

Standing Committee on Parliamentary Privilege and Ethics

Report on review of the Members' Code of Conduct

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Terms of Reference

The Legislative Council first adopted a code of conduct for its Members on 1 July 1998, in the 51st Parliament.¹ It re-adopted the code in the 52nd Parliament on 26 May 1999, with an additional final paragraph.² A copy of the code is attached at Appendix 1.

Section 72C(6) of the *Independent Commission Against Corruption Act 1988 (NSW)* provides:

The designated committee³ is to review the code of conduct at least once in each period of two years.

The Legislative Council has resolved that the Standing Committee on Parliamentary Privilege and Ethics is the 'designated committee' for these purposes.⁴

¹ *Minutes of the Proceedings of the Legislative Council*, No. 54, Wednesday 1 July 1998, entry 9.

² *Minutes of the Proceedings of the Legislative Council*, No. 5, Wednesday 26 May 1999, entry 2. The additional paragraph provides that the resolution of the House adopting the code has continuing effect unless and until amended or rescinded by resolution of the House.

³ Section 72A provides that 'designated committee' means the committee of the Legislative Council that is for the time being designated under section 72B. Section 72B requires that a committee of the Legislative Council is to be designated by resolution of the House as the designated committee for the purposes of Division 1 of Part 7A of the Act. Division 1 of Part 7A includes section 72C(6).

⁴ *Minutes of the Proceedings of the Legislative Council*, No. 2, Wednesday 24 May 1995, entry 21(2)7; *Minutes of the Proceedings of the Legislative Council*, No. 4, Tuesday 25 May 1999, entry 12(4)8.

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Summary of Recommendations

Recommendation 1 *page 17*

That, as the Code of Conduct appears to be satisfactory for its intended purpose, no change to the Code is required at this time.

Recommendation 2 *page 18*

That, as part of its educative role, the Committee compile, publish, and maintain a compendium of all the current provisions and guidelines concerning Members' conduct, pecuniary interests, and resources.

Chair's Foreword

The community places a high trust in Members of Parliament and expects high standards of ethical behaviour.

The adoption of a Code of Conduct by the Legislative Council and the Legislative Assembly in 1988 was an important milestone.

This report outlines the background to the Code of Conduct, including the relationship between the Code and the *Independent Commission Against Corruption Act 1988*. The report also discusses developments since the adoption of the Code, including observations about the Code made by the Independent Commission Against Corruption (ICAC), determinations made by the Parliamentary Remuneration Tribunal (PRT), the appointment of a Parliamentary Ethics Adviser, and developments in other Parliaments. Reference is also made to the review of the Code by the Legislative Assembly's Standing Ethics Committee, and to a recent request from the Legislative Assembly for the ICAC to review adequacy of the Code in relation to paid consultancies and advocacy.

The Committee notes the strict legal context in which the Code operates and the consequent need for it to be clear and precise. The Committee recommends that, as the Code appears to be satisfactory for its intended purpose, no change to the Code is required at this time.

The Committee highlights a number of important issues that have been raised by the ICAC, and others, in recent years, in relation to Members' ethics. The Committee suggests a number of mechanisms by which these issues can be addressed, including education seminars for new Members and other forms of ethics education, clarification of PRT determinations, and the issuing of guidelines by the Presiding Officers as to the use of Members' entitlements. In relation to education seminars, the Committee has pointed out the desirability of such seminars drawing attention to the fact that it is unacceptable for a Member to use his or her position as a Member, or the influence deriving from that position, for personal financial gain.

I would like to thank the Committee Secretariat for their work on this report. Finally, I would like to thank my fellow Committee Members for their constructive approach to this report and for their work on the Standing Committee on Parliamentary Privilege and Ethics over the last four years.

Hon Helen Sham-Ho MLC
Chair

Chapter 1 Background

Obligation to review the code of conduct

- 1.1** The Code of Conduct for Members of the Legislative Council was first adopted by resolution of the House on 1 July 1998.⁵ It was re-adopted, in the 52nd Parliament, on 26 May 1999.⁶
- 1.2** Section 72C(6) of the *Independent Commission Against Corruption Act 1988* ('the ICAC Act'), provides that the 'designated committee' is to 'review the code of conduct at least once in each period of two years'. The Standing Committee on Parliamentary Privilege and Ethics was 'designated' as the relevant committee, by resolution of the Legislative Council on 24 May 1995.⁷

The code of conduct and the ICAC Act

- 1.3** The current provisions of the ICAC Act relating to the Members' Code of Conduct are contained in section 9 and Part 7A. Those provisions were inserted in 1994, in the wake of the decision of the NSW Court of Appeal in *Greiner v ICAC*.⁸
- 1.4** That decision concerned the validity of findings of 'corrupt conduct' which had been made by the ICAC against the then Premier and a government Minister. 'Corrupt conduct' is defined in the Act as conduct which falls within sections 8 and 9.⁹ The ICAC had found that the conduct in question satisfied certain provisions of section 8, and fell within section 9(1)(c).
- 1.5** At the time of the ICAC's decision, section 9(1) provided:
- 9(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
- (a) a criminal offence, or
 - (b) a disciplinary offence, or
 - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

⁵ *Minutes of the Proceedings of the Legislative Council*, No. 54, Wednesday 1 July 1998, entry 9.

⁶ *Minutes of the Proceedings of the Legislative Council*, No. 5, Wednesday 26 May 1999, entry 2.

