

**Submission**

**No 9**

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

**Organisation:** NSW Legislative Council

**Name:** David Blunt

**Position:** Clerk of the Parliaments

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14 March 2014

The Hon. Trevor Khan  
Chair  
Legislative Council Privileges Committee  
Parliament House  
SYDNEY NSW 2000

Mr John Sidoti MP  
Chair  
Legislative Assembly Privileges and Ethics Committee

Dear Mr Khan and Mr Sidoti

I am writing in response to your request for a submission to the joint inquiry being undertaken by the Privileges Committees into recommendations 22, 24 and 25 of the Independent Commission Against Corruption (ICAC) in its report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, dated October 2013.

I have read with interest the Background Papers prepared by the Committees in relation to each of the three matters and, with the exception of some additional matters in relation to the disclosure of interests, my comments are directly related to the issues raised in those papers.

**Amendment of the *Code of Conduct for Members* relating to improper influence by members**

Background Paper No 1 outlines the development and adoption of the *Code of Conduct for Members*, including at paragraphs 1.11 and 1.12 the provisions relating to influence in the codes proposed by the Legislative Council Standing Committee on Parliamentary Privilege and Ethics and the Legislative Assembly Standing Ethics Committee. As pointed out at paragraph 1.12 the code developed and introduced by the executive government (and adopted by both Houses) only addresses the issue of the use of influence briefly in the preamble and not in any substantive clause.

In case your Committees are interested in revisiting the provisions dealing with influence contained in the draft codes proposed by the two committees in 1996, I would draw attention to one aspect of the October 1996 report of the Legislative Council Standing Committee on Parliamentary Privilege and Ethics.<sup>1</sup> Having agreed to a draft code of conduct for Members, the committee sought the advice of the Crown Solicitor, the Chair's letter to the Crown Solicitor indicating that:

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<sup>1</sup> *Report on Inquiry into the Establishment of a Draft Code of Conduct for Members*, Report No 3, October 1996, p 52.

Following extensive public hearings and detailed consideration of this matter, the Committee has now released a proposed Code of Conduct for public comment. The Committee feels that there would be considerable merit in having the Crown Solicitor examine the Code for possible legal ramifications of its contents.<sup>2</sup>

I have retrieved the Crown Solicitor's advice to the Committee, dated 19 September 1996, from the Department of the Legislative Council's legal opinions database. The advice goes through the Committee's draft code of conduct clause by clause, including the draft clause 5 "Use of Public Office for Private Gain" (the clause dealing with influence). The Committee's report includes an amended code adopted by the Committee following the public response and Crown Solicitor's advice on the original draft. The amended code includes some minor textual changes to clause 5, together with an additional paragraph:

5.5 Members should not approach Ministers, public servants or public bodies on a matter connected with a private interest, without appropriate disclosure.

Whilst the Crown Solicitor's advice raises some concerns about inclusion of reference to influence in the preamble, no substantive issues are raised in relation to the proposed clause 5. It is therefore curious that the code developed by the executive government (and adopted by both Houses) retains the reference to influence in the preamble but contains no substantive clause the equivalent of those proposed by the two Committees. It would appear that whatever the reason the proposed clause 5 was not included, it was not the result of legal advice, at least not from the Crown Solicitor.

### **Disclosure of the interests of members' spouses/partners and dependent children**

Background Paper No 2 outlines the current situation in New South Wales in relation to the disclosure of the interests of Members' spouses/partners and dependent children, and the arrangements in other Australian Parliaments and New Zealand.

I draw your attention to the most recent review of this issue by the Legislative Council's Privileges Committee in its *Review of the Members' Code of Conduct* in 2010. The Legislative Council Committee expressed some support for a change to the Constitution (Disclosures by Members) Regulation 1983 to require the disclosure by Members of the interests of their spouses/partners and dependent children, provided an appropriate mechanism could be found, taking into account questions of the confidentiality of such information. The Committee recommended a fresh inquiry into this matter in the new (ie this) Parliament.<sup>3</sup>

This is an area on which your Committees will no doubt receive a variety of firmly held views from Members. Should your Committees be inclined to support a change to the Regulation in this area, it might be useful for the Committees to carefully examine the arrangements in place

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<sup>2</sup> Correspondence dated 2/9/1996.

<sup>3</sup> *Review of the Members' Code of Conduct*, Report 54, December 2010, pp 49-58.

in the Australian Senate, where a separate register of the interests of spouses/partners and dependent children is maintained and kept confidential.

