



**Submission of Taituarā – Local Government Professionals Aotearoa
regarding the Local Government Commission
*Draft Code of Conduct for Elected Members***

Taituarā — Local Government Professionals Aotearoa (Taituarā) thanks the Local Government Commission (the Commission) for the opportunity to submit regarding the Draft Local Authority Code of Conduct. (the code).

Taituarā offers managerial and technical insights and perspectives into the policy process.

Taituarā is Aotearoa New Zealand’s leading membership network for professionals working in and for local government. Our thriving membership base consists of just over 1,000 members, drawn from chief executives, managers, and staff across all 78 local authorities.

Taituarā strengthens the local government sector by using our members’ insight and experience to influence the public policy debate. We encourage thought leadership by enabling our members to step back from the day-to-day agenda, share wisdom, create value, and build knowledge.

The Commission may ask why the body that represents managers and staff has submitted on a governance matter. Codes of conduct are required to set out member’s expectations of their behaviour toward staff (alongside themselves, and the public). Our members are called on to play a role in the ‘first response’ to a breach of the code. For example, it’s often the Chief Executive who is called on to make a preliminary assessment of a complaint and determine whether further investigation is needed.

A draft code should focus primarily on defining good governance behaviours.

Codes of conduct were intended to complement the other governance elements of the Local Government Act 2002, such as the governance principles of section 40. Codes are meant to formally establish and then support effective and appropriate governance behaviours by setting clear, agreed-upon expectations. They are meant to engender the collegiality and respect that are critical to the successful operation of any governance body.

That is to say that codes have an emblematic and educative role. The complaint and investigative process should be more of an adjunct to the code. Codes should state the desired behaviours members should aspire to – with the criteria for assessing each behaviour separately detailed.

We understand that this is the approach that the Code of Conduct for Members of Parliament takes (with the back-up of mechanisms such as the Privileges Committee). This is also the approach taken in recently released codes of conduct for elected members in the United Kingdom and Victoria.

We are further advised that LGNZ had commenced a review of their model code along these same lines and was well advanced at the time the Commission's review was advanced. We suspect that a discussion with LGNZ might help the Commission strengthen its discussion of good behaviour.

On that note, managing elected member behaviours is part of a wider ecosystem. Legislation plays an important role, and this goes beyond the Local Government Act to the Local Authorities (Members' Interests) Act, the Privacy Act, and even some securities law. Custom and practice also play a role.

Equally, the code will only be as good as the professional development that supports it. This is especially where the content of the code has been determined outside the council, and where it is intended that an outside party act both as the investigator and (often) the agent applying a penalty. Professional development that is engaging and based on adult learning principles e.g. learning based on case studies rather than 'death by powerpoint' can only reinforce the code.

The engagement to date has consisted of responding to a draft code. We have not seen any material that indicates whether and how the Commission intends to support the code. The Commission must clarify this in whatever 'cover report' is sent to the Minister.

Recommendation

That the Commission clarify whether and how it intends that the code be supported with professional development and resources.

The line between acting in the capacity as an elected member and a personal capacity is not clear.

"However, they (codes) 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."

Office of the Auditor-General, Local Authority Codes and Conduct (2006)

The code emphasises that actions undertaken while acting as an elected member fall within the scope of the code.

The line between what is an act undertaken in a personal capacity and what is an act undertaken as an elected member is not a clearly defined one. Elected members are often invited to various community events to address particular audiences owing to their status as an elected member. Their actions in these situations should fall within scope. Similarly, an elected member who expresses derogatory views about other members, staff or people engaging with councils in settings such as 'the pub' or on their personal social media accounts may also have a case to answer.

This is not to say that every act in any capacity is justiciable through the code process. For example, an elected member who runs a business and is rude to their customers is a matter appropriately resolved by customers taking their business elsewhere, not through the code.

Recommendation

That the draft code provide examples of situations of activity that might be considered 'personal' that could give rise to a breach.

Allowing the public to make complaints under the code of conduct requires further thought and elaboration.

Paragraph 14 of the code explicitly provides a member of the public with the right to make complaints that a provision of the code has been breached.

The Commission's previous work identified the potential for the 'weaponisation' of codes of conduct. We share these concerns and consider that the extension of 'standing' in this way is likely to further add to these risks.

Elected members and the council as a whole must balance competing interests and objectives in the decision-making process. Often, those decisions may advantage some parts of the community relative to others. We might see complaints under the code of conduct, for example, if a council decided to proceed with some project or made some decision that went against the weight of submissions or disadvantaged some part of the community.

In a more litigious society with a lower degree of trust in government than has existed previously, we see potential for this to create significant additional cost, especially as all complaints must go to independent assessment.

Paragraph 16 sets out some requirements that provide some protection in that complainants must describe the breach and provide evidence of the breach and refer to the provision that has allegedly been breached. We'd add a provision that specifically allows for dismissal of a complaint that has provided little or no evidence of a breach.

