

# LGNZ Code of Conduct Guidelines



< Good local governance requires us to ensure that the way in which we undertake public decision-making is open, transparent and fair. >



## Preface

### Dave Cull, President, LGNZ

Like many public bodies around the world, councils in New Zealand are required to adopt a Code of Conduct. Codes of Conduct are designed to enhance trust in our public institutions by building the respect of citizens. There is nothing like conflict at the governance level to turn people off, feed negative journalism and undermine the morale and the good will of staff.

In 2016, LGNZ updated the Code of Conduct template that was unchanged since 2002 to incorporate recent legislative change, and new approaches to good governance, and to provide better advice for councils having to deal with alleged breaches. In addition, the changes were designed to shift the focus from just controlling poor behaviour to promoting an inclusive and positive governance culture, thereby removing some of the factors that can result in behavioural issues.

Based on the experience of councils applying the Code over the last three years, we have made further changes to the template. One of those changes is intended to more easily address minor and frivolous complaints by allowing Mayors and Chairs to make an initial assessment of complaints that they are not involved in. The second change concerns the addition of a section on social media.

Getting our governance cultures right is important and makes good economic sense. Councils that are trusted and respected are more likely to be able to enlist the support of their communities and other agencies in the goal of improving outcomes and meeting their strategic goals.

I hope you will find the Code helpful in strengthening your governance culture, building the mandate of your local authority and developing a great team.

Dave Cull  
President  
LGNZ

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## Introduction

The LGNZ Code of Conduct template 2019 updates the 2016 template which was published as part of the suite of KnowHow products following the passage of the LGA 2002. The LGA 2002 made the adoption of a Code of Conduct (the Code) mandatory. The 2016 template included a range of new features and draws on good practice introduced by councils over the past decade, particularly Gore District Council and Northland Regional Council. New features are:

- Refinement of the principles including a new principle that highlights the importance of elected members “pulling their weight”;
- Simplification of the roles and responsibilities section;
- Encouragement for members to participate in activities to build and maintain collaborative and cooperative cultures within the council;
- A new process for investigating and assessing complaints, including a ‘materiality’ test;
- Additional guidance on penalties or sanctions;
- Clarification that complaints can only be made by members and chief executives; and
- A more empowering and less prescriptive approach.

The 2019 template includes a section on social media and has a new process for dealing with trivial, minor and frivolous complaints.

## Why a Code of Conduct?

Codes of conduct are common features in local government systems in many parts of the world. In New Zealand the Code complements specific statutes, such as the Local Government and Meetings Act 1987, which are designed to ensure openness and transparency. Codes are an important part of the framework for building citizen confidence in our governmental processes. The template has four objectives:

- To enhance the effectiveness of the local authority and the provision of good local government of the community, city, district or region;
- To promote effective decision-making and community engagement;
- To enhance the credibility and accountability of the local authority to its communities; and
- To develop a culture of mutual trust, respect and tolerance between the members of the local authority and between the members and management.

The four objectives highlight the importance of achieving ‘good local government’, effective and inclusive decision-making, strengthened community credibility, and a culture of trust and mutual respect within the local authority.

They also contribute to making councils a more rewarding and satisfying place for elected members.

## Content

Codes of Conduct vary from place to place, and especially between jurisdictions, but there are certain critical elements a good Code should contain. In addition to the minimum requirements set out in the LGA 2002 (see cl.15 Schedule 7, LGA 2002), an effective Code of Conduct should include:

- Guidance for managing relationships and ensuring constructive behaviour, including processes for ensuring these are adhered to. This will ideally cover relationships with other members, staff, the media and (relationships with) the public;
- A statement of the different roles and responsibilities of governance and management. The Code should complement and reinforce the rules and statutory provisions set out in a council's standing orders;
- Provisions dealing with confidentiality of information received during the course of a members' duties, as well as situations when members are required to disclose information to the local authority and each other;
- Provisions dealing with conflicts of interest;
- Provisions dealing with ethical conduct, such as the way in which expenses may be claimed and soliciting or accepting gifts, rewards, or benefits;
- An explanation of the importance of adhering to the Code of Conduct and details of the procedures for investigating and resolving alleged breaches;
- Provisions designed to encourage courteous and constructive behaviours and so reduce the risk of poor behaviour and alleged breaches;
- Details of penalties or sanctions, such as what they are, when they might be applied, and the processes for their application (where these processes are within the control of council); and
- Provisions for the review of a Code of Conduct (both in terms of the statutory requirements and any processes the local authority has put in place).

