



Good practice guide

## Local authority codes of conduct

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# Local authority codes of conduct

This is the report of a performance  
audit we carried out under section  
16 of the Public Audit Act 2001.

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## Foreword

The Local Government Act 2002 created a new legal requirement for each local authority to adopt a code of conduct for its elected members.

My office has an ongoing interest in governance and probity matters in public entities, and many of my inquiries focus on behaviour or conduct issues. I decided it was important to examine how councils are giving effect to the requirement to have a code of conduct. This report looks at councils' experiences in developing and using their codes.

Councils have considerable discretion in how they design and use their code. Depending on a council's objectives, a code can be an aspirational statement or a rulebook. Councils can choose whether to have their code simply as part of their governance framework, or to create mechanisms for enforcing compliance with their code.

Overall, I found that councils' compliance with their legal obligations is high, and that councils see value in having a code, whether as a governance mechanism or as a compliance tool. The variety of topics and processes addressed across all 85 councils is generally useful. Councils can learn from looking at each other's codes.

I hope this report will enhance general understanding of codes, and assist councils in addressing conduct issues in the future.

I am grateful for the co-operation of those councils and local government sector organisations that participated in this study.

A handwritten signature in blue ink, consisting of a horizontal line that curves upwards and loops back to the left, ending in a small flourish.

K B Brady  
Controller and Auditor-General

20 June 2006

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# Summary

Since 1 July 2003, each local authority has been legally required to adopt a code of conduct for its elected members. This is a new requirement for councils, introduced by the Local Government Act 2002 (the Act).

We decided to examine how councils have implemented the requirement to have a code of conduct, and how codes of conduct are being used by councils, their members, and the public. The purpose of the study was to:

- assure Parliament that councils have properly implemented the requirement to have a code of conduct;
- examine how councils have given effect to the requirement to have codes; and
- report to Parliament and the local government sector on councils' experiences in using their codes, to enhance general understanding of codes and to assist councils in addressing conduct issues in the future.

## Local government's response to the code requirement

All councils have a code. Overall, the concept of a code is not particularly contentious. Most councils accept that it is better to have a code than not to have one. Several councils found discussion and debate among members about what should be in the code to be valuable.

Councils consider codes to be most useful as:

- a prompt;
- a documented reference;
- a tool for educating new members; and
- a risk management tool.

Councils acknowledge that formal enforcement is difficult, but that the other benefits of codes make them worthwhile.

In practice, many councils and members do not refer to their code often. They consider it is meant to be a document that sits in the background.

Council officers tend to view the code more positively than members. This reinforces the importance of the code as a governance mechanism. Codes can help to explain the distinction between governance and management, and to make clear the requirements about members' conduct in relation to staff. Codes have an important role in reducing legal risk for councils in the area of employment disputes with their chief executives, as they can be used to remind members of the rules in this area. Employment law risks can also arise for chief executives if they do not take steps to address complaints from staff about elected members' behaviour. We were pleased to see that the councils we spoke to were very aware of those risks, and the usefulness of codes in managing them.

The Act does not automatically apply the requirement for a code of conduct to community boards. It is unclear whether this issue was given any detailed consideration in the policy development process.

Some community boards have agreed to comply with their parent council's code or have adopted their own. We suggest that councils and community boards that have not considered this approach could usefully do so. We suggest too that the Department of Internal Affairs (DIA) consider whether the Act should be amended to require community boards to adopt their own code.

The Act requires each council to have a code, and sets out the matters a code must address. However, it is for each council to determine whether it wishes to agree to a set of principles or aspirations, or a set of rules and obligations (or both). Councils also have discretion about whether to provide for enforcement and penalties. When exercising their discretion in these matters, councils should have regard to the purposes they seek to achieve.

Concerning implementation of codes, we consider that:

- chief executives should ensure that they cover the code of conduct at the first council meeting after each triennial general election;
- the DIA should consider whether the Act should be amended to specify a council's code of conduct as one of the matters that must be covered in the briefing to members at the first meeting after triennial elections; and
- councils should "re-adopt" their codes after each triennial election, to ensure the "buy in" of newly elected members to the code and to give the opportunity for the rules and principles to be reconsidered and debated.

We found a range of practices about the availability of codes of conduct. While codes are generally available to members and senior staff, they are less available to other staff and members of the public. Our study has prompted some councils to consider making their codes more widely available. We recommend that all councils consider doing this, in the interests of openness and transparency.

## Substance of codes

Overall, the material included in codes meets our expectations. Most codes contain guidance about the main topics we expected to see covered.

The councils we met with told us that the contents of their codes had not been regarded as particularly contentious when they developed them. Many considered the contents of codes to be "common sense".

Most councils used, as their starting point, a model code prepared jointly by Local Government New Zealand, the Society of Local Government Managers, and the DIA as part of guidance on the new Act. It is clear that councils have also copied from each other a great deal.

Codes are well focused on the activities, issues and practices of concern to local government. The length and depth of codes varies a lot, but in general we consider that the material in codes is:

- clear and informative;
- consistent with the governance principles in section 39 of the Act; and
- not inconsistent with other laws.

No council's code covers all of the topics we mention in Part 3 of this report. We consider that most councils could benefit from a review of those topics, to see whether there are any other matters that could usefully be added to their own code when they next review it. There may be scope for codes to contain more cross-references to further sources of guidance about particular regulatory, policy or good practice matters (both internal and external). We also consider that some codes could be more thorough in their explanations of:

- the Local Government Official Information and Meetings Act 1987; and
- non-financial conflicts of interest.

## Complaints and enforcement processes

Members have a statutory duty to comply with their code, and it is for councils to decide for themselves whether – and, if so, how – to enforce the provisions of a code against an offending member.

Some councils appear to have made a policy decision not to provide for any enforcement of their codes, and may prefer not to have any available remedies for “breaches” of the code. That is an entirely legitimate choice, and enables a code to sit simply as part of the council's governance framework.

However, most of the remainder have provided for enforcement, with remedies. If councils do provide for remedies, then they need to design processes and penalties that are clear, lawful, fair and efficient. They need to be prepared to use those processes in suitable cases, and to follow their processes properly.

Most councils use a 2-step process, with an investigation by a person or committee, and then a decision by the full council. Nearly all councils regard any decision to impose penalties as one which warrants the involvement of the full council.

In the detail, however, councils have designed a variety of different processes. Enforcement is the area where councils have most commonly departed from the text of the model code. Councils have often rewritten (or deleted) the model code's provisions to suit their own preferences. We do not have any concerns about the fact that a range of processes exists.

We have not identified significant concerns about the processes set down in councils' codes. It is clear that many councils have given careful thought to the processes they wish to apply. The key issue is that any process must be fair. From our review, councils appear generally aware that enforcement processes need to be fair to all affected parties, and they have designed their processes accordingly.

We consider that it may be better to use independent external people, rather than elected members, for the investigation stage. However, this is for each council to decide.

Views are often strongly held on the question of whether the Act should provide for penalties. However, we did not identify a consensus or clear majority view on this question.

## Experiences of councils that have used their code

Most councils use their codes only rarely, if at all. But a code ought to be a document that is not used frequently. In most councils, if conduct issues do arise, they are usually dealt with informally and privately.

Alleged breaches of codes commonly related to offensive or disparaging remarks, or leaks of confidential information. Councils are most quick to react when the matter relates to staff. The penalties imposed have been light.

Some members and officers who have been through a formal enforcement process end up bitter and frustrated about their code. We do not consider that code complaints necessarily indicate that a council is dysfunctional.

Many councils have not yet considered whether they would permit a complaint under their code to be made by someone outside the council. Most, when asked, said that they probably would. However, some people expressed concern about the risk that their code might become widely abused by members of the public as a means of pursuing political or personal arguments.

Sometimes a code is invoked for matters that may not truly be matters of conduct, or that may be petty or trivial. Councils may have felt themselves to be under an obligation to undertake a full, formal enforcement process for a matter that may not really be significant enough to justify being taken so far. We consider that

it may be useful for codes to allow for some sort of preliminary assessment of complaints, with a discretionary power to dismiss those that do not warrant being taken further.

It may be useful for more codes to explicitly encourage issues to be raised and resolved at the lowest possible level. Many councils consider this to be the most successful and constructive way of resolving most issues. The full, formal enforcement process can then be reserved for only the most serious cases.

### Managing the process effectively

For a council attempting to manage an enforcement process through to a just result, with as little disruption as is necessary, maintaining the balance between fairness and timeliness can be critical.

Some complaints become bogged down for extended periods of time. However, the processes councils have followed in the early days of using their code are not fundamentally flawed. Recent case law can give councils confidence in their processes, and in their substantive decisions. In our view, councils can afford to have confidence in their codes, and in their enforcement processes, should they have to deal with enforcement matters.

We consider that the key factors for councils to bear in mind when dealing with future code complaints (or in reviewing their codes) are:

- attempting to resolve issues informally and privately wherever possible, and reserving use of the formal enforcement mechanism for only the most serious cases;
- providing in their code some method of preliminary assessment of complaints, with a discretionary power to dismiss those that do not warrant being taken further;
- where applicable, carefully selecting the personnel to be involved, to ensure that they have the appropriate skills and experience for the task required of them;
- paying careful attention to following a fair process (including, but not necessarily limited to, whatever steps or entitlements are specified in their code), and seeking legal advice if necessary; and
- proactively managing the process, to ensure that the matter is dealt with promptly (without compromising the need to act fairly).



# Part 1

## Introduction

- 1.1 In this Part, we explain the background to our report, what we looked at, and how we carried out our study. We also discuss the development of the Local Government Act insofar as it relates to codes of conduct, and how local authorities previously dealt with conduct issues.

### Background to codes of conduct

- 1.2 Since 1 July 2003, each local authority has been legally required to adopt a code of conduct for its elected members.<sup>1</sup> This is a new requirement for councils, introduced by the Local Government Act 2002 (the Act).
- 1.3 The Act sets out the matters that a code of conduct must provide for. Codes of conduct govern only members (that is, mayors<sup>2</sup> and councillors). However, they are not limited to “member-to-member” matters, and so do not operate solely in the political arena. Codes of conduct also deal with, for example, the behaviour of members towards staff and the public, and disclosure of information to and by elected members.
- 1.4 The Act requires a member of a council to comply with the council’s code of conduct, but does not expressly provide penalties or mechanisms for dealing with breaches of a code (other than confirming that breach of a code is not an offence). It is for each council to determine any penalties for breach of its code and how alleged breaches will be considered.
- 1.5 Codes of conduct can be seen as part of the governance framework for councils and as a tool for encouraging good governance practices. They should help councils give effect to the governance principles specified in the Act. These principles require councils to (among other things) ensure that:
- the role of democratic governance, and the expected conduct of members, is clear and understood by members and the community;
  - governance structures and processes are effective, open, and transparent;
  - they operate as a good employer; and
  - the relationship between members and management is effective and understood.<sup>3</sup>
- 1.6 Some code of conduct issues over the last couple of years have attracted a high public profile, and have involved acrimonious disputes, including challenges to either the code or the council’s procedure in dealing with an alleged breach, or its

1 The requirement applies to city councils, district councils, and regional councils. In this report, we use the term “councils” to refer to all 3 types of local authority.

2 The head of a city or district council is called the “mayor”, but the head of a regional council is called the “chair”. For simplicity, we use the term “mayor” in this report to refer to both mayors and chairs.

3 See section 39, Local Government Act 2002.

finding of breach of the code. In one such case, the complainants were members of the public. This raised the wider issue of whether codes of conduct can (or should) provide a public law remedy for use by aggrieved members of the public.

