

**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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Trevor Khan MLC and John Sidoti MP
Chairpersons
Legislative Council Privileges Committee
Legislative Assembly Privileges and Ethics Committee

Dear Mr Khan and Mr Sidoti

Joint inquiry into recommendations of the ICAC

Thank you for the opportunity to make a submission into the joint inquiry into three recommendations of the Independent Commission Against Corruption (ICAC) regarding aspects of the Code of Conduct for Members, the interest disclosure regime, and a parliamentary investigator. The broad issues raised by the ICAC are certainly ones that have been considered by the New Zealand Parliament, but there are significant differences in how we have chosen to address these matters. This submission has been prepared jointly with the Clerk of the House of Representatives, Mary Harris, who will not be making a separate submission. It focuses on outlining the approaches taken in New Zealand and the rationale for them. I hope my comments will assist in your consideration of the inquiry.

Recommendation 22

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

The New Zealand Parliament does not have a consolidated code of conduct for its members so I will not comment on the merits of specific amendments to your existing code. The establishment of a code has been considered but dismissed for various reasons.¹ Many of the elements which are found in such parliamentary codes in other jurisdictions are addressed in other ways in New Zealand. For example, we have a separate and comprehensive regime for the disclosure of members' interests, party and electoral financing and spending is dealt with through statutory processes (under the Electoral Act 1993), and our Standing Orders provide means for citizens to apply to respond to comments made about them in the House.

Furthermore, Standing Orders and Speakers' Rulings provide guidance on appropriate behaviour for members in respect of the conduct of parliamentary proceedings. The House

¹ Report of the Standing Orders Committee on the *2008 Review of Standing Orders* (L18B), pp.12-13.

has its own rules for the declaration of interests and improper inducements, accompanied by a detailed list of possible contempts, including the following (Standing Order 407):

- (f) as a member, failing to declare, before participating in the consideration of any item of business, any financial interest that the member has in that business:
- (g) as a member, knowingly failing to make a return of pecuniary and other specified interests by the due date:
- (h) as a member, knowingly providing false or misleading information in a return of pecuniary and other specified interests:
- (i) as a member, requesting without any reasonable grounds that the Registrar of Pecuniary and Other Specified Interests of Members of Parliament conduct an inquiry into another member under clause 16 of Appendix B:
- (j) as a member, receiving or soliciting a bribe to influence the member's conduct in respect of proceedings in the House or at a committee:
- (k) as a member, accepting fees for professional services rendered by the member in connection with proceedings in the House or at a committee:
- (l) offering or attempting to bribe a member to influence the member's conduct in respect of proceedings in the House or at a committee:
- (m) assaulting, threatening, or intimidating a member or an officer of the House acting in the discharge of the member's or the officer's duty.

This approach recognises that politics is intrinsically about advocacy, influencing others, and reconciling conflicting points of view, and that encoding members' behaviour may fetter them and compromise their ability to discharge their representative functions effectively. The long list of possible contempts above shows that members will be judged severely by the House in the event that they allow their private interests to influence their parliamentary activities. Nor are members above the law – section 103 of the Crimes Act 1961 provides for a term of up to seven years imprisonment for corruption and bribery by, or of, a member of Parliament. In 2009 an MP was successfully prosecuted under this provision, the one and only time a prosecution has been taken under section 103.²

Management of conflicts of interest is dealt with extensively in the *Cabinet Manual 2008* (paras 2.50 to 2.86), which offers guidance on pecuniary and family interests, and interests of association, and provides various practical options to Ministers to manage any actual or potential conflicts. The location of this guidance reflects the fact that it is Ministers who have actual decision-making powers, in a way that members of Parliament do not in their capacity as members. Ministers are publicly accountable for their decisions, which may also be subject to review by the Courts.

² See *R v Field* [2009] BCL 843.

The actions of the Hon Ian MacDonald MLC, which have given rise to the recommendations of the ICAC, were taken in his capacity as a member of the Executive, rather than as a member of Parliament. They do not involve proceedings of Parliament. Our view in New Zealand is that the police would be the proper authority to investigate an allegation of corruption by a Minister and to decide whether to prosecute. This course of action has occurred previously in New Zealand.

Finally, I would note that while it is appropriate and important for any code of conduct to remind members to use their influence in the public interest, perceptions of what is in the public interest may vary. Indeed, it can often be a matter of balancing competing interests. A code or regime cannot contemplate every scenario or circumstance that may arise for members (this is a matter we in New Zealand face with our regime for the disclosure of members' interests, and why a key aspect of the Registrar's role is to provide advice to members on their disclosure obligations). There is a risk that, in setting out the different scenarios that may represent improper influence, a code that seeks to deal comprehensively with the problem may, by omission, unintentionally give the impression that something that is not covered is acceptable behaviour, when it actually is not.