### ***Related issues in respect of the disclosure of interests***

Although not raised in Background Papers No 2, I take this opportunity to highlight two related issues discussed in the Legislative Council Privileges Committee 2010 report referred to above.

Firstly, I draw attention to the discussion in that report concerning the timing and types of returns, and the recommendations for the replacement of the current system of four types of returns due at different times, with a revised, simpler system of exception reporting.<sup>4</sup> As the person responsible for receiving and maintaining the Register of Disclosures by Members of the Legislative Council, I can confirm that Members continue to find the current system confusing and overly complex.

Secondly, I also draw attention to the discussion in that report surrounding the publication of the Register of Disclosures by Members of the Legislative Council on the Parliament's website.<sup>5</sup> Whilst the Committee expressed support for online publication of the register, it indicated that privacy issues concerning individuals would need to be first addressed and also recommended that the Regulation be amended to explicitly provide for such online publication. It is because these recommendations have not been implemented that the Register of Disclosures of Members of the Legislative Council is not yet published online.

### **A parliamentary investigator position?**

Background paper No 3 briefly outlines previous discussion of a parliamentary investigator position in New South Wales. Paragraph 1.8 refers to a paper I presented on this subject at the 44<sup>th</sup> Presiding Officers and Clerks' Conference in Canberra in July 2013. The paper was entitled "A Parliamentary Commissioner for Standards for New South Wales?" and I attach a copy of that paper for the information of members of both committees. My paper discusses limitations in the current arrangements for dealing with complaints about the conduct of members in New South Wales, details the operations of the UK model of a Parliamentary Commissioner for Standards, and suggests how the UK model could be adapted and applied in New South Wales.

The major advantage of the UK model as outlined in my paper is the scope for complaints about less serious matters, particularly for example in respect of mistakes in the disclosure of interests or the use of entitlements, to be resolved in a timely, mature and transparent manner through mechanisms such as "rectification" or "reimbursement" and apology, instead of through the ICAC. Of course, it would also provide a mechanism for the investigation and resolution of matters in relation to which parliamentary privilege arises.

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<sup>4</sup> Ibid., pp59-63.

<sup>5</sup> Ibid., pp58-59 and 67.

The paper was the result of extensive research over a number of months, including discussions with relevant officials and Members in London in June 2013. I would be more than happy to make available to the committees any of the research material gathered and which is footnoted in the paper.

In recent weeks, in reviewing the files of my predecessors, a good deal of additional research material on this subject has come to light. This seems to date from when this subject was previously considered by the Legislative Council Privileges Committee in 1996, and from when the Hon Peter Breen MLC gave notice of motion for a Bill to establish a Parliamentary Commissioner for Standards in New South Wales in 2004. Once again, I would be happy to make this material available to the committees. However, I would caution that Mr Breen's Bill, a copy of which is included in this material, was designed to completely oust the jurisdiction of the ICAC from dealing with the conduct of Members, which I note from paragraph 1.6 of the Background Paper is not under contemplation as part of this inquiry, nor was it envisaged in my paper.

Please do not hesitate to contact me if I can be of any further assistance or if you require any additional information in relation to any of the matters outlined in this submission or the attached paper.

Yours sincerely

**David Blunt**  
Clerk of the Parliaments



**A Parliamentary Commissioner for Standards for New South Wales?**

Paper to be presented at the 44th Presiding Officers & Clerks' Conference  
Canberra, 1-4 July 2013

David Blunt  
Clerk of the Parliaments  
Legislative Council  
Parliament of New South Wales

*Anticipating recommendations and extreme pressure for institutional reform following a forthcoming report on a major public investigation by the Independent Commission Against Corruption (ICAC), this paper discusses the merits of one model for enhancing the scrutiny of the conduct of Members of Parliament: the United Kingdom Parliamentary Commissioner for Standards.*

*This paper is not the first time the merits of this model have been considered in New South Wales. In 2005 Mr Bruce McClintock SC in his review of the ICAC Act recommended the adoption of what was, in effect, the UK model for two reasons: to provide for the speedy resolution of minor complaints about the conduct of members (particularly in view of the political impact of, and vulnerability of Members of Parliament to, such complaints); and for the investigation of those matters where the jurisdiction of the ICAC is limited due to parliamentary privilege.*

