

11 April 2021

Peter Sidgreaves MP
Chair
Standing Committee on Parliamentary Privilege and Ethics
Legislative Assembly
Parliament House,
SYDNEY NSW 2000

Dear Mr Sidgreaves

1. I refer to your letter of 10 March 2021 inviting me to make a submission to your Committee in relation to the proposal for the appointment of a Compliance Officer.
2. I apologise for the delay in responding to your request as I have been absent from Sydney.
3. In making this submission I draw to your attention any perceived conflict of interest from my position as Parliamentary Ethics Adviser.
4. No doubt your Committee is aware of the submission I made to the Legislative Council, and which has been made public.
5. Before responding to the specific questions posed to me, I wish to make some general observations on the Compliance Officer proposal.
6. Whilst I support the concept for the appointment of a Compliance Officer, I have difficulties with many aspects of the proposal, which are dealt with in my comments below.

Proposal for a Compliance Officer

7. There is currently no mechanism to investigate complaints of misconduct by Members which do not fall within the definition of corrupt conduct under the *Independent Commission Against Corruption Act 1988* and which also amount to a substantial breach of an applicable Code of Conduct.¹
8. Before commenting on the matters the proposed Compliance Officer may investigate and the questions you have posed, I feel it is useful to outline similar comments I made to the Legislative Council Committee on my understanding of the situation in the UK House of Commons and House of Lords, and which

¹ *Independent Commission Against Corruption Act 1988, ss 8 and 9.*

may assist to clarify the context of my reasoning below for suggested changes to the role of the Compliance Officer.² A similar scheme also applies in the House of Lords.³

9. The Parliamentary Commissioner for Standards (the Commissioner) may only investigate allegations of misconduct of Members involving a breach of paragraphs 9 (Part IV), 10-18 (Part V)⁴ of the Code of Conduct and associated rules. The Commissioner may not investigate allegations of breach of the duties of Members (Part III)⁵ and the general principles of conduct (Part IV).⁶ However, the general principles are taken into account when considering and determination of allegations of breaches of the rules of conduct in Part V of the Code.
10. If the Commissioner concludes that an allegation is not substantiated, the Commissioner will not uphold it and report that conclusion briefly to the Standards Committee (the Committee). The determination letter and relevant evidence is then published on the Commissioner's webpage. Sometimes where an allegation is not upheld, the Commissioner may decide to report to the Committee because of the seriousness of the allegation or it raises matters of wider importance. The Committee then considers the matter and submits a report to the House.
11. Where the Commissioner finds that there has been a less serious breach of the rules the Commissioner can decide that it be resolved through a rectification procedure under Standing Order 150 (4).

² In summarising the role of the Commissioner, I have drawn details from the UK House of Commons "*The Code of Conduct*" and "*Guide to the Rules relating to the Conduct of Members*", 8 January 2019; *Parliamentary Commissioner for Standards, Commissioner's Information Note*, 7 May 2015.

³ House of Lords – "*Code of Conduct for Members of the House of Lords, Guide to the Code of Conduct, and Code of Conduct for House of Lords Members' Staff*", Tenth edition, July 2020.

⁴ (Part V) Para 10 – observe rules and resolutions of the House, Paras 11 to 18.

Para 11 – act in public interest, avoid conflicts of interest and resolve conflicts in favour of public interest.

Para 12 – acting as paid advocate.

Para 13 – accepting a bribe to influence conduct as a Member, including accepting fee, compensation or reward for promotion of a matter.

Para 14 – fulfil conscientiously the requirements of the House in respect of the registration of interests; draw attention to any relevant interest in any proceeding of the House or its Committees, and in communications with Ministers, Members, public officials or public office holders.

Para 15 – use of confidential information only in connection with parliamentary duties, and never use for financial gain.

Para 16 – Members are personally responsible and accountable for ensuring use of any expenses, allowances, facilities and services is in accordance with the rules; that their use of public resources is always in support of parliamentary duties; use of resources not confer any undue personal or financial benefit on themselves, anyone else, or confer undue advantage on a political organisation.

Para 17 – any action of a Member causing significant damage to the reputation and integrity of the House of Commons as a whole, or of Members generally.

Para 18 – Member must treat their staff and all those visiting or working for or with Parliament with dignity, courtesy and respect. A Member must treat their staff and all those visiting or working for or with Parliament with dignity, courtesy and respect.

⁵ Part III – Para 4 – allegiance to the Queen.

Para 5 – duty to uphold the law, including law against discrimination.

Para 6 – duty to act in the interests of the nation, and a special duty to their constituents.

Para 7 – act on in accordance with the public trust, and always behave with probity and integrity, including in their use of public resources.

⁶ Part IV – Para 8 – in carrying out their parliamentary and public duties, Members are expected to observe the general principles of conduct identified by the First Report of Committee on Standards in Public Life – Selflessness, integrity, objectivity, accountability, openness, honesty and leadership.