### Why we looked at codes of conduct

- 1.7 We have an ongoing interest in governance and probity matters in public entities and many of our inquiries focus on behaviour or conduct issues. We consider that members of the public share that interest, and are particularly interested in how public resources are used and how public officials should behave. In our experience, members of the public do not wish to see resources being consumed by public entities in sorting out “behaviour” issues.
- 1.8 In the local government area, we have received an increasing number of queries and complaints from councils and members of the public about the application of codes of conduct to particular issues. Some of these queries and complaints indicated that there may be confusion and frustration among council members, staff, and members of the public about what purpose codes of conduct serve, and how they are supposed to be used. We were aware that a small number of councils were having problems with investigations under their codes, and that code matters were taking up large amounts of the time of councillors and senior staff. We had anecdotal evidence of some cynicism in the local government sector about the usefulness of codes, and wondered whether some councils might have approached codes of conduct as a matter of compliance (that is, adopted a code because they had to, using a standard model provided) rather than as a tool genuinely to improve governance.
- 1.9 We decided to examine how councils have implemented the requirement to have a code of conduct, and how codes of conduct are being used by councils, their members, and the public. As the requirement is fairly new, some councils may be breaking new ground in dealing with alleged breaches through the code enforcement process. We considered that the experiences of those councils that have used their codes, including any problems they had encountered, might be useful for other councils in dealing with conduct issues in the future or when reviewing their codes.
- 1.10 The Local Government Commission has an interest in the code of conduct regime, and is keen to see whether the development of codes of conduct has affected how people work together and their behaviour. The Commission supported our doing work that could help it to consider that question.

## Purpose of our study

1.11 The purpose of the study was to:

- assure Parliament that councils have properly implemented the requirement to have a code of conduct;
- examine how councils have given effect to the requirement to have codes; and
- report to Parliament and the local government sector on councils' experiences in using their codes, to enhance general understanding of codes and assist councils in addressing conduct issues in the future.

## What we looked at

1.12 We examined:

- whether all councils have complied with the legal requirement to adopt a code of conduct and whether the codes meet the requirements of the Act;
- what the contents of codes typically comprise, and whether there are gaps or areas for improvement;
- how codes are being used by councils, their members, and the public, including:
  - whether councils encourage and enforce compliance with codes, and in particular how they deal with alleged breaches of codes;
  - whether codes of conduct are available to, and known and understood by, council members, staff, and members of the public (including whether codes of conduct are promoted by councils as a remedy, in public law terms, for use by aggrieved members, staff, or members of the public);
- whether the sector has clear views on how codes are working so far, and whether they could be improved;
- any problems or “lessons learned” by those councils that have used their codes; and
- how the code of conduct regime compares with other mechanisms for managing public sector ethical and behavioural issues elsewhere in New Zealand and overseas.

## What we did not look at

1.13 We have not questioned whether codes of conduct are a good or bad thing in themselves, or whether the law ought to provide for explicit and meaningful penalties for breach of a code. Our starting point is that Parliament has required councils to have codes of conduct. We therefore focused on how councils are implementing this requirement, and on what, if any, problems they have encountered in doing so.

## How we did the study

1.14 To carry out our study we:

- checked whether codes are publicly available, by obtaining the code from each council's website or from the council directly if not available on the website;
- examined the codes and governance statements of all 85<sup>4</sup> councils to check for compliance with the requirements of the Act;
- analysed and recorded the sorts of matters covered by codes, and checked the extent to which a standard template had been used;
- considered each council's approach to compliance and enforcement, and explanation of potential penalties and the investigation process;
- wrote to all councils about our study, inviting those we were not intending to visit to contact us with any comments;
- interviewed a selection of members, senior staff and advisers of 12 councils,<sup>5</sup> and asked them about their experiences with their code; including:
  - how they encourage and enforce compliance with the code, and what problems they had encountered in doing so;
  - the level of use and understanding of codes by members, staff and the public, including the council's attitude to considering complaints from members of the public;
  - how (if at all) the council had dealt with enforcement action under the code, what process it followed, whether and how councils encourage compliance in other ways, and whether codes and the results of enforcement action are widely accepted by members;
  - whether the introduction of the code has improved ethical and governance practices of members, (including whether the code is useful in defusing potential problems before they escalate, whether the code is used in appropriate situations, and whether the code is used in inappropriate situations);
- met with representatives of local government sector organisations (namely, Local Government New Zealand and the Society of Local Government Managers), to ask them about their overall impressions of how codes of conduct appear to be operating;
- asked the Department of Internal Affairs about the policy rationale for the statutory requirement for a code of conduct;
- researched and analysed published commentary about codes of conduct; and
- compared mechanisms that apply to conduct of public officials in other areas

<sup>4</sup> Banks Peninsula District Council was not included, as it was in the process of amalgamating with Christchurch City Council.

<sup>5</sup> Clutha, Gore, Rodney, South Taranaki, Waimakariri, and Wanganui District Councils; Christchurch, Dunedin, Waitakere and Wellington City Councils; and Canterbury and Wellington Regional Councils.

of the public sector in New Zealand and to local government in Australia and the United Kingdom.

### Reason for requiring a statutory code of conduct

- 1.15 The rest of this Part covers the policy rationale for requiring a code, and how councils previously dealt with conduct issues.
- 1.16 We were interested in Parliament's reason for introducing a statutory requirement for a code of conduct. We wondered whether there was a concern about the conduct of council members at that time, and whether events at Rodney District Council (leading to the appointment of a Commissioner in 2000) or at other councils had contributed to a perceived need for a statutory code.
- 1.17 We reviewed policy papers leading up to the development of the Local Government Bill and spoke to the Department of Internal Affairs (DIA) and Local Government New Zealand (LGNZ).
- 1.18 The requirement seems to have been broadly supported by the local government sector, with the main issue for debate being whether penalties for a breach of a code should be provided for in the Act or left to each council to determine in its code.
- 1.19 LGNZ supported the introduction of a statutory requirement for a code. At the time codes were proposed, LGNZ viewed them as an appropriate method of regulating matters not covered by standing orders, and to help control the conduct of members in (among other matters) their dealings with council staff.
- 1.20 LGNZ had been asked for assistance in governance matters by one council around 1997 and had developed a "code of conduct" for that council. The council adopted the code, and found it helpful at that time. LGNZ told us that other councils adopted voluntary codes before the Act made it a statutory requirement. This was confirmed by some of the councils that we visited for this study, who had adopted policies or sets of "governance principles" with some elements of a code of conduct.
- 1.21 In policy papers, the first mention we found was in a document produced by LGNZ, the Society of Local Government Managers (SOLGM), and the DIA in 2000 entitled *Vision and Strategy for Local Government in 2010*. That document encouraged councils to adopt voluntary codes of conduct, codes of ethics, and citizens' charters, to articulate levels of performance and behaviour that people could expect from councils, and also mentioned the possibility of a new Local Government Act requiring a code of conduct.

- 1.22 The review of the Local Government Act 1974, which commenced in March 2000, was influenced by reforms in the United Kingdom in the late 1990s that led to the Local Government Act 2000 (UK). For example, that Act empowered local authorities to do anything that promotes economic, social or environmental well-being in their communities, which is very similar to the general empowerment of councils that is now provided for in New Zealand's Local Government Act 2002.
- 1.23 The UK Act also introduced a requirement for a statutory code of conduct for local authorities in England and Wales. One commentator has suggested that language in the Vision and Strategy document referred to in paragraph 1.21 above shows that the New Zealand local government sector was paying close attention to reforms then occurring in the United Kingdom, and that the British Government's agenda for greater regulation of ethics and conduct of local authority members may have influenced New Zealand policy makers.<sup>6</sup> Indeed, the commentator suggests that the policy rationale for codes of conduct in New Zealand may have been more influenced by the British agenda of local government reform than any clear New Zealand policy context.
- 1.24 In 2001 the DIA issued a consultation document on the review of the Local Government Act 1974. It proposed, among other things, that councils adopt a code that would cover conflicts of interest, and perhaps behaviour, mediation, sanctions, relationships, customer service, and complaints.<sup>7</sup>
- 1.25 A report on submissions on the consultation document<sup>8</sup> reported considerable support for codes (of the 185 submissions that discussed the issue, 63% were clearly in favour and 11% were clearly opposed). Suggestions about codes included providing for penalties (22 submissions), setting out the standards required (14), and sending serious conflicts to a local government commissioner for resolution (14).
- 1.26 The DIA prepared a paper seeking Cabinet's approval for a statutory requirement for councils to adopt a code of conduct and a corresponding statutory provision requiring members to abide by their code. LGNZ was reported as supporting codes, and proposing penalties to enable their enforcement. However, the paper concluded that the Local Government Bill should not include penalties for breach of codes. The paper said that to develop penalties in legislation potentially conflicted with the political accountability of members to the electorate and, to avoid the inherent problems of members sanctioning other members, would require some form of external and independent body.

6 Leyland, Tim, 2005, *The Design and Implementation of Codes of Conduct in New Zealand Local Government 2003-2004* (unpublished research paper), pages 8-9.

7 Department of Internal Affairs June 2001, *Reviewing the Local Government Act 1974: Have Your Say*, Consultation Document.

8 Department of Internal Affairs October 2001, *Review of the Local Government Act 1974: Synopsis of Submissions*.

- 1.27 In October 2001, the Government agreed that the Local Government Bill should require councils to adopt a code, and that it apply to all members, but that the Bill should not provide for penalties for breaches.
- 1.28 At the Select Committee stage, key issues from the analysis of submissions were as follows:
- 2 councils expressed unqualified support for a code;
  - 5 councils supported it, but said it should be optional;
  - 5 councils opposed having a code. Some called it excessive. Some said standing orders regulate conduct;
  - 23 councils asked for specific penalties to be included in the Act, as did LGNZ and the Chamber of Commerce. Some mentioned suspension. Some asked for cases to be heard and determined by the Local Government Commission; and
  - 2 councils opposed penalties. Another council expressed concern about codes being used unjustifiably to persecute a member.
- 1.29 In advice to the Select Committee, the DIA said that it was a policy decision not to require penalties. This was said to be based on concerns about members judging each other, natural justice, and the need for appeal rights to independent bodies. The DIA suggested that councils could consider “the imposition of voluntary sanctions”. It recommended that the Bill be amended to clarify that a breach of a code is not an offence.
- 1.30 Some submissions suggested contents for codes. The DIA advised this should be a matter for councils to determine. In response to some submissions, the DIA recommended amending the Bill to require codes to include an explanation of laws affecting members.
- 1.31 The Select Committee proposed some minor amendments to the code requirement in the Bill as introduced. The version of the Bill reported back to the House expanded the list of things to be set out in codes by adding a requirement for codes to include a general explanation of the Local Government Official Information and Meetings Act 1987 and other laws applicable to members, and added a new provision, to clarify that breach of a code is not an offence.
- 1.32 From our review of the policy work leading to the code requirement in the Act, it is unclear as to what “mischief” codes were intended to address. There seems to be general agreement that a statutory code was a good idea. It was supported by LGNZ and many councils, and was in line with developments in the United Kingdom. However, there is no clear explanation in the policy papers of any particular concern about “conduct” issues at councils that the requirement was intended to address.

1.33 The enacted version of the requirement<sup>9</sup> is as follows –

**15. Code of conduct—**

- (1) *A local authority must adopt a code of conduct for members of the local authority as soon as practicable after the commencement of this Act.*
- (2) *The code of conduct must set out—*
  - (a) *understandings and expectations adopted by the local authority about the manner in which members may conduct themselves while acting in their capacity as members, including—*
    - (i) *behaviour toward one another, staff, and the public; and*
    - (ii) *disclosure of information, including (but not limited to) the provision of any document, to elected members that—*
      - (A) *is received by, or is in the possession of, an elected member in his or her capacity as an elected member; and*
      - (B) *relates to the ability of the local authority to give effect to any provision of this Act; and*
  - (b) *a general explanation of—*
    - (i) *the Local Government Official Information and Meetings Act 1987; and*
    - (ii) *any other enactment or rule of law applicable to members.*
- (3) *A local authority may amend or replace its code of conduct, but may not revoke it without replacement.*
- (4) *A member of a local authority must comply with the code of conduct of that local authority.*
- (5) *A local authority must, when adopting a code of conduct, consider whether it must require a member or newly elected member to declare whether or not the member or newly elected member is an undischarged bankrupt.*
- (6) *After the adoption of the first code of conduct, an amendment of the code of conduct or the adoption of a new code of conduct requires, in every case, a vote in support of the amendment of not less than 75% of the members present.*
- (7) *To avoid doubt, a breach of the code of conduct does not constitute an offence under this Act.*

<sup>9</sup> Clause 15, Schedule 7, Local Government Act 2002.

