

Transparency in Governance

The Case for a Code of Conduct & Sanctions

February 2002

Promotion and maintenance of high standards of conduct is an integral part of improving corporate governance, decision-making and service delivery.
*It's not an optional extra.*¹

ETHICS IN GOVERNMENT: AN HISTORICAL OVERVIEW

In the evolution of societal governance, the relatively new entrant onto the world scene, democracy, is particularly reliant on public confidence to maintain its legitimacy. The most basic tenet of democracy is voluntary compliance by its citizens. If they don't believe in their leaders, compliance is less likely. As a result, public trust in the integrity of public institutions and officials is essential to the success of democratic representation.

Public distrust of elected officials is not a product of 21st century origin. A lack of confidence in government is an historic premise. Ethical behaviour of political leaders has been of concern for over 4,000 years, as evidenced by the Code of Hammurabi or the oath of office for the Athenian city-state, early examples of ethical standards for public officials.

Over the intervening centuries, politicians at all levels have, to some degree, discouraged a closer look at individual character in order to minimise the importance of personal and public behaviour. Fortunately, throughout the last quarter of the 20th century, public calls for more transparency in government have led the way for the development of ethical standards to which those who deign to lead us must subject themselves. The resultant "sunshine laws" have shed new light on an old problem.

In a fundamental sense, ethics and democracy are intertwined. Political ethics, or the perception thereof, form the basis by which citizens judge official actions, attach responsibility and exercise accountability. Perhaps most important, an ethical governmental process is perceived to be a precondition for enacting and implementing good public policy.²

At their worst, governments are corrupt, rigging elections, holding power beyond their term of office, looting the public treasury, awarding contracts for kickbacks and, when deemed necessary, arranging for dissident citizens to "disappear." Even at their best, governments are often suspected of practising deception, altering budget figures, conducting shady land deals, misrepresenting economic or unemployment projections, and discrediting opponents to aggrandise themselves.

Throughout western democracies, enforcement of ethical standards has relied on public disclosure and an informed electorate. It is, at best, an imperfect arrangement, fraught with legal loopholes and myriad variations of acceptable behaviour. Most attempts to make laws more definitive are resisted. The multiple interpretations of the terms ethical, moral, and legal, indeed the often self-serving application of the overall concept, leaves room for everyone to claim the moral high ground and to proclaim total integrity in their actions which were enacted solely "for the betterment of the community."

¹ *New Ethical Framework*, #1, Sept, 2001, UK Department for Transport, Local Government and the Regions.

² Excerpts from "*Local Government Ethics Ordinances in California*," Charlene Wear Simmons, PhD, March, 1998, commissioned by the California Research Bureau, are included throughout this discussion.

The most effective codes are directed at prevention, providing general guidelines for ethical behaviour, and, to the extent possible, eliminating opportunities for unethical practices. However it should be noted that the most successful application of these values can only be accomplished *when the persons involved practice their own ethical standards during their public service.*

One could therefore postulate that the Judeo-Christian concept of control over self is the strongest component of ethical behaviour. It is a concept the human race has yet to master, hence the need for established criteria by which the public may be confident of open government with a reasonable assurance of high integrity in their elected officials.

One particular incongruity existing in the public sector is that public servants must be aware that even the appearance of inappropriate behaviour can be as damaging as actual misconduct. However, in practice, reliance on perception is one of the weaker aspects of democracy for it is often a false and misleading alarm, subject to misuse. In political debate one's opponent need only raise the spectre of impropriety to successfully denigrate those charged. Campaign smearing, usually unproven allegations, can have a disastrous effect when judiciously applied with exact timing. Subsequent public apologies of "I was misquoted," after the elections, do nothing to dispel the tarnished image of the defeated candidate. Politicians guilty of such unethical behaviour deserve to be held accountable for their inappropriate actions.

