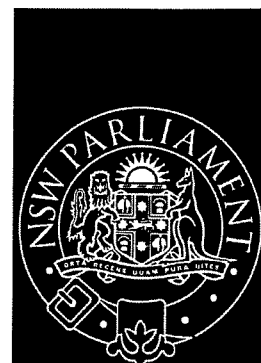


LEGISLATIVE ASSEMBLY

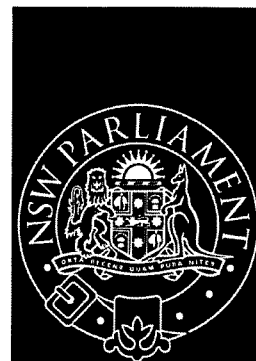


Standing Committee on Parliamentary Privilege and Ethics

Regulation of Secondary Employment for Members of the NSW Legislative Assembly

September 2004

LEGISLATIVE ASSEMBLY



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Regulation of secondary employment for Members of the NSW Legislative Assembly

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Proposals for implementation of ICAC recommendations

TABLE OF CONTENTS

Introduction	Pg 1
Recommendations in the ICAC Report	Pg 2
The Inquiry – the Committee’s approach	Pg 6
The Committee’s principal recommendations	Pg 10
Response to specific ICAC recommendations 1-14	Pg 13
Appendix A: Resolution of the Legislative Assembly to ICAC	Pg 33
Appendix B: Code of Conduct for NSW Parliamentarians	Pg 35

CHAIRMAN'S FOREWORD

This is the first report of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, as constituted by resolution of the Assembly on 4 December 2003. Under the resolution this Committee assumes the functions and powers previously held by the Standing Committee on Ethics, which are outlined in Sections 72D – 72E of the Independent Commission Against Corruption Act 1988. These functions were augmented by the resolution of 4 December 2003 to now include consideration of privilege matters referred to it by the House.

It is fitting that our new committee's terms of reference include consideration of privilege matters since the report of the ICAC on Regulation of Secondary Employment for Members of the NSW Legislative Assembly makes recommendations with regard to parliamentary privilege, as well as the Code of Conduct.

The ICAC report which is discussed in the following pages arose from a request by the Legislative Assembly to examine issues raised in a motion of censure relating to a member's employment as a public affairs consultant, and the adequacy of the Code of Conduct in relation to conflicts of interest that may arise from a Member's secondary employment. The ICAC's ability to review Members' actions in the House goes to the heart of parliamentary privilege, and the Committee carefully considered the Commission's recommendations that touched on this often misunderstood protection for Members.

As requested by the House, the ICAC examined and reported on a range of provisions adopted in other jurisdictions that provide for disclosure and various degrees of detail about Members' interests and activities undertaken for remuneration or benefit. The Committee looked at the background to the different guidelines, regulations and standing orders and compared their aims and requirements with the purpose and operation of our own Code of Conduct and regulatory system for registration of pecuniary and certain other interests. Ultimately the Committee came to agreement, with the exception of one Member, that specific prohibition of secondary employment is not required in NSW, as the current provisions of the Code and the regulation are adequate and sufficient. All Members of the Committee agreed that there could be an augmented role for the parliamentary Ethics Adviser, and clearer and more detailed explanatory material to guide Members in registration of interest, and in declaration of interests.

I would like to thank the officers of the ICAC, Ms Linda Waugh, Executive Director, Corruption Prevention and Education and Mr John Pritchard, Solicitor to the Commission for attending a meeting of the committee to brief Members. I would also like to thank Members of the Committee who attended the frequent deliberative meetings held over the past 6 months, ably served by the Committee Clerk, to discuss and debate the ICAC recommendations. I commend the Committee's report to the House.

JOHN PRICE
Deputy Speaker
And Chairman of the Committee

Chapter 1 - INTRODUCTION

On 15 September 2003 the Independent Commission Against Corruption (ICAC) tabled its Report on Regulation of Secondary Employment by Members of the Legislative Assembly. The report examined matters referred to the ICAC by the Legislative Assembly in November 2002 by resolution of the House (Appendix A).

The resolution referred to the ICAC the issues raised in a motion of censure against John Brogden MP which related to his employment as a public affairs consultant, and allegations that he had asked questions in Parliament that furthered the interests of his employer.

The resolution also requested the ICAC:

- (1) to report on regulating or limiting the employment of Members of Parliament to provide advice on public affairs
- (2) to consider the adequacy of the Code of Conduct provisions (to deal with secondary employment issues)
- (3) to consider provisions in the United Kingdom, the Scottish Parliament and other jurisdictions that pertain to disclosure of, or restrictions on, employment as an adviser on public affairs, parliamentary strategist or consultant, or lobbyist.

The Standing Committee on Parliamentary Privilege and Ethics has a function under the ICAC Act of considering amendments to the Code of Conduct, carrying out educative work relating to ethical standards and advising on ethical standards.

As the ICAC Report makes specific recommendations relating to the Code of Conduct and the declaration of pecuniary interests, the Committee resolved on 18 February 2004 to examine the ICAC's recommendations and report to the House. This Committee's report will also be forwarded to the Committee on the Independent Commission Against Corruption, a joint parliamentary committee comprised of members of both the Legislative Assembly and the Legislative Council. A copy of this report will also be forwarded to the Legislative Council Committee on Parliamentary Privilege and Ethics, which committee's role and function are similar to ours.

Chapter 2 - THE ICAC REPORT RECOMMENDATIONS

The Independent Commission Against Corruption Report on Regulation of Secondary Employment by Members of the Legislative Assembly makes 14 recommendations as follows:

ICAC Recommendation 1: Reforms for all types of Secondary Employment

That the New South Wales Legislative Assembly consider provisions for appropriate declaration and management of all forms of secondary employment and the extent to which they may conflict, or appear to conflict with a Member's parliamentary duties.

ICAC Recommendation 2: Guide to Assist Members on Conduct and Disclosure

That the New South Wales Legislative Assembly consider the development of a guide, similar to the British House of Commons' Guide to the Rules relating to the Conduct of Members, to assist Members in understanding and applying the Code and any other rules relating to the conduct of members, including those set out in the Constitution Act 1902 and the Constitution (Disclosures by members) Regulation 1983.

ICAC Recommendation 3: Additional Principle for the Code of Conduct

That the New South Wales Legislative Assembly consider an amendment to the Code of Conduct to include an additional principle or responsibility which sets out that a Member's primary obligation is to their constituents, and to the people of New South Wales.

ICAC Recommendation 4 – Defining Paid Advocacy in the Code of Conduct

That the title of clause 2 in the Members' Code of Conduct be amended to read "Bribery and Paid Advocacy" to reflect the fact that the description of activities contained in that clause is not confined to bribery.