Para 9 – observe the principles of the Parliamentary Behaviour Code of respect, professionalism, understanding others' perspectives, courtesy, and acceptance of responsibility.

12. The rectification procedure applies to minor or inadvertent failure to register or declare an interest and the Member has taken rectification action approved by the Committee. In cases involving parliamentary allowances or use of facilities and resources the Commissioner and Member may agree to appropriate financial reimbursement within such period of time as the Commissioner considers reasonable. These decisions and relevant evidence are published on the Commissioner's webpage.
13. Where the Commissioner finds that a breach cannot be resolved by the rectification procedure and raises more serious issues, the Commissioner reports the facts and reasons to the Committee. The Committee considers the Commissioner's report and determines whether there has been a breach of the rules. If the Committee finds there has been a breach of the rules it may recommend to the House that a penalty be imposed. (Of course, a fine cannot be imposed in NSW).
14. The House of Commons has determined that the Commissioner may not investigate complaints about:
 - policy matters
 - a Member's views or opinions
 - a Member's handling or decision of a case, including correspondence, whether or not the person is a constituent
 - the conduct of a Member in public life which does not relate to membership of the House.
15. A Behaviour Code was approved by both the House of Lords and House of Commons on 19 July 2018, following a report from an all-party Programme Team of Members and parliamentary officials of both Houses and expert advisers.⁷ The behaviour code is not a set of rules but rather a statement of principles and intent.
16. Bullying, harassment and sexual misconduct⁸ are dealt with under a Parliamentary Behaviour Code. The Code instituted a separate Independent Complaints and Grievance Scheme (ICGS) where independent case managers deal with these complaints and report to the Commissioner, who reports to the Committee.

⁷ UK Parliament, "*Independent Complaints and Grievance Policy Programme Team - Independent Complaints and Grievance Scheme Delivery Report*" July 2018. This report followed from earlier recommendations from a "*Cross-Party Working Group on an Independent Complaints and Grievance Policy*", 8 February 2018, resulting from allegations and media reports about inappropriate behaviour and a culture of bullying and sexual harassment at Westminster.

⁸ Para 18 of the Code of Conduct

17. ICGS cases are strictly confidential and since July 2018 are no longer published, except statistical information.
18. Since 2010 breaches of the scheme for parliamentary expenses (PRT Members entitlements scheme in NSW) is the remit of the Independent Parliamentary Standards Authority (IPSA) or Compliance Officer. However, the IPSA may refer a matter to the Commissioner who may decide to inquire into a potential breach of the Code of Conduct and associated rules. The Committee then decides what action, if any, to recommend to the House.
19. Persons making allegations to the Commissioner are not protected by the law of defamation unless and until the Commissioner accepts a matter for inquiry, when relevant correspondence and evidence are protected by parliamentary privilege, which is a moot point for the Compliance Officer procedure in NSW.
20. The declarations and registration of financial interests in the House of Commons is administered by the Commissioner, who may investigate allegations of failure to register or disclose relevant interests under the Code of Conduct. The Commissioner reports to the Committee.
21. A finding by the Commissioner of non-registration of an interest requires an entry in the register in ***bold italics***, with an explanatory note. Non-declaration of an interest requires an apology to the House.
22. The House of Lords also has a Commissioner for Standards to investigate alleged breaches of the Code of Conduct and other matters.⁹
23. Following an investigation, the Commissioner reports findings of fact to the Lords Conduct Committee in cases where a complaint is upheld, and remedial action has not been agreed with the member concerned. The Commissioner also recommends an appropriate sanction. The member concerned has a right of appeal against both the Commissioner's findings and any recommended sanction. Having considered any appeal, and having agreed to any appropriate sanction, the Conduct Committee reports to the House and, for the most serious sanctions, the final decision rests with the House. In cases where the Commissioner has dismissed the complaint or where remedial action has been agreed, the Commissioner's reports are normally published on the Commissioner's webpage. However, the Commissioner has discretion to submit a report to the Conduct Committee.¹⁰

⁹ See Note 3.

¹⁰ Extracted from House of Lords – “*Code of Conduct for Members of the House of Lords, Guide to the Code of Conduct, and Code of Conduct for House of Lords Members’ Staff*”, Tenth edition, July 2020, para 3, page 6

24. In a case of bullying, harassment or sexual misconduct, the complainant has a right of appeal to an Independent Expert Panel of non-Members. Non-compliance with a decision of the Panel is reported to the Commissioner. The Panel makes an annual report to the Clerk of the House for tabling.

25. In summary, the important elements from the above discussion are:

- the Standards Commissioner does not report directly to the House, but rather the Standards Committee, and which provides for an appeal process. In cases of serious allegations or matters of wider importance the Commissioner reports to the Committee. It is then for the Committee to consider the matter and report to the House in appropriate cases.