All efforts have been made to ensure that these matters have been incorporated in the LGNZ Code of Conduct template.

## Considerations when designing a Code

Codes of Conduct are part of the “house rules” that govern relationships and behaviour and complement other corporate documents, such as Standing Orders and the Council’s Governance Statement. While some high level principles may be desirable in order to “set the scene”, a document that talks in vague generalities will be difficult both to adhere to, and to enforce.

- Codes of Conduct are not a means of preventing elected members from expressing their views.
- Codes of Conduct should promote effective working relationships within a local authority and between the local authority and its community. Among other things, a Code should promote free and frank debate which should in turn result in good decision making. Codes of Conduct should not be used in such a way as to stifle robust debate.
- Provided that an elected member does not attempt to present a personal view as anything other than their own view (and does not contravene other parts of the Code) they should be able to do so. Codes of Conduct are ideally designed to provide rules of conduct that promote debate and make it clear that personal views, and the rights of *all* members to express personal views, are to be respected.
- What a Code of Conduct does is set boundaries on standards of behaviour in expressing and promoting those views, and means of resolving situations when elected members breach those standards.
- Elected members should “own” the Code.
- Nothing is more likely to promote non-compliance with a Code than elected members being invited to “rubber stamp” a Code that others have prepared.
- It may be useful for elected members to “workshop” the Code template as soon as practicable after each triennial election; for example, at the Council’s induction workshop. Given that the Code deals with the relationship between elected members, the Chief Executive and staff, it may be desirable to have the workshop facilitated by an independent person.<sup>1</sup>
- Processes need to be put in place for investigating and resolving breaches of the Code.
- Applying a penalty or sanction under the Code should ideally be the last, rather than the first response. Most situations can be resolved without the need for sanctions. Often something as simple as an apology will resolve the issue. The original Code of Conduct template created difficulties for some councils as it provided little guidance on how to distinguish between minor and material breaches. This template has been specifically designed to enable non-material breaches to be dealt with outside the formal process of a full investigation by the Council or Committee.
- Most of all, the principles of natural justice must apply to the investigation, assessment and resolution of complaints made under the Code.
- Codes of Conduct cannot stand alone.
- Codes of Conduct work best when they are supported by other mechanisms.

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<sup>1</sup> EquiP, LGNZ’s business arm, may be able to help with such sessions or advise on suitable facilitators.

The most obvious supporting mechanism is training. A good Code will remind members of their obligations under the LGA 2002, the Members' Interests Act and the Local Government Official Information and Meetings Act 1987. However, a Code that replicated all of the relevant provisions would probably be of a size where no one person (either member or staff) could remember it all. All elected members should receive training in their obligations under these Acts at the beginning of each triennium. Other provisions of the Code should be covered during such training.

Codes of Conduct should also be linked to other procedural documents adopted by councils, such as Standing Orders. Standing Orders provide rules that set out processes and standards of conduct for meetings while the Code governs day-to-day and less formal relationships.

## The media

When designing the Code it is important to recognise the legitimacy of political debate and open discussion and ensure that provisions do not become an instrument to diminish this. It is important to note that the Declaration of Office, sworn by members, states:

“I will faithfully and impartially, and according to the best of my skill and judgment, execute and perform, in the **best interests** of [name of region, district, locality, community]”

Under the declaration, members must act in what they believe is the best interests of the community, district or region. It is up to individual members, in consultation with residents and on the basis of advice and research, to determine what 'best interests' for their regions or district means.

The Code must respect the spirit and intent of the New Zealand Bill of Rights Act and ability of members to express dissent. However, in doing so, members must act in accordance with the standards set out in the Code. Consequently the new template has not made any substantive changes to the 'dealing with the media' provisions from those set out in the original template.

## Information received in capacity as an elected member

Section 7.2 of the Code has been amended from the original version to place an obligation on members to disclose information received in their capacity as elected members which is relevant to the ability of a local authority to give effect to its responsibilities. The Code states that disclosure should be to “other members and, where appropriate the Chief Executive”.

When applying this requirement, it is important that the process for disclosing information is appropriate in the circumstances of each council. The purpose of the disclosure is to add to the stock of information held by a council in order to strengthen the ability of members to make informed decisions, and diminish risks that might arise if the information on which a decision has been made is incomplete.