In consideration of the local government focus of this discussion, one particular—and rather positive—anomaly should be noted. When opinion polls are taken, the quantitative analysis of public confidence in government *increases* as we descend the hierarchical system of elected legislators. Hence local government consistently retains a higher level of public esteem than its more senior counterparts, regional, (state) or national.

1. The importance of requiring a code of conduct.

1.1 At the core of ethical behaviour are some basic standards that public officials should use to reach a level of conduct that strives to be above reproach.³ In today's politically astute world, the public is at once more acutely attuned to principle core values and less tolerant of ethical lapses by public servants.

By inclusion of a code of conduct and defined sanctions within the revised New Zealand Local Government Act, (*or specific authorisation for local authorities to enact their own*) elected officials in our city and district councils, as well as the community boards for whom these regulations should be applicable, would benefit from the improved transparency of local governance and the increased public trust engendered by the combination of self-regulation and widely disseminated, officially endorsed code of conduct guidelines.

1.2 Legislating standards of behaviour has become the primary way to elaborate on stated core values. When those values are defined, through legislative documents, they provide the guidance by which the great majority of society is able to ascertain actions that should—or shouldn't—be undertaken. However, when an action is neither legally prescribed nor legally proscribed, it falls to the individual to determine acceptability. For the public servant, that distinction is not quite so easy.

³ Ethics Handbook for Elected Officials and Advisory Board Members, City of Mesa, Arizona, January 1999.

For the smallest minority of public officials who fail to regulate themselves, or for those who seek to capitalise on what they perceive as inconsistency between what is legal and what is ethical, many countries have established written criteria, ie codes of conduct, to help them understand the distinction.

Simply stated, legal defines what *must* be done, while ethical defines what *should* be done. Hence an action may be quite legal . . . and quite unethical . . . at the same time.

This distinction alone would give rise to the need for a well-defined set of behavioural criteria aimed at establishing a visible guideline for ethical public service. However, it should be stated at the outset that no code of ethics can be expected to cover the scope and complexity of decisions and actions required of elected members or appointed officers who serve in the public sector.

- 1.3 As mentioned earlier, effective codes require a high degree of self-compliance to assure their efficacy. Most written codes are sustainable, workable documents primarily because they focus on broad, generally accepted principles. The more detailed a code becomes, the more likely it is that examples of specific infractions are omitted and the proverbial “loophole” becomes available. Michael Josephson, founder of the Josephson Center of Ethics, argues:

“If the rules and educational programs are too narrowly focused and not clearly grounded in fundamental principles of public trust, a legalistic view of ethics will prevail: if it’s legal, it’s ethical.”⁴

- 1.4 In spite of the blatant media headlines we occasionally see on the evening news, instances of outright corruption, bribery and felonious behaviour in the public sector are rare. New Zealand in particular, as described in paragraph 2.1, has an exceptionally high rating amongst countries that were evaluated for corrupt practices. Then why a code of conduct? Perhaps the most compelling reason for the establishment of a written code lies in the simple infractions that tend to occur in frequent civic interaction when people of disparate opinions meet to confer.

Respect and tolerance amongst citizens is the hallmark of a civilised nation. Respect and tolerance *while strongly disagreeing philosophically*, is the hallmark of a strong democracy. Such forbearance is necessary when a large group of people come together to in an attempt to enact laws that will govern their peers.

The establishment of a code of conduct is not an admission of inherent or systemic problems of magnitude. It is not a fearful response to deep-seated corruption or malevolent actions. The daily interaction between elected members and their frequent interface with council officers provides far more opportunity for a minor, yet disruptive infraction to occur.

The purpose a code does serve, however, is to assure that under the daily regimen of public activities, committee meetings, or working party disagreements, there is a well-developed, written expression of the need to respect those with whom we work and to assure that those who cannot practise tolerance for differing opinion are liable to censure and/or sanction.