I strongly urge this concept of reporting to the oversight Committee in relation to the Compliance Officer proposal. As discussed further below, other than in an annual report, I believe the Compliance Officer should not report directly to the House.

- breaches of the scheme for parliamentary expenses (PRT Members entitlements scheme in NSW) is the remit of the Independent Parliamentary Standards Authority (IPSA) or Compliance Officer, rather than the Standards Commissioner. However, IPSA may refer a matter to the Commissioner who may decide to inquire into a potential breach of the Code of Conduct and associated rules. The Committee then decides what action, if any, to recommend to the House.
- the declaration and disclosure of financial interests is administered by the Commissioner and breaches of the scheme of disclosure are investigated by the Commissioner.
- bullying, harassment and sexual misconduct are dealt with under a Parliamentary Behaviour Code which instituted a separate Independent Complaints and Grievance Scheme (ICGS) where independent case managers deal with complaints and report to the Commissioner, who reports to the Standards Committee. Appeals are dealt with by an Independent Expert Panel of non-Members appointed by the House.

26. Before responding to the specific questions posed to me, I make some further comments on various clauses of the proposal for a Compliance Officer. I have made similar comments in my submission to the Legislative Council Privileges Committee.

Clauses 1 and 2

29. Clause 1 of the proposed resolution establishes a position of Compliance Officer to deal with “low level, minor misconduct”, which under clause 2 relate to:
1. alleged breaches of the Members’ code of conduct
 2. less serious misconduct falling short of corrupt conduct
 3. allegations of bullying, harassment and other types of grievances
 4. minor breaches of the pecuniary interests disclosure scheme.
30. It is unclear what is meant by “low level, minor misconduct”, “less serious misconduct” and “minor breaches” Surely the Compliance Officer should be able to investigate any matter relating to alleged breaches of the Member’s Code of Conduct and failure to disclose pecuniary interests. Conduct amounting to corrupt conduct would necessarily be brought to the attention of the Independent Commission Against Corruption.
31. Clause (2) (b) (c) and (d) – In my view these matters should be left for inclusion in a protocol and consequent resolution of the House rather than include in the initial resolution establishing the position. Similar comments are made below in regard to other clauses.
32. For reasons discussed below in my submission, in my view the resolution for appointment of a Compliance Officer should simply be confined to the terms of appointment and functions of the Compliance Officer.
33. I would suggest a proposal for the establishment of a Compliance Officer in the following terms:

5. Appointment of Compliance Officer

- (2) That this House directs the Speaker to appoint a Compliance Officer (*jointly with the President of the Legislative Council*).
- (3) The Speaker is to refer the proposed appointment of a person as Compliance Officer to the Privilege and Ethics Committee, who may veto the appointment.

6. Functions of Compliance Officer

- (1) The Compliance Officer has the following functions:

- (a) to receive and investigate complaints of alleged breaches of the Code of Conduct for Members, but not in relation to any proceedings in the House or a Committee, *(proposed (2) (a))*
- (b) to receive and investigate complaints of bullying, harassment and sexual harassment under the Code of Conduct for Members, *(proposed (2) (a) (iii) (this is presuming a provision is inserted in the Code of Conduct))*
- (c) to receive and investigate complaints of alleged breaches of the disclosure of pecuniary interests under the Constitution (Disclosures by Members) Regulation 1983, *(proposed (2) (a) (iv))*
- (d) to receive and investigate complaints of the misuse of additional entitlements provided to Members under Part 3 of the Parliamentary Remuneration Tribunal Act 1989, *(proposed (2) (a) (i))*
- (e) to provide advice to the Privilege and Ethics Committee on any reform necessary on matters within the functions of the Compliance Officer, *(proposed (2) (b))*
- (f) to provide confidential advice, on request, to a Member or relevant staff of the Parliament on the interpretation of additional entitlements available to Members under the Parliamentary Remuneration Tribunal Act 1989, solely for the purpose of resolving any disagreement on interpretation of additional entitlements, and *(proposed (2) (d))*
- (g) to provide, information, training and education to Members of their obligations under the Code of Conduct and pecuniary interests regime. *(proposed (2) (c)).*
(Note: Clause 2 (1) (g) is to be done in conjunction with the Privileges Committee, the Clerk of the Parliaments and the Parliamentary Ethics Adviser)

(Proposed paragraphs (1) (e), (f) and (g) might otherwise be included in the protocol as discussed in paragraph 35)

- (2) The Compliance Officer has such other functions as are conferred by resolution of the House.
- (3) In investigating any allegations of non-compliance with the Code of Conduct, the Compliance Officer must recognise the principle of freedom of speech in parliamentary proceedings, including but not limited to the need for members to be able to express their views fully and frankly in parliamentary proceedings.¹¹

¹¹ See para 23, House of Lords Code of Conduct.