ICAC Recommendation 5 – Prohibiting Paid Advocacy

That paid advocacy be prohibited in the New South Wales Legislative Assembly and that a breach of this rule be grounds for the House to expel a Member of Parliament. This provision should be enforced by way of either a resolution of the House or amendment to legislation, and in developing a definition, the Assembly should give careful consideration to the experiences in the British House of Commons and the Scottish Parliament.

ICAC Recommendation 6 – Paid Parliamentary Strategist, Adviser or Consultant

That the New South Wales Legislative Assembly consider the particular situation of secondary employment as a parliamentary strategist, adviser or consultant and determine whether this type of secondary employment should be prohibited or should be permitted within the current disclosure regime.

ICAC Recommendation 7 – Greater Detail in the Register of Pecuniary interests

That Members undertaking secondary employment should be required to provide a description of the services being provided and/or activities being undertaken, and that the description should be sufficiently detailed that a reasonable person would have an understanding of the actual work being performed by the Member on inspection of the register.

ICAC Recommendation 8 – Declaring Conflicts of Interests before Proceedings in Parliament

A Member should be required to disclose a conflict of interest at the start of any proceedings in Parliament which relate to the interests of any employer, association or client who has employed, or is currently employing the Members. In developing the detail of a disclosure-before-proceedings rule, consideration should be given to the experience in the British House of Commons, the Scottish Parliament and the Ontario Legislative Assembly.

ICAC Recommendation 9 – Employment Arising or Relating to Membership of the Parliament

Where a Member is engaged in secondary employment which depends upon, or arises out of, the Members' position as a Member of Parliament, that this should be indicated in the pecuniary interests register. The Member should be required to list all individual organisations to which the Member's services are provided, with a description of the nature of the business of the employer, client, or association in each case.

Further to this provision, where the Member is engaged by a company or where the Member is a Director of a company which in itself is a consultancy, then the member should also disclose those of the consultancy's clients with whom he or she has a personal connection or who benefit from the member's advice or service.

Further to this provision, where the income received from the employer, client, or association exceeds one per cent (1%) of the member's

parliamentary salary, then the Member should be required to enter a written agreement that outlines the service to be provided and/or activities to be undertaken. Members should be advised that this agreement should be accessible for the purpose of investigating any matter relating to a Member's secondary employment. The Assembly should determine how and with whom these agreements are to be deposited so that they are accessible for the purposes of investigation if required.

The pecuniary interests register should specify whether the secondary employment reaches the threshold of requiring a written agreement with the employer, and if so the date the agreement was entered into. Members should be required to enter into such agreements within 21 days of agreeing to the secondary employment.

ICAC Recommendation 10 – Updating the Register of Pecuniary Interests

That Members of the NSW Parliament be required to register any new interests, or changes in current interests, within 31 calendar days of the new interest commencing or a current interest being amended.

That the register of pecuniary interests be updated within seven days of receipt of documentation of a new interest or amendment to a current interest and that those changes be tabled in the Parliament at the commencement of the next sitting period.

ICAC Recommendation 11 – Establishment of electronic database of the Register of Pecuniary Interests

That the register of pecuniary interests be established as an electronic database that can be accessed via the Internet by Members of Parliament and members of the public.

ICAC Recommendation 12 – Review of Forms under Schedule 1 of the Regulation

That in undertaking a review of the pecuniary interests register, that a new form be developed to allow Members to advise of a material change in interests, and that the current forms under Schedule 1 be redesigned to improve usability.

ICAC Recommendation 13: Procedure to deal with particular allegations

That the New South Wales Legislative Assembly set down in procedure outlining the action it would consider to deal with a serious allegation of the breach of the Code of Conduct and/or of the pecuniary interests

register where parliamentary privilege protects the conduct from investigation by the ICAC. The ICAC recommends two options:

***Option 1:** Amendment to the Independent Commission Against Corruption Act 1988 to allow the Parliament to waive parliamentary privilege for specific matters which are referred to the ICAC by resolution of the House (although such an amendment would most likely only extend to those Members who choose to give evidence to the ICAC on a voluntary basis).*

***Option 2:** The appointment of an officer of the Parliament on a case-by-case basis to investigate particular matters (7 provisions are outlined which would safeguard the independence of the investigating official).*

In cases where the conduct of the investigation by the official, or the findings of the official are contested, that the House consider the appointment of an investigatory panel, similar to that of the British House of Commons.

ICAC Recommendation 14 – Implementation of Recommendations

That the New South Wales Legislative Assembly determine the most effective means of implementing the recommendations in this report – either by legislative amendment or by way of resolution of the House.

Chapter 3 – THE INQUIRY

The Committee's approach

In considering the ICAC Report recommendations the Committee bore in mind that the ICAC's report was framed around the topics specified in the Assembly's request. The ICAC report covers a comprehensive range of options, reflecting the various rules, regulations and reporting systems used in different jurisdictions.

In considering the ICAC recommendations and options identified, the Committee acknowledges the identified deficiency in the current system, which was referred to in the debate in the House regarding Mr Brogden's employment as a public affairs consultant (Hansard, Legislative Assembly 21 November 2002). Consequently, the Committee's focus in examining the ICAC recommendations has been on how to effectively address the problem of potential or actual conflict of interest arising from a member's secondary employment.

The Committee met with officers of the Independent Commission Against Corruption and examined and discussed the various forms of regulation, codes and conflict of interest guidelines currently adopted in New South Wales and other jurisdictions in Australia and overseas.

As noted in the ICAC Report, there is a diverse range of measures across various Parliaments aimed at avoidance of conflict of interest. The differences in the scope and detail of the rules reflects their evolution in response to particular events in those countries and states, the history and traditions of each jurisdiction's legislature and the framework of existing legislation in those countries.

The Committee notes that in background discussion supporting recommendations for change, the ICAC report recognises the close relationship between the provisions of each Parliament's code or rules, and the particular jurisdiction's political and legal environment. In reviewing the recommendations, the Committee has accordingly considered each option in the local context of the New South Wales Legislative Assembly and the community it serves.

The fundamental principle underlying the ICAC recommendations

The ICAC report bases its recommendations on the principle that a member who has employment apart from his or her position as an elected MP should avoid any conflict between their role as a Member of Parliament and their responsibilities and aims as an employee or adviser to another organisation or firm. If a member is receiving a financial benefit from an external employer, there may be a perception of divided loyalties. Members' decisions and actions should be based on factors such as the public interest, their constituents' interests, and their party's policies rather than benefits that might accrue to them personally or to a third party, especially if the member receives financial income from that third party.

MPs hold positions of public trust; public office provides the opportunity to misuse official power and position to serve interests other than the public's interest. Hence modern conflict of interest regulations focus on actual or apparent risks posed to the integrity of official decision making, by the personal interests of members.

A primary aim of an effective conflict of interest regime is to render transparent interests which may have a bearing or influence on a member's actions or decision making. Thus registration of interests is a fundamental mechanism in recognition, and avoidance, of conflict between personal interest and public duty.