## How councils previously dealt with conduct issues

- 1.34 We asked councils how any conduct issues were dealt with before having a code of conduct.
- 1.35 We were aware that, prior to having a code, councils had penalised members for “misbehaviour”, by censuring<sup>10</sup> a member or removing them from the role of chairing or being a member of a committee. Under the Local Government Act 1974, members were generally paid on the basis of their attendance at meetings, so loss of any position on a committee often had a financial consequence. However, under the current remuneration regime, members are often paid an annual salary instead. Committee chairs frequently receive a higher salary than ordinary members, so a member who is removed from a position as chair of a committee may suffer a financial consequence, but an ordinary member who is removed from a committee may not now suffer any financial consequence at all.
- 1.36 Councils that we spoke to, that had such issues prior to having a code, dealt with them informally, by either the mayor or the chief executive officer, or both, talking to the member concerned. In some cases, where an elected member had offended a staff member in some way, the matter was resolved by a meeting between the parties and an apology. Issues between elected members were harder to address, but often an attempt was made to resolve matters informally by getting the members together. This was not always possible where relationships had deteriorated. In some cases, particularly where there were political factions on the council, a more political solution was reached, with a member being voted off committees.
- 1.37 Without an enforcement process set out in a code, councils had to determine their own procedures for dealing with conduct issues.

<sup>10</sup> The penalty of “censure” is not a statutory concept, and appears to be based on practice and standing orders.



## Part 2

# Local government's response to the code requirement

2.1 In this Part, we describe how councils responded to the new requirement to have a code of conduct. Our discussion is based partly on our analysis of codes, and partly on our interviews with councils. We look at councils' overall views of the code and its usefulness, how they wrote and implemented their codes, and the level of availability of codes. We also discuss the application of codes to community boards.

### Adoption of a code

2.2 Although the requirement to have a code of conduct came into force on 1 July 2003, councils had until 31 December 2003 to adopt their code.<sup>1</sup> We found that all 85 councils have adopted a code, and the majority of councils met the 31 December 2003 deadline.

### The concept of a code

2.3 Overall, the concept of a code is not particularly contentious. Of the people we spoke to, a few dislike the idea of having a code imposed on them, because they fear it may restrict individual freedom, or because they are sceptical about whether matters like behaviour and relationships can usefully be subject to regulation. However, those views are not widespread. Most people regard their code as a positive development, or do not have strong views about it either way. Most accept that it is better to have a code than not to have one.

2.4 Councils consider codes to be most useful as:

- a prompt, to require members periodically to turn their minds to, and agree on, what constitutes acceptable standards;
- a documented reference, so it is always clear what those acceptable standards are;
- a tool for educating new members, who may have varying levels of understanding of local government (especially practices and expectations about decision-making, use of confidential information, and the distinction between governance and management); and
- a risk management tool, to reduce the risk of conduct that may lead to personal grievances by staff.

2.5 Councils acknowledge that formal enforcement is difficult, but that the other benefits of codes makes them worthwhile. Although a code can ultimately be used as a disciplinary mechanism, many councils try to encourage their code to be regarded instead as promoting the harmonious functioning of councils.

<sup>1</sup> See sections 274 and 40 of the Act. Each council had to adopt a local governance statement by 31 December 2003. The statement must refer to the council's code of conduct.

- 2.6 In practice, many councils and members do not often refer to their code, but consider that this is not a bad sign. They consider it is meant to be a document that sits in the background. Its existence gives them some comfort.
- 2.7 We received a fairly strong message from elected members (endorsed by staff) that a code should not be used to interfere with robust debate, and that a code is not required for conduct issues that arise at meetings as these can be dealt with at the time by the chair of the meeting using standing orders (see paragraph 5.50).

### **Codes can protect council staff and reduce legal risk**

- 2.8 We were interested to see if we got a different view of codes from council staff than elected members.
- 2.9 We found that staff tend to be more supportive of their code than members. Staff perhaps see it as a protection for themselves. This is a significant point and highlights the importance of codes as a governance mechanism – a code can explain the distinction between governance and management and set out the rules applying to elected members in relation to their interaction with the chief executive and staff. This may be particularly useful for newly elected members, who we are told sometimes find it surprising that there are limits on what they can say publicly about staff members.
- 2.10 Where an elected member criticises a chief executive or staff member publicly, that action may create a legal risk for the council if a staff member raises the issue as an employment dispute. The chief executive is employed by the council, so there is a direct employment relationship between the council and its chief executive. Individual members need to be aware that their actions in relation to the chief executive can create a legal risk for the council if they do not comply with good employer requirements or otherwise act in breach of the employment agreement. For example, if a member publicly criticises the chief executive, this is likely to breach those requirements. We were told that a code is a useful mechanism for reminding members of the rules in this area.
- 2.11 In the case of staff members, they are employed by the chief executive rather than the council. However, a member could also expose a council to legal risk by criticising a staff member. If the staff member were to complain about the elected member's behaviour under the code, the chief executive would need to take appropriate action to address the complaint. The council may face the risk of a personal grievance (against the chief executive) if the staff member had a legitimate complaint under the code and was not satisfied with the way the complaint was addressed.

## Application to community boards

- 2.12 Those we spoke to frequently raised the issue of whether community boards should be subject to a code of conduct. Councils approach this in different ways. Some state that the council's code applies to community boards, some encourage community boards to adopt the council's code (or the board's own code) voluntarily, and some are silent on the matter.
- 2.13 The Act does not automatically apply the requirement for a code of conduct to community boards.
- 2.14 We could not find any discussion of the issue in policy papers on codes of conduct and it does not appear to have been raised by submitters at the select committee stage of the Local Government Bill in 2002. Guidance material on the Act issued in 2003 states that, as community boards have no powers to employ council staff, the good employer obligations that apply to councils are not applicable to community boards.<sup>2</sup> The guidance also says that the role of community board members is different, so different types of behaviour might be required from members, but it does encourage community boards to adopt their council's code.
- 2.15 Several councils that we spoke to expressed a strong view that community boards should be subject to a statutory requirement to have a code of conduct. They gave examples of community board members making adverse comments about council staff, and said that councils face the same risk issues through comments made about council staff by community board members as by council members. They also said that community board members are also publicly elected, so should be subject to a code.
- 2.16 While community boards do not employ council staff, some council staff, as part of their employment by the council, have regular contact with community board members. As with elected members of a council, community board members could create employment law problems for a council if they were to publicly criticise a staff member. The positive aspects of codes, as perceived by councils, are also likely to apply to community boards. Community board members are elected by the community, so the community has an interest in boards' governance practices. There may be merits in having codes for community boards beyond reducing a parent council's legal risk as an employer.
- 2.17 We would encourage community boards that have not already done so to consider developing and adopting a code, which could be based on that of the parent council. The DIA may wish to consider whether the Act should be amended to require community boards to adopt their own code.

<sup>2</sup> Department of Internal Affairs, New Zealand Society of Local Government Managers, and Local Government New Zealand 2003, *The KnowHow Guide to Governance under the Local Government Act 2002*, page 59.

## How councils developed their codes

- 2.18 In the absence of a clear policy rationale for codes of conduct, we were interested in how councils approached the task of developing them. While the Act requires each council to have a code, and sets out the matters a code must address, it is for each council to determine the approach it wishes to take to the content of its code, having regard to the purpose it wishes to achieve. Each council has discretion about matters such as whether it wishes to agree to a set of principles or aspirations, or a set of rules and obligations (or both), and whether to provide for enforcement and penalties.
- 2.19 We asked the councils that we spoke to how they developed their codes.
- 2.20 A few councils had voluntarily adopted a code, or something similar, some years before it became a legal requirement. They used that document as their starting point.
- 2.21 In most cases, councils used a model code prepared jointly by LGNZ, SOLGM, and the DIA as part of guidance on the new Act, as their starting point (we will refer to it in this report as the model code).<sup>3</sup>
- 2.22 Several councils then held one or more workshops of staff and elected members to consider whether the council wished to adopt or amend the model code. We were told that such workshops were very useful, and provided opportunities for members to discuss and debate the standards of behaviour and values that they were prepared to sign up to. Indeed, some people we spoke to said that the process of developing the code was more useful than the code itself. Some described the code as in the nature of a “social contract” between members, of standards and rules that they agreed to be bound by.
- 2.23 We were told that involvement in developing the code was a very useful experience for those elected members who were reasonably new to local government. Elected members come from a wide range of backgrounds, and some members will be more familiar with some of the principles in codes than others, such as the rules about conflicts of interest and the distinction between governance and management. We were told it is particularly useful for the rules about use of confidential information to be spelled out, and there was no statutory vehicle for doing this before codes existed.
- 2.24 Some councils had contentious issues when developing codes, including whether the code should require a register of members' financial and non-financial interests, and enforcement processes and penalties. However, there was usually general agreement on the principles of standards and behaviour set out in codes.

<sup>3</sup> *Ibid*, Appendix B, page 101.

## How councils implemented their codes

- 2.25 The Act requires a council chief executive, at the first council meeting following a triennial general election, to give members a general explanation of laws affecting them, including specified Acts such as the Local Authorities (Members' Interests) Act 1968 and the Secret Commissions Act 1910. Members must make their declaration of office at that first meeting, under which they must, among other things, undertake to act impartially in the best interests of the region or district.<sup>4</sup>
- 2.26 We would expect that the chief executive's briefing would cover the code of conduct, and were told that the code would usually be covered in induction of new members (either at the first meeting or subsequently) even though it is not specified in the Act as one of the matters that must be covered.
- 2.27 Given that codes directly relate to members, it may be useful for the Act to specify the council's code of conduct as one of the matters that must be covered in the briefing to members at the first meeting.
- 2.28 Some councils told us that they re-adopted their codes after the triennial general election in 2004, to ensure the "buy in" of newly elected members to the code and to give the opportunity for the rules and principles to be reconsidered and debated. We think this is a useful process, and recommend that all councils do this after each triennial election.
- 2.29 While codes tend to be covered in the induction process, they are not often the subject of significant formal training. We asked councils whether they run ongoing training sessions for members on governance matters. Most do not, but those that do said that members found refresher training in those matters useful. Some councils use an outside facilitator or legal adviser for such sessions.

## Availability of codes

- 2.30 Members are given copies of their code. Accessibility of the code to other people varies.
- 2.31 There are a range of practices about making codes available to staff. In some cases, we were told that the code is available to senior staff and other staff on request, or that the code was available to all staff on the council's intranet. Councils do not tend to cover the members' code of conduct in training for staff members.
- 2.32 We anticipated that most councils would have their code on their website. However, at the time of our initial search, only just over half of councils' codes were available online. Where we could not find a council's code online, we contacted the council directly for a copy. Those councils told us that a copy of the

<sup>4</sup> See clauses 14 and 21, Schedule 7, Local Government Act 2002.

code would be made available to anyone, including a member of the public, upon request. Since we began our study, 4 councils have updated their websites to include their code of conduct, or are in the process of doing so.

