

LAW REFORM COMMITTEE INQUIRY INTO REVIEW OF THE MEMBERS OF PARLIAMENT (REGISTER OF INTERESTS) ACT 1978

Joint Submission by Ray Purdey, Clerk of the Parliaments and Clerk of the Legislative Assembly and Wayne Tunnecliffe, Clerk of the Legislative Council

As part of its Inquiry into a Review of the *Members of Parliament (Register of Interests) Act 1978* (the Act) the Law Reform Committee has particularly sought our views on the following aspects of the administration of the Act:

- Whether, and how, Members of Parliament are able to seek advice about the Act and its application
- Whether, and how, training or guidance is provided to Members of Parliament about the Act, for example through induction programs for new Members of Parliament
- Current arrangements for making complaints about and investigating alleged breaches
- The number and types of occasions, if any, on which alleged breaches have been formally investigated and the nature and outcome of those investigations
- The number of requests for access to the register each year and, without identifying particular individuals, the proportion of those requests made by parliamentarians, media interests and the public
- Any administrative issues or difficulties that arise under the current Act that should be addressed.

We will deal with each one of those issues in turn.

Whether, and how, Members of Parliament are able to seek advice about the Act and its application

It is not unusual for Members of Parliament to contact the Clerks to seek advice about the Act and its application. In the main the contacts are of a verbal nature, but they can also be via e-mail or occasionally by letter. The types of enquiries made by Members fall into two categories – administrative matters, and declarable items.

Administrative matters relate to enquiries regarding the administration of the Act. Typically these types of enquiries are about how and when a Member should declare a change in their interests or what is the return period for an ordinary return. These types of enquiries are usually straight forward in nature, where the provisions of the Act are clear, and advice can be provided by the Clerks.

Advice is also often sought about whether particular matters might be declarable items under the Act or the Regulations. These types of enquiries are usually more complex in nature and provision of authoritative advice would require legal interpretation. In these

cases the Clerks will attempt to provide some guidance to Members; however, they are not in a position to provide legal advice. Any guidance given will always come with a warning that the Member should not rely on the advice and if they are still unsure about the issue they should seek their own professional legal advice, or take the cautious approach and declare the issue of concern in the register. Members will also be advised to consider consulting previous summaries of returns to see how other Members may have dealt with a similar issue in the past. Previous summaries of returns can be a helpful guidance tool; however Members need to be mindful that they should not blindly follow the declaration practice of other Members as they may end up perpetuating an inappropriate or illegal practice.

It is our experience that Members who seek advice want to ensure that their actions conform with the provisions of the Act. They are looking for authoritative advice to ensure that they record their interests correctly. The Clerks are unable to provide legal advice necessitating Members to seek their own legal counsel for complex interpretation issues. However, requiring each Member to seek personal legal advice is inefficient and will lead to inconsistencies in the interpretation of provisions. In our view it would be more effective for the Parliament to engage a legal expert to provide this advice to Members. The legal expert could be engaged on a retainer basis to provide advice to Members on request. This would provide some comfort to Members in that they would have someone to turn to for advice on the application of the Act and it would also ensure consistency in interpreting the provisions.

Whether, and how, training or guidance is provided to Members of Parliament about the Act, for example through induction programs for new Members of Parliament

New Members are made aware of, and provided with some basic advice about the Act. This information is provided during the induction program conducted for newly elected Members at the beginning of a new Parliament. The training is conducted by the Clerk of the Parliaments and the topics covered in relation to the Act are shown in the Appendix to this submission.

There is a small section in the Members Guide that provides some guidance to Members on the operation of the register of interests provisions of the Act.

Letters are sent to Members reminding them of the need to complete a primary or an ordinary return. These letters include information about the operation of the Act and the due date by which Members must submit their returns. Accompanying each of these letters is a copy of the Member's previous return (where applicable) and a copy of the appropriate primary or ordinary return form that must be completed and submitted by the Member.

Current arrangements for making complaints about and investigating alleged breaches

Section 9 deals with the failure to comply with the Act. It provides that any wilful contravention by any person will be a contempt of Parliament and may be dealt with accordingly. In addition each House is empowered to impose a fine of up to \$2,000 upon a Member who is found to be in contempt of the Parliament for breach of the Act.