*As the UK model has developed in recent years, particularly since the 2009 expenses scandal, the advantages of the model and its potential for redressing flaws in the NSW regime have become increasingly evident. The UK model has been improved through enhanced transparency of the complaints process, so that for every complaint, including those not accepted for inquiry, appropriate information is published. At the same time as this additional transparency has been built into the system, sensible arrangements have been made for the resolution of less serious matters. "Rectification" (particularly in relation to breaches of the pecuniary interest disclosure requirements) and "reimbursement" (in relation to expenses claims) have been formally recognised as appropriate responses to minor breaches of the relevant rules, usually accompanied by sanctions including apologies to the House in writing or by way of a statement. In effect these approaches provide the option of what has been termed a "yellow card" in respect of less serious matters. In contrast the current system in NSW effectively provides only one place for complaints about members conduct (both serious and less serious) to be considered: the ICAC. Appropriately concerned with serious corruption, with finite resources and independent discretion to determine which matters are investigated, only a small percentage of matters are the subject of public investigation by the ICAC. Those that are investigated and result in a finding of "corrupt conduct", even where the conduct is on a scale that in the UK would be viewed as less serious, invariably result in "red cards." Whilst in recent months the ICAC has demonstrated its great value in dealing with very serious matters, the current arrangements for dealing with complaints about less serious matters could be improved. Ensuring that all less serious matters are dealt with appropriately should also result in less corrupt conduct.*

*This paper does not suggest any change to the current jurisdiction of the ICAC or the definition of corrupt conduct. Rather it recommends consideration of the addition of a Parliamentary Commissioner for Standards who would receive and deal with all complaints about the conduct of Members. Appropriate information would be published in relation to the outcome or response to every complaint, including those not accepted for investigation. Serious matters would be referred to the ICAC (and could continue to be the subject of direct complaints to the ICAC). Less serious matters would be speedily resolved by way of a formally recognised system of "rectification" and "reimbursement" and public apology, while clear breaches of the code of conduct would be the subject of a report to the Legislative Council or Legislative Assembly Privileges Committee for the determination of an appropriate recommendation to the House.*

## Introduction: ICAC and the gathering storm

In August 2012 the New South Wales Independent Commission Against Corruption (ICAC) announced that it was to hold a public inquiry into alleged corruption involving former ministers and an MP in relation to mining exploration licences and other matters. At the opening of one segment of the inquiry, known as Operation Jasper, which concerns the granting of coal exploration licences in an area known as Mount Penny, Counsel Assisting the inquiry indicated that segment of the inquiry came at the end of the most complex and most important investigation ever undertaken by the ICAC, involving decisions worth hundreds of millions of dollars. In a remark that has since been repeatedly quoted, Counsel Assisting declared that if the relevant decisions are found to have involved corruption “then it is corruption on a scale probably unexceeded since the days of the rum corps.”<sup>1</sup> As the public hearings have continued, a wide range of political leaders have indicated their shock and profound concern about the evidence presented.

The ICAC Commissioner has indicated his intention to report to the NSW Parliament on the outcome of this inquiry before the end of July 2013. The ICAC’s report will include findings of fact about the conduct investigated, findings as to whether the conduct of affected persons amounts to corrupt conduct within the definition in the *Independent Commission Against Corruption Act 1988 (ICAC Act)*, and statements as to whether consideration should be given to prosecution of any such person for an offence. Additionally the report will no doubt also include recommendations for reforms to systems, processes and rules aimed at reducing the risk of the recurrence of any such conduct in future.

Given the intense public, media and political interest in the ICAC’s inquiry, it can readily be anticipated that immediately following the tabling of the ICAC report there will be intense pressure and high expectations that whatever reforms the ICAC recommends will receive immediate endorsement and commitment. This phenomenon has been observed whenever similar high profile inquiries are undertaken and much anticipated reports are produced: examples include the report of the Fitzgerald Commission in Queensland, the report of the NSW Police Royal Commission and, the NSW Legislative Council Committee inquiry into Cabramatta policing. Although recommendations for reform are often far reaching and, in an ideal world would receive very careful consideration and scrutiny, it is often difficult for those responding to such recommendations to resist giving an immediate commitment.