Current provisions in NSW

There are a range of provisions currently in place in New South Wales that pertain to avoidance of conflicts of interest.

New South Wales has had a regulatory system for registration of pecuniary and certain other interests since 1983. The Constitution (Disclosure by Members) Regulation 1983 requires members to complete Primary and Ordinary Return Forms. These forms are the means by which Members, in accordance with section 14A of the Constitution Act 1902, place on the public record pecuniary and other interests which might raise, or appear to raise, a conflict between the member's private interests and public duty as member.

The Code of Conduct (was adopted by the Parliament in May 1998, readopted in March 1999, and again in February 2002. The Code of Conduct prohibits bribery and requires avoidance of conflicts of interest.

Legislative Assembly Standing Order 186, which was first approved and adopted in 1964, prohibits a member from voting on a matter in which a member has a direct pecuniary interest.

CODE OF CONDUCT FOR MEMBERS

(Votes and Proceedings, 29 April 2003, p.34)

That, for the current session, unless otherwise ordered, the following Code of Conduct for Members be adopted:

Preamble to the Code of Conduct

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.

Chapter 4 - THE COMMITTEE'S PRINCIPAL RECOMMENDATIONS

Review the regulation for registration of interests

Conflict between a public official's private interests and public duty, whether real, or reasonably perceived, negatively impacts on public confidence in the integrity of the system. Public officials responsible for decision-making, or those advising them, are urged to make full and prompt disclosure of any actual or potential conflict of interests they may have in a matter under consideration (NSW Ombudsman: "*Pre-requisites to Avoid or Manage Conflict of Interests*"). The Ombudsman suggests a range of options to avoid or deal with a conflict of interests, depending on the seriousness of the conflict. Declaration is the fundamental basis of transparent decision making. The Constitution (Pecuniary Interest) Regulation is one such system for declaration of interests. Together with Clause 1 of the Code of Conduct these mechanisms should provide transparency.

The Committee carefully considered whether the Code should be amended, as suggested in ICAC Recommendation 5, to prohibit "paid advocacy" as was done in the House of Commons in the wake of the cash for questions scandal that was investigated after being raised by the UK press in 1994. However, the blanket provision introduced in the United Kingdom originally picked up unintended consequences. Furthermore, the prohibition on paid advocacy does not preclude paid employment as parliamentary consultant, but requires such employment to be declared.

The Committee, in discussion with officers of the ICAC regarding the recommendations, determined that a good system of disclosure is probably more comprehensive, clearer and more likely to be understood by members, than a complex set of rules, such as the House of Commons Code and Guidelines. As is discussed further below, jurisdictions which have adopted prohibition, or a very strict rule, have been faced with definitional problems.

The Committee's recommendations for review of the pecuniary interest regulation are set out in the report below.

Committee recommendations:

That to address any possible problem that may arise in relation to a member's secondary employment, emphasis should be on registration of interests and transparency, augmented by raising awareness about how to avoid conflict between a member's personal interests and their public duty.

That the Committee formally review aspects of the regulation as outlined below, and survey members regarding the scope of changes required.

Improvements to current registration of interests scheme

As discussed in the body of the report below, the current registration of interests scheme could be improved by use of clearer forms, improved and more detailed explanatory material, and a requirement to update the Register within a reasonable time of changes occurring.

As previously noted by this Committee in its report on Review of the Code of Conduct (tabled in June 2002) the threshold limits for registration of gifts and travel are now outdated, and should be amended.

Augmented resources available to assist Members

The Committee recommends that education of members underpin the work already undertaken on developing the Code and Members' Handbook. Provision of detailed information and case studies should become an active priority for the Legislative Assembly, and this Committee undertakes to work to this end. Guidelines and instructional material are important in ensuring that all members fully understand the provisions of the Code of Conduct, the requirements of the registration of interests regulation, and the administrative guidelines set out in the Members' Handbook which form part of the Code. This Committee's potential role in training members was also referred to by the ICAC in its report on Investigation on Conduct of the Hon J. Richard Face.

As well as providing additional information for members about the provisions of the Code and the Constitution (Disclosure by Members) Regulation 1983, members of the Committee identified the need for additional assistance for members to be advised on organising their affairs to avoid conflicts.

The Parliamentary Ethics Adviser has the function of advising members on 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). This would extend to giving advice to assist members in fulfilling registration requirements, but under the resolution of the House establishing the Adviser's position, does not extend to the giving of legal advice. The NSW Parliamentary Ethics Adviser thus has a more confined role than equivalent Ethics Commissioners in Canada. The Committee recommends that the Adviser's role be expanded, permitting him to give legal advice to members. One Member of the Committee, the Member for Bligh, holds the minority view that the Adviser should also receive and follow up members' registration of interests forms, and report on members' completion of the requirements under the pecuniary interest regulations.

The ICAC Report on the Investigation on Conduct of the Hon J. Richard Face also identified the need for more and better information about the rulings of the Parliamentary Remuneration Tribunal and the Legislative Assembly's administrative requirements pertaining to use of entitlements, and the need to avoid conflict between private interest and public duty.

Committee recommendations:

That detailed information and case studies be provided to members regarding registration of interests, and avoidance of conflict between private interest and public duty.

That increased access to expert advice on these areas be made available to Members.

That the Parliamentary Ethics Adviser's role be expanded, requiring the Adviser to give legal advice on ethical issues and advice on interpretation of the pecuniary interest laws.

Chapter 5 – RESPONSE TO SPECIFIC ICAC RECOMMENDATIONS

ICAC Recommendation 1: Reforms for all types of Secondary Employment

That the New South Wales Legislative Assembly consider provisions for appropriate declaration and management of all forms of secondary employment and the extent to which they may conflict, or appear to conflict with a Member's parliamentary duties.

Committee's response and comment:

This recommendation has been adopted, in that this report by the Committee considers and responds to the ICAC Recommendations.

The question of what constitutes "a form of secondary employment" is discussed with regard to Recommendations 6 and 7 below.

ICAC Recommendation 2: Publication of a Guide to Assist Members on Conduct and Disclosure

That the New South Wales Legislative Assembly consider the development of a guide, similar to the British House of Commons' Guide to the Rules relating to the Conduct of Members, to assist Members in understanding and applying the Code and any other rules relating to the conduct of members, including those set out in the Constitution Act 1902 and the Constitution (Disclosures by members) Regulation 1983.

Committee's response and comment:

The House of Commons Guide to the Rules is a comprehensive and detailed guide to the various conflict of interest provisions applying to their members. Scotland also has extensive and detailed rules, which are read in conjunction with the statutory requirements for registration of interests ("The Members' Interests Order").

The fact that these jurisdictions have lengthy and detailed guidelines reflect the complexity of their rules. The House of Commons has a number of ethical guidelines, including the aspirational 7 key principles of Standards in Public Life, and a number of interrelating resolutions of the House, which together make up the Code. The application and interpretation of these provisions necessitates extensive explanatory material, such as definitions and contextual information.