In accordance with Parliamentary practice a contempt of the Parliament is dealt with in the same manner as a breach of privilege. A breach of privilege is considered to be a very serious matter by both Houses. These issues rarely arise and when they do the Houses have formal processes to deal with them. In the Legislative Assembly an alleged breach of privilege must first be raised with the Speaker who determines whether there is a *prima facie* breach. If that is the case, the Member making the allegation is given precedence in the House to move a motion to have the matter referred to the Privileges Committee for investigation. When the Privileges Committee determines that there has been a breach of privilege, the House will determine the penalty to be imposed upon the offending Member. In the Legislative Council an alleged breach of privilege is raised in the House by notice of motion. The House may deal with the matter directly or refer it to the Privileges Committee for investigation. Ultimately it is the House that will determine the imposition of any penalty.

As outlined below there are only five known occasions where alleged breaches of the Act have been formally raised in the Parliament. There are a number of plausible reasons why there have been very few breaches raised. These could include:

- Members of Parliament are assiduous in their actions and ensure that they always comply with the provisions of the Act;
- The process for raising a contempt of Parliament is too onerous and therefore alleged breaches are not raised; and
- Breaches of the Act can only be raised by Members of Parliament.

The Committee may wish to consider whether section 9 needs reviewing to provide for alternative and less onerous methods of dealing with breaches of the Act. Such a review could also consider whether members of the public are given the opportunity to raise compliance issues under the Act.

The sitting programs of both Houses are already very busy and having to allocate time to debate contempt issues will come at the expense of Members precious debating time on other important matters. Perhaps issues relating to the Act could be dealt with outside the Chambers and away from the political environment. Whistleblower complaints against Members of Parliament can be investigated by the Ombudsman under the *Whistleblowers Protection Act 2001*. One option could be to extend the Ombudsman's powers to investigate complaints regarding breaches of the *Members of Parliament (Register of Interests) Act 1978*.

The number and types of occasions, if any, on which alleged breaches have been formally investigated and the nature and outcome of those investigations

There are only five occasions of which we are aware that alleged breaches of the Act have been raised.

The first was in the Legislative Assembly in 1986 when the Member for Monbulk raised in the House a complaint against the Member for Gippsland West alleging -

that the member had committed a contempt of the House by – (a) failing to register his continuing pecuniary interest; (b) failing to disclose to the House his interests during various debates; and (c) voting in the House in contravention of Standing Order No. 2.¹

This matter was referred to the Legislative Assembly Privileges Committee for investigation. The Committee investigated the complaint and found that there had been no breach of privilege.

The second occasion occurred in the Legislative Council on 20 October 1993 when the Honourable D R White moved² a motion calling for the establishment of a board of inquiry into issues relating to then Premier Kennett's family advertising business and whether there had been a breach of the code of conduct in the Act. The motion was considered by the House and defeated.

A third occurred in the Legislative Council on 25 October 1995 when the Honourable D R White moved a motion³ to establish a select committee to inquire into the appointment of two renovation companies to undertake work on the then Premier Kennett's home and Crown Casino and whether there had been a breach of the Act and other legislation. The motion was considered by the House and defeated.

Another occurred in the Legislative Council on 9 April 1997 when the Honourable T Theophanous moved⁴ a motion calling on the Government to refer issues relating to the Honourable B N Atkinson's private retail consultancy business to the Privileges Committee to determine whether there had been a breach of the code of conduct in the Act. The motion was considered by the House and defeated.

The final occasion occurred in the Legislative Council on 5 December 2001 when the Honourable M M Gould moved a motion⁵ that sought to establish a select committee to inquire into the failure of a number of members to fully declare their pecuniary interest as required by the *Members of Parliament (Register of Interests) Act 1978*. The motion was considered by the House and defeated.

In relation to each of the motions considered by the Legislative Council, the outcome was determined by a division and the vote occurred along party lines.

The number of requests for access to the register each year and, without identifying particular individuals, the proportion of those requests made by parliamentarians, media interests and the public

The Committee would be aware that section 7(3) of the Act prohibits the Clerk of the Parliaments from allowing anyone to inspect the register or any Member's return. We assume that Members of Parliament and the media are aware of this provision as we rarely receive any requests for access to the register. Where such a request is received the person making the enquiry is made aware of section 7(3) and advised that they are unable to have access to the register. We are unable to provide any details about the

¹ Votes and Proceedings of the Legislative Assembly, Session 1985-87 Vol 1 p 327

² Minutes of the Proceedings of the Legislative Council, Session 1992-94 p 250

³ Minutes of the Proceedings of the Legislative Council, Session 1994-96 pps 275-276

⁴ Minutes of the Proceedings of the Legislative Council, Session 1996-98 pps 198-199

⁵ Minutes of the Proceedings of the Legislative Council, Session 1999-2000 Vol 2 pps 424-425

number of requests for access to the register as no record is kept of such enquiries. However, as mentioned above, such requests are very rare.