What sorts of recommendations can be anticipated from the ICAC in July 2013? Without a doubt, the system for the declaration of pecuniary interests by Members of Parliament will be the subject of recommendations for a major overhaul. The NSW Legislative Council’s Privileges Committee proposed just such an overhaul in a report in December 2010 and it is hoped that these very sensible recommendations will form part of any changes recommended by the ICAC.<sup>2</sup>

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<sup>1</sup> ICAC, Public Hearing, Operation Indus, Jasper & Acacia, Transcript of Proceedings, 12/11/2012, p 418T.

<sup>2</sup> NSW Legislative Council, Privileges Committee, *Review of the Members’ Code of Conduct 2010*, Report No 54, December 2010, pp 47-69. It should also be noted that the NSW Labor Party earlier this year announced that its MPs would be required to declare additional financial interests beyond those currently required to be declared under the Constitution (Disclosures by Members) Regulation 1983, and also proposed the appointment of an Inspector



However, given the scale of the matters being investigated by the ICAC, it is possible (indeed probable) that the ICAC will find that there have been a range of institutional failures that have contributed to the matters at hand. It can therefore be anticipated that the ICAC's recommendations for reform will go well beyond the pecuniary interest disclosure regime, in order to address shortcomings that it may find in the accountability framework for Members of Parliament.

The purpose of this paper, to be presented in early July just a few weeks before the tabling of the ICAC's report, is to make what will hopefully be regarded as an informed and welcome contribution to the inevitable debate, and to the deliberations of decision makers, that will follow immediately upon the tabling of the ICAC's report. Specifically, this paper highlights one model that could enhance the accountability framework for Members of Parliament that has been adopted and evolved in the United Kingdom: the Parliamentary Commissioner for Standards and the associated Standards Committee. This is not the first time this model has been highlighted in NSW. Most recently in 2010 two parliamentary committees each recommended that the merits of a Parliamentary Integrity Commissioner be considered further in the life of the new Parliament.<sup>3</sup> It is hoped this paper will assist in that process.

### **Current model for the scrutiny of Members' conduct in NSW**

The conduct of Members of the Parliament of NSW is regulated in a number of ways. Conduct in the chambers is governed by the Standing Orders and is the direct responsibility of the Presiding Officers. Both Houses have adopted an identical code of conduct that deals with matters such as: disclosure of conflicts of interest; bribery; gifts; use of public resources; use of confidential information; the role of political parties; and secondary employment. There is also a statutory scheme for the disclosure of interests.<sup>4</sup>

Members are also subject to the jurisdiction of the ICAC. Corrupt conduct is defined in sections 7, 8 and 9 of the *ICAC Act*. Section 7 provides that 'corrupt conduct' is any conduct which falls within the description of corrupt conduct contained in section 8, but which is not excluded by section 9. Subsection 8(1) defines corrupt conduct as:

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
- (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

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General for Parliamentary Standards with responsibility for conducting audits of the pecuniary interest register: NSW Labor, *A New Standard*, February 2013.

<sup>3</sup> Parliament of NSW, Joint Select Committee on Parliamentary Procedure, *Reforms to Parliamentary Processes and Procedure*, Report 1/54, October 2010, pp 64-65. *Review of the Members' Code of Conduct*, n 3, pp 44-45.

<sup>4</sup> Constitution (Disclosures by Members) Regulation 1983.

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Under subsection 8(2), corrupt conduct also includes conduct of any person that adversely affects, or could adversely affect, the exercise of official functions by any public official and which could involve certain specified matters including official misconduct, bribery and blackmail.

Subsection 9(1) provides that conduct which falls within section 8 does not amount to corrupt conduct unless it could also constitute or involve:

- (a) a criminal offence, or
- (b) a disciplinary offence, or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
- (d) *in the case of conduct of a minister of the Crown or a member of a House of Parliament – a substantial breach of an applicable code of conduct (emphasis added).*

The ICAC is effectively the only body in NSW which has a role in investigating allegations or complaints that a Member has breached the code of conduct. As outlined below, the ICAC has independent discretion to determine which matters it pursues through a formal (including possibly public) inquiry. Where the ICAC finds that a member has committed a “substantial breach” of the code of conduct and that a Member’s conduct also falls within the other limb of the definition of corrupt conduct (section 8 of the *ICAC Act*), it may report that finding to Parliament. Whilst there are no direct legal consequences from such a finding, it may be accompanied by a recommendation that consideration be given to prosecution for an offence or disciplinary proceedings. Furthermore, as outlined below, a finding of corrupt conduct, even in relation to a matter less serious in nature, will have a significant impact upon a member’s reputation and in most cases precipitate the end of the member’s parliamentary career.