⁷ *Minutes of the Proceedings of the Legislative Council*, No. 2, Wednesday 24 May 1995, entry 21(2)7. In the current Parliament, the Committee was designated on 25 May 1999: *Minutes of the Proceedings of the Legislative Council*, No. 4, Tuesday 25 May 1999, entry 12(4)8.

⁸ (1992) 28 NSWLR 125.

⁹ See section 7.

- 1.6** The Court of Appeal held that the findings of 'corrupt conduct' were void and wrong in law, as the ICAC had not applied the required objective standards when determining that the relevant conduct could constitute 'reasonable grounds for dismissing' the public officials concerned within section 9(1)(c). In reaching this view, the Court specified that 'reasonable grounds for dismissing' within section 9(1)(c) means reasonable legal grounds for successful action for dismissal, even though, in the case of a Premier and/or a Minister, such dismissals will only occur in a very narrow range of circumstances.
- 1.7** The Court of Appeal decision was seen as demonstrating that, apart from criminal offences within section 9(1)(a), the bases for corrupt conduct within section 9(1) could have very little practical operation in relation to Ministers and Members of Parliament.¹⁰ As a result, concerns were expressed that the ICAC Act operated in a more restrictive manner for Ministers and other Members of Parliament than for other categories of public official.¹¹

Amendments to Section 9

- 1.8** To overcome this apparently restrictive application of section 9(1), in 1994 a further ground of 'corrupt conduct' was added to section 9(1) which applied specifically to Ministers and Members of Parliament. The new ground was contained in a new paragraph (d), which was in the following terms:

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

- 1.9** The term 'applicable code of conduct' was defined, in the case of a Member of either House, as a code of conduct 'adopted for the purposes of this section by resolution of the House concerned'.¹² The term 'substantial breach' was not defined.

Introduction of Part 7A

- 1.10** The 1994 amendments also inserted a new Part 7A, which provided for the establishment of an ethics committee in each House. The ethics committees were to have the following functions: preparing draft codes of conduct for the Members of the House;¹³ reviewing the code of conduct every two years;¹⁴ undertaking 'educative work relating to ethical standards applying to Members';¹⁵ and giving advice in relation to such ethical standards in response

¹⁰ *Hansard*, Legislative Council, 27 October 1994, p. 4772.

¹¹ *Ibid.*

¹² Section 9(3)(b). The definition in respect of Ministers of the Crown is 'a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations' (section 9(3)(a)).

¹³ Section 72C(1)(a) (Council committee).

¹⁴ Section 72C(6) (Council committee)

¹⁵ Section 72C(1)(b) (Council committee).

to requests for advice from the House, though not in relation to actual or alleged conduct of any particular person.¹⁶

- 1.11** While the committees of each House were to have the same functions, they were to be differently constituted, in two respects. Firstly, a committee of the Legislative Council was to be 'designated' as the relevant committee, by resolution of the House.¹⁷ By contrast, the Legislative Assembly Standing Ethics Committee was directly established by a provision of the Act. Secondly, the Assembly committee was to include three 'community members', whereas the requirement for such members on the Council committee was rejected by the Council when the insertion of Part 7A was considered in 1994.

Development of the code of conduct

- 1.12** As already noted, in May 1995, the Standing Committee on Parliamentary Privilege and Ethics was 'designated' by resolution of the Legislative Council as the relevant Council committee for the purposes of Part 7A. In 1995-96 the Committee conducted an inquiry to develop a draft code of conduct for Members of the House.¹⁸ During the inquiry, the Committee sought to reach agreement with its counterpart committee in the Legislative Assembly on a single code of conduct for all Members of Parliament. However, all such attempts proved unsuccessful, and separate codes of conduct were ultimately adopted by each of the committees.
- 1.13** In its report to the House in October 1996, the Council committee recommended that a 'free conference of managers' appointed by both Houses be held, to consider the codes of the two committees, and recommend a single code for all Members.¹⁹ However, no action was taken to implement this recommendation.
- 1.14** In 1998, no progress having been made by either House towards adoption of a code of conduct, the State government released a further draft code, intended to apply to the Members of both Houses. In support of this code, the Premier argued that the draft codes prepared by the committees were 'too wide and too uncertain' in scope to constitute effective grounds for findings of 'corrupt conduct' under the Act, and that, in view of the legal implications of the code, the code should be confined to 'matters of corruption', which should be dealt with with clarity and precision.²⁰

¹⁶ Section 72C(1)(c) (Council committee)

¹⁷ Section 72B(1).

¹⁸ Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the establishment of a draft code of conduct for Members*, Report No. 3, October 1996.

¹⁹ *ibid*, p. 60.

²⁰ *Parliamentary Debates*, Legislative Assembly, 2 April 1998, p. 3649.

- 1.15** In 1998 each House referred the government's draft code to its respective ethics committee for inquiry and report. Both committees reported in favour of adopting that code.²¹ Each House then adopted the government's code for the purposes of section 9 of the ICAC Act, and re-adopted the code in the 52nd Parliament.
- 1.16** The resolution of the Legislative Council re-adopting the code in the 52nd Parliament specifies that the resolution 'has continuing effect unless and until amended or rescinded by resolution of the House'. The effect of this is that the Council code continues to operate despite any prorogation of the House, and it is not necessary for the code to be re-adopted by the House at the beginning of every Parliament. A copy of the Council code is attached at Appendix 1.