Appropriate disclosure in particular circumstances may be to the Mayor, to the Chief Executive or in the course of a meeting, depending on the public nature of the information. In some cases a council may have a specific officer, such as a council ombudsman, charged with that responsibility.



## Register of Interests

The Code requires that members maintain a register of interests. A template register is set out in **Appendix A** of this guide. The register is limited to disclosures affecting members and their spouses or partners. It is important that members update their details when circumstances change. We recommend that staff regularly remind members to check that the register is up to date and relevant.

## Promoting a supportive governance culture

One important difference between the new and old templates is the addition of commitments designed to promote a supportive and inclusive governing environment and strengthen relationships at the governance level.

These provisions are intended to diminish the risk of conflict between members and between members and the public, and thereby avoid the likelihood of breaches. The new Code encourages members to review their collective performance and governance style in order to assess the degree to which their culture is both inclusive and supportive.

The reference to “equitable contribution” in the Values section has been added to encourage members to take all reasonable steps to fulfill the duties and responsibilities of office, such as attending meetings and workshops, undertaking relevant reading, preparing for meetings and taking part in relevant training workshops or seminars.

The intention is to provide councils with leverage to encourage members to do ‘their fair share’ of the tasks necessary to provide effective governance and representation and take part in exercises designed to improve relationships and teamwork.

## Creating an inclusive council

A proactive focus on building a positive culture is the subject of section 11, “Creating a supportive and inclusive environment”. The key parts of this section are designed to encourage members to:

- Take part in council induction workshops;
- Contribute to activities designed to seek agreement on vision, goals, objectives and operating values;
- Participate in processes for assessing the governing body’s performance (see **Appendix B** for a self-assessment form for consideration); and
- Undertake, where necessary, training to improve their knowledge of how the council works and being an effective elected member.

The provisions require that members should take “all reasonable steps” to fulfill their responsibilities as elected members. As a result of these commitments the possibility exists that a complaint could be laid against a member for having consistently refused to participate in council organised activities designed to build a better culture.

## Breaches of the Code

One of the ongoing problems with many of the Codes in use is the way they deal with the process of making, investigating and ruling on complaints. In its report on Codes of Conduct (OAG 2006) the Office of the Auditor General noted that many councils lacked a process for distinguishing between trivial and serious breaches of the Code and consequently spent considerable energy and resources hearing complaints on what are in effect matters of no concern. Many other issues have also arisen, such as:

- Failure to adequately guard against the risk of members with an interest in a complaint taking part in the decision on whether or not to uphold a complaint;
- Examples of members of the public making complaints about the behaviour of individual members for reasons that appear to be more concerned with settling 'political' differences; and
- Lack of preparedness. Many councils discover, when faced with a Code of Conduct complaint, that they have failed to establish in advance the processes for handling the complaint, thus exacerbating the original issue.

This section of the guide discusses the process set out in the new template for investigating, assessing and making decisions about complaints.

### Who can make a complaint?

The Code is designed to be a self-regulatory instrument and as a result complaints can only be made by members themselves and the Chief Executive. All complaints must be made in writing to the Chief Executive who is obliged to forward them to the Mayor/Chair or an independent investigator for a preliminary assessment.

### Decision-making options

Where a complaint is found to be material, the investigator will provide a report to the Council setting out the reasons why the allegation has been upheld and is material. The Council needs to have a process in place for discussing and making a decision on the investigator's recommendations. In some cases the governing body, or some of its members, may be interested parties in the complaint and should therefore not take part in discussions on the matter nor determine penalties.

To avoid such situations, the Council might consider establishing a Code of Conduct Committee (see **Appendix C** for Code of Conduct Committee terms of reference). The purpose of the Committee would be to consider any reports from an independent investigator and determine appropriate responses. An appropriate Code of Conduct Committee might consist of three members (a member of the governing body and two community representatives) chosen for their knowledge and experience, either by invitation or as a result of a call for expressions of interest.

The Council will need to decide whether the Code of Conduct Committee should have delegated decision making or recommendatory powers.

### Investigating complaints

One of the issues with the original template was the lack of detail about the process for investigating complaints and determining their materiality. Another issue involved the need to ensure processes are free of bias, especially when all councillors might be seen to be interested parties.

