



LEGISLATIVE COUNCIL

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Law Reform Committee

OFFICE OF THE CLERK

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7 May 2009

Dear Mr Scheffer

Review of the *Members of Parliament (Register of Interests) Act 1978*

I refer to your correspondence dated 17 April 2009 seeking information and assistance in relation to your committee's review of the *Members of Parliament (Register of Interests) Act 1978*.

Please find attached a submission to your inquiry on behalf of the New South Wales Legislative Council.

Yours sincerely

Lynn Lovelock
Clerk of the Parliaments

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Received 14/05/2009

Law Reform Committee VICTORIAN LAW REFORM COMMITTEE

**REVIEW OF THE MEMBERS OF PARLIAMENT (REGISTER OF INTERESTS)
ACT 1978**

Submission by the New South Wales Legislative Council

BACKGROUND

The following section provides a background to the arrangements regulating the conduct of members of the New South Wales Parliament.

The Code of Conduct for Members of the NSW Parliament

Since 1998, the conduct of members of both Houses of the NSW Parliament has been regulated by a Code of Conduct for members. The code was most recently re-adopted by the Council on 27 June 2007 by resolution expressed to have 'continuing effect unless and until amended or rescinded by further resolution of the House'.

The Code of Conduct consists of a preamble and seven clauses. The individual clauses deal with: conflicts of interest, bribery, gifts, use of public resources, use of confidential information, duties as a member of Parliament and, in a new clause adopted in 2007, secondary employment or engagements. One of the most important provisions in practice is clause 4, which requires members to 'apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources'. A copy of the Code of Conduct is enclosed.

Enforcement of the Code of Conduct is the responsibility of the individual Houses. However, the Independent Commission Against Corruption (ICAC) has jurisdiction to make findings of 'corrupt conduct' against a member, including that a member has committed a 'substantial breach' of the code. Specifically, section 9(1) of the *Independent Commission Against Corruption Act 1988* includes within the definition of corrupt conduct:

- (d) in the case of conduct by a minister of the Crown or a member of a House of Parliament - a substantial breach of an applicable code of conduct.

This direct linkage between the Code of Conduct for members and external review by an independent watchdog agency, the ICAC, is believed to be unique in Australia.

In your correspondence, you invite comment on issues that might need to be considered were Victoria to adopt similar arrangements.

One issue that might need to be considered is that of parliamentary privilege. While the ICAC has wide investigatory powers, it should be noted that under section 122 of the *Independent Commission Against Corruption Act 1988*, parliamentary privilege is expressly preserved in relation to the freedom of speech and debates and proceedings in Parliament.

This limitation on the capacity of the ICAC to investigate or adjudicate on breaches of the Code of Conduct for members where the conduct in question is protected by parliamentary privilege raises the issue of how such matters should be investigated.

In 2003, in a report to the Speaker of the Legislative Assembly,¹ the ICAC raised various possible models for addressing this issue:

- The appointment of a parliamentary committee, such as the Privileges Committee, to conduct investigations into possible breaches of the Code of Conduct. However, the ICAC acknowledged that in the past, parliamentary committees in various jurisdictions have made observations on the limited capacity of committees to conduct investigations of this type.
- The establishment of a Parliamentary Commissioner to investigate such issues. However, the ICAC noted that in New South Wales, where the ICAC can investigate all corrupt conduct allegations apart from those to which parliamentary privilege applies, the likely need to call on a Parliamentary Commissioner would be limited.
- An amendment to the ICAC Act to allow the Parliament to waive parliamentary privilege for specified matters which are referred to the ICAC by resolution of the House. This was one option recommended by the ICAC.²
- The appointment of an officer of the Parliament to undertake an investigation into possible breaches of the Code of Conduct on a needs basis. This was ICAC's preferred option. It suggested that such a procedure 'would provide a means for the Parliament to enforce its own privileges in such a way as to ensure public confidence in the integrity and impartiality of the outcome yet still maintain the independence and self-regulation of the House'. The ICAC also recommended the provision of certain safeguards in the appointment and duties of the investigating officer.

In 2004 the NSW Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics considered the options recommended by the ICAC in 2003, but concluded that it would be preferable for the Assembly to consider options for investigating matters coming before the ICAC which involve parliamentary privilege 'on a case by case basis'.

This issue remains unresolved.

The Parliamentary Ethics Adviser

Following the adoption by both Houses of the Code of Conduct for members in 1998, the Council agreed on 24 September 1998 to the appointment of a Parliamentary Ethics Adviser.

¹ ICAC, *Regulation of secondary employment for Members of the NSW Legislative Assembly*, Report to the Speaker of the Legislative Assembly, September 2003.