⁴ Michael Josephson, “More Than a Set of Rules,” *Western City*, March 1989, p. 3

2. Practice in New Zealand and in other countries

- 2.1 In light of the stated purpose of this document, namely to advocate the establishment of governing legislation by which New Zealand elected members and appointed officers may conduct the public's business in tranquillity, and the secondary advocacy of applied sanctions for those who don't, perhaps it would be well to highlight the outstanding reputation New Zealand has earned worldwide for its level of integrity.

Transparency International, a global watchdog organisation rating public perception of government service, annually publishes a "Corruption Perception Index," (CPI.) The highest ranking country is perceived to be the least corrupt. The reader of this paper should be pleased to note that of the ninety-one countries rated in the most recent CPI 2001, New Zealand ranked 3rd, bested only by Finland and Denmark. Australia enjoyed 11th place, UK 13th, the USA 16th and on down the list to Bangladesh at 91st. Several hundred other countries declined to become involved. We could probably assume that these reluctant participants would not be likely to break into the Top Ten of CPI 2002.⁵

One might postulate that in the presence of such high marks for honourable public service, a specific code of conduct is not required. In fact, the opposite is true! It is precisely when reputations are riding high that government can continue to assure the public that all is well . . . and that it is going to remain so. Effecting a set of ethical laws as a result of scandal adds to public discredit, effecting an aura of latent cover-up, yet that is exactly the situation when many government ethics laws were established around the world. New Zealand has the opportunity to continue to lead the way, in essence, justifying the top ratings reflected in the Transparency International survey.

- 2.1 Throughout New Zealand, city and district councils have independently adopted and are currently enforcing local ethics laws. They vary from community to community, but all have accepted the basic concepts enumerated in Section 3, General Principles. The timing of the current Local Government Act rewrite provides an opportunity for a national law that supports, sustains and, in fact, strengthens local government's attempt to assure a high level of integrity.
- 2.2 Many nations, including the United States, Great Britain and Australia, have incorporated ethics codes and enforcement procedures relative to their locally elected officials. Perhaps most closely related to New Zealand's effort, in 2000, the United Kingdom enacted a revision of their local authority governing legislation incorporating mandatory ethical standards for local government. As an integral component of the newly adopted Local Government Act 2000, the UK Department of Transport, Local Government and The Regions drafted a Model Code of Conduct. It was laid before Parliament and approved in November, 2001. The proposed document may be modified by each Authority to suit their individual needs. However, if a locally modified version is not adopted within six months, then that particular Authority will be required to abide by the national Code as of May, 2002.

⁵ These ratings of course are public *perceptions* of corruption in the respective countries and the ratings are not based on demonstrated actions or successful prosecutions.

- 2.3 Queensland, Australia's Public Sector Ethics Act 1994, has required the Chief Executive Officer of a public entity to create and implement a code of conduct for the agency. The Act also established the office of Integrity Commissioner whose duties include the responsibility to help ". . . *avoid conflicts of interest and in so doing, to encourage confidence in public institutions.*"
- 2.4 Los Angeles, Seattle, New York City, and hundreds of smaller communities in the United States have implemented ethics laws, detailed codes of conduct, and the necessary enforcement mechanisms to assure compliance with accepted principles. Not surprisingly, these principles have universal application and have been determined to be uniquely applicable to a government entity seeking to raise its level of transparency, and accordingly, the public's trust.

3. General Principles of Ethics Standards

- 3.1 Many international organisations have endeavoured to codify the basic principles by which people govern themselves under ethical standards. Different standards apply around the world, but certain characteristics continue to repeat as review after review list the key criteria for a good public servant.

National and local statements of ethical principles generally touch on issues relating to professional conduct, leadership, teamwork, quality service, community involvement, public trust, innovation, and human resources. Key words often include fairness, integrity, respect, and trust, even reverting to the use of 'honour' and 'sacred' to add solemnity to the process.