34. It may well transpire that both Privileges Committee are unable to reach agreement on the precise terms of the proposed resolution for a Compliance Officer. In that event the Privilege and Ethics Committee should propose a scheme to meet the needs of the Legislative Assembly, but with a common Compliance Officer for both Houses.
35. Under this approach any protocol to be approved by the Privilege and Ethics Committee and resolution of the House, could be accompanied by an appropriate resolution encapsulating as appropriate the matters now included in clauses (2) (b) (c) and (d), clause (4) and clause (5).

Clause 3 – amendment of the Code of Conduct for Members

36. Clause 3 proposes an amendment to the Member’s Code of Conduct requiring members to treat staff and others “in a manner compatible with a safe workplace, free from harassment.”
37. What is meant by safe workplace and free from harassment? Is this meant to cover, bullying and harassment as well a sexual harassment?
38. If under proposed clause (2) (a) (iii) the Compliance Officer may investigate “allegations of bullying, harassment and other types of grievances”, then any amendment of the Members’ Code should include bullying.
39. Of course, sexual harassment by Members is unlawful under section 22B (7) of the *Anti-Discrimination Act 1977*, as well as workplace participants sexually harassing Members under section 22B (8).
40. I suggest a variation of the wording of clause 3, which is based on the rules in the UK Parliament¹², as follows:

“10 Behaviour of Members

A Member must treat all those with whom they come into contact in the course of their parliamentary duties and activities (including parliamentary proceedings) with dignity, courtesy and respect, and free from any behaviour that amounts to bullying, harassment or sexual harassment.”

41. There is a typographical error in the commentary on clause 3 and “Section 22(b) should read “Section 22B”.

¹² House of Commons rules 9 and 18; House of Lords rules 10 and 17.

42. In the UK Parliament since July 2018 a Behaviour Code applies to members of both Houses, following recommendations from two reports from a working group of members of both Houses for an Independent Complaints and Grievance Scheme (ICGS) to deal with bullying, harassment and sexual misconduct.¹³
43. The ICGS recognises that sexual harassment and sexual violence are different from other forms of inappropriate behaviour, including harassment and bullying, and require separate definition and procedures. Thus, the ICGS has two new Parliament-wide policies for responding to and managing complaints of sexual harassment¹⁴ and bullying and harassment¹⁵.
44. Significantly, the schemes provide specialist independent support and guidance to complainants, to offer a specialist independent investigation process where required and to arrange access to informal resolutions (where appropriate and agreed by both parties).¹⁶
45. Formal complaints under the ICGS scheme are allocated to an independent external investigator who completes an initial assessment to determine whether the allegations concern bullying and harassment, or sexual misconduct. If the complaint is assessed as falling under either of ICGS policies, it is passed to the Standards Commissioner to agree on a full assessment of the complaint. An independent external investigator (usually, the same investigator who completed the initial assessment) will complete this assessment. If at the conclusion of the full assessment the complaint is upheld, and subject to any appeal by those involved, the Commissioner can impose sanctions for less serious breaches of the relevant policy. From June 2020, an independent expert panel of non-members considers such cases, in place of the Standards Committee.¹⁷
46. There are three pathways for dealing with sexual misconduct under the ICGS Sexual Misconduct Policy & Procedure.¹⁸ Complaints requiring an intervention are initially dealt with by experienced Sexual Violence Advisers (ISVAs) acting as case managers within the Independent Sexual Misconduct Advisory Service (ISMA Service). Case managers facilitate interventions and broker outcomes which can include, for example:

¹³ Report of “Cross-Party Working Group on an Independent Complaints and Grievance Policy”, 8 February 2018; *Report of “Independent Complaints and Grievance Policy Programme Team - Independent Complaints and Grievance Scheme Delivery Report”*, July 2018

¹⁴ “Independent Complaints and Grievance Scheme - Sexual Misconduct Policy Procedure”, July 2018 - a useful list of behaviours that may constitute sexual misconduct at paragraphs 5.2 to 5.4.

¹⁵ “Independent Complaints and Grievance Scheme - Bullying & Harassment Policy & Procedure”, July 2018, has a useful discussion of examples of harassment at paragraphs 2.5 to 2.8, and bullying at paragraphs 2.9 to 2.11.

¹⁶ Para 29 *Working Group Report*, *ibid* note 6.

¹⁷ See “House of Commons, *The Parliamentary Commissioner for Standards - Annual Report 2019–20*”

¹⁸ *Ibid* note 14.