- 2.33 The Act requires each council to prepare and make publicly available a “local governance statement” after the triennial general election. The statement must include information on several governance matters, including “members’ roles and conduct (with specific reference to the applicable statutory requirements and code of conduct)”.<sup>5</sup>
- 2.34 We checked each council’s local governance statement<sup>6</sup> for reference to the code, and found that all but one statement did mention the council’s code. The majority of councils have their local governance statement on their website, even many of those that do not have their code on the website.
- 2.35 Ten council websites make no mention of either the code or the local governance statement. There is no explicit requirement to make codes publicly available, so the requirement that the local governance statement (which must be made publicly available<sup>7</sup>) refer to the code is important, as a way of alerting members of the public to the existence of the code.

## Our conclusions

- 2.36 All councils have a code. Overall, the concept of a code is not particularly contentious. Most councils accept that it is better to have a code than not to have one. Several councils found discussion and debate among members about what should be in the code to be valuable.
- 2.37 Councils consider codes to be most useful as:
- a prompt;
  - a documented reference;
  - a tool for educating new members; and
  - a risk management tool.
- 2.38 Councils acknowledge that formal enforcement is difficult, but that the other benefits of codes make them worthwhile.
- 2.39 In practice, many councils and members do not refer to their code often. They consider it is meant to be a document that sits in the background.

<sup>5</sup> Section 40(1)(e), Local Government Act 2002.

<sup>6</sup> One council does not have a local governance statement. We have written to that council about this breach of the Act.

<sup>7</sup> The Act defines “publicly available” in section 5(3).

- 2.40 Council officers tend to view the code more positively than members. This reinforces the importance of the code as a governance mechanism. Codes can help to explain the distinction between governance and management, and to make clear the requirements about members' conduct in relation to staff. Codes have an important role in reducing legal risk for councils in the area of employment disputes with their chief executives, as they can be used to remind members of the rules in this area. Employment law risks can also arise for chief executives if they do not take steps to address complaints from staff about elected members' behaviour. We were pleased to see that the councils we spoke to were very aware of those risks, and the usefulness of codes in managing them.
- 2.41 The Act does not automatically apply the requirement for a code of conduct to community boards. It is unclear whether this issue was given any detailed consideration in the policy development process.
- 2.42 Some community boards have agreed to comply with their parent council's code or have adopted their own. We suggest that councils and community boards that have not considered this approach could usefully do so. We suggest too that the DIA consider whether the Act should be amended to require community boards to adopt their own code.
- 2.43 The Act requires each council to have a code, and sets out the matters a code must address. However, it is for each council to determine whether it wishes to agree to a set of principles or aspirations, or a set of rules and obligations (or both). Councils also have discretion about whether to provide for enforcement and penalties. When exercising their discretion in these matters, councils should have regard to the purposes they seek to achieve.
- 2.44 Concerning implementation of codes, we consider that:
- chief executives should ensure that they cover the code of conduct at the first council meeting after each triennial general election;
  - the DIA should consider whether the Act should be amended to specify a council's code of conduct as one of the matters that must be covered in the briefing to members at the first meeting after triennial elections; and
  - councils should "re-adopt" their codes after each triennial election, to ensure the "buy in" of newly elected members to the code and to give the opportunity for the rules and principles to be reconsidered and debated.
- 2.45 We found a range of practices about the availability of codes of conduct. While codes are generally available to members and senior staff, they are less available to other staff and members of the public. Our study has prompted some councils to consider making their codes more widely available. We recommend that all councils consider doing this, in the interests of openness and transparency.



## Part 3

# Substance of codes

3.1 In this Part, we discuss the substantive principles, rules, and guidance contained in codes. (Part 4 discusses the provisions of codes relating to complaints and enforcement.)

3.2 We examined the codes of all 85 councils, to see what their contents typically comprise.

3.3 Codes are both aspirational and regulatory. They contain a mixture of principles and rules. They –

*... serve a variety of purposes – to encourage right conduct in the administrative sphere of government; to provide a standard by which official conduct may be judged; to highlight statutory obligations; to emphasise the importance of a particular role (such as an elected official in a representative, democratic, political context); to provide for recourse and penalty for breaches of standards or regulations; and to promote a sense of purpose and obligation. ... They are usually a mixture of legal requirements, constitutional principles, conventions, principles, and ethical values and standards.*<sup>1</sup>

3.4 About half of the councils appear to have based their code almost entirely on the model code (see paragraph 2.21). Most of the remainder used parts of the model code, and combined it with additional or rewritten material in several specific areas.

### Requirements of the Act

3.5 Much of the content of codes is left to the discretion of each council. However, there are some minimum requirements specified by the Act. We were particularly interested to see whether codes comply with the requirements of the Act.

3.6 In general, the vast majority of codes comply with the requirements of the Act.

3.7 Two codes were particularly brief, and in our view fall well short of the requirements of the Act.<sup>2</sup> We have written to those councils, recommending that they review the contents of their code.

### Understandings and expectations about conduct

3.8 The Act requires codes to set out understandings and expectations adopted by the council about the manner in which members may conduct themselves while acting in their capacity as members.<sup>3</sup> In particular, this must include material

<sup>1</sup> Reid, Mike and Hicks, Colin, March 2006, *Councillor conduct: Is the code of conduct working for local government?*, unpublished paper presented to LexisNexis 5<sup>th</sup> Annual Local Government Legal Forum, pages 4, 6.

<sup>2</sup> One covers only a few of the Act's requirements, and the other does little more than repeat the wording of clause 15 of Schedule 7.

<sup>3</sup> Clause 15(2)(a) of Schedule 7.

relating to members' behaviour toward one another, staff, and the public.<sup>4</sup> We found that:

- 82 codes address members' behaviour towards other members;
- all 85 codes address members' behaviour towards staff; and
- 84 codes address members' behaviour towards the public.

3.9 The model code sets out some standards of behaviour applying to members' relationships with each other, staff, and the community. These standards focus on such things as teamwork, honesty, courtesy, respect, and focusing on issues (rather than personalities). Among other things, they emphasise the need to remember that the chief executive is responsible for the employment of staff, and the need not to do or say things that may compromise the council's obligations to act as a "good employer" towards its staff (for instance, by publicly criticising a staff member). Most codes have material covering these sorts of matters, usually based on the model code. Some councils have rewritten or added to the matters covered in the model code.

3.10 Codes must also include material relating to the disclosure of information.<sup>5</sup> We found that 84 codes do so.

3.11 The model code contains provisions emphasising the need to refrain from inappropriately disclosing or using confidential information that members receive in the course of carrying out their official duties. Most councils used this as the basis for their material about the use and disclosure of information.

### Explanation of applicable laws

3.12 Codes must include a general explanation of the Local Government Official Information and Meetings Act 1987 (LGOIMA).<sup>6</sup> We found that 76 codes do so.

3.13 Those councils that have not included an explanation in their code all have material in their governance statement that addresses the requirements of the LGOIMA. Although the Act technically requires such information to be in the code, those councils presumably felt it unnecessary to duplicate that information.

3.14 Many of the councils that have included material about the LGOIMA have used the suggested description from the model code. The model code's description does not address the official information aspects of the LGOIMA at all, but mentions only meetings, and then only to the extent of dealing with the behaviour of members in meetings. The model code does not explain matters such as the procedural requirements for meetings; nor the presumption of

<sup>4</sup> Clause 15(2)(a)(i).

<sup>5</sup> Clause 15(2)(a)(ii).

<sup>6</sup> Clause 15(2)(b)(i).

conducting meetings in public and the grounds for meeting in private. In our view, this does not meet the Act's requirement for a "general explanation" of the LGOIMA. Some councils drafted their own fuller descriptions of the LGOIMA.

- 3.15 As well as an explanation of the LGOIMA, codes must also include a general explanation of "any other enactment or rule of law" applicable to members.<sup>7</sup> We found that 80 codes include material about other laws.
- 3.16 The other statutes most often covered are the Local Authorities (Members' Interests) Act 1968, Secret Commissions Act 1910, Crimes Act 1961, and Securities Act 1978. Most councils used the material from the model code about these statutes. Some rewrote and expanded the material about the Local Authorities (Members' Interests) Act.
- 3.17 Other statutes sometimes mentioned include the Local Government Acts 1974 and 2002; Resource Management Act 1991; Privacy Act 1993; Health and Safety in Employment Act 1992; and Public Audit Act 2001.<sup>8</sup> We consider that some extracts from the Local Government Act 2002 that are especially relevant to members may be particularly useful.<sup>9</sup>
- 3.18 In local government, financial conflicts of interest are governed primarily by the provisions of the Local Authorities (Members' Interests) Act, but non-financial conflicts of interest are governed by the common law rule about bias.<sup>10</sup> We expected non-financial conflicts of interest (as a rule of law – albeit non-statutory – that applies to members) to be explained in codes. Eighty-four of the 85 codes discuss the statutory rules about financial conflicts of interest (and the consequences for breaching them). However, only 25 codes contain what we consider to be a useful discussion of non-financial conflicts of interest (and some of these councils appear to have written their own material about this). Forty-nine codes contain a brief reference to non-financial conflicts of interest, without explaining the concept, and 11 do not mention non-financial conflicts of interest at all. We expected that most would explain both types of conflicts of interest, but were disappointed to find that many had not.<sup>11</sup>

7 Clause 15(2)(b)(ii).

8 Some also included references to provisions in the Public Finance Acts 1977 and 1989 that have been repealed.

9 Such as, for instance, the provisions about personal liability in sections 44-46 of the Act.

10 A person who exercises powers that can affect the rights and interests of others may be subject to the common law rule about bias. If a decision is tainted with bias, the courts may declare it to be invalid. The current judicial expressions of the test for bias are "Is there, to a reasonable, fair-minded and informed observer, a real danger of bias on the part of a member of the decision-making body, in the sense that he or she might unfairly regard with favour (or disfavour) the case of a party to the issue under consideration?" and "Would the reasonable, informed observer think that the impartiality of the decision-maker might have been affected?"

11 There is no shortage of useful information available on this topic. Those councils that did address the topic frequently did so thoroughly. We have also issued guidance about this topic in our 2004 publication *Conflicts of interest - A guide to the Local Authorities (Members' Interests) Act 1968 and non-pecuniary conflicts of interest*.

## Bankruptcy

- 3.19 The Act requires councils, when adopting a code, to consider whether to require a member to declare whether or not they are an undischarged bankrupt (although the council's decision need not be mentioned in the code).<sup>12</sup> We found that:
- 63 codes require such a declaration; and
  - 22 do not.

## Other matters covered in codes

- 3.20 There were several other key topics that we expected codes to commonly provide guidance about. They are:
- general public sector ethical and/or governance principles;
  - roles and responsibilities of members;
  - decision-making principles and processes;
  - dealing with the news media;
  - gifts, hospitality and expenses; and
  - use of a council's resources and facilities.
- 3.21 Most codes address all of these matters.
- 3.22 Seventy-six codes include a set of general high-level principles, as a guide to good public sector governance and ethics. Most codes adopt the principles in the model code. In summary, these are:
- public interest;
  - honesty and integrity;
  - objectivity;
  - accountability;
  - openness;
  - personal judgement;
  - respect for others;
  - duty to uphold the law;
  - stewardship; and
  - leadership.
- 3.23 Where a council has varied these, it is often to give extra weight to the concept of collective responsibility for decisions, or to emphasise that members have a duty

<sup>12</sup> Clause 15(5) of Schedule 7.

to the public, district or region as a whole (rather than simply their own ward or community, or other sectoral interests that a member may feel they represent).<sup>13</sup>

- 3.24 Seventy-five codes have material describing the different roles and responsibilities of:
- the mayor;
  - the deputy mayor;
  - committee chairs;
  - ordinary members; and
  - the chief executive.
- 3.25 This is often based on material in the model code, although some councils have rewritten or added to it. Common variants include extra material on:
- the distinction between governance and management functions;
  - the role of staff;
  - what members should expect from policy advice;
  - protocols for contact with staff; and
  - the role of councillors who also sit on community boards.
- 3.26 Decision-making principles and processes are dealt with in 71 codes. Such provisions explain how councils go about making decisions. They sometimes refer to:
- principles and processes prescribed by the Act;
  - meeting procedures;
  - the need to be prepared and informed for meetings;
  - the desirability of members operating as a team;
  - working openly and taking collective responsibility for decisions;
  - the importance and process of consultation; and
  - formal delegations.
- 3.27 Dealing with the news media is covered in 81 codes. Such provisions frequently emphasise that generally only the mayor (or chief executive or other officially designated spokesperson) may speak publicly for the council, but that ordinary members are free to express a personal view to the media (or in some other public forum) so long as they do not state or imply that their views represent the council (and so long as they do not disclose confidential information or compromise the impartiality or integrity of staff). Some codes cover correct ways for seeking to make information public.