The Privileges Committees of each House have roles in relation to the review of the members’ codes of conduct, the provision of educative work in relation to ethical standards and the giving of such advice in relation to ethical standards in response to requests for advice from each House, “but not in relation to actual or alleged conduct of any particular person.”<sup>5</sup> The two Houses have also appointed a Parliamentary Ethics Adviser to assist and advise members in resolving ethical issues and problems, however, the Ethics Adviser also has no role in dealing with complaints about the conduct of Members.<sup>6</sup>

Members’ use of additional entitlements is the subject of two forms of audit: small samples of claims for reimbursement are audited by the NSW Audit Office and by the Parliament’s internal auditor. The conclusions of the audit programs are communicated to Members (the Audit Office’s opinion is published in a report to Parliament), although without identifying any particular Member who has breached the rules. Where a Member has not complied with the rules for the use of entitlements a number of possible sanctions are considered. These range from

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<sup>5</sup> Legislative Council, *Minutes of Proceedings*, 10/5/2011, pp 84-85.

<sup>6</sup> Legislative Council, *Minutes of Proceedings*, 28/6/2007, pp 208-210.

correspondence with the Member acknowledging the issue and referring to the applicable policy, a written warning, a requirement that the relevant expenditure is refunded or where the expense has been incurred and not yet reimbursed by the parliament, the Member will be personally responsible for the payment. Matters involving serious allegations of misconduct and inappropriate use of resources (eg fraud) will be referred to the ICAC.<sup>7</sup> However, as pointed out below the escalation of such matters to the ICAC is not straight forward, due to a possible anomaly in the *ICAC Act*.

### **Flaws in the current system for dealing with complaints about the conduct of Members of Parliament in NSW**

The ICAC's report on its inquiry into mining exploration licences and related matters will no doubt describe in detail the circumstances which have led to the events subject to its current inquiry. Given the scale and seriousness of the conduct in question, it can be anticipated that the ICAC will outline a range of institutional and systems failures that led to this situation. The current accountability framework for Members' conduct may be one part of the institutional failures identified. The following comments are offered as some initial observations about flaws in the current arrangements (in addition to any criticisms that the ICAC itself may make).

A critical aspect of the ICAC's independence is that it determines which matters it will investigate and how those investigations are conducted. The ICAC is not obliged to investigate every matter received.<sup>8</sup> By way of illustration, in 2011/12 the ICAC received 2,978 matters, commenced 73 preliminary investigations, 19 full investigations and 10 public inquiries.<sup>9</sup> This is in no way highlighted as any criticism of the Commission; indeed resources and the likely lack of robustness of many complaints dictate that it can only investigate a small proportion of matters received and in this regard the ICAC is operating exactly as envisaged under the *ICAC Act*. It does, however, mean that it is likely that only a small proportion of complaints about the conduct of Members of Parliament are ever the subject of a full investigation, or public inquiry, and that no information is ever published as to the outcome of the vast majority of such complaints.

In 2002 the Legislative Council's Privileges Committee conducted an inquiry into the pecuniary interest returns of a Member of the Legislative Council, who is now an affected person in relation to the current ICAC inquiry. This was a rare instance, in modern times, of a parliamentary committee investigating the conduct of a Member. The minutes of proceedings of the committee, included in the committee's report, show that the committee divided along party lines in its consideration of the Chair's draft report. The Committee Chair, the Hon Helen Sham-Ho MLC, noted in her foreword to the report:

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<sup>7</sup> Department of Parliamentary Services, *Members' Entitlements Handbook*, First Edition 2011, pp 59-60.

<sup>8</sup> Excepting matters referred by the Houses of Parliament under section 73 of the *ICAC Act*, which the ICAC is obliged to investigate.

<sup>9</sup> NSW ICAC, *Annual Report 2011-2012*, p 11.

This was always going to be a difficult inquiry due to: the absence of any legal precedent to guide the Committee...; the highly charged political background against which the inquiry has been conducted, less than six months away from the next State election; the fact that 8 Members of the Legislative Council, representing four political parties and one independent Member, have been effectively asked to sit in judgment upon another Member, who is a senior Minister in the Government; and the limited time provided to the Committee in which to report on these matters.