In order to address these concerns, the Code provides two pathways for dealing with complaints. On receiving a complaint the Chief Executive will forward it to the Mayor/Chair for an initial assessment or, if the complaint involves the Mayor/Chair, forward it to the independent investigator.

### **1. Forward the complaint to the Mayor/Chair for an initial assessment**

On receipt of a complaint made under the provisions of the Council's Code of Conduct, the Mayor/Chair will assess whether it is material or not. As the situation allows:

- Interview the complainant to assess the full extent of the complaint.
- Interview the member(s) subject to the complaint.
- Where a complaint is assessed by the Mayor/Chair to be trivial, frivolous or minor, either dismiss the complaint, require an apology or other course of action, or assist the relevant parties to find a mutually agreeable solution.
- Where a complaint is found to be material, or no mutually agreed solution can be reached, the Mayor/Chair will refer the complaint back to the Chief Executive who will forward it, along with any recommendations made by the Mayor/Chair, to the adjudication body established by the Council to assess and rule on complaints made under the Code.
- If the Mayor/Chair chooses, they may instead refer the complaint to the independent investigator, via the Chief Executive

### **2. Forward the complaint referred to Independent Investigator**

On receipt of a complaint that involves a Mayor/Chair, the Chief Executive will forward that complaint to an independent investigator for a preliminary assessment to determine whether the issue is sufficiently serious to be referred, with recommendations if necessary, to the Council's adjudication body for assessing and ruling on complaints.

In some cases, an investigator may choose to make non-binding recommendations, for example, where a pattern of non-material complaints has emerged that highlight a need for changes in council processes or an investment in capacity building.

## **Creating a panel of investigators**

At the beginning of each triennium, the Chief Executive will prepare a panel of investigators in consultation with the Mayor, Chairperson or Council. Investigators may be drawn from inside or outside the district or region. In putting together the list, the Chief Executive may call for nominations, invite members of the public with appropriate skills (for example retired judges who may live within the district) to be investigators, or contract with an external, such as Equip, to provide the service.

Councils may wish to develop a joint list of investigators.

## **The role of investigators**

The process set out in the Code gives an investigator responsibility to determine, without challenge, whether a complaint is material or not. The rationale for giving the investigator this degree of authority is to ensure the process is free of any suggestion of bias. It is also intended to reduce the cost of the complaints process, by reducing the time spent by members and officials. It also ensures that the Code process itself is less likely to be brought into disrepute.

In adopting the Code, members of the governing body agree to abide by an investigator's preliminary assessment. Under the process set out in the Code, members are informed of the result of a preliminary assessment and only if the finding is material will members have any involvement (and then only if there is no conflict of interest).

## Determining materiality

The complaints procedure is underpinned by the principle that councils (or committees) should only be involved in ruling on possible breaches of the Code when they are material (see **Appendix D** for flow chart). Consequently a level of clarity is required about how materiality should be determined. In the case of non-statutory breaches, the Code states that a breach is material if:

“...it would, if proven, bring the council into disrepute or reflect adversely on the local authority if not addressed.”

The notion of disrepute involves the local authority's reputation and the risk that specific behaviours will, in the mind of the public, undermine that reputation. Only if there is a real risk that reputation will be undermined should a breach be determined as material (see **Appendix E** for examples).

Other factors that might be considered when determining the level of materiality include whether complaints are intended to:

1. Intimidate or harass another member or employee;
2. Damage another member's reputation;
3. Obtain a political advantage;
4. Influence the Council in the exercise of its functions or prevent or disrupt the exercise of those functions;
5. Avoid disciplinary action under this Code; or
6. Prevent or disrupt the effective administration of this code.

Other factors include whether complaints are vexatious and have not been made in good faith. The investigator may take whatever actions they need in order to determine the materiality of a complaint, although investigations will need to be within whatever budgetary constraints have been set in their contract for service or approved by the Chief Executive.

## Process upon receiving a complaint

Having received a complaint in writing, the Chief Executive will:

- Notify the complainant and the respondent(s) that the complaint has been received and the name of the selected investigator (including information on the process that will be followed); and
- Provide ongoing updates to members on progress with the resolution of complaints received. This could be through a chairperson or Chief Executive's report.