- 3.2 A survey of nine countries by the Organization for Economic Cooperation and Development⁶ (OECD) found that an effective ethics infrastructure has eight key elements:

1. Political commitment
2. An effective legal framework
3. Efficient accountability mechanisms
4. Workable codes of conduct
5. Professional socialization mechanisms (including training)
6. Supportive public service conditions
7. The existence of an ethics coordinating body
8. An active civic society (including a probing media)

Ideally, these elements attain a balance that encourages good conduct through strong leadership, clear and comprehensive standards, widespread educational programmes, and effective enforcement mechanisms. The goal is to support ethical public organisations and to encourage and ensure ethical actions by public officials. The basic notion is that public office is a public trust, and that trust is endangered by unethical and corrupt actions in which private self-interest, or in some cases, even the *appearance* of self-interest, overrides the public good.

⁶ New Zealand is a permanent member of OECD. There are a total of thirty member countries, including Australia, the United States, and the United Kingdom.

3.3 The Hastings Center (Institute of Society, Ethics and the Life Sciences)⁷ examined the ethical implications of legislative representation and identified three basic principles: autonomy, accountability and responsibility. Following these principles, the Center concluded that elected officials are obligated to:

- Remain free from improper influence
- Provide constituents with sufficient information to exercise responsible democratic citizenship
- Contribute to an effectively functioning (governmental) process

Local government must not only be transparent in its governance procedure, it must be *seen* to be transparent in its actions. These principles, applied to everyday actions, establish a framework from which the public may evaluate the performance of their elected officials.

4. The case for enforcement and sanctions

4.1 Sound ethics management not only sets standards of behaviour, but also monitors compliance with these standards.⁸ This scrutiny keeps public servants accountable to the public for their actions.

4.2 Beyond the general principles for which most ethics laws seek compliance, there are more specific infractions they seek to preclude. The most commonly regulated of these fall into several categories as enumerated in a survey of government agencies:⁹

- General Conflict of Interest
 - Unauthorised use of government resources
 - Bribery, nepotism
 - Disclosure of confidential or privileged information for personal gain.
 - Gifts, gratuities, travel, contracts
 - Appearance of impropriety
- Outside Employment and Income
 - Prior authorisation required for outside employment
 - Representing outside interests before the jurisdiction
 - Honoraria, fees, gratuities, kickbacks
 - Loans to officials or employees
 - Business relationship with jurisdiction officials
 - Restricted income sources/investments
 - Contracts, inducements, fees
- Post-employment (Revolving door)
 - Negotiation for future employment while in public office

⁷ Since its foundation in 1969, the Hastings Center has worked to shed light on ethical and social issues.

⁸ OECD PUMA Policy Brief No. 7, *Building Public Trust: Ethics Measures in OECD Countries*, Sept 2000.

⁹ "Ethics Codes and Ethics Agencies: Current Practices and Emerging Trends," *Ethics and Public Administration*, ed., Carol W. Lewis, H. George Frederickson, M.E. Sharpe, New York, 1993, p. 142.

- Appearance before former agency
 - Lobbying former officials
 - Personal Disclosure
 - Range of financial interests, sources, investments, level of ownership
 - Professional and consulting fees, inheritances and trusts
 - Scope and coverage in relation to position
 - Level of scrutiny
- 4.3 While the above examples display the larger, more frequently abused areas of public service, codes of conduct should also seek to regulate the more mundane—and more frequent—behaviour that occurs amongst elected members and between members and officers of the authority that cause a breakdown in operational efficiency.

Empowering an independent Ombudsman to scrutinise mismanagement has become a popular instrument in over half of OECD countries, and more and more countries are appointing a specialised independent unit to oversee the behaviour of public servants.

Over one third of OECD countries have updated their core public service values in the last five years, and further reviews are being undertaken. In the course of the revisions, countries have re-emphasised “traditional” values while giving them a modern content and adding “new” values to reflect an increasingly results-based public service culture.