² The NSW Legislative Council would have misgivings about any move to provide for waiver of privilege, in light of the experience of the Council in 1997 when the *Special Commissions of Inquiry Amendment Act 1997* was passed and the House subsequently adopted a resolution to waive privilege in relation to comments made in the House by the Hon Franca Arena MLC.

The position is part-time, and is appointed by the President and Speaker on a renewable contract with the joint Clerks.

The function of the Parliamentary Ethics Adviser is to advise any member of Parliament, when asked to do so by that member, on ethical issues concerning the exercise of his or her role as a member of Parliament. These include the use of entitlements and potential conflicts of interest, including those relating to post-separation employment for ministers and former ministers. The role excludes the giving of legal advice. Advice is kept confidential unless the member who requested the advice gives permission for it to be made public. The House can call for the production of records of the Parliamentary Ethics Adviser, but only if the member to which the records relate has sought to rely on the advice or has given permission for the records to be produced to the House.

A copy of the resolution appointing the Parliamentary Ethics Adviser is also enclosed.

The Register of Pecuniary Interests

Section 14A(1) of the *Constitution Act 1902* (NSW) provides that the Governor may, subject to certain qualifications, make regulations with respect to the disclosure by members of either House of their pecuniary interests.

In 1983, the *Constitution (Disclosures by Members) Regulation 1983* was made pursuant to section 14A(1). The regulation, as amended, provides for four types of returns disclosing members' pecuniary interests – primary returns, ordinary returns, supplementary ordinary returns and discretionary returns.

New members must lodge a primary return with the Clerk within three months of the date on which they take the pledge of loyalty under section 12 of the *Constitution Act 1902*. Before 1 October each year, members are required to lodge an ordinary return for the 12 months ending 30 June in that year, except for new members whose primary return date was between 1 May and 30 June that year. Members must also lodge a supplementary ordinary return before 31 March for the period 1 July to 31 December for the previous year. The regulation also provides for members to lodge a discretionary return with the Clerk at any time.

Members must lodge a return even if they do not have any interests to disclose.

Matters required to be disclosed by members (in brief) include:

- Real property: Members are required to list in a primary return, ordinary return or supplementary ordinary return the address or title particulars of all property in which they have an 'interest'. An 'interest' is defined to mean any estate, interest, right or power whatever, whether at law or in equity, in or over a property.
- Sources of income: Members are required to disclose in a primary return each source of income that the member received, or reasonably expects to receive, in the period commencing on the primary return date and ending on the next succeeding 30th June, and in an ordinary or supplementary ordinary return each source of income received by the member at any time during the return period. Members are not required to disclose their salary of office, or any of the benefits/allowances determined by the Parliamentary

Remuneration Tribunal. Only income from sources other than Parliament need to be disclosed.

- Gifts: Members are required to disclose in an ordinary return or supplementary ordinary return each gift they receive during the return period, and the name and address of the donor of each such gift. This includes wedding gifts or other such gifts. It also includes any disposition of property to a member, whether in money or in some other form. Gifts under \$500 do not need to be disclosed. However, if a member receives more than one gift from the same source, it is necessary to aggregate the value of each gift received during the return period to determine whether in total they exceed the \$500 limit.
- Contributions to travel: Members are required to disclose in a primary return, ordinary return or supplementary ordinary return the name and address of each person who made any financial or other contribution to any travel undertaken by the member during the return period, the dates on which the travel was undertaken, and the names of the States, Commonwealth Territories and overseas countries in which the travel was undertaken. Members must also disclose contributions to accommodation incidental to a journey or contributions to 'honeymoon' travel in lieu of a wedding gift.
- Interests and positions in corporations: Members are required to disclose in a primary return, ordinary return or supplementary ordinary return the name and address of each corporation in which they had an interest or held any position (whether remunerated or not) during the return period, together with the nature of the interest, or the description of the position held, in each such corporation, and a description of the principal objects of each such corporation (except in the case of a listed public company). The disclosure of interests in corporations in most circumstances relates to stocks, shares, debentures or the like.
- Positions in trade unions and professional or business associations: Members are required to disclose in a primary return, ordinary return or supplementary ordinary return the name of each trade union and each professional or business association in which they held any position during the return period (whether remunerated or not), and a description of the position held in each such union or association.
- Debts: Members are required to disclose the name and address of each person to whom they were liable to pay any debt. Members are not required to disclose a debt where the debt is owed to a relative, or where the amount to be paid does not exceed \$500. The same rule of aggregation applies to debts as applies to gifts. Members are also not required to disclose a debt to a bank, building society, credit union or other person whose ordinary business includes the lending of money and the loan was made in the ordinary course of business of the lender.
- Dispositions of property: Members are required to disclose in an ordinary return or supplementary ordinary return particulars of each disposition of real property by the member at any time during the return period, but only where the member retained either wholly or in part, the use and benefit of the property or the right to reacquire the property at a later time. This includes disposition of real estate, grants of leases as well as any other type of property.

