiring all candidates to prepare detailed lists of all their interests and potential conflicts of interest would be a significant burden on candidates and be difficult for electoral officers to administer.

Declaration of interests – members

Q3: How desirable would it be to require members to declare conflicts of interest in advance, and for a register to be kept of these?

The Law Society considers it would be desirable to require members to declare conflicts of interest in advance, and for a register to be kept of these. However, a register of interests is only a starting point, as issues can arise at each meeting. Procedures will still be needed to identify whether or not an interest is such that the member might benefit in some way from a decision. Making interests public is also a useful reminder for members.

Q4: Would making these registers public contribute to public confidence and to the accountability of the member and the local authority?

The Law Society considers making these registers public will contribute to public confidence and to the accountability of members and local authorities.

Q5: What would be an appropriate balance between effective disclosure and protecting members' privacy?

Registers of interests should not be so detailed that a member's privacy is breached. A register should not identify a member's place of residence or include the monetary value of interests, for instance.

Contracts

Q6: Is retaining a rigid prohibition on members having an interest in contracts with the local authority over a certain value a better option than other ways of achieving the same objectives (e.g. audit oversight, transparency and public scrutiny)? Please give reasons for your answer.

The Law Society does not consider the rigid prohibition on members having an interest in contracts needs to be retained. This is simply another form of pecuniary interest and can be managed through the discussing and voting rule and most of all through the professional procurement processes councils have in place.

As noted by the Auditor-General,³ instances of poor practice these days should be exposed by a combination of:

- the Local Government Act 2002 principles requiring open and prudent decision-making and financial management,
- accounting and auditing standards,
- the Official Information Act 1982,

³ Auditor-General, *The Local Authorities (Members' Interests) Act 1968: Issues and options for reform* (2005), paragraph 4.17

- the operation of the discussing and voting rule,
- the council's own internal controls, and
- scrutiny by the media, the public, politicians, and relevant central government agencies.

Q7: If a rigid rule is the better option:

- *Should this apply to both existing contracts (at the time of election/appointment) and new contracts proposed during the term of office?*
- *Should there be scope for exemptions from the prohibition, and who should grant these?*
- *Should the value threshold be set, or be able to be varied by some other person, and if so, by whom?*

Please see our response to Question 6.

Q8: Would a requirement for existing contracts to be declared at the time of candidacy provide appropriate safeguards and accountability?

As noted above, the Law Society considers that the existing procurement framework provides sufficient transparency and a sufficiently rigorous process so that it is unnecessary for prospective candidates to declare an interest. Sufficient disclosure will be achieved through a register of interests prepared by members, rather than candidates.

Managing conflicts of interest – rules or common law?

Q9: Are statutory rules for managing conflicts of interest in public bodies necessary or would reliance on the common law be preferable? What would the consequences be of reliance on the common law?

The Law Society considers that having statutory rules has several advantages over a reliance on the common law. As noted by the Auditor-General:⁴

- A well-written statute should promote certainty, transparency and accessibility of the law. Members of local authorities are more likely to be aware of a statutory rule, and to know how to comply with it.
- A statutory expression of the rule will provide a clear external framework for the most important legal limitations on members' participation in decision-making.
- The statutory rule encourages personal responsibility. The Act, unlike the common law, establishes a penalty that can be imposed on individual members.

Scope of interests covered

Q10: What interests should be covered by whatever approach is taken to conflicts of interest? Should this be limited to pecuniary interests, or be extended to include non-financial interests?

The Law Society considers that the statute should address both pecuniary and non-pecuniary interests in order to assist elected members to understand when they might be conflicted and to assist officials to interpret the legislation. One concern with the current legislation is that non-

⁴ Auditor-General, *The Local Authorities (Members' Interests) Act 1968: Issues and options for reform* (2005), paragraph 4.7

pecuniary conflicts of interest are poorly understood and treated lightly by elected members simply because they are not explicitly addressed by statute.

Q11: Is it preferable for the scope of “interests” or “conflicts of interests” to be:

- (a) *Tightly defined in legislation?*
- (b) *Tightly defined in legislation with scope for exemptions –*
 - *authorised by the Auditor-General?; or*
 - *authorised by the local authority itself, or the presiding member?; or*
 - *authorised by someone else?*
- (c) *Loosely defined (i.e. in terms of principles/objectives) in the legislation with detailed rules set out in a policy adopted by each local authority?*
- (d) *Defined/prescribed some other way?*

The Law Society considers that the statute should tightly define the nature of “interests”, list the key principles that should be complied with, and provide scope for exceptions administered by the Auditor-General. Principles should be drawn from the common law as well as the current framework of principles in the Local Government Act 2002.

