

Submission

No 5

**INQUIRY INTO RECOMMENDATIONS OF THE ICAC
REGARDING ASPECTS OF THE CODE OF CONDUCT FOR
MEMBERS, THE INTEREST DISCLOSURE REGIME AND A
PARLIAMENTARY INVESTIGATOR**

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Date Received: 20/02/2014

19 February 2014

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Legislative Council Privileges Committee

Parliament of New South Wales

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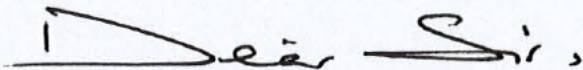
Chair

Legislative Assembly Privileges & Ethics Committee

Parliament of New South Wales

Macquarie Street

SYDNEY NSW



Re: Inquiry into recommendations of the ICAC regarding aspects of The Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator

I am writing in response to your letter of 22 January inviting St James Ethics Centre to make a submission to your joint inquiry. We are pleased to do so.

You seek our submission in relation to three of the Independent Commission Against Corruption (ICAC) recommendations made in its report entitled *Reducing the opportunities for corruption in the State's management of coal resources*. We note that these particular recommendations concern the conduct of Members of Parliament more generally – and are not limited to matters relating to the management of coal resources.

In making this submission, we have consulted the documents provided by you, including:

Terms of reference

Background Paper 1 Amendment of the *Code of Conduct for Members* relating to improper influence by members.

Background Paper 2 Disclosure of the interests of members' spouses/partners and dependent children

Background Paper 3 A parliamentary investigator position?

For ease of reference we list each of the relevant ICAC recommendations in turn – with accompanying comment.

Dr Simon Longstaff AO

Recommendation 22

That the NSW Parliament's Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committees consider amending the *Code of Conduct for Members* to deal comprehensively with improper influence by members.

Comment:

1. As noted in *Background Paper No. 1* the nub of ICAC's concern is that:

There are currently no specific provisions concerning members attempting to influence ministerial or bureaucratic decisions that affect their private interests and those of their family and associates, although such conduct seems quite contrary to the preamble (of the Code of Conduct for members). This ignores the reality that major decisions of considerable value are taken by the executive and by state agencies and do not come before parliament.

2. We agree with ICAC that the current Code is deficient in that its clear intent is not reflected in its substantive provisions. The great mischief that is left unaddressed is the possibility that a Member of Parliament might succumb to the temptation to 'use public power for private profit' (which is, of course, the definition of 'grand corruption').
3. As ICAC notes, considerable discretion in the exercise of public power lies in the hands of members of the Executive (Ministers) and in those whom they direct, or strongly influence, within state agencies. Again, it is essential that this public power be exercised exclusively for a public purpose.
4. The concept of 'public purpose' needs to be understood within the larger context of 'representative democracy' – which is, by convention, the particular type of democracy adopted within Australia. Unlike other systems of democracy, 'representative democracy' does not require (and probably does not allow) for a Member of Parliament to serve as a 'delegate' of his or her constituencies. That is, the member of Parliament should not operate as the mere 'mouthpiece' or 'agent' for those constituencies (whether individually or collectively). Rather, an elected Member of Parliament is required to exercise personal judgement on behalf of the constituents as a whole and with a proper regard for the wider electorate that comprises the political unit which is served by the Parliament as a whole (in this case, the State of NSW). Thus, while a Member of Parliament should acknowledge and understand the 'wants' of a constituent (or group of constituents) their duty is to go beyond this and discern and serve their interests (which may not be the same). Seen in this light, a 'public purpose' is not (by definition) simply an aggregation of the wants of citizens. Nor can it be discerned simply by asking citizens what they happen to want. Instead it is the responsibility (and privilege) of Members of Parliament to apply reason in the disinterested discernment of how the electorate's interests might best be served. It should be noted that this exposes politicians to the very real risk that they will make unpopular decisions. However, under the conventions of representative democracy this is a risk that must be taken (e.g. the decision to introduce the compulsory wearing of seat belts was made at a time when a majority of the population opposed this provision – but politicians enacted these laws because it was deemed to be in the public interest that they do so).
5. As noted above, in their use of public power, Members of Parliament are obliged to apply reason and be disinterested in their discernment of the public interest and accordingly, of what constitutes a legitimate 'public purpose'. It should be noted that, with very few exceptions (such as might apply in cases of grave risk to the safety and security of the community), the reasons applied by Members of Parliament should be public reasons – open to scrutiny and debate.