Further details on these matters required to be disclosed by members of the NSW Parliament are available on request.

The Clerk is required to compile and maintain the 'Register of Disclosures by Members of the Legislative Council'. The register is open to public inspection at the office of the Clerk between the hours of 10.00 am and 4.00 pm on any day except Saturday, Sunday or a day which is a public holiday throughout New South Wales. Members of the Council may inspect the register on any day that the Council is sitting, outside of the days that the register is open to public inspection.

Section 14A(2) of the *Constitution Act 1902* provides that if a member of either House wilfully contravenes any regulation made under section 14A(1) of the *Constitution Act 1902*, including the *Constitution (Disclosures by Members) Regulation 1983*, the House may declare the member's seat vacant. Section 14A(3) sets out certain requirements which apply to such declarations.

QUESTIONS RAISED BY THE LAW REFORM COMMITTEE

The following section provides a response to the four specific questions raised by the Law Reform Committee in its correspondence of 17 April 2009.

Whether, and how, members of parliament can seek advice about the arrangements and their application

As indicated, members may seek advice in relation to the Code of Conduct for members from the Parliamentary Ethics Adviser. Those requests may relate to use of entitlements, such as staff, travel and official letterhead or stamp allowances, or to the interpretation of rules for use of entitlements. The Ethics Adviser is also an independent point of contact for advice on more difficult questions arising in relation to exercising the role of a member of Parliament, such as whether there is a potential conflict of interest in particular circumstances. Ministers and former ministers may also ask him for advice on post-separation employment.

Of note, however, the Ethics Adviser is not able to give legal advice; the Adviser only gives opinions and not rulings. It is up to Members how or whether they adopt the advice given.

In his annual report to November 2007, the Ethics Adviser indicated that he had provided advice to three members/former members in relation to ethics issues for the year. In his interim report to June 2008, he indicated that he had provided advice to a further five members/former members for the six months to June.

Members may also seek advice in relation to the Code of Conduct from the Clerk.

Members may also seek advice from the Clerk when completing their returns disclosing their pecuniary interests. However, the Clerk has repeatedly emphasised that she provides advice only in relation to the disclosure requirements. Members may need to seek their own legal advice in relation to the application of the disclosure requirements to their individual circumstances.

Whether, and how, training or guidance is provided to members of parliament about the arrangements, for example through induction programs for new members of parliament.

The Clerk arranges induction programs for all new members of the Legislative Council. Following the 2007 periodic election all 8 newly elected members of the Council attended a formal two-day induction program. This combined Legislative Council specific sessions and other sessions held jointly with the Legislative Assembly covering common material. The Code of Conduct, ethics and the pecuniary interest disclosure requirements were important aspects of this induction program.

Members elected to fill casual vacancies between periodic elections are provided with one-on-one customised induction programs, including the provision of information about the Code of Conduct, ethics and pecuniary interest disclosure requirements. The Department of the Legislative Council seeks to continuously improve its induction programs for new members and during 2010 will be devoting considerable resources to developing the induction program for members who will be newly elected at the 2011 periodic election.

All members receive a copy of the current version of the Legislative Council Members' Guide, which is a publication providing detailed information about the entitlements of members, together with a chapter devoted to members' ethics. This chapter describes the reporting requirements under the Code of Conduct for members, the role of the Parliamentary Ethics Adviser and the role of the ICAC.

The Code of Conduct for members, the resolution appointing the Parliamentary Ethics Adviser, a brochure on the Ethics Adviser, and the pecuniary interest disclosure forms are also available on the Parliament's intranet site. The *Constitution (Disclosures by Members) Regulation 1983* is available separately on the NSW legislation website.

Members are advised by the Clerk in advance of the relevant deadline of the requirement to submit an ordinary or supplementary return under the pecuniary interest disclosure regime.

Finally, Part 7A of the *Independent Commission Against Corruption Act 1988* provides for the establishment of an ethics committee by each House. The designated ethics committee of the NSW Legislative Council is the Privileges Committee. Its functions include undertaking 'educative work relating to ethical standards applying to members'. In this regard, the Committee recently distributed to all members of the Council a revised brochure on the Parliamentary Ethics Adviser.

Current arrangements for making complaints about and investigating alleged breaches

There are various mechanisms for reporting alleged breaches of the Code of Conduct for Members which may amount to corrupt conduct.