Another example of a comprehensive compilation of ethical guidelines is the Queensland Legislative Assembly Code of Ethical Standards, which contains

information on the law, standing orders, complaints process and general principles relating to members' ethical obligations, published as one booklet.

The Committee recognises that precedents can give guidance to Members, and as noted by the ICAC, the fact that some principles in the Code are not articulated can be a problem for members.

Recommendation:

That the New South Wales Legislative Assembly compile a booklet for members, containing the Code, Standing Orders, information on the registration of pecuniary interests and other guidelines issued by the Parliamentary Remuneration Tribunal or Assembly administration, for the assistance of members.

ICAC Recommendation 3: New principle in the Code of Conduct

That the New South Wales Legislative Assembly consider an amendment to the Code of Conduct to include an additional principle or responsibility which sets out that a Members' primary obligation is to their constituents, and to the people of New South Wales.

The ICAC gives reasons for this recommendation on pages 66-67 of its Report.

The Report notes that the Assembly's current Code of Conduct does not specifically address the public duty and primary obligation of Members, as for example done by the Scottish Code. The Scottish Code explicitly states that:

Members' primary obligation is to act in the interests of the Scottish people and their Parliament. In doing so, members have a duty to uphold the law and to act in conformity with the rules of the Parliament.

Committee's response and comment:

This Committee does not support adoption of this recommendation, as suggested amendment is not considered to be necessary as the Code already incorporates this principle. The Preamble to the NSW Code of Conduct already emphasises the primacy of using influence to advance the common good and maintain public trust. The Preamble states:

"Members of Parliament recognise that they are in a unique position of being responsible to the electorate."

"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 proposed amendment would give rise to difficulties in application, as it is so broad in scope. It would also shift the content of the Code away from aspirational principles.

Response to ICAC Recommendation 3:

That the ICAC recommendation not be adopted.

ICAC Recommendation 4: Defining Paid Advocacy in the Code of Conduct

That the title of clause 2 in the Members' Code of conduct be amended to read "Bribery and Paid Advocacy" to reflect the fact that the description of activities contained in the clause is not confined to bribery.

Committee's response and comment:

The Committee considers that the Code adequately prohibits paid advocacy, in that the text of Clause 2 of the Code clearly states:

*Clause 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.*

Response to ICAC recommendation 4:

That the ICAC recommendation not be adopted.

ICAC Recommendation 5: Prohibiting Paid Advocacy

That paid advocacy be prohibited in the New South Wales Legislative Assembly and that a breach of this rule be grounds for the House to expel a Member of Parliament. This provision should be enforced by way of either a resolution of the House or amendment to legislation, and in developing a definition, the Assembly should give careful consideration to the experiences in the British House of Commons and the Scottish Parliament.

Committee's response and comment:

This recommendation is closely related to ICAC recommendations 4, 6 and 9.

The Committee considers that Clause 2 of the NSW Code of Conduct, which prohibits promoting any matter or asking any question in return for payment, already achieves the aim of prohibiting paid advocacy.

Clause 2 of the NSW Code of Conduct is a comprehensive statement which already prohibits “paid advocacy” as commonly understood:

CODE OF CONDUCT

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.

Paid advocacy is also countered by requiring registration of any secondary employment that might have the potential to give rise to an impression that financial reward might influence a member’s actions.

The committee noted that the experiences in the UK and Scotland had resulted in detailed definitions being required of what actions constituted “advocacy” in relation to receipt of “benefits”, and that various guidelines were needed to ensure that such provisions did not capture unintended and completely legitimate representations made by Members in the House or with Ministers. The Scottish Parliament has fine-tuned its original provision to ensure that the nexus between the benefit and the advocacy must be extremely clear to be caught within the provision.

In relation to the original resolution of the House referring the matter of secondary employment of members to the ICAC for investigation, it is notable that while the UK House of Commons has a blanket prohibition on “paid advocacy” it does permit employment as a parliamentary adviser or parliamentary consultant, provided that certain prescribed details of the employment are registered.

With reference to the ICAC recommendation that breach of the rule in clause 2 of the Code be grounds for expulsion from the House, existing law in NSW as stated in *Armstrong v Budd* (1969) 71 SR (NSW) 386 upholds the right of each House of Parliament to have a power of expulsion for reasonable cause, provided the circumstances are special and its exercise is not a cloak for punishment of the offender. The power is grounded in the rights of a House of Parliament to regulate its own constitution and composition for the purpose of preserving its dignity and efficiency, as well as to preserve public confidence in the institution of Parliament.

Grounds accepted by the Court of Appeal as warranting expulsion on the grounds of necessity include conduct involving “want of honesty and probity” (NSW Parliamentary Library Briefing Paper No17/2003 “Expulsion of Members of the NSW Parliament” p18).

Committee recommendation:

That the information booklet being compiled to augment the Code of Conduct clearly confirm that clause 2 of the Code prohibits “paid advocacy” including in the sense of accepting a bribe to influence a member’s conduct in the House, or acceptance by a member of remuneration to advocate a cause in the House.

That the Legislative Assembly confirm its right to expel members where the House resolves that the member’s conduct is such as to render them unfit to perform their responsibilities and functions as members, and whose actions would bring into question the honour and good faith of deliberations in the House.

ICAC Recommendation 6 – Paid Parliamentary Strategist, Adviser or Consultant

That the New South Wales Legislative Assembly consider the particular situation of secondary employment as a parliamentary strategist, adviser or consultant and determine whether this type of secondary employment should be prohibited or should be permitted within the current disclosure regime.

Committee response and comment:

Members of the NSW Parliament are currently not prohibited from undertaking secondary employment. Any income is required to be declared in the pecuniary interests register. Any move towards prohibition would necessitate careful definition of what activities would be considered to constitute employment as a “parliamentary strategist”, “adviser” or “consultant”, and whether in fact those terms were sufficiently comprehensive to include all activities desired to be prohibited. The ICAC points out that some other jurisdictions prohibit, strongly restrict, or impose special requirements with regard to being informed about employment of MPs as parliamentary affairs advisers, and gives examples of the House of Commons and Scotland.

The Code of Conduct adopted by the House of Commons in 1995 requires that any paid employment to provide parliamentary services needs to be registered, if the value of that employment is more than 1% of the base annual salary of an MP. The NSW pecuniary interest regulation has a similar requirement to annually register information about the source of any income above the value of \$500.

The House of Commons imposes additional requirements in relation to contracts for services “in a capacity as an MP”, requiring copies of each contract to be deposited with the Parliamentary Commissioner and made available to the public. There are different provisions relating to media employment such as journalism, broadcasting, speeches, training, appearances etc, whereby the agreement doesn’t have to be deposited, but certain information is required to be provided about the value of the work. Any such

employment cannot be in breach of the ban on lobbying for reward or consideration.