## Process for non-material breaches

In the case of complaints that are non-material, an investigator can, if required, discuss the matter with the complainant and the respondent and may:

- Dismiss the complaint with no further action taken;
- Uphold the complaint but rule that, as it is minor and non-material, no action is required; or
- Uphold the complaint, noting its minor and non-material nature, and make a non-binding recommendation to the council, such as, that the respondent consider attending a relevant course or that a policy or practice is reviewed.

The investigator will present their findings to the Chief Executive, who will inform the complainant and the respondent at the earliest opportunity.

## Process for managing material breaches

Where an investigator finds that a breach is material, the following steps will apply:

- The investigator will inform the Chief Executive, who will in turn inform both the complainant and the respondent that the breach has been determined as material and outline the process to be followed.
- The investigator will undertake an investigation appropriate to the scale of the breach, which may include interviews with other affected parties, and prepare a report for the Chief Executive which will set out the rationale for their findings and may include recommendations for resolving the breach and/or appropriate penalties.
- On receipt of a report, the Chief Executive will send a copy of the investigator's findings to the complainant and the respondent(s) inviting them to reply in writing as to whether or not they agree to the findings and whether they wish to make a written submission for consideration by the Council or Committee.
- The Chief Executive will then prepare a paper, including the investigator's report and any submissions from affected parties, for a forthcoming meeting of the Council, or Committee with delegated responsibility, to consider complaints and determine penalties.

## Hearing by council or committee

On receipt of the Chief Executive's report, the Council or Committee will:

- If necessary, ask the investigator to provide a briefing on his or her findings and invite the complainant and/or respondent to speak to any submissions that might have been made.
- Decide whether a material breach of the Code has occurred and what, if any, penalty or action should occur in response to the breach.
- Inform the respondent and complainant of its decision in writing.

No member of the Council with an interest in the complaint may take part in the hearing or decision-making process, unless invited by the Council or Committee to speak to their submission.

**Note:** No appeal right is included in the Code as all members are able to make use of the processes set out in Standing Orders for revoking council decisions. In addition, a council decision can be subject to a judicial review and a committee decision can be subject to an Ombudsman’s review.

## Possible penalties and actions in response to a material breach

The Code reflects an agreement between elected members about the behaviours they expect from each other and themselves. It is therefore heavily reliant on individual good will and the ability of the Council, as a collective body, to exert moral suasion to either prevent breaches of the Code or promote a positive and constructive culture. However, where a material breach of the Code has been confirmed, a local authority might consider the following penalties and actions:

1. A letter of censure to the member;
2. A request (made either privately or publicly) for an apology;
3. A vote of no confidence in the member;
4. Removal of certain council-funded privileges (such as attendance at conferences);
5. Removal of responsibilities, such as Committee Chair, Deputy Committee Chair or portfolio holder;
6. Restricted entry to council offices, such as no access to staff areas (where restrictions may not previously have existed);
7. Limitation on any dealings with council staff other than the Chief Executive or identified senior manager;
8. Suspension from committees or other bodies to which the member has been appointed; or
9. Invitation to the member to consider resigning from the council.

A council or committee may decide that a penalty will not be imposed where a respondent agrees to one or more of the following:

- Attend a relevant training course; and/or
- Work with a mentor for a period of time; and/or
- Participate in voluntary mediation (if the complaint involves a conflict between two members); and/or
- Tender an apology.

Decisions to apply a non-statutory penalty for material breaches should be made in meetings, open to the public unless some aspect of the matter necessitates treating the matter “in committee”.

## Process to be followed in the case of statutory breaches

Where an investigator finds, in response to a complaint, that a member has breached provisions set in statute, such as a breach of the Members’ Interests Act 1968, the Local Government Official Information and Meetings Act 1987 or the LGA 2002, they will immediately provide their findings to the Chief Executive who will inform the relevant agency, as well as the complainant and the respondent.

## Possible penalties for statutory breaches

Although the local authority and its community will play a role in monitoring compliance with these provisions, outside agencies also have a role in monitoring compliance and more particularly in dealing with breaches of law. Penalties that may apply, depending on the type of breach, are:

- Criminal prosecution, conviction, and the resulting consequences (for breaches of the Crimes Act, the Secret Commissions Act or the Securities Act); or
- Prosecution by the Audit Office<sup>2</sup> under the Member's Interests Act which on conviction leads to the member's ouster from office (where a member votes or discusses a matter in which they are deemed to have an interest); or
- Inviting the Auditor-General to prepare a report on any financial loss or damage suffered by a local authority as the result of a breach (which could potentially lead to the member having to personally make good the loss or damage); or
- Sanctions made under the Privacy Act.