<sup>13</sup> Some codes make particular reference to the declaration made by members on taking office, which refers to executing and performing their powers, authorities and duties “in the best interests of” their district or region – see clause 14(3) of Schedule 7.

- 3.28 Gifts, hospitality and expenses are addressed in 72 codes. These provisions commonly require members to disclose the receipt of gifts over a certain value, and to claim for only legitimate expenses (and some prescribe detailed rules and processes for expenses, reimbursement, fees and allowances). Some set out expectations about the acceptance of hospitality.
- 3.29 Use of a council's resources and facilities is covered in 71 codes. These provisions typically require members to refrain from using the council's resources for personal business. Some also prescribe limits to the use of the council's support services, equipment and buildings.
- 3.30 In addition to the topics above, which are commonly addressed, some councils have added other topics. The range varies widely. It is clear that some councils have given a great deal of thought to addressing those issues that are important to them. They include discussion of such things as:
- registers of members' interests;
  - compliance with standing orders;
  - appointments to other bodies;
  - civic duties;
  - internal communications;
  - dress standards;
  - guidance for conducting quasi-judicial hearings;
  - defamation;
  - responding to queries involving potential council legal liability and insurance claims;
  - advertising and publicity;
  - pre-election communications;
  - use of letterhead and titles;
  - training, conferences and induction; and
  - how to raise operational concerns with council staff.
- 3.31 One code appears to impose various obligations on the chief executive and other staff. Generally, we expect that councils will have separate codes of conduct for staff (although they are not often referred to in the codes of conduct for members). In addition, some councils include a section setting standards about the "quality of policy advice", which also seems out of place because it appears to be addressed mainly to staff.

- 3.32 Some councils that added significant extra material going beyond the model code include:
- Auckland, Southland and Waikato Regional Councils;
  - Christchurch, Hutt, Manukau and Porirua City Councils; and
  - Kapiti Coast; Ruapehu, South Waikato, Tasman, Waitomo, Western Bay of Plenty and Whakatane District Councils (see also paragraph 6.9).
- 3.33 The codes prepared by these councils may contain some useful ideas for other councils when reviewing their own codes.<sup>14</sup>

## Our conclusions

- 3.34 Overall, the material included in codes meets our expectations. Most codes contain guidance about the main topics we expected to see covered.
- 3.35 The councils we met with told us that the contents of their codes had not been regarded as particularly contentious when they developed them. Many considered the contents of codes to be “common sense”.
- 3.36 Most councils used the model code as their starting point. It is clear that councils have also copied from each other a great deal.
- 3.37 Codes are well focused on the activities, issues and practices of concern to local government. The length and depth of codes varies a lot, but in general we consider that the material in codes is:
- clear and informative;
  - consistent with the governance principles in section 39 of the Act; and
  - not inconsistent with other laws.
- 3.38 No council’s code covers all of the topics mentioned in this Part. We consider that most councils could benefit from a review of those topics, to see whether there are any other matters that could usefully be added to their own code when they next review it. There may be scope for codes to contain more cross-references to further sources of guidance about particular regulatory, policy or good practice matters (both internal and external).<sup>15</sup> We also consider that some codes could be more thorough in their explanations of:
- the LGOIMA; and
  - non-financial conflicts of interest.

<sup>14</sup> We note that, because of the high degree of copying between councils, we do not know whether the material in these councils’ codes originates from them or from another source.

<sup>15</sup> For example, councils may have separate policies about matters like the use of e-mail and computers, contact with staff, official information, delegations, and fees and expenses. Agencies such as the DIA, LGNZ, and the Office of the Auditor-General may have more detailed guidance about various other matters touched on in codes.



## Part 4

# Complaints and enforcement processes

4.1 In this Part, we discuss the provisions of codes that relate to complaints and enforcement. We were especially interested to see whether – and if so, how – councils have included provisions in their codes to enforce compliance. (In the next Part, we discuss the experiences of those councils who have had to use these provisions.) This Part is largely based on our examination of the codes of all 85 councils.

### Must codes provide for enforcement?

- 4.2 The Act specifies that elected members must comply with their council’s code of conduct.<sup>1</sup>
- 4.3 However, the Act does not provide councils with any additional powers to penalise breaches of their code, and the Act makes it clear that breach of a code is not an offence.<sup>2</sup>
- 4.4 Accordingly, the question of enforcement is left open. Councils can legitimately choose whether or not to have any enforcement mechanism:
- councils may decide to regard their code as nothing more than a statement of good governance practice; or
  - councils may decide to provide for remedies for breaches of their codes.
- 4.5 The obligation to comply with a code can stand on its own. But, if councils do provide for enforcement and provide for remedies, then they need to design processes and penalties that are clear, lawful, fair and efficient. They need to be prepared to use those processes in suitable cases, and to follow their processes properly.

### Do codes provide for enforcement?

- 4.6 Seventy-one codes address, in some way, the question of enforcing compliance with the code. They usually do so by providing that the council or a nominated committee will “monitor” compliance with the code, and by also providing for complaints, investigations, and penalties for breaches of the code.
- 4.7 Thirteen codes are entirely silent on this topic, and make no provision for dealing with alleged breaches of the code. Most of these codes do not expressly state that the council will never take action to enforce compliance with the code, but we suspect this may be their intention.<sup>3</sup> Often, these councils’ codes are otherwise closely based on the model code (or another council’s code), so it seems that they

1 Clause 15(4) of Schedule 7.

2 Clause 15(7) of Schedule 7.

3 Although, in our view, a code’s silence on this point does not necessarily mean that the council is prohibited from taking action, should it decide it wishes to do so.

have deliberately chosen to omit the provisions about enforcement. In some of these cases, the council's code is described as "voluntary" or "self-complying".<sup>4</sup>

- 4.8 One code explicitly says that "there are no enforcement mechanisms attached to this code".
- 4.9 Some codes emphasise the desirability of resolving issues informally if possible, or (if issues arise in a meeting) encourage them to be resolved at the time by the chair. We agree – see our discussion of this issue at paragraphs 5.32-5.34 and 5.50. Nevertheless, councils have often also decided that a more serious process is sometimes desirable. The remainder of this Part is concerned with the contents of formal enforcement processes that are provided for in codes.

## Complaints

- 4.10 Where a code envisages enforcement action, we expected that the usual mechanism for initiating enforcement action would be by someone making a formal complaint about a member.<sup>5</sup> We looked to see whether codes address complaints, and whether they specify who is entitled to complain.
- 4.11 We found that:
- 70 codes contain provisions about making complaints about alleged breaches of the code;
  - 15 are silent as to whether or not complaints will be accepted; and
  - none explicitly state that complaints will not be accepted.<sup>6</sup>
- 4.12 The model code provides that complaints of alleged breaches of a code must be made in writing, and most of the codes that address the topic include a provision to this effect. Beyond this, many codes do not prescribe precisely how a complaint should be made; nor to whom it should be made.
- 4.13 Of the codes that mention complaints, none at present specifically preclude a complaint being made by a member of the public (see also paragraph 5.28).<sup>7</sup>
- 4.14 However, it is usually not made explicit that any class of person does or does not have the right to complain. Most codes are silent on this, and some appear to be drafted on an assumption that only another member or the chief executive (perhaps on behalf of a staff member) is likely to make a complaint.

4 In another case, a council – after going through a long and unsatisfactory series of complaints – amended its code to remove all references to complaints, enforcement and penalties.

5 However, some councils that have a standing committee performing an ongoing monitoring role in respect of the code expressly permit that committee to initiate an investigation of its own motion.

6 One says that there are no "enforcement mechanisms", but this does not necessarily mean that a complaint will never be considered. It may simply mean that penalties will not be imposed.

7 We have been told by one council that it intends to amend its code to preclude complaints from members of the public.

- 4.15 As we discuss later (see paragraph 5.31), allowing any person to complain would not necessarily create problems, because we do not consider that a right to complain also confers on a complainant the right to insist that any particular complaint be accepted or “prosecuted”.

### Taking enforcement action

- 4.16 Sixty-two codes contain some process for investigating and determining alleged breaches of a code. The remaining 23 do not give any indication of how, if at all, the council will act upon a complaint of an alleged breach.
- 4.17 It is for councils to decide for themselves whether they prefer this – or any stage of it – to be done by elected members, or independent external persons, or a combination of both. Councils are entitled to design a process that best suits their needs, so long as it is fair to all affected parties.

### Who investigates complaints?

- 4.18 Of those codes that do deal with enforcement, some specify that complaints are only ever to be considered by the full council (without any preliminary investigation or report by someone else).
- 4.19 However, the majority use a 2-step process, whereby:
- a person or committee investigates the complaint and reports to the council; and
  - the full council then makes any decisions about the matter.
- 4.20 Many codes use the 2-step process in the model code as their starting point. Under the model code, compliance with the code is monitored by a particular committee of the council (of which the mayor is a member). The committee will notify the member concerned of the alleged breach, and will explain when and how that member will get the opportunity to put their version of events. The committee will investigate the alleged breach, and report to the council, which will then consider the report.
- 4.21 But there are several other variations. Alternatives include:
- specifying that complaints will be investigated by the mayor or chief executive (instead of by a committee);
  - specifying that the mayor or chief executive will consider the complaint in the first instance, and that they have a discretion to decide whether or not the complaint warrants referral to the investigating committee (or full council)<sup>8</sup> – see our discussion of this issue at paragraph 5.27;
  - specifying that the investigating committee must include one or more persons who are not members of the council (and, in some cases, these independent

<sup>8</sup> One code sets out permissible grounds for such a decision.

external people must have dispute resolution or mediation skills – see also paragraph 5.39);

- specifying that the investigation will be undertaken not by a committee but by an independent person who is not a member or employee of the council (one code allows the member who is the subject of the complaint to choose whether the investigation will be by a committee or by an independent external person); or
- permitting the member who is the subject of the complaint (and, in one case, also the complainant) to nominate a member of the investigating committee.

4.22 Some codes are silent or unclear as to who investigates complaints (perhaps to preserve flexibility).

4.23 Using members for a formal investigation can have special difficulties. Many elected members could be alleged to have prejudicial views about their peers. Also, many elected members are uncomfortable with the idea of having to sit in judgement over their peers. They are conscious that they will have to continue to try and work together for the remainder of the triennium, and disciplinary proceedings can severely undermine their ability to do so. Our view is that, on balance, it may be better to use independent external people, rather than elected members, for the investigation stage. This will help ensure that the matter is dealt with impartially and is less likely to be seen as a partisan act (whether on political or personal grounds). As we have said, though, this is for each council to decide.

### What is the process?

4.24 Any enforcement process must allow the person complained against to be made aware of the substance of the complaint and have an opportunity to put their case to the investigating person or body in writing or in person, often at an early stage. We expected to find processes that embodied this aspect of fairness. We found that it was at least implicit, and often explicit, in all the processes contained in codes.