While almost all OECD countries criminalise active and passive forms of corruption committed by public officials, more and more countries are also criminalising other forms of corruption, such as indirect and attempted corruption. A growing number of countries are also seeking to punish breaches of core public service values and principles and the use of public office for private gain.¹⁰

- 4.4 Within the overall government structure to be found in New Zealand are a myriad of Local Authority Trading Enterprises (LATE’s.) In many instances, the local authority has retained a majority, if not total ownership of these entities.

Increasingly, consideration is being given to including these publicly owned, privately operated enterprises within the sphere of accountability for ethical behaviour. When OECD conducted a survey of member countries, several reports commented on this increasingly vulnerable aspect of public business.

“... changes in the legal and political forms of association, (e.g. the transfer of authority from ministries and directorates to public enterprises and state foundations / state-owned limited companies) result in a certain freeing of public employees from many of the rules, civil service norms and established practices that have characterised public administration up to the present day.”¹¹

Should unethical actions transpire within an entity majority owned by council, public outcry would be forthcoming similar to that to be expected within the government body itself. Accordingly, appropriate consideration should be given to inclusion of LATE’s, their officers and directors, under the code of conduct rules and sanctions.

¹⁰ IBID

¹¹ Norwegian Country Report, PUMA (OECD) Policy Brief, *Managing Government Ethics*, February 1997.

- 4.5 Of the eight elements listed under paragraph 3.2, three have been determined to be essential to the operational enforcement of what, otherwise, could be viewed as lip service to universally applied principles.

Element #2, An effective legal framework, #3, Efficient accountability mechanisms, and # 7, The existence of an ethics coordinating body, provide the enforcement apparatus by which sanctions may be applied to those who violate their oath of office.

- 4.6 One argument against sanctions that result in the suspension or disqualification of elected members from participation in the government process is the potential to disenfranchise the specific electorate from whence the member derives. Should the adjudicatory body determine to suspend or remove a member from public service, the respective constituency would need to be considered and potentially, another representative temporarily appointed to assure the continued contribution of the affected electorate.

5. Proposed enforcement mechanism: Standards Board or Ethics Commission

- 5.1 The most onerous task of enforcing behavioural standards is the adjudication process appropriate to the infraction. Within the political arena, it needs no explanation why this function should not be accomplished by the elected group to which the accused belongs. Namely, City or District Council or Community Board members should not sit in judgment of members of their respective elected bodies. Hence the need for an independent commission to which specific charges or violations may be referred.
- 5.2 A code of conduct without a prescriptive remedial process becomes an ineffective document, unable to sustain the gravity of import it seeks to apply. Many of the international communities that have adopted a set of ethical principles have assured their enforcement through the use of a locally established ethics commission. Other government agencies, citing the national need for sanctions, have established state-wide regulatory authorities to respond to local issues. These local or national commissions have one basic similarity: they are independently appointed and operate separate and distinct from the bodies they are obligated to regulate.
- 5.3 The United Kingdom has established investigatory and enforcement procedures throughout the UK. Recognising the importance of the three key enforcement elements referenced in paragraph 4.1, a significant component of the UK ethical process is the provision for a national Standards Board. Tasked with the responsibility of enforcing the Code, complaints are investigated, heard before a case tribunal, and, if the infractions are deemed authentic, punitive measures are imposed.

From the UK Local Government Act 2000, Part 3, the Standards Board may deliver disciplinary measures ranging from a public censure to complete disqualification from serving as an elected official. Section 79 states:

- 4) A person may be –
- a) Suspended or partially suspended from being a member or co-opted member of the relevant authority, or
 - b) Disqualified for being, or becoming (whether by election or otherwise) a member of that or any other relevant authority.

- 5) Where a case tribunal makes such a decision as is mentioned in subsection 4) a), it must decide the period for which the person should be suspended or partially suspended (which must not exceed one year or, if shorter, the remainder of the person's term of office.)
- 6) Where a case tribunal makes such a decision as is mentioned in subsection 4) b) it must decide the period for which the person should be disqualified (which must not exceed five years.)