The media from time to time seek advice about the operation of the Act, including - how members are required to submit returns, what is required to be submitted in a return, and how information provided in returns is made available publicly. Following the closing date for the submission of Ordinary Returns, there will often be a number of enquiries from the media seeking advice on when the annual cumulative summary of returns is likely to be tabled.

Any administrative issues or difficulties that arise under the current Act that should be addressed

There are a number of administrative issues that could be addressed during this review.

Reporting failure to lodge returns on time

The Act requires Members to submit Primary and Ordinary Returns by specified dates. Although there is no compulsion to do so, the Clerk of the Parliaments currently reports to the Parliament the names of those Members who have not submitted their returns by the due date. This is an important compliance and accountability measure and the requirement of the Clerk of Parliaments to report these breaches should be included in the Act.

Reporting summary of returns to the Parliament

Section 7(4) requires the Clerk of the Parliaments to lay before each House a copy of the summary of information contained in the Primary Returns and the Ordinary Returns. It is our current practice to also table from time to time during the year a "Summary of Variations", and a "Cumulative Summary" of each Member annually. Perhaps this section could be amended to give effect to our current practice.

Development of guidelines

It is impossible to draft legislation to deal with every eventuality. Section 6 of the Act sets out the information that must be included in Primary and Ordinary returns. However, changing circumstances necessitates the need for interpretation of some of the legislated requirements. We give two examples.

- Section 6(f) requires Members to declare the address or description of any land in which they hold a beneficial interest. When the Act first came into operation Members would declare the full address of their residential property and other land beneficial interest. In more recent times, for safety and privacy reasons, Members only divulge the suburb or town in which their residential and other properties are located. While the expression "the address or description of any land" is unclear some form of guidance that took into account the current concerns of Members would be helpful.
- Section 6(h) requires a Member to declare the particulars of any gift above the amount of \$500. As this amount has reduced in relative terms it has caused some issues for Members. If a Member were to be offered tickets to a live performance, the amount could clearly be under \$500. However, over the course of a year if a

Members were to be offered additional tickets on separate occasions by the same person or organisation, the cumulative amount might well exceed \$500 in value. Whether the Member should declare the cumulative amount is unclear.

This problem could easily be overcome if the Act provided for the issuing of guidelines to assist with the interpretation of its sections. The Presiding Officers or a specialist legal adviser might be the appropriate authority to issue such guidelines.

Location of the Code of Conduct

We raise the issue as to whether the "Code of Conduct" for Members of Parliament should be removed from this Act and enacted in a separate piece of legislation. The Code of Conduct seems to be irrelevant to the current Act which deals predominantly with the Members of Parliament register of interest. The move of the Code to separate legislation would provide greater transparency and less confusion for both the Members and the public.

Reference to monetary amounts

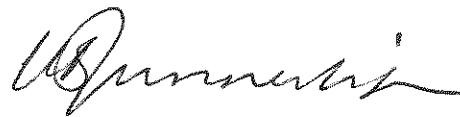
There are four references in the Act⁶ to amounts exceeding or equal to \$500. These amounts were set at \$500 when the Act was drafted in 1978. According to the Reserve Bank of Australia, \$500 in 1978 is equivalent to just over \$2,000 today. Consideration should be given to increasing these monetary references to a figure more properly reflecting their value in today's terms.

Change monetary value of fine to penalty units

Section 9 empowers the Houses to impose a fine upon a Member of an amount not exceeding \$2,000. This figure should be deleted and replaced with a reference to "Penalty units" which would make it consistent with the framing of more recent legislation. The value of the fine should also be increased to reflect its current worth in monetary terms today.



Ray Purdey
Clerk of the Parliaments and
Clerk of the Legislative Assembly
29 May 2009



Wayne Tunnecliffe
Clerk of the Legislative Council

29 May 2009

⁶ sections 4(a), 4(b), 6(c) and 6(h)

Appendix

OUTLINE OF TOPICS COVERED AT NEW MEMBERS SEMINAR

REGISTER OF MEMBERS INTERESTS

[Members of Parliament (Register of Interests) Act 1978]

- Submit a Primary Return within 30 days of being sworn
- Submit an Ordinary Return each year within 60 days from 30 June
- May notify variations from time to time
- Clerks of Parliaments will prepare summary of information
- Wilful contravention will be a contempt of Parliament
- Act also set out a Code of Conduct for Members of Parliament
 - Primary responsibility is performance of public duty
 - Conduct must not bring discredit upon the Parliament
 - Must not advance private interests by use of confidential information
 - Shall not receive fee on account of position as a Member
 - Must declare interest in any matter upon which they speak in Parliament