- apology
 - acknowledgement of behaviour
 - behavioural agreement outlining appropriate/inappropriate behaviour
 - training.
47. Where a formal complaint is made against a Member, an independent specialist investigator is appointed to undertake an assessment, gather evidence and report to the Commissioner for Standards, who has oversight of the investigation and reports to the Committee.
48. As might be expected, if there is to be an amendment to the Code of Conduct for Members to promote dignity and respect, there should equally be a Parliament wide behaviour code applicable to all those whose place of work is Parliament House and electoral offices. This should apply to all passholders, including visitors, media and contractors.
49. In my humble view it would be difficult for a Compliance Officer primarily intended to deal with complaints concerning the Members' Code of Conduct, parliamentary entitlements and the pecuniary interests regime to also fulfill the role of a grievance officer dealing with bullying and harassment and sexual harassment. I believe such role should be undertaken by an independent investigator with relevant expertise (for example a person seconded from the Anti-Discrimination Board) but with oversight by the Compliance Officer. The protocol under proposed clause 5 (a) should have a process for dealing with remedies - such as, training, apology or behaviour agreement - and reporting to the Compliance Officer, who in turn, in appropriate cases, could recommend sanctions against a Member to the Privilege and Ethics Committee.
50. A framework for agreed remedies, which should include an appeal process to findings of the Compliance Officer should be approved by the Privilege and Ethics Committee. The Committee should hear appeals against a finding of the Compliance Officer.
51. I note that under proposed clause (5) (e) the Compliance Officer may engage expert assistance.

Targeted questions for Parliamentary Ethics Adviser

52. The following comments are in response to the specific questions you have asked me to discuss.

53. **Appointment of Compliance Officer**

1. *What are the main considerations in deciding on an appointment method for a Compliance Officer?*
54. The appointment proposal under clause 4 would appear to be founded on the fact that the present Parliament is mid-term of the four-year term of the Parliament, which expires in March 2023.
55. I suggest that the initial appointment of the first Compliance Officer, when made, should continue for a fixed term until September in the year prior to the expiry of the Parliament in March 2027 – that is September 2026. Thereafter a Compliance Officer should be appointed six months before the commencement of the Parliament in March each four years, that is by the previous September, and be eligible for re-appointment for one more term. (I note that in the UK Commons, the Standards Commissioner is appointed for five years and is not eligible for reappointment.)
56. In this way a Compliance Officer would be in office six months before the commencement of each new Parliament and well before induction seminars take place in the new Parliament.
2. *Is there an optimal method for appointing a Compliance Officer? For example, who should make the decision and who should be consulted?*
57. See my comments above on clauses 1 and 2 at paragraphs 29 to 35.
58. I would imagine the recruitment process would be undertaken by the Clerk of the Parliaments, Clerk of the Legislative Assembly, Chief Executive, Department of Parliamentary Service, and an independent person, who would sift through applicants and provide a short list of two candidates, or more if necessary, for further interview. Shortlisted candidate to be further interviewed by a selection panel comprising the Joint Clerks, the Chair of the oversight Committees in the Legislative Council and Legislative Assembly, and an independent person - perhaps the Parliamentary Ethics Adviser. The Joint Clerks would brief the panel on the performance of the shortlisted candidates before the interviews. The selection panel would make a recommendation to the Presiding Officers for appointment. Prior to appointment the Presiding Officers to refer the proposed appointment to the two oversight Committees for comment or veto.
3. *Is the appointment method set down in Clause 4 of the Compliance Officer proposal that is before the Houses appropriate?*

59. See my comments above. The oversight Committees should be consulted by the Presiding Officers on the proposed appointment.
4. *At what point in the parliamentary term should a Compliance Officer be appointed, and for what period?*
60. See my comments at paragraphs 54-56. I suggest the initial appointment should be until September 2026 for a single term only. Thereafter the appointment to commence in September the year before the expiry of the Parliament and be for four years. The Compliance Office be eligible for reappointment for only one further term at the discretion of the Presiding Officers.
61. **Dismissal of Compliance Officer**
1. *What are the main considerations in deciding on a dismissal method for the Compliance Officer?*
62. I would not include a dismissal procedure in the proposed resolution. As discussed below, dismissal should be a matter for inclusion in the contract of appointment.
2. *Is there an optimal method for dismissing a Compliance Officer? For example, who should make the decision and who should be consulted?*
63. I would imagine that any contract of employment would include a provision for termination of employment of the Compliance Officer “at any time, for any or no stated reason and without notice”.
64. I imagine that any proposal for dismissal would involve consultation with the Chair of the oversight Committees, before making a recommendation to the Presiding Officers.
3. *Is the dismissal method set down in Clause 4 of the Compliance Officer proposal that is before the Houses appropriate?*
65. In my view the term of appointment and dismissal of the Compliance Officer should not be included in the proposed resolution but rather included in the contract of employment of the Compliance Officer, which can only be executed between the Department Heads and the Compliance Officer. Since the Compliance Officer is appointed by the Presiding Officers any scheme for dismissal should be on the recommendation of the Joint Clerks, rather than the Chief Executive of the Department of Parliamentary Services, as proposed.