²¹ Standing Committee on Parliamentary Privilege and Ethics, *Second report on code of conduct*, Report No. 5, June 1998, p. 20. Other recommendations included that the code proposed by the Committee in 1996 be adopted as a general guide to Member in carrying out their duties as elected representatives.

Chapter 2 Developments since adoption of the code

Since the Code of Conduct was adopted by the Legislative Council in 1998, a number of developments have occurred which may be considered relevant to the current review: (1) the publication of comments and recommendations by the ICAC concerning the Code of Conduct and related issues; (2) determinations by the Parliamentary Remuneration Tribunal including guidelines concerning the use of Members' official resources; (3) the appointment of a Parliamentary Ethics Adviser; (4) review of the Code of Conduct by the Legislative Assembly Standing Ethics Committee; (5) a recent request by the Legislative Assembly to the ICAC regarding paid consultancies and advocacy; and (6) events in other Parliaments. These developments are outlined below.

(1) ICAC comments on the code and related matters

2.1 In its Second Report on parliamentary and electorate travel published in December 1998,²² the ICAC made over 60 recommendations for reform of the parliamentary systems relating to administration of Members' entitlements and allowances. These included four recommendations relating to the Members' Code of Conduct, to be actioned by the ethics committee of each House, and four recommendations relating to induction and training for Members, including one specifically to be actioned by the ethics committees.

2.2 In its Third Report on the subject in November 1999,²³ the ICAC considered the extent to which its recommendations from the Second Report had been implemented. In relation to the Code of Conduct, it concluded that meetings of the respective ethics committees should be convened as soon as practicable to consider the matters raised.²⁴ Concerning induction and training, it noted that, despite partial progress, further work was required.²⁵

2.3 In June 2002 the Standing Ethics Committee of the Legislative Assembly published its review of the Code of Conduct for the Members of that House (see paragraph 2.45 below), in which it commented on each of the ICAC's recommendations. The ICAC's recommendations, and the comments of the Assembly Committee, are outlined below.

(A) Code of conduct

2.4 The ICAC's recommendations concerning the code of conduct relate to clauses 1, 2, 5, and 6, of the code.

²² ICAC, *Investigation into parliamentary and electorate travel: second report. Analysis of administrative systems and recommendations for reform*, December 1998.

²³ ICAC, *Investigation into parliamentary and electorate travel: third report. Monitoring report on the implementation of recommendations relating to the administrative systems operating within the NSW Parliament*, November 1999.

²⁴ *ibid*, p. 37.

²⁵ *ibid*, pp. 38-39.

Clause 1

2.5 Clause 1(a) of the Code of Conduct states:

1. *Disclosure of conflict of interest*
- (a) Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.

2.6 In relation to this clause, the ICAC recommended that:

The Ethics Committees of each House should consider the appropriateness of the phrases 'private financial benefit'²⁶ and 'decisions in which they participate' used in Clause 1 of the Members' Code of Conduct and recommend clarification of their meaning by appropriate amendment.²⁷

2.7 In support of its recommendation, the ICAC stated:

The emphasis in this part of the Code of Conduct is on private financial benefit. Members may have friends, families or favoured causes whose interests may give rise to a conflict of interests for the Member by virtue of their relationship, and these may not only be limited to pecuniary interests. The Code of Conduct does not appear to contemplate or capture these circumstances.

In Local Government, councillors are precluded from speaking or voting on any matter in which they, or associated persons, have a pecuniary conflict of interests. The Local Government Act 1993 defines associated persons as including, among others, close relatives and business partners. There is no such provision in the circumstances covered by Clause 1 of the Code of Conduct.

Neither does this part of the Code of Conduct address circumstances in which Members may be capable of considerable influence but do not formally participate in the decision making process.²⁸

2.8 The Assembly committee did not accept the ICAC's recommendation, and recommended that the wording of clause 1 should remain as originally drafted. In reaching this view it noted that, if the conflict of interest requirement were extended beyond 'financial interests', the clause would have a very wide application, which could constitute a deterrent to action which might otherwise be considered appropriate in representing the interests of constituents.²⁹ Further, broadening the requirement would require precise definitions of the relationships held by Members, which would inevitably be too broad and ambiguous to be workable, and open the door to legal quibbles.³⁰ As 'substantial breach' of the Code has

²⁶ Although the recommendation refers to 'private financial benefit', the term actually used in the clause is 'private financial interests'.

²⁷ Recommendation No. 54.

²⁸ ICAC, *Second Report*, *ibid*, pp. 47-48.

²⁹ Legislative Assembly Standing Ethics Committee, *Review of the code of conduct*, June 2002, para 9.3.

³⁰ *ibid*, paras 9.3 - 9.4.

such serious consequences for Members, the clauses of the Code should be as unambiguous as possible.³¹

2.9 In response to the suggestion that the clause should be expanded to cover ‘favoured causes’, the committee noted that support for particular causes, policies, or ideologies, is an integral part of political life, rather than a matter to be regulated by a code.

2.10 Concerning the inclusion of the use of Members’ influence, the committee observed that the ability to influence decisions through private meetings, the party room, or public debate, is a ‘fundamental attraction and responsibility of political life’. While the matter of access to decision-makers can involve ethical implications, this is a separate question of primary importance to Ministers, as opposed to Members. The idea that a Member should be responsible for decisions they may have indirectly influenced would be difficult to prove and therefore open to legal quibbles.³²

Clause 2

2.11 Clause 2 of the Code of Conduct states:

Bribery

Members must not promote any matter, vote on any bill or resolution, or ask any question in the Parliament or its committees, in return for payment or any other personal financial benefit.