4.25 It is not always clear from codes whether:

- the investigating committee or person is expected to hold a hearing that the complainant and member who is the subject of the complaint (and perhaps others) are able to attend; or
- the investigating committee or person will instead obtain information from relevant parties by way of private meetings or interviews with affected individuals and/or inviting written comments.<sup>9</sup>

<sup>9</sup> One code says that the investigator is not to hold a hearing. Another code explicitly states that the committee will hold a hearing.

- 4.26 Councils may have deliberately preserved flexibility in this area. We are aware that both types of process have been used.
- 4.27 Nevertheless, some codes provide additional details about other aspects of the process. These include:
- clarifying that the member who is the subject of the complaint must not be a member of the investigating committee, and must not vote on the council's decision-making about the complaint;<sup>10</sup>
  - expressly empowering the investigating committee or person to initiate investigations of their own motion (as well as upon receipt of a formal complaint);
  - expressly empowering the investigating committee or person to discontinue an investigation if the complaint is considered to be technical, trivial or vexatious;
  - expressly permitting the member who is the subject of the complaint to have an advocate or support person;
  - providing that the council will pay the costs of legal representation for the member who is the subject of the complaint;
  - permitting the investigating committee or person to only make findings of fact, and prohibiting them from making findings or recommendations about whether the code has been breached or what penalties should be imposed (leaving those matters to the full council to decide);
  - requiring the investigator to present their report in person to a meeting of the council; or
  - expressly permitting the member who is the subject of the complaint (and, in one case, the complainant) to make submissions at the meeting of the council.
- 4.28 Some (but not all) of these elements might be permissible or necessary anyway, in order to meet fairness requirements, but it can be helpful for all parties to have them written down.
- 4.29 Some codes specify that enquiries and deliberations of the investigating committee will be undertaken in private, or that the investigating committee is deemed not to be a committee of the council (presumably so that the requirement in the LGOIMA for meetings to ordinarily be held in public does not apply).<sup>11</sup> Once the matter reaches the full council, many codes, based on the model code, provide that the council will consider the investigating body's report in a meeting open to the public (unless confidential information or personal privacy issues require otherwise), although some require it to be in private.

<sup>10</sup> However, it is not always made clear that a member who is a complainant should not be a member of the investigating committee, and also should not vote on the council's decision-making about the complaint.

<sup>11</sup> We are not sure whether such an assertion would be legally effective, if the investigating body meets the Act's definition of a "committee", and where it otherwise behaves as a committee of the council.

- 4.30 We consider that the question of whether to conduct such business in private or public is not amenable to a firm rule either way. It will depend on the nature of the matter being considered, and on the type of process being followed.<sup>12</sup> We consider that it will usually be desirable for consideration at any stage below the level of the full council to be undertaken in private.
- 4.31 Some codes specify that the council's decision on the matter is "final and binding" on the member, and that the member may not challenge the outcome in any way, except in relation to natural justice issues (that is, the legal principles about conducting a fair process). However, it is questionable whether a disaffected party can be prevented from using whatever legal rights they may have to challenge the outcome of an investigation.
- 4.32 One code includes an appendix that appears to be based on a staff policy, and which uses the language of employment law. It purports to allow members to be warned, suspended and dismissed. This is inappropriate. Council members are not subject to employment law, and are not able to be removed from office by their peers. We have written to that council to draw attention to this.

## Penalties

- 4.33 Sixty-nine codes specify the potential penalties that may be imposed if a member is found to have breached their code. Fifteen do not give any indication of what, if any, penalties may be imposed. One council has specifically precluded the imposition of penalties.
- 4.34 Of those codes that do provide for investigation and penalties, nearly all – like the model code – provide that a meeting of the full council (rather than any investigating committee or person) decides, by resolution, whether penalties will be imposed on a member who has breached the code. Regardless of the type of investigation process followed up to that point, it seems that nearly all councils regard any decision to impose penalties as one which warrants the involvement of all members.<sup>13</sup>
- 4.35 Most councils use the penalty provisions from the model code. These provide that where the matter is something governed by statute, it may be referred to the relevant external enforcement agency.<sup>14</sup> For "non-statutory" matters, the potential penalties are:

12 For instance, if the process is managed as an inquisitorial investigation (with interviews or research), it is probably best done in private; but, if it is conducted by way of a formal hearing or meeting under standing orders, it may be expected or required to be public.

13 Although the member who is the subject of a complaint, and the complainant (if that person is also a member), would presumably not participate in the council's decision-making on the matter.

14 For instance, a breach of the Local Authorities (Members' Interests) Act constitutes an offence, and may be prosecuted only by the Auditor-General. However, it is not always clear whether councils intend to preclude the possibility of them also imposing penalties themselves where a matter is governed by another statute.

- censure;
  - removal of the member from committees or other bodies to which they have been appointed; and
  - dismissal from a position as regional council chair, regional council deputy chair, deputy mayor or committee chair.
- 4.36 Some additional penalties, that a few codes mention, include such things as:
- a letter to the member;
  - a request (made either privately or publicly) or requirement<sup>15</sup> for an apology;
  - a vote of no confidence in the member;
  - removal of certain council-funded privileges (such as cellphones, or attendance at conferences);
  - suspension (rather than removal) from committees or other bodies; and
  - an invitation for the member to consider resigning from the council.
- 4.37 Councils do not have any power to suspend or remove a member from the council; nor to impose a monetary penalty like a fine or suspension of remuneration (although dismissal of a member from a deputy mayor or committee chair's position will often result in a reduction of their remuneration).
- 4.38 Some codes do not specify what penalties may be imposed on a member who breaches the code, perhaps to preserve flexibility over the range of options. Some permit penalties to be imposed only by a special majority (such as 75%).
- 4.39 The penalties discussed in paragraphs 4.35 and 4.36 are all within the inherent power of councils. They were available before codes existed, and are unchanged from those that were available prior to enactment of the Act. The Act, and codes, have not given councils any new powers to penalise members who do not comply with expected standards of conduct.
- 4.40 We understand that the absence of new or more powerful penalties is the result of a deliberate policy decision by the drafters of the Act (see paragraph 1.29). Among people we interviewed, views are split on whether the law ought to allow for stronger penalties:
- some people feel that codes need real “teeth” in order to be effective, and that the inability of councils to impose heavier penalties (such as suspension from office or a fine) weakens the credibility and effectiveness of codes because the worst-behaved members can simply ignore any attempts at enforcement;
  - some feel that the current situation is best, because of a fear that stronger penalties may increase the risk of codes becoming abused for improper purposes; or because codes' real value should be educative rather than

<sup>15</sup> We do not consider that councils have any power to “require” a member to give an apology.

punitive; or because it is undemocratic for elected members to be able to be removed from office by any means other than an election.

- 4.41 Views are often strongly held on the question of whether the Act should provide for penalties. However, from our interviews of council members and officers, we did not identify a consensus or clear majority view on this question.

### Our conclusions

- 4.42 Members have a statutory duty to comply with their code, and it is for councils to decide for themselves whether – and, if so, how – to enforce the provisions of a code against an offending member.
- 4.43 Some councils appear to have made a policy decision not to provide for any enforcement of their codes, and may prefer not to have any available remedies for “breaches” of the code. That is an entirely legitimate choice, and enables a code to sit simply as part of the council’s governance framework.
- 4.44 However, most of the remainder have provided for enforcement, with remedies. If councils do provide for remedies, then they need to design processes and penalties that are clear, lawful, fair and efficient. They need to be prepared to use those processes in suitable cases, and to follow their processes properly.
- 4.45 Most councils use a 2-step process, with an investigation by a person or committee, and then a decision by the full council. Nearly all councils regard any decision to impose penalties as one which warrants the involvement of the full council.
- 4.46 In the detail, however, councils have designed a variety of different processes. Enforcement is the area where councils have most commonly departed from the text of the model code. Councils have often rewritten (or deleted) the model code’s provisions to suit their own preferences. We do not have any concerns about the fact that a range of processes exists.
- 4.47 We have not identified significant concerns about the processes set down in councils’ codes. It is clear that many councils have given careful thought to the processes they wish to apply. The key issue is that any process must be fair. From our review, councils appear generally aware that enforcement processes need to be fair to all affected parties, and they have designed their processes accordingly.
- 4.48 We consider that it may be better to use independent external people, rather than elected members, for the investigation stage. However, this is for each council to decide.
- 4.49 Views are often strongly held on the question of whether the Act should provide for penalties. However, we did not identify a consensus or clear majority view on this question.

## Part 5

# Experiences of councils that have used their code

- 5.1 In this Part, we discuss the experiences of councils that have used their code. Much of the material in this Part is drawn from our interviews with council and sector personnel.
- 5.2 As discussed in Part 2, most people we spoke to regard their code as valuable, and most believe it is better to have a code than not to have one. There will occasionally be cases where resorting to a formal disciplinary process for a wayward member is regrettably unavoidable.
- 5.3 A minority of councils have had to make formal use of their code, and some of them have found the process difficult.

### Use of codes

- 5.4 Most councils use their code only rarely, if at all. Many told us they have never had to refer to it.
- 5.5 In most councils, if conduct issues do arise they are usually dealt with informally and privately. As a result, it is not possible to give a meaningful indication of exactly how many councils have had to use their code, or how often they have done so.
- 5.6 People we spoke to commonly said that the most usual, and most effective, method of dealing with a conduct issue is for the mayor (or sometimes the deputy mayor, or the chief executive – especially if the matter involves a staff member) to act as mediator or counsellor and call in the member concerned for a “quiet chat”. Frequently, the matter is able to be resolved without explicit reference to the council’s code, even though it might be able to be classified as something technically covered by the code. Often, we were told, people do not even think to turn to their code when an issue arises. Even if the code is specifically mentioned, many councils will still attempt to keep the matter at a private and informal level, without resorting to the formal enforcement process specified in their code. Those people invariably said that this approach was usually far preferable to resorting to formal enforcement processes, and that formal enforcement should be avoided if at all possible. Some said that progression of a matter to a formal stage is a sign that it is already out of control.
- 5.7 Only very occasionally does a matter reach a stage where a formal enforcement process is invoked. We are aware of 11 councils that have had code matters progress to a formal stage.<sup>1</sup> There could well be more, because sometimes a formal process is undertaken entirely out of the public domain.<sup>2</sup>

<sup>1</sup> Six of them have had this occur more than once.

<sup>2</sup> Formal enforcement processes can sometimes remain wholly confidential, even after the event. This may be entirely appropriate if the matter is especially sensitive, such as in the case of a sexual harassment complaint.

- 5.8 In our view, a lack of frequent use of codes is not an indication that they are of no value. They are the sort of document that probably work best by their mere presence in the background, as part of the council's governance framework. As one commentator has said –

*It would be quite a good sign if council members were not constantly bringing [their code] off the shelf. If the Code is being continuously called on to influence behaviour, relationships probably have deteriorated already.<sup>3</sup>*

- 5.9 Councils that manage conduct well often have a mayor (or deputy) who takes a strong leadership role and who regards the proactive management of relationships with and between members as an important part of their job.

### Some councils have struggled

- 5.10 Some members and officers who have been through a formal enforcement process end up bitter and frustrated about their code. This feeling is not limited to those who were the subject of a complaint. The process can be stressful, time-consuming, expensive, exhausting, and inconclusive. Relationships between members, and between members and staff, can be put under heavy strain (particularly while the process remains uncompleted). It is common for the parties to feel that nothing really resulted from the whole process because the matter is never fully resolved, or because the penalty able to be imposed is insignificant or ineffective. People often end up feeling the process was a waste of energy. The matter can absorb huge amounts of the time and energy of members and senior staff. Some councils end up being “put off” their code, and in future go out of their way to avoid using it again (and, in one case, rewriting their code in an attempt to effectively prevent complaints from being able to be made at all). All of this causes the credibility of codes to suffer.
- 5.11 Taking disciplinary action against an elected member of a council is a serious matter. To some extent, it can be expected that it will be a difficult process. It should certainly not be an action to be taken lightly. Some level of discomfort with such a process may be unavoidable.
- 5.12 Also, those councils that have been early users of their code have had to learn as they go. It is understandable that some of them may have been unsure how best to proceed, or may have been especially tentative in pushing the process along, or may have made a poor choice of investigator. In addition, we consider that some councils – because of the way their code was written – felt themselves to be under an obligation to proceed with a formal enforcement process for matters that may not really have warranted it. We look at some of these matters later in this Part.