## References

OAG (2006) Local Authority Codes of Conduct available from:

<http://www.oag.govt.nz/2006/conduct/docs/conduct.pdf>

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<sup>2</sup> The Audit Office is an avenue for making complaints about breaches of the Members' Interests Act, but also functions as an advisor where there is doubt as to whether a particular course of action constitutes a breach, and can in certain circumstances give approval for members who might have an interest to participate in discussions and/or vote on a particular matter.

## Appendix A: Register of interests template

Member name:		
Spouse/partner name:		
Declared employment or business interest	Spouse/partner declared employment or business interest	Council appointment
Address of any land in which a beneficial interest is held within the Council boundaries (member and her/his partner)		
Address of any land owned by the Council rented to the member or spouse, or to a firm or organisation in which the member or spouse is a director or trustee		

## Appendix B: Self-Assessment Template

Please rate how you view the performance of the governing body in the following areas:



A rating of 1 indicates an excellent level of performance, through to a rating of 4 indicating that the collective performance of elected members could improve significantly.

1. We act together as a team to deliver value to the people of our district/region.  
1                      2                      3                      4                      (please circle)
2. We are effective in being part of a coordinated approach to promote the district/region.  
1                      2                      3                      4                      (please circle)
3. We have effective working relationships with key stakeholder groups.  
1                      2                      3                      4                      (please circle)
4. We have an effective working relationship with Council staff through members' interactions with the Chief Executive.  
1                      2                      3                      4                      (please circle)
5. We engage effectively with the community on issues of importance to them.  
1                      2                      3                      4                      (please circle)
6. We are well prepared and well equipped to make informed decisions in our capacity as elected representatives.  
1                      2                      3                      4                      (please circle)
7. We participate appropriately in debates and act collectively in the best interests of the district/region.  
1                      2                      3                      4                      (please circle)
8. Council decisions are made in an open and transparent fashion.  
1                      2                      3                      4                      (please circle)
9. We treat each other with mutual respect and demonstrate tolerance to different points of view in order to arrive at the best decisions for the district/region as a whole.  
1                      2                      3                      4                      (please circle)

10. We have a clear sense of direction and understanding

1

2

3

4

(please circle)

The objective of this assessment is not necessarily that all members should agree. It is to provide an indication of areas where we are doing well and areas where we can make improvements. The analysis of results will provide a useful starting point for discussions on the overall performance of the governance functions of the council and provide some insight into areas where action can be taken to raise performance.

## Appendix C: Code of Conduct Committee terms of reference

The Code of Conduct template offers two options through which a council may choose to consider a report from an investigator, namely consideration by the full council or consideration by a Code of Conduct Committee established specifically for that purpose. Reasons a council may choose to refer decision-making to a committee include:

- To ensure that members ruling on the complaint have no interest in the nature of the complaint and that the council's process is seen to be free of any suggestion of bias;
- To provide access to additional expertise through the ability to appoint members to the Committee who have experience and knowledge in making judgements on matters involving ethical behaviour;
- To reduce the risk of tension and conflict from a Code of Conduct process that may distract the governing body from its ongoing business.

### The powers of a Code of Conduct Committee

There are two ways of giving effect to the findings of a Code of Conduct Committee: binding recommendations or delegations.

- **Binding recommendation approach:** The Code of Conduct Committee described in this Appendix uses the binding recommendation approach whereby the Committee is responsible for providing the council's governing body with a recommendation in response to the findings of an investigator; recommendations that the governing body will adopt without discussion, other than questions of clarification. Appendix B of the LGNZ Code of Conduct states that "in accordance with the code, councils will agree to implement the recommendations of a Code of Conduct Committee without debate".
- **Delegation approach:** As an alternative, a council may prefer to provide a Code of Conduct Committee with specific delegations so that its decisions are final and can be referred to the Chief Executive or appropriate officer for implementation. Depending upon the style in which a council frames its delegations a simple delegation could be to consider the findings of a Code of Conduct investigator and determine the appropriate course of action.

The following draft terms of reference take the binding recommendation approach.

### Draft terms of reference

The purpose of the Code of Conduct Committee is to:

- Consider, in relation to a Code of Conduct complaint referred to the Committee, the findings of an investigator and make recommendations to the governing body of the council as to whether or not a penalty or action should be imposed and if so the nature of that penalty or action; and
- Consider any matters relating to the Code of Conduct and/or the behaviour of elected members referred to it by the governing body for advice.