The Scottish Parliament's blanket ban on accepting paid work to provide services as a Parliamentary strategist, adviser or consultant, is also to be read in conjunction with examples and qualifications. For example, the prohibition does not extend to prohibiting a member from being remunerated for activity, which may arise because of, or relate to, membership of the Parliament, such as journalism or broadcasting, or work involving political comment or involvement in representative or presentational work, such as participation in delegations, conferences or other events.

The complexity and detail of the UK and Scottish provisions have developed in the context of a broad-brushed, comprehensive scheme, although in the case of the House of Commons progress was piecemeal in response to particular events in the Parliament.

The Committee notes that the perceived problem with employment as a parliamentary adviser or parliamentary consultant, which the ICAC recommendation seeks to alleviate, is the risk that a Member may have difficulty in drawing a line between actions motivated or influenced by employment and actions taken in the course of public duty in the House. The risk is one of perceived or actual influence on the Member's speeches or decisions in the House.

The Committee notes that such a risk is not limited to employment as a parliamentary adviser or consultant, but might arise in relation to many types of employment. The majority of the Committee is of the view that the clearest, simplest, and least ambiguous way of addressing this risk would be disclosure. Disclosure of information about employers from whom a member receives income does not require a complex scheme, catches everything, and is transparent in that the register is available for public inspection. The Member for Bligh did not consider registration of income sufficient to overcome the problems of Members being employed as strategists, advisers or consultants, and thought there should be a specific prohibition in the Code of Conduct.

The requirements of an effective registration scheme are discussed in relation to ICAC Recommendations 7 and 10, below.

Committee recommendation:

That members be required to disclose their pecuniary interests on a continuing and timely basis to ensure that the public have confidence in the integrity of the decision-making process of the Parliament.

ICAC Recommendation 7 – Greater Detail in the Register of Pecuniary interests

That Members undertaking secondary employment should be required to provide a description of the services being provided and/or activities being undertaken, and that the description should be sufficiently detailed that a reasonable person would have an understanding of the actual work being performed by the Member on inspection of the register.

Committee's response and comment:

ICAC Recommendations 6 (discussed above), 9 (the need to list employers and clients) and 12 (amending the registration of interests forms) are related to this recommendation.

Those jurisdictions which permit secondary employment, especially in relation to parliamentary services, rely on registration to provide the necessary transparency.

Currently in NSW clause 9(2) of the pecuniary interest disclosure regulation requires declaration of any source of income, and in relation to income from an occupation, "(i) a description of the occupation", and (ii) "where the member is employed or the holder of an office - the name and address of his employer or a description of the office". In relation to any other income (i.e. not from employment in an occupation, or from a trust), the Member needs to give a description sufficient to identify the person from whom, or the circumstances in which, the income was, or is reasonably expected to be, received.

The NSW Code of Conduct, which was adopted in 1998, requires that members 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.

The implication of the ICAC report is that the above requirements are insufficient to identify potential conflicts of interest as in the case of a Member employed as a consultant, or other like occupation, there is no transparency as to whom the clients are, or which third parties may be clients of the Member.

How do the NSW requirements compare with other jurisdictions?

In the UK since 1995 there have been detailed requirements for registration of employers, disclosure of payment received (in bands), and registration of contracts for certain types of employment. There have been a number of investigations by the Parliamentary Commissioner of members who have been found in breach of these requirements due to various circumstances, and the Committee noted that these provisions have given rise to complaints and in several cases adverse findings against members who have failed to register

income received from media appearances on TV chat-shows or newspaper articles. The House in each case recognised that failure to register had been inadvertent and the member apologised to the House.

Of the Australian codes, the Queensland Code of Ethical Standards requires the most detail to be disclosed when registering interest in shareholdings, positions in a company, or beneficial interests in trusts. It is notable that the Queensland Code, which is considered to be one of the more comprehensive Australian codes, only requires information on “nature of activities” in respect of any company of which the Member or a related person is an officer, or in respect of any family or business trust or nominee company in which the Member or a related person holds a beneficial trust. With regard to income from employment, say as an adviser to a management consultancy, the Code requires that the statement of interests lodged by a Member to contain the following details :

- (l) any other source of income over \$500 per annum received by –
 - (i) the Member or a related person;
 - (ii) a private company, or a trust, in which the Member or a related person holds an interest;

or where the source of income is under \$500, where that income might, in the judgment of the Member, involve sensitivity or be capable of misconstruction;

The current NSW provisions, which requires a description of the occupation, would seem to be broader.

The Committee noted that the Queensland Parliament has addressed the issue of conflict of interest which may arise in the course of professional services by publishing the following information in the publication that constitutes the Code of Ethical Standards of the Legislative Assembly of Queensland:

3.4.2

The House of Commons has long held various forms of conduct by members which may cause a conflict of interest, or a perception of a conflict of interest to be contempts. These include:

- Corruption in the execution of a member's duty, such as: acceptance of a bribe to influence a member's conduct in the House; accepting remuneration to advocate a cause in the House (“acting as a paid advocate”); or accepting money to disclose the confidential business of the House;
- Advocating in the House matters in which they have previously been involved professionally; or
- Accepting professional services connected with the business of the House. That is, members may not accept professional fees or undertake service on a matter before the House, whether or not the member is actually promoting the matter in the House.

The above matters could also be held to be a contempt of the Legislative Assembly.

The majority of the Committee were of the view that stating this information as a general guideline avoids the problems of interpretation and definition which could arise if this text was formally incorporated into the Code, or attempts were made to define “services connected with business of the House”.

The well-established parliamentary principle stated above works in tandem with the pecuniary interest regulation, which operates to disclose areas where Members might be receiving “professional fees” for services which could be related to business of the House. The Member for Bligh held a minority view that the pecuniary interest regulations should require detailed description of the source of a Member’s earned income, giving transparency and understanding of the actual work being done by the Member.

As the registration of pecuniary interests is established pursuant to a regulatory scheme, which prescribes the exact format of the registration form, changes to the registration of pecuniary interests regulation affect both Houses, and consequently would need agreement between the Houses to be effective.

Committee recommendation:

That the NSW Legislative Assembly compile a booklet for Members’ guidance containing the Code, Standing Orders information on registration of pecuniary interest and other guidelines issued by the Parliamentary Remuneration Tribunal or Assembly administration, and that the publication include reference to activities that constitute contempt of parliament.

ICAC Recommendation 8 – Declaring Conflicts of Interests before Proceedings in Parliament

A Member should be required to disclose a conflict of interest at the start of any proceedings in Parliament which relate to the interests of any employer, association or client who has employed, or is currently employing the Members. In developing the detail of a disclosure-before-proceedings rule, consideration should be given to the experience in the British House of Commons, the Scottish Parliament and the Ontario Legislative Assembly.

Committee's response and comment:

There is currently no Legislative Assembly Standing Order that requires declaration of a conflict of interest during debate in the House, although Standing Orders 186 and 187 prevent a member from voting on a matter where they have a direct pecuniary interest not held in common with other citizens.