66. Functions of Compliance Officer

1. *Under Clause 2 of the Compliance Officer proposal before the Houses, the Compliance Officer would have various functions including investigating complaints about: entitlements breaches; minor breaches of the pecuniary interest disclosures scheme; and allegations about bullying and harassment by Members.*
 - *Is creating a Compliance Officer type role an appropriate way to address bullying and harassment matters?*
 - *What steps might be taken to ensure the person appointed to the role has the necessary skills and support to deal with entitlement and pecuniary interest complaints on the one hand; and bullying and harassment complaints on the other?*

64. As discussed above in relation to clauses 1 and 2, in my view the investigative role of the Compliance Officer should be confined to allegations of breaches of the Code of Conduct, members entitlements and pecuniary interest regime.

65. I do not consider that the Compliance Officer role is an appropriate mechanism to deal with bullying and harassment, and sexual harassment. As discussed above in relation to clause 3, such a role should be performed by independent trained experts, similar to the UK Parliament model. For example, a person on secondment from the Anti-Discrimination Board. The Compliance Officer would have an oversight role in such matters and report to the oversight Committee in appropriate cases.
 2. *Given your role as Ethics Adviser, to what extent do you think closing any 'jurisdictional gap' around Member conduct may result in an increase in complaints about:*
 - *Bullying, harassment and other types of grievances;*
 - *Breaches of requirements around entitlements and pecuniary interests?*

66. I think it is inevitable with the establishment of a complaint process where members of the public and others may complain about these issues, there will be complaints concerning the conduct of Members. The number of complaints and whether or not such complaints will be substantiated, will be a matter of record.
 3. *Under clause 2(d) of the proposal, one of the Compliance Officer's functions would be to provide advice to Members and the parliamentary administration on a matter of interpretation of the Members' Entitlement scheme to resolve any disagreement.*

- *Is this role consistent with the Compliance Officer's investigative role? That is, could the Compliance Officer investigate an entitlements complaint involving a matter that had been the subject of his or her previous interpretation?*
67. I do not believe the Compliance Officer should perform both roles as it would amount to a conflict of interest. The role of the Compliance Officer should be limited to investigating complaints on the misuse of entitlements and appropriate remediation.
68. Matters concerning of interpretation of member's entitlements should be left to the Department of Parliamentary Services and the Presiding Officers, and Clerks. In appropriate cases a ruling can always be sought from the Parliamentary Remuneration Tribunal.
69. In my role as Parliamentary Ethics Adviser, I have from time to time been asked to provide advice to Members on the use of entitlements.
- *Further, could the Compliance Officer resolve a disagreement flowing from his or her own interpretation around the Members' Entitlement scheme?*
70. As indicated above, I do not believe the Compliance Officer should be involved in the interpretation of members' entitlements, except to resolve a disagreement over the interpretation of an entitlement.
71. **Publication of Investigation Outcomes and the Evidence on which they are based**
1. *Clauses 5(b) to (d) of the Compliance Officer proposal relate to the reporting of investigative outcomes, including where there is a minor breach or where the Compliance Officer declines to investigate.*
 - *Should the outcomes of the Compliance Officer's investigations be published?*
 - *What about in the case of minor and/or inadvertent breaches?*
 - *What about in the case of unsustainable matters?*
 - *Are the arrangements for reporting on investigative outcomes, as set down in clause 5 of the Compliance Officer proposal, appropriate?*

2. *Under clause 5(b) of the proposed resolution, the complainant would have a veto over publication of investigatory reports of the Compliance Officer, even in cases where such reporting may be considered to be for legitimate public interest reasons.*

- *Might there be merit in allowing the Compliance Officer a level of discretion about whether to publish details of investigations, perhaps in consultation with the relevant oversight committee?*

72. In responding to the questions on clause 5, my comments are similar to those that I made to the Legislative Council Committee.
73. In regard to clause 5 (a) I would envisage that in the development of any protocol the Compliance Officer would consult with the Presiding Officers, relevant leaders in the House, Department Heads and the Parliamentary Ethics Adviser.
74. Both the House of Lords and House of Commons Guide to the Code of Conduct provide a useful starting point in developing a protocol. The Commons Standards Commissioner *Information Note* also outlines procedures for how a complaint is investigated and ultimately referred to the Standards Committee, and then to the House.
75. In regard to investigatory reports under clause (5) (b) it is my considered opinion that the Compliance Officer should not report directly to the House, but rather to the Privilege and Ethics Committee in regard to matters involving the Members' Code of Conduct and breaches of the pecuniary interests regime, and to the Presiding Officers in matters involving PRT additional entitlements.
76. I posit this view on the basis of my previous experience that parliamentary law and practice requires a unique knowledge, experience and practical understanding. Members of the Privileges Committee with the expert advice of senior officials of the House, such as the Clerk and Deputy Clerk, are best placed to formulate recommendations to the House, while having regard to the nuisances of parliamentary practice.
77. The Privilege and Ethics Committee would consider any report to it from the Compliance Officer and report its conclusions and recommendations to the House. This process would allow an appeal mechanism from the findings of the Compliance Office by the Member concerned, before the Committee reports to the House
78. Recommendations could include, for example, a written apology from the Member to the House; an apology to the House by means of a personal explanation; suspension from the service of the House for a specified number

of days; or in the most serious cases, the Committee may recommend the Member's expulsion.