Section 79 continues further with more examples of code infractions and punitive response measures from the Standards Board, but the above clauses suffice to demonstrate that the United Kingdom has determined that enforcement of mandatory codes of conduct is necessary to establish in the minds of the public that local governments are, and should be, serious about maintaining a high degree of integrity.

- 5.4 In New Zealand's recently revised draft Standing Orders, the Chair is granted the authority to remove a member for 15 minutes for inappropriate behaviour. This authority granted the Chair, in effect to *suspend* a member for 15 minutes, could be viewed as a precursor to the more stringent authority sought in replication of that which is found in the UK sanctions, ie to suspend a member either partially or completely, from committee or council assignment, as a result of inappropriate actions.
- 5.5 Local Government New Zealand, in their response to the LGA consultation document, were strongly in favour of the inclusion of a mandatory code of conduct. Specifically, they stated it should include provisions to address:
 - Individual behaviour of members;
 - Process for the mediation of conflicts;
 - Members' relationship with management and staff; and
 - Handling of complaints made against individuals (as distinct as to complaints with regard to decisions or service delivery issues)

The support afforded by LGNZ for inclusion of a code of conduct in the revised LGA, is representative of multiple local government authorities throughout New Zealand.

6. Danger of not providing a mechanism for enforcement

- 6.1 If local government is not self-regulated, with attendant punitive procedures for those who abuse the public trust, we can rest assured that in the event of an infraction, the entire organisation will be castigated by the other public enforcement agency, ie those addressed in paragraph 3.2, item #8, “. . . a probing media.” Media are all too eager to report government infractions, yet oft times, *they are the public's only source of knowledge that something unethical has transpired*. Consequently, they serve, de facto, as the omnipresent Ethics Commission of which we speak.
- 6.2 Enforcement is the process by which the honest remain honest. In a recent article written in the United States, a periodical that promotes public integrity, stated the weakness inherent in an ethical standard process without teeth.

. . . the great weakness in the regulation of ethics in this country is not so much the provision of the law, but the lack of concern for their

administration and enforcement. Independent regulatory agencies are critical to proper administration of ethics laws, but those agencies are generally too small, too weak and insufficiently independent.”¹²

6.3 The absence of an enforcement mechanism will not assure the failure of New Zealand local government to continue a high degree of integrity. As has been stated previously, New Zealand enjoys a worldwide reputation for ethical government. However we should not underestimate the importance of the general public being aware that appropriate institutions are in place to assure, *from a high visibility standpoint*, that their elected officials are subject to close observation and that governance is transparent.

7. Sanctions: Discussion of alternatives

7.1 Public sanction following infraction of an accepted principle has generally been limited to censure and, hopefully, to the public’s memory at the next election. In view of the nature of the public’s interaction with the government process, this limited regulatory mechanism has too often failed to correct inappropriate actions.

7.2 The current range of sanctions appropriate to the infractions run from censure to expulsion from public service for a defined number of years. Suspension from committees, either for a portion of the meeting wherein the tumult occurred or for months or years for more sustained disruption, financial penalties in the form of fines or income loss from suspension, and disqualification from public service are all severe forms of punitive action, but recent ethics commissions, and specifically the UK model, inclusive of a nationwide Standards Board, have shown that the trend is toward application of these sanctions.

8. Summary of issue

8.1 As the New Zealand Local Government Act is finalised, it is within the authority of the legislature, concurrent with the adoption of the Local Government Act, to include provisions for a code of conduct and an ethics commission, or, at the minimum, to grant local government the authority to establish both procedures.

This document strongly advocates for the inclusion of a mandatory code of conduct authority, consistent with locally applied contents and criteria, as well as the establishment of a state-wide ethics enforcement investigatory and tribunal process, or prescribed authority to establish such an independent body at the local level.

¹² Frederick M. Herrmann, “Bricks Without Straw: The Plight of Governmental Ethics Agencies in the United States,” *Public Integrity Annual*, 1997, Council of State Governments, p. 13.