But we would go further. Complainants should provide a valid name and contact details. This would allow an investigator to ask a complainant further questions should the progress of an investigation warrant it. It would allow for application of natural justice *for the complainant* should, for example, an investigator find that some action of the complainant contributed to the breach and want to put that to them. And having to put a name to a complaint may also discourage frivolous, vexatious or malevolent complaints.

Recommendations

That all complaints under the code of conduct require a valid name and contact details.

That agencies receiving complaints under the code of conduct be given powers to dismiss complaints that do not include a valid name and contact details or lack both materiality and evidence.

An independent investigative process is essential but has cost implications.

To the best of our knowledge few current codes do not allow for the investigative process to be undertaken independently of the local authority. This is as it should be, having alleged breaches investigated by the presiding member of council, a council committee or the Chief Executive comes with the risks that the process may be tainted by predetermination, bias, or 'politics' and can be as destructive to relationships as the breach itself. We should also note that occasionally elected members can be 'in the right' and be in the minority.

Some codes require that staff (usually the Chief Executive) make a preliminary assessment of a complaint. The assessment process includes determining whether the matter falls within the code, whether there is evidence to support the complaint, and whether the matter is substantive.

While there are benefits to such a process (minimal cost, having existing knowledge of the protagonists), Chief Executives note that this process requires them to make some level of judgement on the behaviour of someone who is ultimately their employer. To the best of our knowledge, this situation is unique to the sector and not conducive to effective relationships between governance and management.

We support the notion that the initial assessment of any complaint also be performed external to council. The draft code allows the assessment and the investigation to be performed by the same person. At the margin there is potential for conflicts of interest in that the person doing the assessment is recommending whether they undertake further (paid) work.

We accept that this will come with an additional cost – though there is also some benefit in more effective council/CE relationships and the consequences of that. Taituarā also considers that this provides further support for the need both for professional development to support the code and for a central register of investigators.

More guidance is needed on the appointment of investigators.

An investigator acts in a quasi-judicial capacity. As the code stands, the investigator is the sole determiner of fact and determiner of whether and what sanction (if any) should be applied. There is currently no right of appeal in the code.

The credibility of the code of conduct is critically dependent on the credibility of the investigators across the country. The draft code, or material supporting their code, should provide more guidance on the necessary skills and attributes of an investigator. An investigator must be a person of good character. Possession of

investigative skills are also a 'must have'.¹ Skills at mediation and conflict resolution are also important – being a 'good listener' not least!

Another issue that needs careful consideration is the degree of independence that the investigator should have from council. There are arguments for and against an investigator being free from the type of preconceptions and potential conflicts that having say, the Risk and Assurance Committee Chair or a former elected member in the council might bring.

We submit that the pool of suitably skilled and independent people would be both highly finite and most likely concentrated in the larger centres. There is merit in a centrally maintained register of investigators. This could be Local Government New Zealand (as the representative body for councils as bodies corporate), the Department of Internal Affairs or the Commission itself.

Recommendations

That the draft code or supporting material contain further guidance on the appointment of investigators.

That the Commission further consider the merits of a central register of investigators.

The draft code appears reliant on further policies that 'localise' what is intended as a centrally set code.

At paragraph 12 the draft code identifies a suite of nine policies. These include the following:

- conflicts of interest
- confidential information
- election year policy
- communications policy
- media protocols
- social media guidelines
- governance role and responsibilities
- expenses policy.

As drafted, a failure to comply with any of them is prima facie grounds for a complaint under the code. But these policies are discretionary, and therefore both

¹ Investigative skills might include the following: data analysis, critical thinking, interviewing, research skills and ethical judgement.

the existence of the policies and content of the policies is likely to vary from council to council.² This seems to partially defeat the purpose of a centrally developed code of conduct.

While we recommend adding a statement to clarify that members are expected to comply with all applicable council policies, not only those listed. This ensures the Code remains relevant as councils develop new or tailored policies (e.g. on AI, delegations, appointments, procurement, fraud).

The Chief Executive's role as the employer is a statutory role – a policy around access to staff undermines this role and potentially creates legal risk.

The code needs to clearly state that s42, Local Government Act 2002, vests the responsibility of acting as the employer of staff in the Chief Executive. Only the Chief Executive may lawfully hire, fire, or instruct staff. The legislation currently before Parliament has not amended this in any way.

Section 42 means that access to staff is as the Chief Executive determines and solely as they determine. Implying that a council policy can override or amend this is factually inaccurate and could expose Chief Executives to risk in employment law. References to such policies should be removed from the draft code.

Sanctions go as far as the existing policy settings allow. We remain concerned as to the effectiveness of many of the proposed mechanisms.

The Local Government Act requires that elected members abide by the code but does not provide any statutory penalty for breaching the code, or even require that codes allow for sanctions (and therefore that any sanctions are binding).