3 Barrington, Rosemary, September 2003, *Good behaviour can't be determined by rules*, NZ Local Government, page 2.

## The behaviour of members

- 5.13 Most people we spoke to told us that codes have not had a significant overall effect on the behaviour of elected members, either for better or for worse.
- 5.14 Yet, in those places that had dealt with formal complaints, we gained the impression that the experience had often softened the subsequent behaviour of the member who had been the subject of the complaint. As a result of the experience, other members of those councils also had a higher awareness of their code and the potential for complaints to be made, and so were perhaps more cautious in their behaviour.
- 5.15 We do not consider that code complaints necessarily indicate that a council is dysfunctional. It takes only one disruptive person to create difficulties. It is not uncommon for a complaint to be about the acts of only one individual, who may often be regarded by many others as a “maverick” or rebel member.
- 5.16 Wayward members can be particularly unsettling in a local government setting. The structures of local government are not designed in the same adversarial way as national politics. Rather, both the prevailing culture and the law of local government expect politicians to operate as a team, and to take collective responsibility for decisions. Collegiality is critical to the effective operation of councils. As one commentator has said –
- ... on entering office councillors are now morally obliged to take a wider perspective of community issues and leave behind any single-issue crusades. ... Every councillor has a responsibility towards the council. They all have to make the council succeed.<sup>4</sup>*
- 5.17 Whether problems arise, and whether they are dealt with effectively or not, may often be determined largely by the personalities of the particular individuals involved. Most members regard themselves as wholly independent (and therefore not subject to controls, such as the ministerial, caucus, and party whip disciplines that exist in Parliament). A small minority of members will not accept the standards and roles expected of them, and are not prepared to work with their colleagues as part of a team. They are unmoved by the contents of their code or the judgement or persuasion of their peers, and are unlikely to change their behaviour after disciplinary proceedings. For such individuals, having formal action taken against them may simply provoke them into behaving even more disruptively (and this likelihood means that councils will sometimes, as a deliberate tactic, refrain from taking formal action against such a member). As some of our interviewees said to us, unwilling people cannot be forced to be polite to each other.

4 Shaw, Robert, January 2004, *New era demands new attitudes*, NZ Local Government, pages 26-27.

## Types of situation where codes are used

### Common types of alleged breach

- 5.18 The 2 most common types of alleged breach of a code are:
- offensive or disparaging remarks, or improper allegations, made about other members or staff; and
  - leaking confidential information.
- 5.19 From our interviews, it appears that councils are often most quick to react when the matter affects staff, such as complaints from staff about bullying or public criticism of them by a member. In some councils, the chief executive will effectively “adopt” a complaint made by one of their staff, and take the place of the complainant, acting on their behalf.
- 5.20 By contrast, other elected members, and members of the public who engage in political debates with elected members, usually understand that they are choosing to participate in an environment where vigorous debate can be expected. Some allowance needs to be made for that.

### Inappropriate use of a code

- 5.21 We found that some matters that have been dealt with under a code may not truly be matters of conduct, and do not really warrant the use of the code. Code enforcement is a disciplinary process, not a general dispute resolution or inquiry tool. For instance, some complaints seem to be primarily about:
- disputes between people in a context of mutual animosity; or
  - inquiries into operational matters.
- 5.22 Such matters may come to be regarded as “code of conduct” matters because someone has taken exception to the way a member has expressed themselves, but the subsequent investigation or hearing may range well beyond strict conduct issues. Conversely, some matters that possibly were legitimate matters of conduct have been dealt with outside the process set down in the council’s code – see paragraph 5.51 below.
- 5.23 To a large extent, whether or not the code procedure is followed depends simply on whether the complainant (or, sometimes, the member who is the subject of the complaint or the mayor or chief executive) expressly asserts that the complaint is made “under” the council’s code.
- 5.24 Sometimes a council’s code is invoked for matters that may seem petty or trivial. These may be such things as:
- a single usage of coarse language that some people would find offensive;

- disparaging remarks made about a person in the heat of debate; or
- “tit for tat” complaints made by and against the protagonists of a political or personal dispute.

5.25 One commentator has emphasised that –

*Members ... need to realise that the complaints procedure is separate from politics and thus not the arena for scoring political points.*<sup>5</sup>

5.26 The credibility of codes will be undermined if they are trivialised or abused, or overly politicised. Participants in local government need to accept that they are operating in a political environment. Allowances need to be made for the fact that the cut and thrust of debate can often be robust and blunt. We doubt that a code enforcement process should ordinarily be undertaken, for example, on the basis of a single instance of a member expressing themselves impolitely. And disagreements over personal or political style may often be best left to be resolved by the electoral process. (Although, once the code is invoked, it is important for the matter to be addressed fairly, and free of political bias.)

5.27 Many codes do not expressly permit petty or trivial complaints to be dismissed at an early stage, and so we consider some councils may have felt themselves to be under an obligation to undertake a full formal enforcement process for a matter that, on an objective view, may not really be significant enough to justify being taken so far. Yet, in our view, an enforcement process does not have to be entirely driven by a complainant. We consider that it may be useful for codes to allow for some sort of preliminary assessment of complaints, with a discretionary power to dismiss those that do not warrant being taken further. Councils would need to consider whether this power should be given to the mayor (or deputy, where the mayor is the subject of the complaint), or to an independent external person.

### Complaints from members of the public

5.28 As noted in paragraph 4.13, few codes expressly say whether or not members of the public are permitted to make a complaint under a council’s code. One case involving the Mayor of Wanganui, which received a large amount of media coverage, arose from complaints from members of the public, but very few complaints have in fact arisen in that manner.

5.29 Accordingly, many councils have not yet considered whether they would permit a complaint under their code to be made by someone outside the council. Most, when asked, said that they probably would. After all, some aspects of a code are likely to relate to the public. The Act requires that, among other things, a code must cover members’ “behaviour toward ... the public”.<sup>6</sup>

<sup>5</sup> Sheppard, John, May 2004, *Codes of Conduct*, Brookfields Newsletter.

<sup>6</sup> Clause 15(2)(a)(i) of Schedule 7.

- 5.30 Some people expressed concern about the risk that their code might become widely abused by members of the public as a means of pursuing political or personal arguments. This could lead to council processes becoming gridlocked. These people thought that more traditional methods of political action (such as private lobbying, speaking at meetings, writing to newspapers, and – of course – voting) ought to be sufficient, without the establishment of a practice of code complaints as an easy but potentially obstructive tool, where lengthy code investigations and hearings will be used as a forum for relitigating political decisions.
- 5.31 Councils may be able to prevent the abuse of their code's procedures if they ensure that their code contains some preliminary assessment step with a discretion as to whether a code complaint is allowed to proceed to a full enforcement process (see paragraph 5.27). A code does not have to grant members of the public (or any other complainant) the right to insist that any and every complaint must lead to the full enforcement process being commenced. A council could legitimately take into account the extent to which a complainant has a direct personal interest in the matter complained about.

## Enforcement processes

### Informality as a first step

- 5.32 Many codes appear to imply that the making of a complaint must always, and automatically, cause the formal enforcement process to be invoked. This seems unfortunate, because it may lead to many matters being dealt with in a very full, legalistic and drawn-out way, when there may be no need for them to be escalated to such a solemn and significant level. Many issues – especially where their effect or significance does not extend beyond the member concerned and the complainant – may be able to be satisfactorily dealt with informally and privately at a low level, through a quiet discussion with the mayor (or another senior member or chief executive) or some other negotiated or mediated resolution. Some councils have a practice of holding regular informal get-togethers of members, where members can “get things off their chest” privately; or the mayor or an outside facilitator may sometimes run a “members only” session when there is a need for members to be reminded about particular rules in response to an issue that has arisen (such as a leak of confidential information).
- 5.33 In our view, it may be useful for more codes to explicitly encourage issues to be raised and resolved at the lowest possible level. As noted in paragraph 5.6, many councils consider this to be the most successful and constructive way of resolving most issues. The initial objective is to defuse the situation quickly, because if it advances to a formal stage the stakes will be raised considerably.

- 5.34 Under this approach, the full, formal enforcement process (with an investigation and/or hearing, and the possibility of penalties) would be reserved for only the most serious cases. There will occasionally be cases that require this level of gravity, and where a broader public interest is at stake than simply the alleged hurt to the complainant. But this stage should be kept in reserve, for use if all else fails. Some people we spoke to said it should be regarded as a “backstop”.

### Investigation processes

- 5.35 Once a formal investigation or hearing is commenced, councils need to be very careful to ensure that the member who is the subject of the complaint is treated fairly. A failure to act consistently with the expectations of procedural fairness – also called “natural justice” – can leave a council open to legal challenge. Whatever constitutes a “fair” process depends on the circumstances, and so can vary from case to case. In essence, the underlying principles are that:
- each affected party must be allowed a full opportunity to be heard; and
  - the decision-maker must avoid any bias or appearance of bias.
- 5.36 It may be prudent for councils to have legal expertise on the investigating committee, or access to legal advice before and throughout the process.
- 5.37 Councils also need to deal with the matter promptly. Some complaints become bogged down for extended periods of time, because of:
- arguments over natural justice and other procedural issues; or
  - a lack of co-operation from the member who is the subject of the complaint;<sup>7</sup> or
  - an apparent lack of political will to deal with the matter.
- 5.38 The balance between fairness and timeliness can be difficult to achieve. Yet, where a member is unco-operative, a council should not be afraid to advance the process through to its conclusion. A member who is the subject of a complaint is not entitled to delay the matter interminably through unresponsiveness or other delaying tactics. Allowing the process to drag on can be exhausting and costly, and can make the situation worse in the meantime for a complainant who has a legitimate grievance.
- 5.39 Many codes provide for an investigation to be undertaken by a committee or person. Where this process exists, councils need to pay special attention to the selection of personnel. If elected members are used, they need to be people who cannot be reasonably accused of having made up their minds about the matter or person in advance. If independent external persons are used, some codes encourage councils to use people with mediation or dispute resolution

<sup>7</sup> Or, in one case, a reluctance to co-operate on the part of some other witnesses whose evidence was considered to be critical to the inquiry. The investigating committee has become frustrated at not having any legal power to compel co-operation.

skills. This may not necessarily be the most helpful skill-set for this role. If the matter has proceeded to a formal enforcement process, it is probably already beyond the stage of being resolved amicably; it now requires a quasi-judicial process that leads to a clear finding. Other types of people sometimes used include senior lawyers, investigators (such as retired policemen), and experienced local government practitioners (such as retired chief executives). Some councils report that, with hindsight, they prefer people with a sound understanding of local government. We agree. We also consider that legal expertise may often be desirable too.

- 5.40 The fairness of the process followed by Wellington City Council in relation to one complaint, where the Council had censured a member for public criticism of a Council employee, was recently challenged in the High Court.<sup>8</sup> The Court rejected the challenge. The process followed by the Council was detailed in the Court's judgment.
- 5.41 The Court also dismissed arguments that various members of the Council were biased, although its discussion is a useful reminder of the need for other members to avoid conduct that may give the appearance of pre-determination. Members need to be very careful about the risk of bias.
- 5.42 The Wellington case can give councils confidence in the processes they are using. However, this is only one example, and there is no single correct process to follow for all cases. The fairness of a council's hearing or decision-making process is always amenable to judicial review. In acting fairly, councils will need to ensure that they follow the specified process in their own code, which may have different requirements from those outlined in the Wellington case.<sup>9</sup> They may also have to consider any special requests from the member who is the subject of the complaint, or other unforeseen issues that arise in the circumstances of their own case.