2.12 In relation to this clause, the ICAC recommended that:

The Ethics Committee of each House should consider the appropriateness of the phrase ‘payment or any other personal benefit’ used in Clause 2 of the Members’ Code of Conduct and recommend an appropriate amendment to clarify its meaning.³³

2.13 In support of this recommendation, the ICAC stated:

This section limits the test for a bribe to ‘payment or any other personal benefit’. The ICAC’s experience, indeed international experience shows, that bribes can also take the form of benefits or advantage to family members, friends and even favoured causes. An example of the last category may be funding for elections. The Clause in its present form does not provide adequate protection against such circumstances.³⁴

2.14 The Assembly Committee agreed with part of this recommendation, concerning benefit to family and friends. It accepted that a Member who pursues an agenda designed to benefit

³¹ *ibid*, para 9.7.

³² *ibid*, para 9.5.

³³ Recommendation No. 55.

³⁴ ICAC, *Second Report*, *ibid.*, p. 48.

family or friends should be seen as being as culpable as a Member who acts for personal gain. To take account of this, it recommended that clause 2 be redrafted as follows:

Members must not knowingly or improperly promote any matter, vote on any bill or resolution, or ask any question in the Parliament or its committees, for the private benefit of themselves or others.³⁵

2.15 However, as with clause 1, the committee rejected the notion that clause 2 should extend to 'favoured causes', as support for particular causes is part of the political process and is often in accordance with the expectations of a Member's constituency. The committee further noted that the clause as currently drafted accommodates 'legitimate political deals', such as the memorandum of understanding entered into by the Greiner Government and the three non-aligned independents.³⁶

2.16 With regard to election funding which was raised as a concern by the ICAC, the committee noted that there are requirements for the disclosure of political donations under the *Electoral Funding Act 1983*, and that clause 3 of the Code of Conduct recognises that Members may accept political contributions in accordance with that Act. While ethical dilemmas can arise in this area, the committee believed that such issues should be addressed by amendment to existing legislation, rather than the code.³⁷

Clause 5

2.17 Clause 5 of the Code of Conduct states:

Use of personal information

Members must not knowingly and improperly use official information which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for the private benefit of themselves or others.

2.18 The ICAC recommended that:

The Ethics Committees of each House should consider the appropriateness of the term 'private benefit' used in Clause 5 of the Members' Code of Conduct and recommend an appropriate amendment to clarify its meaning.

2.19 In support of the recommendation, the ICAC commented:

The test in this clause is whether there is a private benefit for the Member or others. Conceivably, information could be used when it is difficult to substantiate a direct private benefit, such as information leaked to discredit an opponent party's policy proposals or even an opponent in an electoral or parliamentary contest. There may be a benefit to the Member's own political party, but it may be difficult to substantiate that any particular Member received a private benefit.³⁸

³⁵ Legislative Assembly Standing Ethics Committee, *ibid*, para 10.7.

³⁶ *ibid*, para 10.5.

³⁷ *ibid*, para 10.6.

³⁸ ICAC, *Second Report*, *ibid*, p. 48.

- 2.20** The Assembly committee believed that the use of the term ‘private benefit’ in the clause is appropriate, and that there should be no change to the clause. It noted that without the use of the term ‘private’ to qualify ‘benefit’, the clause would leave Members open to allegations of breach of the Code if they used information not in the public domain in a way which ‘benefited others’.³⁹
- 2.21** Beyond the qualification ‘private’, the committee considered it would be difficult to further define the kinds of benefit to be proscribed by the clause, given the difficulty of distinguishing between the public, party, and personal benefits which may flow from a Member’s actions.
- 2.22** The Committee also noted that provisions equivalent to clause 5 exist in the Tasmanian and Victorian Parliaments, which use the terms ‘private interests’, and ‘private benefit’, respectively.⁴⁰
- 2.23** Despite recommending no change to the clause, the committee recommended that ‘the topic of freedom of speech and confidentiality be included in any ethics workshop for Members’.⁴¹

Clause 6

- 2.24** Clause 6 states:

Duties as a Member of Parliament

It is recognised that some Members are non-aligned and others belong to political parties. Organised parties are a legitimate part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.

- 2.25** The ICAC recommended:

The Ethics Committees of each House should consider whether the term ‘legitimate activities’ in Clause 6 of the Members’ Code of Conduct should be amended to define these as activities whose principal purpose is for parliamentary or electorate benefit.⁴²

- 2.26** The ICAC’s recommendation on this clause was made in the context of amendments to the *Parliamentary Remuneration Act 1989* in 1998, concerning the use of Members’ entitlements. Under that Act, entitlements are provided for the purpose of facilitating the efficient performance of Members’ ‘parliamentary duties’.⁴³ The 1998 amendments defined ‘parliamentary duties’ to include ‘participation in the activities of recognised political

³⁹ Legislative Assembly Standing Ethics Committee, *ibid*, para 11.6.

⁴⁰ *ibid*, paras 11.8, 11.9.

⁴¹ *ibid*, para 11.12.

⁴² Recommendation No. 57.

