



2.4 Local Authorities (Members' Interests) Act 1968 – Discussing and Voting When Interested

- 2.401 The rule of law known as the rule against bias exists to ensure that persons with the power to make decisions affecting the rights and obligations of others carry out their duties fairly and free from bias. It is summed up in the saying “no one should be a judge in their own cause.”
- 2.402 The Local Authorities (Members' Interests) Act 1968 (the Act) is a codification of part of this rule. It governs financial conflicts of interest by members of local authorities in two key ways. The Act:
- controls the making of contracts between members and their authority; and
 - prohibits members from participating in authority matters in which they have a pecuniary interest (other than an interest in common with the public).
- 2.403 The Audit Office is responsible for overseeing and enforcing the Act¹⁴, and we have taken an active role in recent years in raising awareness of the Act among local authority members. We encourage members to raise their queries with us before they cause problems. Accordingly, we now receive a large number of requests for advice about the Act, and requests for decisions about particular matters where the Act allows us to grant an approval of a contract or an exemption or declaration to enable a member to participate in a particular matter.
- 2.404 This section discusses:
- our role in investigating complaints under the Act;
 - a recent prosecution we took under the Act;

14 Further information about the Act, and our role in relation to it, is available in our publication *Financial Conflicts of Members of Governing Bodies: A Guide to the Local Authorities (Members' Interests) Act 1968*, 3rd edition September 2001, ISBN 0-477-02885-3.





- our view that there is a need for a modern re-statement of the law; and
- the need for members to be alert to non-financial conflicts of interest.

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Complaints

- 2.405** We continue to receive a steady stream of complaints about alleged breaches of the Act. We have a role to investigate complaints under the Act and, if we consider that the circumstances warrant it, a duty to prosecute alleged offenders. A conviction of a member results in vacation of office, so we exercise our discretion to prosecute carefully.
- 2.406** In any particular situation it is open to us to form the view that, although an offence appears to have been committed, the circumstances do not warrant instituting legal action. We consider:
- the criteria usually considered by any prosecuting agency; and
 - the policy and objectives of the Act.
- 2.407** Many complaints can be resolved following preliminary enquiries. However, others require formal investigation – which is invariably costly, and extremely stressful for the member concerned, since his or her political reputation will often be at stake.

Prosecution and the Scope of Defences

- 2.408** During the last year we prosecuted a local authority councillor for alleged offences of participating in meetings when he had a pecuniary interest. The decision to prosecute in this case was made after a thorough investigation, and after seeking independent legal advice.
- 2.409** The councillor was acquitted because the Court found that, although he had a pecuniary interest in the matter the subject of the charges, no offence had been committed because a statutory defence under section 6(3)(e) of the Act applied. It is the Court's role under the Act to decide on such questions.
- 2.410** That section provides a defence to an alleged breach of the Act if the matter in which the defendant participated was the "preparation, recommendation, approval, or review of" a district plan under the Resource Management Act 1991. The Judge held that the defence applied to a discrete matter relating to a Council policy that was being considered for possible future inclusion in part of a district plan.





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2.411 The decision has two potential implications:

- Councils typically consider a wide range of matters that may ultimately be included in a district plan. Some councillors might now consider that they can participate in such matters even though they have a personal pecuniary interest. In our view, this would be inconsistent with the policy of the Act.
- It will be more difficult to apply the Act in individual situations, because it will not always be obvious to a councillor – or to those advising him or her – whether a particular matter is covered by the section.

2.412 In our view, the outcome of the prosecution:

- Reinforces the validity of the principles underlying the Act.
- Demonstrates a need for clarification of the scope of the section 6(3)(e) defence.
- Reinforces our long-held view that the Act needs redrafting. It is 35 years old, and in many areas its language is archaic, difficult to follow, and out of date.

2.413 The judgment also highlighted the problematic nature of prosecution as the only available remedy under the Act. It can be difficult to reconcile established civil law tests about pecuniary interest (based, as they are, on questions of what a reasonable bystander would think) with the criminal law standard of proof of an offence beyond reasonable doubt.

2.414 In addition, there may be a view that a criminal conviction is sometimes too blunt and heavy an instrument to comprise the only possible legal consequence for a breach of the Act. Nevertheless, prosecution remains the only sanction available under the Act and we will continue to fulfil our duty to bring charges before the courts in appropriate cases.

2.415 We intend to work with the relevant government agencies with the objective of obtaining a restatement of the law, to provide fresh and firm guidance for local authority members in today's environment.





Non-financial Conflicts of Interest

- 2.416** The Act applies only to pecuniary interests. We do not have any formal decision-making role in relation to other types of conflict of interest, but can advise on or look into such matters in our role as auditor of local authorities.
- 2.417** Members of local authorities need to be aware of the potential for non-financial conflicts of interest. If a disaffected party challenges a decision of a local authority in the courts, the decision may be struck down if there exists a real likelihood or danger of bias by a member who was involved in the decision. This might arise, for example, if a member has a close relationship with an individual or organisation affected by the decision, or if a member expresses views which indicate that he or she has pre-determined the matter (that is, has a “closed” mind) before hearing all relevant information.
- 2.418** In these situations, as with pecuniary interests, members need to be alert to the risks of being challenged over a potential conflict. In the interests of openness and fairness, we encourage members to take a cautious approach to such matters and, if in doubt, to declare an interest and abstain from discussing or voting on the issue.
- 2.419** We intend to consider preparing, in the next year, some guidance for members on non-financial conflicts of interest.

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