### Determination that a code has been breached

- 5.43 The Wellington case can also give councils a considerable degree of confidence in their substantive decisions about whether or not their code has been breached. The Court indicated that it will not lightly assume the role of second-guessing the correctness of the merits of a council decision. The Court said –

*It is not for the Court to judge the merits of the Council's decisions that the applicant (whether impliedly, inadvertently or otherwise) had criticised [the*

<sup>8</sup> *Goulden v Wellington City Council* (unreported, High Court, Wellington, CIV-2004-485-1, 21 April 2006, Goddard J).

<sup>9</sup> For instance, the Wellington code is different to many others in that it does not provide for the main investigation of the complaint to be undertaken by a committee or independent external person. Wellington's code specifically empowers the mayor to consider the complaint, and then to decide whether the matter is sufficiently serious to warrant referral to a meeting of the full Council.

Council employee] and that he should be censured for that. Those were decisions for the Councillors to make, on balance and in light of the spirit and meaning of their own Code of Conduct. The Code is in the nature of an internal regulatory manual so that whether there has been any transgression of its guidelines is very much a matter for the Council to assess. On that basis, the Court would not readily intervene in any decision by the Council unless that decision were demonstrably unreasonable.<sup>10</sup>

- 5.44 The Court took the view that the decision was a political one that elected members were in the best position to make.
- 5.45 The Court also provided guidance on the inter-relationship between codes and the right of freedom of expression under the New Zealand Bill of Rights Act 1990, which is something that is often claimed to be a defence to a complaint under a code. Freedom of expression is certainly a relevant factor to be considered, and will often mean that behaviour of which others disapprove should nevertheless not be penalised, but it is not a complete defence. On this matter, the Court said –
- ... the entitlement of a Council member to freely and publicly express an opinion is subject to the limitation that “media comments must observe the other requirements of the Code of Conduct”. As it is appropriate to regard the Code as a lawfully promulgated set of guidelines or rules, issued under s 48 (and Schedule 7) of the Local Government Act, this limitation on public criticism of any Council employee in any way can be regarded as a justified and reasonable limit on the entitlement of a Councillor to freely express his or her personal view in the media at any time.*<sup>11</sup>

## Penalties

- 5.46 From our research, it seems that councils do not readily impose penalties. In general, they do so sparingly, and with reluctance. The penalties imposed have usually been light.
- 5.47 The most common types of penalty imposed, in those cases of which we are aware, are:
- a request for an apology; and
  - a resolution of censure.
- 5.48 In a few cases, a member has been stripped of a chairpersonship, or removed from a committee altogether. Yet this appears to be rare. Some councils even told us they would regard this as an extreme move, which they would not envisage ever using.

<sup>10</sup> At paragraph 59.

<sup>11</sup> At paragraph 73.

- 5.49 We are unaware of any councils purporting to impose any more serious penalties.

### Enforcement outside a code

- 5.50 If a conduct issue arises in the context of a meeting, often it will be able to be dealt with immediately, under powers that exist in standing orders (such as through a point of order, personal explanation, withdrawal and apology, or expulsion from the meeting). Some mayors told us they use this method a lot. This may be an effective way to resolve many minor matters immediately, without them having to go further and escalate into lengthy disputes. Some people expressed to us the view that, because of the ability to apply standing orders in meetings, a code should apply only to matters arising outside the confines of a meeting.
- 5.51 Some councils have, at times, bypassed their code process altogether and dealt with a conduct issue summarily without considering any preceding complaint, investigation or hearing. The council simply passes a resolution which censures the member or removes them from some position. Where the decision involves removing someone from a position as chair or member of a committee, it is rationalised as being treated as a simple political question of losing “confidence” in the person in that role. This has sometimes been effective in resolving an issue quickly. We consider it carries risks, though. A dissatisfied member might contest the outcome, arguing that because a specified process exists for conduct issues, the council is obliged to follow it.

### Our conclusions

- 5.52 Most councils use their codes only rarely, if at all. But a code ought to be a document that is not used frequently. In most councils, if conduct issues do arise, they are usually dealt with informally and privately.
- 5.53 Alleged breaches of codes commonly related to offensive or disparaging remarks, or leaks of confidential information. Councils are most quick to react when the matter relates to staff. The penalties imposed have been light.
- 5.54 Some members and officers who have been through a formal enforcement process end up bitter and frustrated about their code. We do not consider that code complaints necessarily indicate that a council is dysfunctional.
- 5.55 Many councils have not yet considered whether they would permit a complaint under their code to be made by someone outside the council. Most, when asked, said that they probably would. However, some people expressed concern about the risk that their code might become widely abused by members of the public as a means of pursuing political or personal arguments.

- 5.56 Sometimes a code is invoked for matters that may not truly be matters of conduct, or that may be petty or trivial. Councils may have felt themselves to be under an obligation to undertake a full, formal enforcement process for a matter that may not really be significant enough to justify being taken so far. We consider that it may be useful for codes to allow for some sort of preliminary assessment of complaints, with a discretionary power to dismiss those that do not warrant being taken further.
- 5.57 It may be useful for more codes to explicitly encourage issues to be raised and resolved at the lowest possible level. Many councils consider this to be the most successful and constructive way of resolving most issues. The full, formal enforcement process can then be reserved for only the most serious cases.

### **Managing the process effectively**

- 5.58 For a council attempting to manage an enforcement process through to a just result, with as little disruption as is necessary, maintaining the balance between fairness and timeliness can be critical.
- 5.59 Some complaints become bogged down for extended periods of time. However, the processes councils have followed in the early days of using their code are not fundamentally flawed. Recent case law can give councils confidence in their processes, and in their substantive decisions. In our view, councils can afford to have confidence in their codes, and in their enforcement processes, should they have to deal with enforcement matters.
- 5.60 We consider that the key factors for councils to bear in mind when dealing with future code complaints (or in reviewing their codes) are:
- attempting to resolve issues informally and privately wherever possible, and reserving use of the formal enforcement mechanism for only the most serious cases;
  - providing in their code some method of preliminary assessment of complaints, with a discretionary power to dismiss those that do not warrant being taken further;
  - where applicable, carefully selecting the personnel to be involved, to ensure that they have the appropriate skills and experience for the task required of them;
  - paying careful attention to following a fair process (including, but not necessarily limited to, whatever steps or entitlements are specified in their code), and seeking legal advice if necessary; and
  - proactively managing the process, to ensure that the matter is dealt with promptly (without compromising the need to act fairly).



## Part 6

# Codes of conduct used elsewhere

- 6.1 In this Part, we briefly compare council codes of conduct to similar regimes that exist elsewhere.

### Who else uses a code of conduct?

- 6.2 Codes of conduct are becoming a common feature of organisational governance and management. They are widely used for employees of organisations, and are frequently regarded as forming part of an employee's employment agreement. Many professional associations and voluntary organisations also have codes of conduct for their members.
- 6.3 In the public sector, the State Services Commissioner sets minimum standards of integrity and conduct for all employees in public service departments and, from time to time, issues guidance in the form of the New Zealand Public Service Code of Conduct. In 2005, the Commissioner's authority in this area was extended to cover most Crown entities and certain other non-public service departments. We understand the Commissioner is currently working towards developing a code or codes for those agencies.
- 6.4 Codes are also becoming more common for governing bodies, in both the public and private sectors. The Institute of Directors in New Zealand has a code of practice for directors, and encourages company boards to adopt their own codes of conduct. NZX (formerly the New Zealand Stock Exchange) has issued a corporate governance best practice code for directors of companies that issue securities. The Securities Commission has published a handbook on corporate governance principles and guidelines for directors, executives and advisers. Some private companies and Crown entities have chosen to adopt a code of conduct or code of ethics for (or at least expressly including) their boards.<sup>1</sup>
- 6.5 In central government, there is no code of conduct for members of Parliament, although Standing Orders prescribe rules for many aspects of MPs' activities. The House of Representatives (through its privileges committee) has an inherent power to adjudicate on and punish breaches of privilege and other contempts of Parliament. Members of Parliament who are ministers also have to comply with the Cabinet Manual, which sets out conventions about the role and responsibilities of ministers.
- 6.6 Codes of conduct are also common for local government bodies in foreign jurisdictions. In England, councils must adopt a code of conduct for their members (which must incorporate certain provisions of a prescribed model code). Members must give the council a written undertaking to observe the code of conduct (or else they vacate office). Each council must establish a standards committee, which

<sup>1</sup> In the future, boards of Crown entities are likely to be covered by codes issued by the State Services Commissioner.

promotes high standards of conduct by members, assists them to comply with the code, advises the council about the code, and monitors the code's operation.

- 6.7 Codes of conduct are also mandatory for local government in some Australian states, including New South Wales, Victoria, and Queensland. These states have all issued model codes, and the contents of the prescribed model code are mandatory in New South Wales.

### Contents of codes

- 6.8 We were pleased to see that the codes of conduct for most councils in New Zealand are closely focused on the activities, issues, and practices of concern to local government. Many of them are more tightly focused, if anything, than some types of codes used by governing bodies outside the local government sector. In other sectors, codes are often simply high-level generic statements of values. They may speak in general terms about concepts such as honesty, integrity, professionalism, transparency, accountability, efficiency, and leadership, but do not always offer specific practical guidance to the sector or entity.
- 6.9 New Zealand councils interested in reviewing and improving their codes may also wish to look at the model codes of conduct for England, New South Wales, and Queensland, which cover similar issues to New Zealand's codes, and in considerable detail.

### Enforcement

- 6.10 Most codes of conduct or codes of ethics in other sectors do not include formal enforcement processes. In the case of employees, any serious issues would ordinarily be dealt with as an employment matter, which will include the possibility of dismissal. But, for members of governing bodies, who are not employees, the codes do not usually appear to contemplate formal action (other than whatever other remedies may be available to have a member removed from office).
- 6.11 However, in local government in foreign jurisdictions, detailed enforcement processes and serious penalties are more common, and are sometimes significantly more prescriptive and punitive than in New Zealand.
- 6.12 In New South Wales, councils must have a conduct committee (usually consisting of the mayor, general manager and an independent person) to investigate alleged breaches of the code by members. The penalties available are similar to those adopted by councils in New Zealand. However, more serious matters can be referred to the Local Government Pecuniary Interest and Disciplinary Tribunal, which has the power to suspend or disqualify members for up to 5 years.

- 6.13 In England, there are 2 central monitoring bodies – the Standards Board for England and the Adjudication Panel for England. The Standards Board investigates allegations that a member of a council has failed to comply with the council’s code of conduct. (Indeed, members are required to report suspected breaches by their colleagues.) Detailed procedural requirements are specified.
- 6.14 After an investigation, the Standards Board may refer the matter to the standards committee of the relevant council, or to the Adjudication Panel. The standards committee or the Adjudication Panel will hold a hearing to decide whether the member has failed to comply with the code. A standards committee may take various actions, including suspension of the member from office for up to 3 months. The Adjudication Panel may suspend the member from office for up to a year, or disqualify the member from office for up to 5 years, and may award costs. The Adjudication Panel may also make recommendations to the council, and must publicise its determinations. Appeal rights are provided for.
- 6.15 The Standards Board receives more than 3500 complaints each year about alleged breaches of councils’ codes of conduct. In the 2004-05 year, 78 councillors were suspended or disqualified from office.
- 6.16 In England, codes of conduct have come under some public criticism, concerning:
- the scale and complexity of the administrative processes;
  - the political or trivial nature of some complaints; and
  - the suspension or disqualification of elected members, which some people view as undemocratic.



# Publications by the Auditor-General

Other publications issued by the Auditor-General recently have been:

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- Annual Plan 2006-07 – B.28AP(06)
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