Standing Order 317 states:

317. A Member shall not sit on a committee if personally interested in the inquiry before the committee.

Other jurisdictions have the following provisions:

UK House of Commons:

A declaration of interest is required when tabling any written notice of motion, or question on notice, motion equivalent to a private members' statement, private member's bill or any other motion or amendment. The printed paper shows a symbol reflecting a personal interest next to the relevant entry.

If an interest is declared in the Register of Members' Interests, a member is not required to make an oral disclosure for the purpose of taking part in any division of the House or Committees. There are particular requirements for declaration of interests in Select Committees, withdrawal from Committee proceedings and other special declaration procedures prior to election of a Chairman.

The Guidelines also remind members to declare an interest at the appropriate time in every aspect of parliamentary duties, including in correspondence and meetings with Ministers and public officials.

Scottish Parliament:

Section 5 of the Scottish Code of Conduct details the statutory requirements for oral declaration of interests: basically if a member has a registrable interest relevant to proceedings, the Member should make an oral statement before

taking part in those proceedings (pages 33-40 of the Scottish Code). There are detailed guidelines on how to determine whether an interest should be declared, how to declare, when to declare, and to be particularly mindful of the prohibition on paid advocacy.

The Member for Bligh holds a minority view that a similar provision should be introduced in the New South Wales Legislative Assembly.

Ontario Legislative Assembly:

The Member's Conflict of Interest Act section 9 requires that :

"A Member who has reasonable grounds to believe that he or she has conflict of interest in a matter that is before the Assembly or the Executive Council, or a committee of either of them shall, if present at a meeting considering the matter, (a) disclose the general nature of the conflict of interest; and (b) withdraw from the meeting without voting or participating in the consideration of the matter."

Queensland:

The Queensland Code of Ethical Standards states (at paragraph 3.2) that the Westminster system has a long tradition that requires members of Parliament to declare their financial interests in any matter before the House. However, it is noteworthy that the Queensland Legislative Assembly Standing Orders only require a member to abstain from voting if pecuniarily interested, or to disclose to a Committee any conflict of interest with a matter before a Committee.

Committee's response to ICAC Recommendation:

Given that the Code of Conduct directly requires that:

"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"

and specifically provides that:

"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"

this recommendation is not adopted.

ICAC Recommendation 9 – Employment Arising or Relating to Membership of the Parliament

Where a Member is engaged in secondary employment which depends upon, or arises out of, the Members' position as a Member of Parliament, that this should be indicated in the pecuniary interests register. The Member should be required to list all individual organisations to which the Member's services are provided, with a description of the nature of the business of the employer, client, or association in each case.

Further to this provision, where the Member is engaged by a company or where the Member is a Director of a company which in itself is a consultancy, then the member should also disclose those of the consultancy's clients with whom he or she has a personal connection or who benefit from the member's advice or service.

Further to this provision, where the income received from the employer, client, or association exceeds one per cent (1%) of the member's parliamentary salary, then the Member should be required to enter a written agreement that outlines the service to be provided and/or activities to be undertaken. Members should be advised that this agreement should be accessible for the purpose of investigating any matter relating to a Member's secondary employment. The Assembly should determine how and with whom these agreements are to be deposited so that they are accessible for the purposes of investigation if required.

The pecuniary interests register should specify whether the secondary employment reaches the threshold of requiring a written agreement with the employer, and if so the date the agreement was entered into. Members should be required to enter into such agreements within 21 days of agreeing to the secondary employment.

Committee's response and comment:

This recommendation reflects the UK guidelines applying to Members of the House of Commons, which the ICAC was asked to examine by the House.

The recommendation proposes that in addition to registering the source of income, a Member undertaking employment "arising out of a Member's position as a Member of Parliament" where the income exceeds \$1,062 per year (1% of base salary of \$106,270 as at July 2004) should record details in a written agreement, and that the agreement be accessible for the purposes of investigation if required.

There is currently no requirement in NSW for registration of such detail nor a written contract to be lodged in relation to any employment. The Committee

considers that introduction of such provisions is not currently warranted, and that the existing declaration requirements adequately cover the field.

As noted above, the current scheme of disclosure of pecuniary interests requires that a Members Primary and ordinary annual returns record the sources of any income reasonably expected to exceed \$500, and that the circumstances in which the income was or is expected to be received be stated. The definition of the term "income" specifically includes income received by a member from an occupation, as the holder of an office, from a partnership and income from any trust.

The current NSW regulation further provides that : *"a Member may, at his discretion, disclose in any return any direct or indirect benefits, advantages or liabilities, whether pecuniary or not –*

(a) which are not required to be disclosed by any other provision of this Part; and

(b) which the Member considers might appear to raise a conflict between his private interests and public duty as a member or which he otherwise desires to disclose."

All jurisdictions have similar provisions to this discretionary, "catch-all" provision, and most have prepared Guidelines which refer to this type of provision as means of reminding members of the need to consider disclosure of matters which might appear to raise a conflict. Annex 4 to the Scottish Code is one such example.

The Committee notes that the detailed UK provisions were in response to a series of problems arising from the tradition of Members of the House of Commons being openly employed, or sponsored, by interest or industry groups. This practice dates back to a time when members received token remuneration and membership of the House was not considered to be a full-time occupation.

The majority of the Committee's view is that the UK practice has not been a tradition or common practice of the NSW Parliament, and consequently the cultural change sought through introduction of the UK provisions in 1985 is not warranted in NSW, where current registration requirements adequately serve to address the problem of potential conflict of interest, provided members are fully aware of their scope and application. The Member for Bligh indicated to the Committee that she supports the ICAC recommendation.

Committee recommendation:

That in the case of a Member receiving income from secondary employment, the Member be required to provide a description of the nature of the business in the register.

ICAC Recommendation 10 – Updating the Register of Pecuniary Interests

That Members of the NSW Parliament be required to register any new interests, or changes in current interests, within 31 calendar days of the new interest commencing or a current interest being amended.

That the register of pecuniary interests be updated within seven days of receipt of documentation of a new interest or amendment to a current interest and that those changes be tabled in the Parliament at the commencement of the next sitting period.

Committee's response and comment:

The current regulation requires only that Members make a primary return when elected, and an ordinary return each year.

The Legislative Council Standing Committee on Parliamentary Privilege and Ethics considered the issue of updating the Register of Pecuniary Interests in that committee's inquiry into the Hon Edward Obeid's declaration of interests. The report of that Committee noted that members had in practice made additional disclosures outside the deadlines of the ordinary returns (page 95 of the aforementioned Legislative Council report).

This ICAC recommendation also relates to Recommendation 12 (design of a new form to update entries in the Register).

Other jurisdictions (eg Senate, House of Representatives, Queensland, ACT and The Welsh National Assembly) require that members register any changes to their interests in the Register of Members' Financial or Other Interests within four weeks of any change; Northern Territory requires notification within 60 days.