⁴³ Section 10(1)(a).

parties'.⁴⁴ The ICAC was concerned that this amendment, together with clause 6 of the code of conduct, could have the effect of enabling Members' public resources to be used for party political purposes, as opposed to 'legitimate' parliamentary or electorate purposes. To address this problem, the ICAC believed that:

'legitimate activities' should be defined as activities whose principal purpose is for parliamentary or electorate benefit'.⁴⁵

2.27 The ICAC also recommended that the Parliamentary Remuneration Tribunal should clarify the meaning of 'parliamentary duties', by excluding certain types of political activities not related to parliamentary or electorate duties.⁴⁶

2.28 The Assembly committee noted that, since the ICAC's recommendations had been made, the Parliamentary Remuneration Tribunal had issued determinations which included guidelines as to the meaning of 'parliamentary duties' in line with the ICAC's recommendation. This development is further considered later in this chapter.

2.29 The committee also supported retaining the existing terms of clause 6 on the ground that they reflect the view of 'the majority of Assembly Members' that:

involvement in party activities such as election campaigns is part and parcel of being a Member of Parliament, and constitutes a 'legitimate' activity of a Member of Parliament.⁴⁷

(B) Members' induction and training

2.30 In its Second Report, the ICAC recommended that:

- there should be a comprehensive induction program for Members, their staff and administrative personnel within Parliament, which should include components on ethical behaviour, legal obligations of Members and dilemma resolution (Recommendation No. 59);
- specifically, the ethics committee of each House should jointly develop an education program to examine and explain the ethical standards and legal obligations applying to all Members (Recommendation No. 60);
- the induction and education programs should cover the relevant codes of conduct for Members and staff, and include information about available options for reporting suspect behaviour (Recommendation No. 61); and

⁴⁴ Section 10(1)(b).

⁴⁵ ICAC, *Second Report*, *ibid*, p. 49.

⁴⁶ *ibid*, p. 28.

⁴⁷ Legislative Assembly Standing Ethics Committee, *ibid*, para 12.2.

- refresher training sessions should be undertaken to remind Members and staff of the conditions attaching to the use of Members' entitlements and allowances, and consideration should be given to undertaking this refresher training at the beginning of each Parliament (Recommendation No. 62).

2.31 In support of these recommendations, the ICAC noted that the current induction program for new Members lacks an ethics component;⁴⁸ that there is no ongoing training or education program for Members on their roles and responsibilities including use of entitlements;⁴⁹ and that no training had been given to Members in the Members' Code of Conduct, despite the code having been adopted some months before.⁵⁰

2.32 In its Third Report, the ICAC noted that an ethics seminar had been held for Members in 1999,⁵¹ and that the Legislative Council had made progress in the development of an 'ethics case book'.⁵² The latter development was described as 'encouraging', and as a 'starting point' for the ethics committees of each House to meeting their legislative obligation under the ICAC Act to carry out educative work in respect of Members.

(2) Parliamentary Remuneration Tribunal determinations

Overview

2.33 As noted earlier, under the *Parliamentary Remuneration Act* (PRA), the Parliamentary Remuneration Tribunal is required to make determinations in relation to Members' entitlements. Such determinations may define matters such as the classes and terms of entitlements, and the conditions on which entitlements are provided.

2.34 The PRA states that entitlements are provided to facilitate the performance of Members' 'parliamentary duties', though it provides little guidance as to the meaning and scope of that term. Until recently, guidelines issued by the Tribunal restated the requirement as to 'parliamentary duties', but provided minimal clarification as to the types of activities which might be included within that term.

2.35 However, following amendments to the PRA in 1998, the Tribunal has issued a series of annual determinations, commencing in December 2000, which have introduced changes to the system of entitlements and have clarified, to some extent, the activities for which entitlements may be used. Under these determinations, Members have been given discretion as to the expenditure of a comprehensive single allocation, covering transport,

⁴⁸ ICAC, *Second Report*, *ibid.*, p. 50.

⁴⁹ *ibid.*

⁵⁰ *ibid.*, p. 51.

⁵¹ ICAC, *Third Report*, *ibid.*, p. 38.

⁵² *ibid.*, p. 39.

communication, printing and stationery. However, guidelines and conditions have been imposed as to the receipt, use of, and accounting for, these entitlements.

2.36 The guidelines and conditions of the Tribunal constitute 'guidelines or rules' about the use of public resources within the meaning of clause 4 of the code of conduct. Clause 4 states:

Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.

As a result, conduct by a Member which breaches a term of a Tribunal determination constitutes a breach of clause 4 of the code. A serious breach of such a term may amount to a 'substantial breach' of the code of conduct, within the meaning of section 9(1)(d) of the *Independent Commission Against Corruption Act*. As noted in Chapter 1, a 'substantial breach' of the code is one of the elements for a finding of 'corrupt conduct' under the Act.

Guidelines issued since 2000

Party political activities

2.37 One of the areas addressed in the Tribunal's recent determinations is the use of entitlements by Members for the purpose of participation in party political activities. As noted earlier, amendments to the Act in 1998 expanded the definition of 'parliamentary duties' to include 'participation in the activities of recognised political parties'. In response to this development, the ICAC recommended that the Tribunal specify that certain party activities, which the ICAC considers are not related to parliamentary duties, are not included within the scope of that the term for the purposes of its determinations.

