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GPO Box 3161
MELBOURNE VIC 3001
Ph: (03) 9670 6422
Fax: (03) 9670 6433
Email: info@libertyvictoria.org.au

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Liberty Victoria submission to the
Review of the Members of Parliament (Register of Interests) Act 1978
Victorian Parliament Law Reform Committee

Liberty Victoria – Victorian Council for Civil Liberties Inc

GPO Box 3161
Melbourne VIC 3001
Ph: 9670 6422
Fax: 9670 6433
Email: info@libertyvictoria.org.au

Contact persons:

Michael Pearce
President
Ph: 9225 6440
Email: email@michaelpearce.com.au

Anne O'Rourke
Vice-President
Ph: (03) 9905 2469 (w) 0409 334 581 (m)
Email: Anne.O'Rourke@buseco.monash.edu.au

Prepared by Alice Vaillant

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1. Introduction

- 1.1 Liberty Victoria—The Victorian Council for Civil Liberties Inc—is an independent non-government organisation which traces its history back to the first Australian civil liberties body established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia’s compliance with the rights and freedoms recognised in international law.

Liberty Victoria believes that these objectives cannot be met without open, transparent and accountable government. Liberty Victoria has campaigned extensively in the past on issues concerning democratic processes, government accountability, transparency in decision-making and open government.

- 1.2 We welcome this opportunity to comment on the Review of the *Members of Parliament (Registry of Interests) Act 1978*

2. Liberty Victoria’s submission to the Public Accounts and Estimates Committee

- 2.1 On 3 August 2007 Liberty Victoria provided submissions to the Public Accounts and Estimates Committee inquiry *Strengthening Government and Accountability in Victoria*.

- 2.2 In that submission Liberty Victoria supported the seven criteria of the Nolan Committee (United Kingdom), which it had determined were essential to a citizen’s trust in Parliamentarians and the workings of the political system itself. Liberty Victoria reasserts its support for the criteria set out below:

Selflessness:—Holders of public office should make decisions solely in terms of the public interest. They should not do so in order to obtain financial or other material benefits for themselves, their family or their friends.

Integrity:—Holders of public office should not place themselves under any influence or other obligation to outside individuals or organisations that might influence them in the performance of their official duties

Objectivity:—In carrying out public business, including making public appointments, awarding contracts or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability:—Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness:—Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands it.

Honesty:—Holders of Public Office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership:—Holders of public office should promote and support these principles by leadership and example

3.3 Reasons why Self Regulation is not an option

3.1 Luke Raffin in his paper titled “Individual ministerial responsibility during the Howard years: 1996–2007” in the *Australian Journal of Politics and History* (54.2 (June 2008) page 225) makes a compelling argument why self regulation is not an option.

3.2 The paper clearly demonstrates, through case studies, how the Howard government’s *Guide on Key Elements of Ministerial Responsibility* (1996) was interpreted by that government to achieve its political needs rather than address the citizen scepticism about parliamentarians and cynicism about the workings of the political system itself. We suggest that the register and any new codes addressing politicians’ behaviour and interests must be transparent in their motivation and applicability.

4. Reasons for amending/strengthening the *Members of Parliament (Register of Interests) Act 1978*

4.1 There is a need to address:

- The scepticism of the citizen about parliamentarians. This requires parliamentarians to explain and justify their actions.
- The cynicism of citizens about the political system because of actual or perceived unethical conduct/ behaviour of parliamentarians.

This is more difficult to achieve where distrust exists because of the perception that the government is not serving the interests of the wider community as a result of its interventionist actions in disputes and where policies appears to be driven by blind ideology, self interest or pressure groups rather than the needs and aspirations of the community.

There is a need to overcome: the political culture which sees parliamentary positions as a prize to be acquired and retained at any cost rather than a responsibility.

5. The two purposes of a Code of Conduct

5.1 Public:

To provide the public with criteria by which they can judge which actions of parliamentarians are acceptable and which are unacceptable.

5.2 Institutional:

To enhance the workings of Parliament through guiding the behaviour of parliamentarians, both inside and outside the Parliament. The latter covers relationships which parliamentarians may have which may cause the public to question their objectivity in the performance of their duties.

5.3 A Code of Conduct provides a foundation for the development of responsible and honourable action, a basis for developing the skills and patterns of behaviour necessary for honourable public life.

6. Narrow codes of conduct versus wide codes of conduct

6.1 Narrow codes of conduct are those that focus on financial conflicts of interest and gifts. Wider codes of conduct encompass broader activities and legislative functions.