This Committee is of the view that updating is important in terms of transparency, as the register must be current if the public is to be on notice of any interest. However, the Committee recognises that there is an administrative burden in recording details of receipt of benefits from travel (for example flight upgrades), so for the sake of efficiency the time-frame for lodging amendments should not be too restricted.

The Committee also notes that, under the regulation pertaining to registration of interests, which provisions would also apply to the requirement to update the information, failure to register would need to constitute a "wilful breach" for consequences to flow under the Constitution Act. This would mean that omission through accidental oversight would not have the consequence of serious penalties that apply under that Act.

Committee recommendation:

That provision be made for updating the pecuniary interest register, and that the Committee formally inquire into the terms of necessary amendment.

ICAC Recommendation 11 – Establishment of electronic database of the Register of Pecuniary Interests

That the register of pecuniary interests be established as an electronic database that can be accessed via the Internet by Members of Parliament and members of the public.

Committee response and comment:

The Constitution (Disclosure by Members) Regulation requires that the register shall be open to public inspection at the office of the Clerk between the hours of 10.00am and 4.00pm on working days, and when the house is sitting. The Registers are required to be tabled in each House and published as a Parliamentary Paper, which means that it is available in libraries.

The Clerk of the Western Australian Parliament has advised that, after an inquiry last year, the Western Australian Parliament is intending to place their register on line. To enable this to occur amendments will be required to the Members of Parliament (Financial Interests) Act.

Reasons for placing the register on-line are greater transparency, and easier updating of information, thereby strengthening the risk-avoidance which is at the heart of declaration of interest provisions.

The House of Commons and Scottish Registers are available for inspection on-line via the Parliaments' websites.

The Member for Bligh holds a minority view in supporting the ICAC recommendation.

Committee recommendation:

That the Committee monitor and review the Western Australian experience with an on-line register after one year's operation and consider changes to the processes for inspection of the register in the context of any other amendments to the pecuniary interest regulation, including timing and process for lodging updates to a member's declaration.

ICAC Recommendation 12 – Review of Forms under Schedule 1 of the Regulation

That in undertaking a review of the pecuniary interests register, that a new form be developed to allow Members to advise of a material change in interests, and that the current forms under Schedule 1 be redesigned to improve usability.

Committee response and comment:

The layout and appearance of the form used by members to record their pecuniary interests is dictated by regulation, so will require formal regulatory amendment. Any new form introduced to record material changes in the course of the reporting year would also need to be incorporated into the current regulation.

The ICAC has identified inconsistencies within the various reporting requirements of the current form, and recommended that it should be updated to conform with on-line registration of interests, and to allow greater space for some entries if needed.

The requirements of the pecuniary interest regulation and the format and requirements of the form in particular were discussed in debate in the House on the Brogden reference, in the context of whether Mr Brogden had provided adequate information. This issue is also discussed in the report by the Legislative Council Standing Committee on Parliamentary Privilege and Ethics inquiry into the Pecuniary Interests Register (in relation to whether Minister Edward Obeid had wilfully contravened the requirements of the regulation).

The Welsh Parliament has recently given consideration to changing its pecuniary interest registration form, with a view to giving more information on the form itself about the detail to be recorded. However, there were concerns about the possibility of misleading members through truncating the legal requirements, and also about the length of the form, and to date this change has yet to be implemented.

The Canadian jurisdictions have very detailed forms, which are kept confidential by the Ethics Commissioner, with only limited information published. In New South Wales the forms are themselves compiled and published in exactly the format provided by the member making the declaration.

Committee recommendation:

That in the context of recommended changes to the pecuniary interests regulation, the design and layout of the form dictated by the regulation be amended to more clearly cross-reference with the various sections of the regulation.

ICAC Recommendation 13: Procedure to deal with particular allegations

That the New South Wales Legislative Assembly set down in procedure outlining the action it would consider to deal with a serious allegation of the breach of the Code of Conduct and/or of the pecuniary interests register where parliamentary privilege protects the conduct from investigation by the ICAC. The ICAC recommends two options:

Option 1: Amendment to the Independent Commission Against Corruption Act 1988 to allow the Parliament to waive parliamentary privilege for specific matters which are referred to the ICAC by resolution of the House (although such an amendment would most likely only extend to those Members who choose to give evidence to the ICAC on a voluntary basis).

Option 2: The appointment of an officer of the Parliament on a case-by-case basis to investigate particular matters (7 provisions are outlined which would safeguard the independence of the investigating official).

In cases where the conduct of the investigation by the official, or the findings of the official are contested, that the House consider the appointment of an investigatory panel, similar to that of the British House of Commons.

Committee response and comment:

To some extent these recommendations have been superseded by the establishment of this Committee on Parliamentary Privilege and Ethics, which has the power and function of considering any matters relating to privilege which may be referred to it by the House.

As noted above, the equivalent Legislative Council Committee, the Standing Committee on Parliamentary Privilege and Ethics has held an inquiry and reported on allegations of breach of the requirements for declaration of pecuniary interests.

ICAC Option 1 (amend the Act to permit waiver of privilege):

Waiver of parliamentary privilege is a contentious issue. Houses of Parliament have taken the view that the privilege bestowed by Article 9 cannot be waived by action of an individual member.

In the opinion of authorities such as Professor Enid Campbell, “there seems to be little doubt that the immunity from liability which Article 9 [of the Bill of Rights 1689] confers cannot be waived by a House of Parliament, or by an individual who is entitled to rely on the immunity”. There are however differences of opinion about whether a clear statutory provision could allow privilege to be waived to enable evidence to be received and used for a purpose

other than to fix liability on a person on account of what the person has said or done in Parliament.

The amendment recommended by the ICAC would pertain to s122 of the ICAC Act 1988. That section states:

122 Parliament

Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

In considering the ICAC recommendation, the committee noted the intent of the Parliament in legislating s122. The history of this section is that it was introduced by an amending bill in 1988. The insertion of this protection was in response to concerns raised in debate on the Independent Commission Against Corruption Bill (No 2), where some members had noted that in granting extensive powers to the investigative body, the Government had discarded the checks and balances that had evolved over many hundreds of years in democratic countries (The Hon J. R Hallam, MLC, 8 June 1988 Hansard p1682).

Other members pointed out that the original ICAC Act, which did not have section 122, “prevented adequate parliamentary scrutiny by the proposed joint parliamentary committee, and protected the commission from debate and criticism in Parliament by abrogating the ancient privileges of this Parliament and its Members” (Hon M. Egan MLC, 8 June 1988 Hansard page 1697). The Opposition view was that the contempt provisions in the bill “shackled debate about and criticism of the commission by parliamentarians, and ... abolished many aspects of parliamentary privilege. Any member of this Parliament who dares to criticize the workings of the commission will run the risk of being in contempt of the Commission” (p1699). Mr Egan also noted that the bill gave the Commission’s authorised officers power to enter the Parliament, the office of any Member of Parliament, and to inspect or seize any documents in that office.