This was an important inquiry for the Legislative Council. The report will be no doubt be looked at as a precedent for subsequent considerations of failures to comply with pecuniary interest disclosure requirements, not only in this Parliament but also in other Parliaments throughout Australia and overseas. It is therefore extremely disappointing that this report is, in my view, so inadequate and "politicised."<sup>10</sup>

The experience of the 2002 Legislative Council Privileges Committee inquiry illustrates the inherent limitations of parliamentary committees as a means of investigating serious matters concerning the conduct of fellow Members.

Another consequence of the ICAC's independence in determining which matters are the subject of preliminary or full investigations is the way in which less serious matters are dealt with. Between 1989 and 2011 the ICAC reported on 16 matters involving the conduct of members of Parliament. Two recurring themes in these reports have been the misuse of entitlements and lobbying.<sup>11</sup> Whilst not in any way suggesting these matters have not been serious (and the ICAC is only able to make findings of corrupt conduct against Members where it finds there has been a *substantial* breach of the Code of Conduct, or otherwise falls within the definition of corrupt conduct), none of these reports has dealt with matters on a scale of the matters subject of the current inquiry.

While the courts recognise the seriousness of an offence in sentencing convicted offenders, there are no degrees or shades of finding of corrupt conduct by the ICAC: the ICAC either makes a finding of corrupt conduct or does not. A member the subject of such a finding in relation to, for instance, the false claiming of sitting day relief to a total value of \$7,600<sup>12</sup> will be the subject of the same finding of "corrupt conduct" as an affected person may have as an outcome of a major investigation.

In the absence of any effective alternative avenue for the investigation of potential breaches of the Members' Code of Conduct, the only place to which complaints about a Member's conduct may be taken is the ICAC. Many complaints that are lodged with the ICAC, particularly those about Members of Parliament, are accompanied by statements to the media by complainants and subsequent media reports. The ICAC does not advise Members or make announcements confirming whether or not matters have been received or the outcomes of its assessment process

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<sup>10</sup> NSW Legislative Council, Standing Committee on Privileges and Ethics, *Report on inquiry into the Pecuniary Interest Register*, Report No 20, October 2002, p xi.

<sup>11</sup> *Review of the Members' Code of Conduct 2010*, n 3, p 71. Department of the Legislative Council and Department of the Legislative Assembly, *Summary of ICAC investigations into the conduct of Members of Parliament: Program for new Members of Parliament*, April 2011.

<sup>12</sup> ICAC, *Investigation into the Submission of False Claims for Sitting Day Relief Payments by a NSW MP and Members of her electorate staff*, July 2010, p 5.

or preliminary investigations. A Member may therefore find themselves the subject of media reports that they have been “referred to ICAC” or are “being investigated by ICAC”, even though the complaint may be of a trivial, vexatious or less serious nature, and have such reports effectively left hanging over them and unresolved for a very long period of time.

Section 122 of the *ICAC Act* provides that nothing in the 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.” Although arguably not necessary, this section has served to make clear an important limitation upon the role of the ICAC. Parliamentary privilege consists of the powers and immunities recognised as necessary for Parliament to fulfil its roles in legislating and holding the executive government to account. Parliamentary privilege cannot be waived except by express words in a statute. The effect is that there are restrictions on the jurisdiction of the ICAC with respect to Members and its ability to obtain evidence in relation to the conduct of Members.

There have been a number of matters in which parliamentary privilege has been an issue in relation to the conduct and jurisdiction of the ICAC. In 2002 there were a number of debates in the Legislative Assembly about allegations that the then Leader of the Opposition had engaged in paid advocacy and asked questions in Parliament that could have furthered the interests of those on whose behalf he was engaged. The asking of questions being a proceeding in parliament, the ICAC had no jurisdiction to investigate this matter. Subsequently, the Legislative Assembly resolved to request the ICAC to report with recommendations for the future regulation of the secondary employment of Members.<sup>13</sup>

In 2003 the Legislative Council Privileges Committee found that the ICAC had breached parliamentary privilege in seizing documents concerning parliamentary proceedings during the execution of a search warrant on the Parliament House office of the Hon Peter Breen MLC.<sup>14</sup> A memorandum of understanding has since been entered into by the Presiding Officers and the ICAC, incorporating an ICAC protocol, which sets out the procedures to be followed by the ICAC in executing a search warrant on a Member’s Parliament House office. However, the memorandum of understanding and protocol do not address the procedure to be followed when a search warrant is executed on the electorate office of a member of the Legislative Assembly or a Member’s home office. Furthermore, search warrants are only one mechanism by which the ICAC seeks to obtain evidence in relation to Members – far more frequent is the service upon parliamentary officers of notices to attend and produce documents under section 22 of the *ICAC Act*. The complex matters of privilege that arose in the Breen matter in 2003 are equally important and frequently arise in relation to section 22 notices.