Section 10 of the *Independent Commission Against Corruption Act 1988* provides that an individual member, or any person, may make a complaint to the ICAC about a matter that concerns or may concern corrupt conduct. Section 11 of the Act further placed a duty on certain individuals, including ministers and the principle officer of a public authority, to report to the Commission

any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct.³

In addition, under section 73(1), both the Council and Assembly may, by resolution of the House, refer a matter to the ICAC for inquiry and report. Under section 73(2), it is the duty of the Commission to fully investigate a matter so referred for investigation.

Section 13 of the *Independent Commission Against Corruption Act 1988* describes one of the principal functions of the ICAC as conducting investigations into corrupt conduct. It provides in part:

- (1) The principal functions of the Commission are as follows:
 - (a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:
 - (i) corrupt conduct, or
 - (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
 - (iii) conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur,
 - (b) to investigate any matter referred to the Commission by both Houses of Parliament,
 - (c) to communicate to appropriate authorities the results of its investigations,
 - (d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct, ...

Section 13(3)(a) further provides that the ICAC may make findings and form opinions on the basis of the results of its investigations (section 13(3)(a)).

Where the ICAC finds that a member of Parliament has engaged in 'corrupt conduct', it may report that finding to the Parliament. No penalties are attached to such a finding, and the finding has no effect on a member's legal rights and obligations. However, findings invariably have a significant impact on reputation. Further, the finding may lead to the House itself, in the exercise of its inherent power to discipline members, taking action against the member concerned (for example, by expelling the member concerned for conduct unworthy of a member). If the ICAC finds that the relevant conduct could also amount to a criminal offence, it may recommend obtaining the advice of the Director of Public Prosecutions with respect to a prosecution.

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

As indicated, under section 73(1) of the ICAC Act, both the Council and Assembly may, by resolution of the House, refer a matter to the ICAC for inquiry and report. Under section 73(2), it is the duty of the Commission to fully investigate a matter so referred. A motion for the Council to refer a matter to the ICAC under section 73(1) has been moved twice in the Council,

³ The NSW Legislative Council is not a public authority. Accordingly, section 11 does not apply to the Clerk of the Parliaments, although its intent is observed in practice.

however the motions were either amended to remove the reference to the ICAC or negated. However, the lower House has referred matters to the ICAC on several occasions.

The Council does not have information on other references that may have been made confidentially to the ICAC under sections 10 or 11 of the *Independent Commission Against Corruption Act 1988* in relation to the conduct of members.

However, there have been various preliminary inquiries or assessments of complaints about the conduct of members by ICAC which have involved ICAC requiring the production of information by order under the ICAC Act, for example in relation to the use of entitlements by members, but which have not led to formal investigations.

Some preliminary investigations have led to formal inquiries. In 2003 and 2004, the ICAC conducted an investigation into the conduct of the Hon Peter Breen MLC, following anonymous allegations that he was falsely claiming the Sydney Allowance, had used his parliamentary staff to assist in the publication of a book and had misused his travel allowance. This investigation was significant in that it raised various issues in relation to the execution of search warrants at Parliament House. However, in the context of this submission, the ICAC found that despite some doubt as to Mr Breen's principal place of residence and his use of staff to assist with publication of his book, the evidence did not justify a finding that Mr Breen had acted dishonestly such as to engage in corrupt conduct.

There is only one case in which the ICAC has made a finding of corrupt conduct against a member of the Council (based on an allegation by an anonymous staff member); that of the Hon Malcolm Jones in 2003. Following the release of the ICAC report in which the finding of corrupt conduct was made, Mr Jones was given an opportunity on 3 September 2003 to address the House, which he did. The next day, the Leader of the Government in the House gave notice of a motion for Mr Jones' expulsion, but shortly before the House met to consider the expulsion motion Mr Jones resigned to the Governor.

In relation to the disclosure of pecuniary interests, as indicated, Section 14A(2) of the *Constitution Act 1902* provides that if a member of either House wilfully contravenes any regulation made under section 14A(1) of the *Constitution Act 1902* the House may declare the member's seat vacant. There has not been a case in which a member's seat has been declared vacant under this provision. However, on 25 September 2002 the House requested the Standing Committee on Parliamentary Privilege and Ethics to investigate and report on whether the Hon Eddie Obeid, Minister for Mineral Resources and Minister for Fisheries, had 'wilfully contravened' clause 12 of the *Constitution (Disclosures by Members) Regulation* by failing to disclose interests and positions in 29 corporations and if so, what, if any, sanctions should be enforced. The Committee found that the member had made errors in his pecuniary interest returns, but that the errors were not 'wilful contraventions' of the regulation, and that no sanction could be recommended. During the debate on the Committee's report in the House, Mr Obeid apologised to the House for the errors in his returns.