Q12: Should a member’s interests be deemed to include the interests of relatives and associates beyond his/her spouse or partner? If so, whose interests and what type of interests should be included?

The Law Society considers that the rules should extend to immediate family.

Nature of rules

Q13: How prescriptive should (or can) the rules for managing conflicts be?

The rules need to be written in a way that gives certainty to both elected members and officials about when a conflict occurs and whether or not it is prejudicial. Consequently, the statute will need to contain clear definitions covering financial and non-financial conflicts of interest and principles that allow elected members and staff to apply the definitions to examples in practice.

In *The Local Authorities (Members' Interests) Act 1968: Issues and options for reform* (2005), the Auditor-General undertook a review of overseas legislation.⁵ By way of example, the Australian State of Victoria’s model makes it quite clear that where a conflict of interest occurs a member must disclose the conflict at the start of the meeting, and may take part in the discussion but must not move or second a motion or take part in the voting.

Q14: Are there benefits in having relatively ‘black and white’ rules (as is the case for financial interests under the LAMIA) or is a broader principles-based approach more appropriate?

The Law Society considers that there would be more value in having relatively black and white rules rather than a broader principles-based approach. The value of explicit rules is for the clarity and certainty they provide to guide elected members and officials.

⁵ Auditor-General, *The Local Authorities (Members' Interests) Act 1968: Issues and options for reform* (2005), Appendix.

Q15: Who should decide what the rules are? Should it be left entirely to the local authority to determine how best to manage a conflict? Or is there benefit in third party oversight?

The Law Society considers that clear rules should be specified in legislation. In the first instance it should be the responsibility of the member and officials of the local authority to determine whether a conflict exists. However, officials and members should continue to have the option of being able to refer particular cases to the Auditor-General.

Q16: Is third party oversight of an elected body appropriate?

Please see our response to Question 15.

Q17: If there is third party oversight who should that party be?

Please see our response to Question 15.

Consequences of breach

Q18: If candidates are required to disclose any interest in contracts with the local authority and other potential conflicts of interest, should it then be up to the voters whether to elect them or not?

The Law Society considers that this asks too much of voters (there is a limit to the amount of time voters are prepared to spend researching candidates before casting their votes). Further, it is difficult to predict how conflicts may arise in advance.

Q19: Similarly, if local authorities are required to transparently adopt and implement their own rules for dealing with conflicts of interest (including decisions on exemptions), would normal political processes and feedback provide sufficient accountability on these issues?

Typically, a member will declare an interest at the beginning of a meeting and the chair (with advice from officials) will make a ruling as to whether that member may participate in the meeting or not. If there is a conflict of interest, then the current practice, in which the Auditor-General is able to provide an exemption, seems appropriate.

The Law Society does not support an option of local authorities developing their own rules.

Q20: Are there circumstances where criminal sanctions and/or automatic disqualification would still be required to protect communities from major decisions being captured by the private interests of elected members?

The Law Society does not support criminal sanctions or automatic disqualification. As noted by the Auditor-General,⁶ many foreign jurisdictions create a wholly civil (as opposed to criminal) enforcement process with a range of penalty options, imposed at the discretion of the adjudicating body. The penalty options can include:

- publishing adverse findings,
- formal censures or reprimands,
- compulsory counselling,
- ordering restitution or damages if financial gain resulted,
- suspension from office for up to several months,

⁶ Auditor-General, *The Local Authorities (Members' Interests) Act 1968: Issues and options for reform* (2005), paragraph 5.7

- vacation of office, and
- disqualification from future office for up to 5 years.

Q21: In what circumstances would these apply, and what sort of penalties would be appropriate?

Please see our response to Question 20.

Q22: Should prosecutions be initiated by the Auditor-General (as now), the Police, the local authority itself or someone else?

The Law Society considers a two stage response may be appropriate – minor breaches should be managed by each local authority. More serious breaches should be referred to the Auditor-General.

This submission has been prepared with assistance from the Law Society's Public and Administrative Law Committee. If further discussion would assist, the Committee Convener Rodney Harrison QC can be contacted through the Committee Secretary, Vicky Stanbridge (ph (04) 463 2912 or email vicky.stanbridge@lawsociety.org.nz).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Temm', written in a cursive style.

Jonathan Temm
President