79. Depending upon the nature of the allegation or complaint there should be a different reporting scheme for decision and sanction dependent on the relevant decision-making authority. For example:
- sanctions for breaches of the Code of Conduct and pecuniary interests regime should be reported by the Compliance Officer to the Privilege and Ethics Committee in the first instance.
 - matters involving PRT additional entitlements should be reported by the Compliance Officer to the Speaker, who would then refer matters to the Privilege and Ethics Committee, as appropriate.
 - issues of bullying, harassment, sexual harassment and other grievances, should be reported to the Speaker, who would then bring matters to the attention of the Privilege and Ethics Committee or the House, as appropriate.
80. Adopting this scheme the Privilege and Ethics Committee would consider any report to it from the Compliance Officer, and report its conclusions and recommendations to the House, as appropriate. The House may then impose a sanction on the Member where necessary.
81. This process would ensure that the Privilege and Ethics Committee has an oversight role on recommendations from the Compliance Officer and provide an appeal process for the Member concerned.
82. In many instances involving minor or inadvertent breaches, I would envisage such issues would be dealt with by the Compliance Officer negotiating an outcome with the Member concerned and the complainant. For example, a minor breach of use of Members entitlements might require the Member to make any repayment or other relevant rectification.
83. In matters concerning complaints of non-disclosure of pecuniary interests, rectification might require an apology to the House
84. Apart from requiring the Compliance Officer to develop a protocol under clause 5 (a), I would leave the detailed mechanics of clause 5 (b) to (e) for inclusion in the protocol rather than inclusion in the resolution establishing the position.

85. In summary, for the reasons set out above, I do not believe the arrangements under clause 5 for the Compliance Officer to directly report outcomes of investigations to the House are appropriate.
86. Nevertheless, the Compliance Officer should report briefly to the Committee details of unsubstantial allegations, and all formal complaints and allegations, and successful outcomes of investigations to the relevant Committee or Presiding Officer.
87. The Compliance Officer should only report directly to the House, through the Presiding Officers, in an annual report. Apart from a general discussion of the nature of complaints investigated in the various categories, details in the annual report should be limited to statistical information on the number of allegations received, the number of complaints unsubstantiated, the number of complaints investigated, the number of inquiries initiated on own initiative, the number of inquiries resolved, referred to the oversight Committee, not upheld, and resolved through rectification.
3. *Clause 7 of the Compliance Officer proposal provides that the Compliance Officer's records are to be regarded as records of the House and are generally not to be made public.*
- *Do you have any comments on these provisions?*
88. I support the proposal that records of the Compliance Officer are to be regarded as records of the House and not made public. This means that the records could only be made public under a resolution of the House.
89. However, I would leave the matter of recording keeping until the development of the protocol and for inclusion in a resolution of the House.
90. I do have a concern with the wording of records not to be made public except “or where the member requests that the records be made public”. How is this to occur?
91. As Parliamentary Ethics Adviser I have previously informed the Committee that there needs to be provision in a resolution of the House for a document which a Member agrees to be made public to be able to be presented to Clerk by the Parliamentary Ethics Adviser and to be deemed as tabled and presented to House by the Clerk at the next sitting. It is only in this manner that the document would attract parliamentary privilege.
92. The reference to “paragraph 12 of the protocol” should read “5”.

4. *Do you have any comments on potential issues of parliamentary privilege as they relate to clauses 5 or 7 of the Compliance Officer proposal?*

- *In particular, as Ethics Adviser, what are your views with regard to the extent to which records received and created by you in carrying out your role are protected by parliamentary privilege?*

93. The issue of parliamentary privilege is a moot point. The extent to which records of the Parliamentary Ethics Adviser are protected by absolute privilege is limited to those which are tabled in the House, or in response to a request from a Committee.

94. Perhaps, to somewhat mitigate any doubt as to the application of parliamentary privilege to the proceedings of the Compliance Officer, I would suggest a resolution of the House in the following terms:

“For the avoidance of doubt, the provisions of Article 9 of the Bill of Rights 1688, applies in relation to the proceedings of the Compliance Officer for the purposes of “proceedings in Parliament” and the test of necessity of the proper functions the House is intended to execute.”

95. To compliment the above suggestion, I would also include the appointment of the Compliance Officer as an independent officer of the House in the Standing Orders, in terms as follows:

“Compliance Officer

- (1) An Officer of the House, called the Compliance Officer, is to be appointed by the Speaker.
- (2) The Compliance Officer has and may exercise the functions authorised by resolution of the House, but not in relation to any proceedings in the House or a Committee of the House.”