6.2 As the aim of the code of conduct is to strengthen the democratic process, this can only be achieved through accountability and transparency which promotes a higher standard of behaviour amongst parliamentarians and trust in the system of government.

6.3 Victoria has a narrow-based code of conduct and we believe that it should adopt a wider code of conduct which meets the standards of conduct required for citizens to have trust in the workings of the political system. Ontario (Canada) has enacted a wider code of conduct, the *Members' Integrity Act 1994*. It imposes a wider range of duties and prohibitions regarding a member's conduct than that of the Victorian legislation.

6.4 **Liberty Victoria submits that the Ontario *Members' Integrity Act* should be considered when considering amending the *Members of Parliament (Register of Interests) Act 1978*.**

6.5 Preamble to the Act

The preamble of the *Members' Integrity Act 1994* sets out principles which aim to reconcile "private interests and public duties" of parliamentarians. It states four principles:

(1) Parliament can most effectively represent its people if members "have experience and knowledge in relation to many aspects of life ... and if they can continue to be active in their own communities, whether in business, in the practice of a profession or otherwise".

(2) The Members have a duty to represent their constituents' interests in Parliament and to the Government.

(3) Members "are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence in the integrity of each member, maintains the [Parliament's] dignity and justifies the respect in which society holds the [Parliament] and its members".

(4) Members are expected to act with integrity and impartiality that will bear the closest scrutiny.

In substance they appear to be similar to those of the *Members of Parliament (Register of Interests) Act 1978* except they require Members to think in terms of integrity, which is omitted in the Victorian legislation.

7. Proposed Amendments by Liberty Victoria

Definition of family and exercise of voting rights

7.1 The *Members of Parliament (Register of Interests) Act 1978* Act currently fails to define "Member's family". This should be clearly defined in the Act for both the following purposes:

- disclosure of information which needs to be placed on the Register of Members' Interests.
- the exercise of Members' voting rights. This is limited to a member using insider information for their own purpose or benefit and receiving a financial benefit through misuse of their position

7.2 Under the *Members' Integrity Act*:

- disclosure for the purposes of the register applies only to interests of Members, Members' spouse, minor children and dependant children. (This is a correct approach, as to require public disclosure of interests of a wider range persons with whom a Member may have a connexion would be an unjustifiable breach of those persons' privacy).
- for the purposes of the exercise of voting rights a Member is prohibited from making a decision or participating in the decision making if the "Member knows or reasonably should know that in making of the decision there is an opportunity to further the member's private interest or improperly to further another person's private interest." There is also a prohibition on the use of insider information for the benefit of the member or to further another person's private interest.

7.3 These provisions reflect the approach taken in the Australian Corporations Law 2001, which imposes specific duties on directors, officers and employees not to use their position to further their own interests and those of other persons. Under s191 of the Corporations Law a director must disclose any material

personal interest that they have to the board; in some cases the common law requirements is more onerous.

- 7.4 It submitted that the Victorian legislation should impose specific duties on Members identical to those set out in the *Members' Integrity Act*. Further, there should be a specific requirement to disclose any conflict to Parliament. Failure to do this should carry penalties.

8. Awarding of government contracts to former members

- 8.1 There is an obligation placed on both the Executive Council and its former members

Obligation of the executive council

The executive council is prohibited from

- awarding a government contract or granting a benefit to a former member within a 12 month period of their ceasing to be a member.
- awarding a contract where a member makes representations on that contract or benefit on their own behalf or on behalf of another during 12 months after ceasing to be a member.

The former member

The former member is prohibited for a period of 12 months after ceasing to be a member from:

- accepting government contracts
- making representations before parliament regarding government contracts for their own benefit or another's.
- receiving any benefit from another who has received or benefited from government contract.

- 8.2 The Australian Democrats in their former Bill for a Code of Conduct argued that a two year prohibition is more acceptable. Liberty submits that the longer the prohibition period the less likely the person's position as a minister would be seen as giving him/her a benefit.

9. Obligation on members to report non compliance of duties of member

- 9.1 Under the *Members of Parliament (Register of Interests) Act 1978* there is no provision which compels a member to report another Member's non compliance with the provisions of the Code of Conduct. It is submitted that the Code of Conduct should impose a specific duty on Members to disclose such information about other Member.

10. Penalties

- 10.1 Under the *Members of Parliament (Register of Interests) Act 1978* failure to comply with a provision of the Code of Conduct may result in a \$2,000 fine and failure to pay that fine results in the Member's seat being vacated.