Shortly before the commencement of the current public inquiry by the ICAC legislation was passed to amend section 122 of the *ICAC Act* to provide, to the extent that it may have been

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<sup>13</sup> ICAC, *Regulation of secondary employment of Members of the Legislative Assembly: report to the Speaker of the Legislative Assembly*, September 2003.

<sup>14</sup> NSW Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, report no 25, December 2003, p x.

necessary, for the ICAC to be able to include within the scope of its investigations the pecuniary interest returns of Members of Parliament.

There is one further flaw, or at least ambiguity, in the current regime for the scrutiny of the conduct of Members of Parliament that is worthy of comment. Section 11 imposes a duty on a wide range of public officials (broadly, Ministers and the heads of public sector agencies) to report to the Commission any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct. The Parliament has legal advice from the Crown Solicitor indicating that neither the Clerks nor the Executive Manager, Parliamentary Services, are covered by the scope of section 11.<sup>15</sup> It is unknown whether the absence of such an obligation was inadvertent or the intention of the framers of the *ICAC Act* in 1988. However, it leaves a gap in the regime for the reporting of suspected corrupt conduct and adds a level of complexity to the escalation procedure referred to above in respect of allegations of misconduct and inappropriate use of resources.<sup>16</sup>

### **The UK model<sup>17</sup>**

#### *Background: Committee on Standards in Public Life*

The current model for dealing with concerns about the conduct of Members of Parliament in the United Kingdom had its origin in the “cash for questions” and other contemporaneous scandals in the early 1990s. In the wake of these scandals Prime Minister Major established a Committee on Standards in Public Life, under the chairmanship of Lord Nolan, to report with recommendations for reform. The first report of the Committee, in May 1995, identified seven principles of public life and included detailed recommendations aimed at Members of Parliament, Ministers, civil servants and Quangos.<sup>18</sup> In addition to a code of conduct for members, the Nolan Committee recommended the appointment by the House of Commons of a Parliamentary Commissioner for Standards:

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<sup>15</sup> Crown Solicitor’s Office, *Application of ICAC Act to Parliament*, Ref 200902640, 21/12/2009.

<sup>16</sup> *Members’ Entitlement Handbook*, fn 7, p 60.

<sup>17</sup> This section has been informed both by desk-based research of publicly available information and by briefings and discussions with key personnel in London in June 2013. Meetings were held with the current House of Commons Parliamentary Commissioner for Standards, senior Clerks of both the House of Commons and House of Lords, and representatives of the Independent Parliamentary Standards Authority and the Committee on Standards in Public Life. Profound thanks are extended to each of those people with whom meetings were held for their generosity in terms of their time, frankness and wisdom. The views of MPs were also able to be gauged through a session on the standards framework at the 62<sup>nd</sup> Westminster Seminar on Parliamentary Practice and Procedure, thereby providing an up-to-date picture of the regime and current issues.

<sup>18</sup> Committee on Standards in Public Life, *Standards in Public Life*, Volume 1: Report, May 1995. The Committee continues to exist as a body, with terms of reference slightly expanded in 1997 and 2013. The Committee consists of an independent Chair, six non-political leaders (including civil servants, business leaders and academics) appointed by the Prime Minister and three senior political members, one from each of the three main political parties in the UK. “The Committee is an advisory non-departmental public body sponsored by the Cabinet Office. This means that it is funded by the Government and supported by a secretariat of civil servants. It is a standing committee, with a non-statutory basis... A recent triennial review has confirmed the Committee’s continuing role...” *The Committee on Standards in Public Life*, unclassified briefing note, 19/6/2013. The seven principles of public life identified as already existing but “codified” in the first report are: selflessness; integrity; objectivity; accountability; openness; honesty; and leadership.

By analogy with the Comptroller and Auditor General, the House should appoint as Parliamentary Commissioner for Standards, a person of independent standing who will take over responsibility for maintaining the Register of Members Interests; for advice and guidance to MPs on matters of conduct; for advising on the Code of Conduct; and for investigating allegations of misconduct. The Commissioner's conclusions on such matters would be published.