In fulfilling its purpose, the Committee will:

- In considering a report from the Chief Executive, ask, if necessary, the investigator to provide a briefing on their findings and invite the complainant and/or respondent to speak to any submissions that might have been made;
- Conduct its business in open meeting, except where the alleged breach concerns matters that justify the exclusion of the public, in which case it will be a closed meeting;
- On consideration of the evidence, decide whether a material breach of the Code has occurred and what, if any, penalty or action should occur in response to the breach;
- Ensure that penalties or actions recommended in response to a serious breach of the Code are proportionate to the breach and consistent with the actions set out in clause 13.1 of the Code.

## Membership

The Committee will consist of three members:

- The Mayor or Regional Council Chair who will also be the chair of the Committee (except where there is a potential conflict of interest where the Mayor/Chair will stand aside and the committee will be chaired by another member of the governing body).
- Two non-elected members appointed by the council on the basis of relevant experience, knowledge and/or qualifications.

## Appendix D: Examples

### Example One

Cr Smith was elected on a platform of stopping the sale of council housing. The council has made a decision to sell the council housing. Cr Smith makes media comments against the decision after it is made. Those same statements suggested that council staff advising on the sale “must have owned shares” in the company that proposed to buy the houses.

Cr Smith’s actions in releasing a media statement criticizing a decision after it has been made would probably not in and of themselves constitute a breach of a reasonable code of conduct. Cr Smith has a right to express a viewpoint and, provided that he makes it clear he is expressing a personal view, issuing a critical press statement is an action he is entitled to take. If his statements failed to make it clear that he was expressing a personal or minority view then it may be a non-material breach of the Code, probably one where censure would be the appropriate response.

However, this media statement has made an allegation that staff advice was based on improper motives and/or corruption. This is a breach of most codes of conduct. It is most likely to be a material breach given the potential impact on the Council’s reputation and the reputation of staff.

Also, there is no qualified privilege attaching to public statements about employees which are false and damaging. In other words, elected members may be sued for defamatory statements made about employees.

### Example Two

Cr Jones is on the Council’s Works and Services Committee. The Committee is currently considering tenders for the construction of a new wastewater treatment plant and has received four tenders in commercial confidence. The Committee has recommended to Council that they award the contract to the lowest tenderer. Cr Jones is concerned the lowest tender proposes to treat sewage to a lesser standard than others. She leaks all four tenders to the local media. A subsequent investigation by the Council conclusively traces the leak back to her.

In leaking the tender information to the media, Cr Jones will have breached most codes of conduct. This breach has potentially serious consequences for the Council as a whole. It not only undermines elected members trust of each other, it also undermines the confidence of suppliers in the Council, which may lead to them not dealing with council in future, or even complaints under the Privacy Act.

In circumstances such as these, where an elected member fails to respect a commercial confidence, censure and removal from the Committee is an obvious first step. The Council may be liable for prosecution under the Privacy Act and even to civil litigation.

In the event that the council suffers financial loss, the Council may elect to ask the Auditor-General to prepare a report on the loss (or the Audit Office may do so on their own initiative), which may result in Cr Jones having to make good the loss from her own pocket.

### Example Three

Eastland Regional Council is conducting a performance review of the Chief Executive. It has established a CEO Performance Management Committee to conduct the review. In the course of that review the Committee meets informally with the Chief Executive to review which performance targets were met and which were not. The meeting notes that the CEO has been unable to meet two of his twenty performance targets that were set and resolves to

formally report this to the full Council for its consideration. At the conclusion of that meeting Cr Black leaves to find a local reporter waiting outside and makes the comment that “Jack White won’t be getting a pay increase this year because he didn’t meet all his targets”.

This action will probably constitute a breach of most codes of conduct in that it:

- Breached a confidence;
- Presumed to speak on behalf of council;
- Purported to commit council to a course of action before the council made a decision (or even met to consider the matter); and
- Failed to treat a staff member with respect and/or courtesy.

In addition to the provisions of the Code, Cr Black’s actions will severely undermine the relationship between the Chief Executive and the Council, which may well constitute grounds for litigation against the Council both in terms of employment and privacy law.

## Appendix E: Complaints Procedure – Flow Diagram