6. The requirement to be 'disinterested' is reasonably self-evident. Its most basic requirement is that Members of Parliament should examine each matter that comes before them free from any consideration of how their exercise of public power (including the power to make representations) might affect their own interests – whether this be positively or negatively, financially, materially, politically, or otherwise. There will be some who would argue that this is too high a standard to expect of Members of Parliament and that it is naïve to imagine that any politician will set aside political advantage (such as the opportunity to be re-elected, or secure preferment within their party, or appointment to the executive, etc.) in favour of the public interest. We would respond by acknowledging that this is a high standard but also that i) it is a defining element of representative democracy and ii) that there are sufficient occasions when this standard is applied by Members of Parliament to inspire confidence in the ideal. However, we would also observe that it is not unreasonable to expect that the public might wish to confer electoral advantage on those who consistently act in what they sincerely believe to be in the public interest – even if they do so in the face of majority public opinion.

7. It is against this background that members of the public should be encouraged to call on the assistance of a Member of Parliament in the pursuit of legitimate interests. While it is clearly not the case that a Member of Parliament is bound to support or advance just any cause that a constituent may happen to propose, there is a proper expectation that MPs will aid constituents – including by making representations on their behalf. Again, the obligation is placed upon the Member of Parliament to exercise judgement, for public reasons and from a disinterested perspective. As such, there may be some representations that a Member of Parliament cannot (and should not) make if to do so could not be so justified.

8. In our view, all of the above needs to be taken into account by Members of Parliament – not only when speaking, deliberating or voting on legislative instruments in Parliament, but also when making representations, on behalf of constituents, to Ministers and others exercising public power.

9. One of the problems with the current *Code of Conduct for Members* is that it attempts to manage these issues under the general heading 'Bribery'. Apart from the fact that the relevant provisions of the Code are too narrow in their application (as noted above – in that they apply only "in the Parliament or its Committees"), there is the more fundamental problem that the concept of 'bribery' does not encompass what may merely be a conflict of interest. To be clear, while it is necessary it is not sufficient that a Member of Parliament declare a conflict of interest – and then continue to speak or act. In some cases, the conflict will be such that a member of Parliament should not only declare the conflict but also not act – at least in terms of making representations to Ministers, their advisers or others exercising public power.

10. As such, we would recommend that the *Code of Conduct for Members* be amended as follows:
 - a. Introduce a new section within the enforceable body of the *Code* that reads:

Members of Parliament must act only for a legitimate public purpose in the execution of their office. A legitimate public purpose is one:

 - i. in which the purpose is not inconsistent with the interests of the electorate as a whole, and either
 - ii. in which a Member of Parliament has no interest other than coincidentally as a member of the public or broad class, or
 - iii. is approved by Parliament following a Member's declaration of a conflict of interest.

 - b. In ss. 2(a) and 2(b) insert after the word "Committees" the words "and must not make any representations to Ministers, Ministerial advisers, public servants or those controlling state agencies"

Recommendation 24

That the NSW Parliament's Legislative Council Privileges Committee conducts a new inquiry into the mechanism for elected members to disclose the interests of their spouses/partners and dependent children under the provisions of the Constitution (Disclosures by Members) Regulation 1983, with a view to making third party disclosures a requirement.