2.38 In line with this recommendation, the determinations issued by the Tribunal since 2000 have made it clear that entitlements are not to be used for:

- 'political campaigning' or 'direct electioneering';
- activities such as those associated with party Membership drives;
- mail distributions for non-electorate or non-Parliamentary activities;
- costs associated with election campaigning for an individual Member;
- fund raising for other political party Members (such as the purchase of raffle tickets, raffle prizes or tickets to attend functions, etc); and
- costs previously borne by political parties which are not principally related to a Member's parliamentary or electorate duties.⁵³

2.39 Despite this level of clarification however, there remains uncertainty as to the precise meaning of key terms such as 'parliamentary duties', 'political campaigning', 'direct

⁵³ *Annual Report and determination of additional entitlements for Members of the Parliament of New South Wales*, 31 May 2002, p. 18.

electioneering', and 'participation in the activities of recognised political parties'. The absence of clear legal authority on these issues has resulted in problems in relation to a number of matters, such as the type of information which may be included in Members' newsletters, and websites. On one level, some of these issues are being addressed by the development of guidelines by the Presiding Officers, who are responsible for administering the system of Members' entitlements within the parameters of the PRA and the Tribunal's determinations. However, difficulties will remain until the Tribunal itself provides greater clarity about the definition of key terms, or there is some other legal authority to assist in their interpretation and application.

Private purposes

- 2.40** Other matters addressed in recent determinations are concerned with ensuring that entitlements are not improperly used for *private* purposes. For example, in relation to benefits accrued from Members' travel, the most recent determination states:

Benefits accrued by a Member by way of loyalty/incentive schemes such as frequent flyers, as a consequence of the Member using his or her additional entitlements, are to be used only for Parliamentary duties and not for private purposes. Any outstanding benefits of this nature, when the Member ceases to be a Member, are to be forfeited.⁵⁴

Audits of compliance

- 2.41** The final aspect of post-2000 determinations to be noted in this context is a requirement for audits of compliance, to be conducted by the Auditor General.⁵⁵ The first audit pursuant to such requirement has been carried out, for the period ending 31 December 2001. The audit identified a number of areas of non-compliance with determinations (eg party political material included on some websites funded from Members' allocations), and made various recommendations for improvements to administrative practices, to ensure compliance in future.⁵⁶

(3) Parliamentary Ethics Adviser

- 2.42** In September 1998 the Legislative Council and Legislative Assembly resolved to appoint a Parliamentary Ethics Adviser, whose role is to advise Members, on request, in relation to:

ethical issues concerning the exercise of his or her role as a Member of Parliament, including the use of entitlements and potential conflicts of interest.⁵⁷

⁵⁴ *ibid*, p. 35, paragraph 8.

⁵⁵ *ibid*, pp. 20-21, paragraph 8.

⁵⁶ Audit Office, *The Legislature; PRT Determination; Audit Management Letter for the period ending 31 December 2001*, Appendix 1, p. 2.

⁵⁷ *Minutes of the Proceedings of the Legislative Council*, No. 63, 24 September 1998, entry no. 2, para 4. Following expiry of the Ethics Adviser's annual term, a new Adviser was appointed in 1999, and re-appointed in 2000 and 2001.

2.43 In providing such advice the Adviser is to be guided by:

any code of conduct or other guidelines adopted by the House, (whether pursuant to the Independent Commission Against Corruption Act 1988 or otherwise).⁵⁸

2.44 Although the Ethics Adviser has no role in enforcing the code, the availability of such a source of confidential and objective advice may assist Members to find appropriate solutions to dilemmas or uncertainties encountered in relation to the interpretation and application of the code.

(4) Legislative Assembly committee review of code

2.45 As noted earlier, the Assembly committee's report on the review of the code was published in June 2002.⁵⁹ The report addresses the ICAC's recommendations concerning the code of conduct, as discussed above, as well as various proposed strategies for pursuing the statutory function relating to educating Members concerning ethical standards. It also makes various recommendations concerning other issues, including biennial reviews of the code; the desirability of Members acknowledging the code of conduct when taking the oath or affirmation of office; the requirement for permanent community members on the Assembly committee; and increasing public access to the register of Members' pecuniary interests.

(5) Legislative Assembly request to ICAC regarding paid consultancies and advocacy

2.46 The Committee notes that, following debate in the Legislative Assembly about the pecuniary interests of the Leader of the Opposition, the Assembly resolved on 21 November 2002 to request the ICAC to look into the 'matters' and to report to the Speaker on 'what measures might be taken in respect of regulating or limiting the employment of Members of Parliament to provide advice on public affairs'.⁶⁰ In particular, the Assembly requested the ICAC to consider the adequacy of the provisions of the code of conduct for Members of the Legislative Assembly, and to consider provisions of the United Kingdom House of Commons *Code of Conduct and Guide to the Rules Relating to the Conduct of Members*, the code of conduct for Members of the Scottish Parliament in relation to paid consultancies and advocacy, and any other relevant provisions in other jurisdictions.

(6) Other Parliaments

2.47 In its report on the development of a code of conduct for Members of the Legislative Council in 1996, the Standing Committee on Parliamentary Privilege and Ethics reviewed codes of conduct and ethics regulations applying to Members in a range of other

⁵⁸ *ibid*, paragraph 5.

⁵⁹ Legislative Assembly Standing Ethics Committee, *Review of the Code of Conduct*, June 2002.

⁶⁰ Legislative Assembly, *Votes and Proceedings*, 21 November 2002, entry 23.