- 10.2 Under the *Members' Integrity Act* the Commissioner in charge of administering the Act can make the following range of recommendation to the Assembly:
- that no penalty be imposed.
 - that the member be reprimanded.
 - that the member's rights to sit and vote in the assembly be suspended for a specified period or until a condition imposed by the Commissioner is fulfilled
 - that the member's seat be declared vacant.
- 10.3 Liberty submits that:
- the Victorian Act should include a wider range of penalties
 - that some form or penalty be imposed where a Member breaches the Code of Conduct
 - profits made by Members in breach of their duty be disgorged, as they are like profits made by directors of companies in breach of their fiduciary duties
 - monetary penalties should be more severe.

Failure of both Acts

Both the abovementioned Acts fail to address wider issues involved in responsible government. Both Acts fail to connect integrity with more than avoidance of conflict of interest. Some of the more evident failures are listed below.

11. Ministerial responsibility for departmental actions

- 11.1 Under the Westminster system of government ministers were responsible for "culpable" acts of their departments and would resign for such actions.
- 11.2 Self regulation is not plausible in this area. Under the Howard government Ministerial guidelines, ministers were held accountable if they were aware of problems but had not acted to rectify them. For significant department wrongdoings they were responsible for the matter where they should have known about matters of departmental administration which came under scrutiny. As the guide was not law, the then Prime Minister interpreted the guide as requiring the Minister to resign only where there was deliberate wrongdoing or illegality.
- 11.3 Under the *Australian Corporations Act 2001* directors are required to act with due care and diligence. Although they are permitted to delegate their duties (the degree of delegation not being a settled matter) the acts of the delegate are seen as the acts of the directors thus the directors are liable. There are exemptions. Reliance on the advice of others is qualified by the need to read the advice, understand it and make an independent informed decision.
- 11.4 It is submitted that similar provisions should be inserted in the code of conduct. Such duties would not be onerous on Members and would avoid scenarios such as the "children overboard" affair going unpunished. It would lessen the

likelihood of misleading information being presented to Parliament and the electorate.

12. Unwarranted or groundless actions against citizens and fellow parliamentarians

12.1 Unwarranted attacks on citizens and parliamentarians who have no effective means of redress. The Victorian Public Service Code of Conduct and the Queensland *Public Sector Ethics Act* require respect to be shown for individuals. Respect would entail ensuring as far as possible that information presented to Parliament has a reasonable and warranted basis. Baseless attacks such as that by Senator Heffernan on Justice Michael Kirby should not be allowed. Parliamentary privilege should not be used in a vexatious manner. Such use should attract a penalty. Given the severe impact such statements can have on individuals, penalties attached to breach of such provisions should be commensurate.

12.2 The Victorian Parliament has passed legislation dealing with the use of confidential information of citizens but it is submitted that this should be contained in the Code of Conduct.

13. Requirement for induction course and continuing education for all parliamentarians

13.1 As the aim of the Code of Conduct is to change the culture of parliamentarians, education about the Code of Conduct and what conduct is required of parliamentarians is essential. Continuing legal education is a prerequisite for re-registration of Legal Practitioners and an attendance at an Ethics seminar is required every five years.

13.2 It is submitted that a similar requirement should be inserted into the Code of Conduct. Parliamentarians may be aware of the need to disclose their material interest but may fail to appreciate what other standards are required for them when discharging their duties.

14 Independence of Archivists be maintained and the protection of documents

14.1 The Code of Conduct should prohibit parliamentarians from destroying documents or information contained in any form or authorising others to do so.

15. Establishment of an independent body to administer the Act

15.1 There should be an independent person who or body which administers the Code of Conduct. That person or oversight body should be able to carry out proper investigations and have access to all relevant documentation.

16. Other considerations include the following:

16.1 Government and members of Parliament must represent all constituents and not just promote personal interests. Australia is a secular, pluralist democracy and

parliamentarians should be mindful of promoting the values that contribute to the maintenance of democracy.

- 16.2 Under the *Freedom of Information Act* more information about government decisions should be accessible to the public. There has been a disturbing trend towards hiding information under the guise of “commercial-in-confidence”. The option towards confidentiality favours the business sector. If there is a use of public funds in a project then the emphasis should be on public disclosure of information not private privilege.

17. Conclusion

- 17.1 Liberty Victoria submits that the amendments proposed above would satisfy the seven criteria of the Nolan Committee referred to at the beginning of this submission. They should be adopted in Victoria.