The Minister's terms of reference for the Commission explicitly assigned the role of considering sanctions to the Department of Internal Affairs. The proposed set of sanctions collates the range of mechanisms used in the current codes. This is as far as sanctions can go without legislative backing.

We will draw this to the Minister's attention, but consider that the Commission should note that these sanctions and enforcement processes represent the limit of what is possible under current legislation.

Our concern is that there is no means to enforce many of the proposed measures. We have seen highly publicised examples of elected members refusing to abide by an investigator's direction to apologise, attend training or counselling, etc. That will

² We understand the approach is based on the Auckland Council Code of Conduct. We doubt that many other councils would have much beyond a communications policy, an election year and social media guidelines.

remain an issue—the draft code might minimise this by adding the refusal to abide by a sanction imposed as a result of a previous code of conduct complaint as a ground for a complaint.

That means that the only guaranteed effective sanctions remain the removal or suspension of an elected member from positions of responsibility and removing/withholding any training and travel.

These sanctions may not always fit the crime. In fact, withholding some training may deny the member an opportunity to see what ‘good looks like’ while playing publicly as ‘petty’ or the literal ‘wet bus ticket’. The enforcement of a suspension from a committee requires the presiding member instruct the member to leave and/then have them removed. We observe that this is not always conducive to building long-term relationships. These latter mechanisms also require the council to vote to implement them.

The assessment procedures need to more clearly separate the conclusions an assessor might reach and the actions they might take on concluding the assessment.

The initial assessment is an important step in the process. In this phase the assessor makes a conclusion as to whether there is prima facie evidence of a breach of the code, what the nature of that breach is, and based on both of those factors what the next steps should be. A good assessment process should result in the next steps in any response process being fair and proportionate to the nature of the alleged breach.

We see similar ideas and concepts repeated in paragraph 25 in that the terms ‘trivial’, ‘without substance’, ‘relatively minor’ and ‘not material’ are all used, often with a different consequence or action associated.

Complaints that involve allegations of conduct that could be a criminal matter should not be dealt with through these processes. If there is an allegation of potentially criminal behaviour then the investigator must refer the matter to the relevant authorities without taking steps to investigate the complaint. The purpose of this being to ensure that evidence is preserved for the proper authorities, and no-one’s right to due process is compromised.

We suggest that para 25 be redrafted along the following lines:

On receipt of a complaint, the investigator will undertake a preliminary assessment to determine the relative merit and seriousness of the alleged breach and the nature of the subsequent process that will be followed. The investigator will consider whether:

- *the complaint lacks evidence that a breach has occurred*

- *the complaint is trivial, vexatious, frivolous, or otherwise not made in good faith*
- *the complaint raises matters that should be dealt with by another agency of process. In particular, allegations of a breach that is potentially criminal in nature should be referred to the appropriate law enforcement agency*
- *any steps already taken to resolve the complaint. For example, any attempt at mediation or that the member has been removed from a role as Committee Chair. .*

Following consideration of these matters the investigator may:

- *dismiss the complaint*
- *recommend that no further action be taken*
- *recommend that the matter be referred to the Mayor or Chairperson to be dealt with under paragraph 33*
- *recommend that the matter be dealt with through mediation*
- *refer the complaint to another agency for investigation as a breach of statute. For example, this may involve referral to law enforcement, the Office of the Auditor-General or other agencies*
- *recommend that the complaint receive further investigation under the Code of Conduct.*

Other comments

Complaints involving the Mayor/Chair - it appears that the Code expects the Mayor/Chair to play a key role in resolving some complaints (e.g. referral to the Mayor is one option open to an investigator). This would be inappropriate if the alleged breach were related to some act of the mayor. In a similar vein the Mayor is an ex-officio member of all Committees, limiting this as an option for resolving a breach. The Commission should further consider this.

Undischarged bankruptcy – clause 15(5) of Schedule Seven, LGA requires local authorities to decide whether or not to require any member who is an undischarged bankrupt to declare that fact. We found no provision in the draft code that required disclosure. We're unsure whether this was a conscious decision (i.e. the Commission thought disclosure was not necessary) or an oversight.

Becoming an undischarged bankrupt raises legitimate questions about a member's financial management and governance skills and their judgement. Undischarged bankrupts may be legally prohibited from some roles e.g. as a director of a CCO where that CCO is a company. It may be unwise to assign them other roles such as the Chair of the Audit and Risk Committee. The code should include a requirement on undischarged bankrupts to disclose that status.

Conflicts of interest - the Code outlines the expectations of members to seek advice from the CE about conflict of interest issues. However, it may not always be

appropriate for the CE to advise individual members, particularly where the conflict relates to governance dynamics or the CE is directly involved. The code should simply require the member to seek appropriate advice.

Defamation – there is a Court of Appeal decision that holds that the qualified privilege defence (also known as the ‘political speech’ defence) is limited only to material regarding elected officials and does not extend to unelected officials such as the CE and their staff. (Vickery vs McLean 2000).