When the Independent Commission Against Corruption Amendment Bill was introduced three months later, Attorney General Hon John Dowd MP noted (at Hansard page 2273) “It is now proposed to insert a new section 122 into the Act to reflect Article 9 of the United Kingdom Bill of Rights of 1688 by providing that nothing in the Act shall be taken to affect the rights and privileges of freedom of speech, debates and proceedings in Parliament”. It was noted by the Shadow Attorney General, the Hon Paul Whelan, that this proposed amendment was in response to criticism by the Opposition that the Act had eroded parliamentary privilege.

Given that recent experience has seen the ICAC execute a search warrant on a member’s office in Parliament House (discussed in Legislative Council Standing Committee on Parliamentary Privilege and Ethics Reports on

Parliamentary Privilege and Seizure of Documents, Nos 1 and 2) section 122 would appear to not even provide the type of protection to members that was envisaged in debate on the bill.

The delegation of this committee which visited ACT and Victoria to discuss privilege specifically discussed other jurisdiction's views of waiver. The point was made by the Senate Privileges Committee Chair that if waiver was available to the House as a discretionary option, any decision not to waive privilege, based on whatever grounds, could be construed as evasive or an admission of guilt. Furthermore, parliamentary privilege has been hard-won, has a strong public interest basis, and should not be conceded.

The Committee is firmly of the view that s122, which by its wording guarantees the application of parliamentary privilege under Article 9 of the Bill of Rights, should not be amended.

ICAC Option 2 (Appointment of Parliamentary investigator or panel on case-by-case basis):

With respect to option 2, there is a precedent in the House of Commons resolving in 2002 to establish procedures for an investigating panel in response to concerns that members had expressed about inquiries which had been undertaken by the Parliamentary Commissioner for Standards. Again, this is an example of action taken by the House of Commons in response to a particular political and parliamentary environment at the time, and a specific set of circumstances. Although the resolution of the House appointing the Parliamentary Ethics Adviser in New South Wales only provides for the Adviser to provide advice on ethical issues, including conflict of interest, at the request of the Member involved him or herself, the capacity is there for the House to amend the resolution to do otherwise if so desired.

The Member for Bligh noted that option 2 was to be preferred to option 1, for the reason that dealing with allegations about a Member's activities that breached parliamentary privilege should remain an activity of the House, rather than the ICAC. The fact that such allegations would be considered by the House on a case by case basis would also minimise the referral of matters to the ICAC that could be characterised as political pursuits.

Committee recommendation:

This Committee on Parliamentary Privilege and Ethics having been established, the Committee recommends that s122 of the Act not be amended, and that the House consider options for investigating matters coming before the ICAC which involve parliamentary privilege on a case by case basis.

ICAC Recommendation 14 – Implementation of Recommendations

That the New South Wales Legislative Assembly determine the most effective means of implementing the recommendations in this report – either by legislative amendment or by way of resolution of the House.

Committee response and comment:

Some of the recommendations outlined above will require legislative change, for example the form for recording pecuniary interests is specified by regulation.

Currently the Code of Conduct has been adopted by both Houses, a fact which is considered to give the Code authority. Originally each House has proposed codes with slightly differing provisions, and ultimately these codes were not adopted. The current Code was adopted by joint resolution, and it would be desirable for any change to the Code to also be adopted by joint resolution. A first step in any change to the Code suggested by this Committee would be to request the Legislative Council Standing Committee on Parliamentary Privilege and Ethics to also consider the issues and report to their House.

Other changes recommended in this report could be adopted by administrative action undertaken by this Committee in conjunction with the Clerk of the Legislative Assembly. For example, the publication of existing regulations, standing orders, resolutions and other rulings in one comprehensive and detailed booklet would greatly assist members and also provide a basis for further educational activities.

**APPENDIX A - Excerpt from Votes and Proceedings of the Legislative Assembly of
23 November 2002. V&P No 58, Entry 23**

**1 MOTION FOR URGENT CONSIDERATION—REFERENCE TO THE
INDEPENDENT COMMISSION AGAINST CORRUPTION**

Dr Refshauge moved, pursuant to notice, That, having regard to the issues raised in the debate on the censure motion in the Legislative Assembly on 14 November 2002 and to subsequent questions relating to the conduct of the Hon John Brogden MP, Leader of the Opposition, the Member for Pittwater, the House requests the Independent Commission Against Corruption (ICAC) to look into those matters and report to the Speaker as soon as practicable on what measures might be taken in respect of regulating or limiting the employment of Members of Parliament to provide advice on public affairs.

In particular, the House requests the ICAC to consider the adequacy of the provisions of the Code of Conduct for Members of the Legislative Assembly.

In respect of the above, the ICAC should specifically consider provisions in:

- (a) the United Kingdom House of Commons Code of Conduct and Guide to the Rules Relating to the Conduct of Members, which:
 - require the nature of any post held by a Member to be properly described, for example, as a ‘legal adviser’ or ‘parliamentary and public affairs consultant’;
 - require a written contract of engagement to be disclosed, together with details of all clients to whom the Member provides advice, where the provision of services depends upon, or arises out of, the Member’s position as a Member; and
 - prohibit ‘advocacy’ whereby a Member receives a direct or indirect benefit to advocate or initiate any cause or matter in proceedings in Parliament specifically on behalf of an outside body, where such action would confer an exclusive benefit on that body;
- (b) the Code of Conduct for Members of the Scottish Parliament, which:
 - prohibit advocacy for a fee in proceedings in Parliament;
 - direct that a Member should not accept any paid work which would involve the Member in lobbying on behalf of any person or organisation or any clients of a person or organisation; and
 - direct that a Member should not accept any paid work to provide services as a parliamentary strategist, adviser or consultant, for example, in advising on parliamentary affairs or how to influence the Parliament and its members; and
- (c) any other relevant provisions in other jurisdictions.

Debate ensued.

Mr Tink moved, That the motion be amended by the addition of the following words:

- (d) Further requests the Independent Commission Against Corruption to look into and report to the Speaker as soon as practicable upon:
- Whether persons who have served on the Premiers' or a Ministers' personal staff should be prohibited for a period of time from receiving payment for making representation to that Minister, the Premier or any other Minister.

Question proposed—That the amendment be agreed to.

Debate continued.

Question—That the amendment be agreed to—put and negatived.

Question—That the original motion be agreed to—put and passed.

APPENDIX B – CODE OF CONDUCT

53rd Parliament 1st Session

Code of Conduct for Members adopted by the Legislative Assembly (29 April 2003, p. 34)

Legislative Assembly, Parliament of New South Wales

That for the current session, unless otherwise ordered, the following Code of Conduct for Members be adopted:

Preamble to the Code of Conduct

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.