Comment:

1. This is a genuinely difficult question to resolve. On the one hand, it is not in the interests of society that the spouses/partners and children (dependent or otherwise) be seen as mere 'extensions' of Members of Parliament. On the contrary, each should be recognised as a person in their own right – with distinct rights and responsibilities – including a *prima facie* right to privacy.
2. However, it is also clear that there is a general public interest in ensuring probity of the political process – and that the spouses/partners and children of Members of Parliament share in this interest as citizens. Indeed, it is as citizens that the spouses/partners and children of Members of Parliament might be said to have an independent duty to play their part in maintaining the integrity of and therefore, public trust in the democratic system of government.
3. Given this and on balance, we would support the introduction of a mechanism that requires and facilitates the disclosure of the interests of the spouses/partners and dependent children of Members of Parliament.
4. Given the recent findings made by ICAC in relation to the activities of the Obeid family, it would also seem to be necessary that the interests of independent children be disclosed – but only in cases where the activities of the Member of Parliament are known (or might reasonably be known) by the Member to affect the interests of those independent children other than coincidentally as a member of the public or broad class.
5. The introduction of these additional provisions will place a commensurate burden on the spouses and partners of Members of Parliament in particular – as it draws aspects of their private lives into the public arena without their ever having stood for public office. As noted above, this can be justified on the assumption that citizens (including spouses and partners of members of Parliament) share in a general civic obligation to assist in the maintenance of the integrity of our democratic polity. However, if this assumption is warranted, then it is arguable that those seeking election to public office should only do so with the informed consent of their partner or spouse – with full knowledge of the implications for disclosure of otherwise private information.

Recommendation 25

That the NSW Parliament's Legislative Council Privileges Committee considers the establishment of a parliamentary investigator position in consultation with the Legislative Assembly Privileges and Ethics Committee.

Comment:

1. We would support the appointment of a Parliamentary Commissioner for Ethics and Standards.
2. We propose that this role be an extension of the existing role of Parliamentary Ethics Adviser.

3. The role should continue to be that of a Statutory Officer – appointed by and responsible to the Parliament as a whole. The work of the Parliamentary Commissioner would be overseen by the Legislative Assembly Privileges and Ethics Committee and the Legislative Council Privileges Committee.
4. We would recommend that the New South Wales Parliament base its model on that of the UK House of Commons and House of Lords. Given that model, it is proposed that the Commissioner's functions include:
 - a. Providing advice, on a confidential basis, to: individual members, the Legislative Assembly Privileges and Ethics Committee and the Legislative Council Privileges Committee about the interpretation of the *Code of Conduct* and other matters relating to the conduct of Members.
 - b. Providing advice, on a confidential basis, to: individual members, the Legislative Assembly Privileges and Ethics Committee and the Legislative Council Privileges Committee, upon their request, on ethical issues arising in their role as Members of Parliament.
 - c. Preparing guidance and providing training for Members on matters of conduct, propriety and ethics.
 - d. Receiving and investigating complaints about Members who are allegedly in breach of the Code of Conduct. 'Serious matters' (that is, matters falling within a class deemed to be so by the ICAC Commissioner) would be referred by the Parliamentary Commissioner to ICAC. Other "less serious" matters could be dealt with in a timely manner through "rectification" and "reimbursement" and apology.
5. One possible disadvantage of the model outlined above is that there may be some reluctance on the part of Members of Parliament seeking advice about ethics from a person who is also charged with the responsibility of receiving and investigating complaints. Although we think that this situation can be managed, it should be noted that apart from having access to the Parliamentary Ethics Adviser (or a future Parliamentary Commissioner), Members of Parliament also have available to them the free, national Ethic-Call service (1800 672 303) by which any person may phone St James Ethics Centre for confidential assistance in relation to ethical issues arising in their work. That is, there is a 'safe' source of confidential advice from an organisations (St James Ethics Centre) that has neither regulatory nor supervisory powers.

Please feel free to contact me if you wish to discuss this submission.