Parliaments. In relation to Australian parliaments, the Committee noted that codes existed in only two jurisdictions. In Tasmania, a code of conduct had been incorporated into the Standing Orders of the House of Assembly, consisting of a Preamble, Statement of Commitment, and a Declaration of Principles. In Victoria, a code of conduct for Members, consisting of six clauses, formed part of *the Members of Parliament (Register of Interests) Act 1978*.

2.48 Since 1996, there have been few substantial changes to this picture. In 2001, a committee of the Legislative Assembly of the Australian Capital Territory recommended the adoption of an aspirational-style code for the Members of that House,⁶¹ but no code has been adopted to date. Currently, a committee of the Legislative Assembly of the Northern Territory is inquiring into a draft ‘Members’ Code of Conduct and Ethical Standards’, but the committee has yet to report.⁶² In only one Australian jurisdiction, Queensland, has a code of conduct been adopted since 1996. The key features of the Queensland code are outlined below.

Queensland

2.49 The Queensland code, entitled ‘Code of Ethical Standards’, was developed in 2000 by the Members’ Ethics and Parliamentary Privileges Committee, and was adopted by resolutions of the Legislative Assembly in 2001. The first part of the code consists of a ‘Statement of Fundamental Principles’. The committee responsible for developing the code indicated that this part of the code is aspirational, intended to provide a framework for the rules which are imposed on Members, and an indication of how ethical dilemmas should be resolved where there are no orders relating to a particular set of circumstances.⁶³

2.50 The body of the code consists of a compilation of the legislative provisions, Standing Orders, resolutions of the House, and practices and procedures of the House, which regulate Members’ conduct both inside and outside the House. These provisions include reference to:

- disclosure and registration of Members’ pecuniary interests;
- the criminal law relating to bribery;
- contempt of Parliament (meaning and examples of);
- qualifications and disqualifications for membership of Parliament;

⁶¹ Legislative Assembly for the Australian Capital Territory, Standing Committee on Administration and Procedure, *Inquiry into a code of conduct for Members of the Legislative Assembly and a Parliamentary Ethics Adviser for the ACT*, Report No. 8, August 2001.

⁶² www.nt.gov.au/lant/parliament (Standing Orders Committee/ Members’ Code of Conduct and Register of Members Interests – Draft).

⁶³ Members’ Ethics and Parliamentary Privileges Committee, *Report on a code of ethical standards for Members of the Queensland Legislative Assembly*, Report No. 44, September 2000, p. 7.

- electoral funding laws, including requirements for the disclosure of political donations;
- Standing Orders governing Members' conduct in the House;
- procedures for raising and considering complaints of breach of privilege or contempt;
- limitations on freedom of speech within the House (such as the power of the House to inquire into Members' statements, and the citizen's right of reply procedure).

2.51 The purpose of the code is stated to be: (a) to assist Members to better understand the nature of their public offices and related obligations; (b) to provide an 'educative tool' to assist Members to manage conflicts of interests and resolve ethical dilemmas; and (c) to provide an overview of the current obligations which members are required to observe. Complaints about Members not complying with the code may be considered by the House or the committee.⁶⁴

⁶⁴ *Parliament of Queensland Act 2001*, section 92(3).

Chapter 3 Conclusions

- 3.1** As noted in Chapter 1, the Code of Conduct in NSW has not been designed as an aspirational or general guide to Members' conduct; it operates in a strict legal context, forming part of the definition of 'corrupt conduct' within the ICAC Act. In this context, a 'substantial breach' of the Code may result in a finding of 'corrupt conduct' by the ICAC. However, the link between the Code and the ICAC's jurisdiction is somewhat problematic, as the meaning of 'substantial breach' has not been defined, and is far from clear. In these circumstances, it is important that the Code of Conduct focuses only on issues in respect of which there is a broad consensus as to the nature of a Member's obligations, and that it deal with those issues with as much clarity and precision as possible.
- 3.2** In view of the purpose of the Code, the legal context in which it operates, and the resulting need for clarity and precision, the Committee considers that the Code of Conduct in its present form is appropriate, and that no change is currently required. The Committee therefore recommends:

Recommendation 1

That, as the Code of Conduct appears to be satisfactory for its intended purpose, no change to the Code is required at this time.

- 3.3** In relation to the matters raised by the ICAC and discussed in Chapter 2, the Committee acknowledges the importance of the issues raised, and the desirability of Members having further guidance in relation to these issues. However, in view of paragraph 3.1 above, the Committee believes that changes to the code are not the best way to address such issues. Rather, the Committee believes such issues should be addressed through avenues such as education seminars for new Members and other forms of ethics education, clarification of PRT determinations, and the issuing of guidelines by the Presiding Officers as to the use of Members' entitlements.
- 3.4** In particular, the Committee believes that, in any education seminars or forums to be conducted in the next Parliament, Members' attention should be drawn to the fact that it is unacceptable for a Member to use his or her position as a Member, or the influence deriving from that position, for personal financial gain.
- 3.5** The Committee also believes it would be desirable if the various provisions, procedures, and guidelines which currently govern Members' conduct were published in a single, consolidated volume. Such a volume could include, for example, the Code of Conduct, requirements for the disclosure of Members' pecuniary interests, determinations of the Parliamentary Remuneration Tribunal, and any other 'guidelines or rules about the use of [Members'] resources' within the meaning of clause 4 of the Code. The Committee believes that the publication of such a volume would greatly assist Members to be aware of, and comply with, their obligations. The Committee therefore recommends:

Recommendation 2

That, as part of its educative role, the Committee compile, publish, and maintain a compendium of all the current provisions and guidelines concerning Members' conduct, pecuniary interests, and resources.