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.

The New Zealand Parliament's Register of Pecuniary and Other Specified Interests of Members does not require MPs to disclose interests of spouses, partners, or dependent children. The Standing Orders (161-163) do, however, require a broader declaration of financial interests by a member before he or she participates in an item of parliamentary business, if the interest has not already been declared in the Register.

"Financial interest" is defined in the Standing Orders as follows:

161 Financial interest

(1) A financial interest is a direct financial benefit that might accrue to a member personally, or to any trust, company, or other business entity in which the member holds an appreciable interest, as a result of the outcome of the House's consideration of a particular item of business.

(2) A financial interest—

(a) includes a financial interest held by a member's spouse or domestic partner or by any child of the member who is wholly or mainly dependent on the member for support, but

(b) does not include any interest held by a member or any other person as one of a class of persons who belong to a profession, vocation, or other calling, or who hold public offices or an interest held in common with the public.

Our regime for the disclosure of members' interests seeks to promote transparency and accountability in a way which enhances public trust in the parliamentary process. At the same time, we have to recognise that the regime must operate in a way that is workable for members. Members are required to make a comprehensive annual declaration and do not have to declare interests of family members. In the nine years since the Register was established, only two members have failed to submit a return by the due date. There may be a risk of unintended consequences if we were to broaden the scope of the Register significantly. For example, compliance with the regime could decline if it became too time-consuming and onerous for members, or they could have less time available to discharge their representative functions. In rare cases, members may decide to structure their affairs in more elaborate and less transparent ways to avoid disclosure obligations.

Underpinning our approach to the disclosure of interests is the notion that the House itself requires members to disclose certain interests. In so doing, the House exercises its privilege of exclusive cognisance, or its right to regulate its own internal processes, free from outside interference. These provisions are not legislated for and we would be unlikely to contemplate doing so.

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

The House in New Zealand has previously considered the case for establishing an independent office of Commissioner to investigate complaints into members' compliance with the rules for disclosure of interests.³ The idea was rejected for two main reasons. Firstly, New Zealand is a relatively small country and it did not appear sensible to have two officers performing separate roles of Registrar and Commissioner. Secondly, and consistent with the principle of exclusive cognisance discussed above, it was considered important that the power to investigate serious breaches remain with the Privileges Committee and not be delegated to an unelected official.

The Registrar of Pecuniary and Other Specified Interests of Members of Parliament does have the ability to conduct an inquiry in the event that a member raises concerns about another member's compliance with the rules of the Register. The Registrar can instruct a member to submit an amended return for a finding of a minor matter. For a matter that appears more serious, the Registrar may determine that a question of privilege is involved, and report accordingly to the House. This report would stand referred to the Privileges

³ Report of the Standing Orders Committee on the *Review of Standing Orders relating to pecuniary interests* (I.18A), p.15.

Committee for consideration. The committee has the power to summon written and oral evidence, and to seek specialist advice to assist its investigation.

The Registrar is appointed by the Clerk of the House, with the agreement of the Speaker. The Registrar's power to receive and determine requests for an inquiry into a member's compliance with the Register appears consistent with the other functions of the position – to compile and maintain the Register, and to provide advice and guidance to members on their obligations. The inquiry function previously sat with the Auditor-General, an independent Officer of Parliament, who does have the power to investigate how members spend public money. The inquiry function was never exercised and concerns were raised about whether the Auditor-General in fact had the statutory authority under the Public Audit Act 2001 to conduct an inquiry into a member's compliance. Returns of pecuniary and other specified interests are parliamentary proceedings, and the existence of a statutory provision for them to be examined by an outside authority would raise issues for the House's freedom to conduct its business without interference.

New Zealand has always been careful to protect the independence of Parliament and the mutually respectful relationship with the courts, with the aim of not trespassing on the other's jurisdiction. The maintenance of such a relationship is assisted by the fact that legislation in the nature of the Independent Commission Against Corruption (ICAC) Act 1988, which could potentially allow for external examination of proceedings in Parliament, does not exist here.

I noted with interest the comments in the background paper on a parliamentary investigator for New South Wales about a previous review in 2005 of the ICAC Act. The review proposed that a parliamentary investigator could fill the gap to investigate matters where the jurisdiction of the ICAC was limited due to parliamentary privilege. If the Parliament of New South Wales decides to proceed with the position of a parliamentary investigator, it seems to me that the jurisdiction and scope of the role, and the legitimacy of its inquiry functions, are essential matters to be resolved.

I wish you well in your inquiry and would be happy to provide further information on any matters in this submission when we meet in Sydney next week.

Yours sincerely

 Rt Hon David Carter

Speaker of the House of Representatives of New Zealand