96. Similar considerations should apply to the role of the Parliamentary Ethics Adviser.

97. Absolute privilege under section 27 of the Defamation Act 2005 only applies to proceedings of a parliamentary body, including:

- a document published by order, or under the authority, of the body
- publication of the debates and proceedings of the body by or under the authority of the body or any law
- giving evidence before the body

- presenting or submitting a document to the body.
98. For absolute privilege to apply to the proceedings of the Compliance Officer and the Parliamentary Ethics Adviser, an amendment would be necessary to the Defamation Act.
- *In your view, on most occasions, would you be obliged to supply such records in response to a request under the Government Information (Public Access) Act 2009?*
99. I do not believe the records of the Parliamentary Ethics Adviser are subject to the provisions of the *Government Information (Public Access) Act 2009*, since my appointment is by resolution of the Houses of Parliament. Further, the resolution of the House governing the role of the Parliamentary Ethics Adviser states “... the Parliamentary Ethics Adviser shall be under a duty to maintain the confidentiality of information provided to him in exercising his function and any advice given...”¹⁹

100. Powers of the Compliance Officer

1. *Under Clause 6 of the Compliance Officer proposal before the Houses, the Compliance Officer would have the power to call for the production of relevant documents and other records from Members and officers of the Parliament.*
 - *Is the power to call for the production of relevant documents and other records from Members and officers of the Parliament an appropriate power for the Compliance Officer?*
 - *Should the power to compel such production be left to the House?*
101. I believe it is appropriate for the Compliance Officer to have power to compel the production of documents under a resolution of the House, in a similar manner to Committees. However, I would leave the powers of the Compliance Officer to any resolution accompanying approval of the final protocol. The Houses may have differing views on the manner of conferring this power, either by resolution or Standing Order.
102. Whilst I did not address the specific issue of production of documents in my submission to the Legislative Council Committee, this power should be subject to a requirement that an order for documents should only be made after consultation with the relevant Presiding Officer or Clerk of the House and Chief Executive, Department of Parliamentary Services, as appropriate. Such a

¹⁹ *LA Votes and Proceedings*, 17 June 2014, para (8)

procedure would ensure that an order of the Compliance Officer was appropriate and did not involve documents amounting to “proceedings in Parliament”. Consultation with the Presiding Officer should involve the purpose of the order and the reason why the order for production is needed.

- *Alternatively, is there a need for a statute setting out the Compliance Officer's powers?*

103. I would strongly oppose any proposition for a statute governing the powers of the Compliance Office, since the enactment of any statute would subject the powers and authorities of the Parliament and Compliance Officer to interpretation by the Courts. The powers, authorities, duties and functions of the Compliance Officer should at best be left to determination by standing orders and resolution of the Houses of Parliament. Thus, ensuring that the internal workings of the Houses are not subject to interference by the Courts.

104. *Sanctions*

1. *Should the Compliance Officer have the power to recommend sanctions to the House?*
 - *If so, what sanctions (e.g. apology, reprimand, fines, suspension, expulsion)?*

104. I support the proposal for the Compliance Officer to have power to recommend sanctions, but not in directly reporting to the House, as discussed above in relation to clause 5.

2. *Currently, the Houses of Parliament in NSW have self-protective but not punitive powers.*
 - *How might the issue of sanctions for the Compliance Officer scheme be dealt with if more punitive options like fines are considered desirable?*

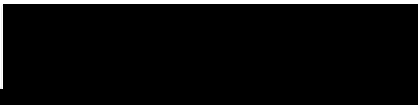

105. It is well settled by legal cases that the powers of the Parliament are protective and self-defensive and not punitive. Although the powers of the Parliament do not extend to the imposition of fines, it is perhaps a matter left well alone because of constitutional limitations.

106. However, the Houses do have power to impose sanctions on a Member such a submission of an apology, reprimand and admonishment, and suspension from the service of the House. Further, in extreme cases involving conduct unworthy of a Member, the Houses have power to expel a member as a measure of self-protection.

Role of Privilege and Ethics Committee

107. In my recommendation above that the Privilege and Ethics Committee should have oversight of the Compliance Officer, rather than the Compliance Officer having direct reporting to the House, and to allay concerns that allegations and appeals involving bullying, harassment and sexual misconduct are not heard by Members considering the behaviour of another Member, consideration should be given to the appointment of say three lay members to the Privilege and Ethics Committee to allow them to participate in decisions and voting on motions in these matters.
108. A similar arrangement applies in both Houses of the UK Parliament, and if I may be so bold as to suggest, the Parliamentary Ethics Adviser could possibly be one of the lay members.
109. If I can be of further assistance to the Committee, I am happy to elaborate on my views at a meeting of the Committee, preferably at a deliberative meeting.

Yours sincerely


 John Evans
Parliamentary Ethics Adviser