- 3.6** Finally, the Committee notes that, as discussed in Chapter 2, the Legislative Assembly has requested the ICAC to report on the adequacy of the Code of Conduct in relation to paid consultancies and advocacy. Any recommendations made by the ICAC concerning that matter will be considered by the Committee.

Appendix 1

Code of Conduct for Members of the Legislative Council

Code of conduct

(Extract from *Minutes of Proceedings of the Legislative Council*, No. 5, 26 May 1999, entry no.3)

That:

1. This House adopt, for the purposes of section 9 of the Independent Commission Against Corruption Act 1988, the following code of conduct:

PREAMBLE

- The Members of the Legislative Assembly and the Legislative Council have reached agreement on a Code of Conduct which is to apply to all Members of Parliament.
- Members of Parliament recognise that they are in a unique position of being responsible to the electorate. The electorate is the final arbiter of the conduct of Members of Parliament and has the right to dismiss them from office at regular elections.
- Members of Parliament accordingly acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.

THE CODE

1 Disclosure of conflict of interest

- (a) Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.
- (b) This may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner.
- (c) A conflict of interest does not exist where the member is only affected as a member of the public or a member of a broad class.

2 Bribery

Members must not promote any matter, vote on any bill or resolution, or ask any question in the Parliament or its Committees, in return for payment or any other personal financial benefit.

3 Gifts

- (a) Members must declare all gifts and benefits received in connection with their official duties, in accordance with the requirements for the disclosure of pecuniary interests.
- (b) Members must not accept gifts that may pose a conflict of interest or which might give the appearance of an attempt to corruptly influence the Member in the exercise of his or her duties.
- (c) Members may accept political contributions in accordance with part 6 of the Election Funding Act 1981.

4 Use of public resources

Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.

5 Use of confidential information

Members must not knowingly and improperly use official information which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for the private benefit of themselves or others.

6 Duties as a Member of Parliament

It is recognised that some members are non-aligned and others belong to political parties. Organised parties are a fundamental part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.

- 2. This resolution has continuing effect unless and until amended or rescinded by resolution of the House.

Appendix 2

Minutes of the Committee's proceedings

Minutes

Note: Asterisks indicate text which has been omitted as not relevant to the current inquiry.

Meeting No. 16

Monday 18 March 2002

at Parliament House, Sydney at 2.30 pm

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Fazio	Mr Primrose
Mr Kelly	Ms Saffin
Revd Mr Nile	

Apologies were received from Ms Gardiner and Ms Forsythe.

In attendance: Lynn Lovelock, Velia Mignacca and Janet Williams.

Review of the Code of Conduct

The Committee continued to deliberate.

Resolved, on motion of Ms Fazio: That the Clerk prepare a discussion paper for consideration of the Committee.

The Committee adjourned at 3.15 pm sine die.

Meeting No. 19

Thursday 28 August 2002

at Parliament House, Sydney at 1.00 pm

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Gardiner	Mr Primrose
Mr Kelly	Revd Mr Nile

Apologies were received from Ms Fazio, Ms Forsythe, and Ms Saffin.

In attendance: Lynn Lovelock, Velia Mignacca and Janet Williams.

Minutes of meeting no. 18 were confirmed on motion of Mr Kelly.

Correspondence received:

Other current inquiries

The Committee continued to deliberate.

Resolved, on motion of Mr Primrose: That the Clerk prepare briefing papers on the Committee's current inquiries, especially the review of the Members' code of conduct *****.

The Committee adjourned at 1.14 pm sine die.

Meeting No. 26

Thursday 21 November 2002

at Parliament House, Sydney at 1.00 pm

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Fazio	Mr Kelly
Ms Forsythe	Revd Mr Nile
Ms Gardiner	Mr Primrose
Mr Hatzistergos	

In attendance: Lynn Lovelock, David Blunt, Velia Mignacca and Janet Williams.

Review of the Code of Conduct

The Committee deliberated.

Resolved, on the motion of Mr Kelly, that the briefing paper previously circulated to Members be developed into a Chair's draft report including a recommendation that, as the Code of Conduct appears to be satisfactory for its intended purpose, no change should be made to the Code at this time.

The Committee adjourned at 2.20 pm sine die.

Meeting No. 27

Tuesday 3 December 2002

at Parliament House, Sydney at 1.00 pm

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Fazio	Mr Kelly
Ms Forsythe	Revd Mr Nile
Ms Gardiner	Mr Primrose
Mr Hatzistergos	

In attendance: Lynn Lovelock, David Blunt, Velia Mignacca and Janet Williams.

Confirmation of Minutes

The minutes of meeting no. 26, as circulated, were confirmed on the motion of Revd Mr Nile.

Review of the Code of Conduct

The Chair's draft report entitled "Review of the Members' code of conduct", together with possible amendments circulated on 3 December 2002, as circulated, was taken as read.

The Committee deliberated.

Resolved, on the motion of Ms Fazio: That the report be adopted.

Resolved, on the motion of Ms Fazio: That the report be signed by the Chair and presented to the House.

The Committee adjourned at 2.00 pm sine die.