When the Commissioner recommends further action, there should be a hearing by a sub-committee of the Committee on Privileges, comprising up to seven senior MPs, normally sitting in public, and able to recommend penalties when appropriate. MPs who are being heard should be entitled to be accompanied by advisers.<sup>19</sup>

The House of Commons first appointed a Parliamentary Commissioner for Standards in 1995. The House of Lords first appointed a Commissioner for Standards in 2010. There are some subtle but important differences in the roles of the two Commissioners. Unless otherwise stated the discussion and analysis which follows relates to the House of Commons arrangements. The current House of Commons Parliamentary Commissioner for Standards, Ms Kathryn Hudson, the fifth since the inception of the position, took up the position in January 2013.<sup>20</sup> The commissioner is appointed by the House of Commons for a single term of five years. The procedures and remit of the commissioner have evolved over time together with the code of conduct for MPs, and the role of the parliamentary committee to whom the commissioner reports, now the Committee on Standards. Recent changes have included increases in the amount of information published about the work of the commissioner, and changes to the membership of the Committee on Standards. The Parliamentary Commissioner and Standards Committees are appointed by resolution of the House and their roles are set out in Standing Orders: the standards regime is not a statutory scheme.

#### *Committee on Standards*

The composition and role of the Committee on Standards is set out in House of Commons Standing Orders 149 and 149A. The role of the committee in respect of alleged breaches of the code of conduct is:

To consider any matter relating to the conduct of members, including any specific complaints in relation to alleged breaches in any code of conduct to which the House has agreed and which have been drawn to the committee's attention by the Commissioner...<sup>21</sup>

Standing order 149A now provides for the appointment of "lay members" (that is, non-members of the community who are not elected Members of Parliament) to the Committee on Standards. The Committee or its sub-committees cannot proceed to business unless at least one lay member

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<sup>19</sup> Ibid, p 4.

<sup>20</sup> Ms Hudson is a former Deputy Ombudsman.

<sup>21</sup> *Standing Orders of the House of Commons*, 2012, SO 149 (1) (b). The Committee is chaired by a senior Member of the Opposition, the Rt Hon Kevin Barron MP, who served on the Committee for five years before becoming Chair in 2010.

is present, and a lay member who is present at a meeting at which a report is agreed shall have the right to submit a paper setting out that lay member's opinion on the report, which is then appended to the committee's report to the House. The first three lay members were appointed in early 2013.<sup>22</sup>

#### *Parliamentary Commissioner for Standards*

Standing Order 150 sets out the duties of the Parliamentary Commissioner for Standards, including the investigation of specific matters relating to the conduct of members, and reporting on such investigations to the Standards Committee.<sup>23</sup> Recent changes formally provide for the timely resolution of minor matters by way of "rectification" or in the case of matters concerning parliamentary allowances, by way of "reimbursement", as well as the publication of details about such matters, together with information about complaints received and current matters.

Detailed information about the procedure for complaints and inquiries is published in the House of Commons Guide to the Code of Conduct<sup>24</sup> and a procedural note published by the Commissioner.<sup>25</sup> Some aspects of note include:

- Complaints may be received from either Members of Parliament or from the public
- Members making complaints about a fellow MP are reminded that it is a basic courtesy when complaining to the Commissioner about a fellow MP to also send copy of the complaint to the MP concerned (about 50% of Members lodging complaints doing so in practice)
- Complaints must be in writing, signed and include a postal address
- Complaints must be accompanied by supporting evidence
- Conduct more than seven years previous is rarely examined
- Members may self-refer themselves but there is a high threshold for such a self-referral to be accepted for investigation

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<sup>22</sup> The appointment of lay members was a recommendation of the Committee on Standards in Public Life in its report on *MPs' expenses and allowances: Supporting Parliament, safeguarding the taxpayer*, November 2009, in response to the expenses scandal, as a means of enhancing public confidence in the "proportionality" of sanctions applied to members by their peers. The appointment of lay members was also strongly supported by the current Chair of the Standards Committee, the Rt Hon Kevin Barron MP, on the basis of his own previous experience as a lay member of the disciplinary board of the Medical Council. The roles of lay members on the Committee have been "carefully calibrated" – to the extent that they participate in proceedings of the Committee their contributions are covered by parliamentary privilege.

<sup>23</sup> The other duties of the Parliamentary Commissioner for Standards include maintenance of registers of disclosures (for MPs, MPs staff, journalists and All Party Parliamentary Groups), the provision of confidential advice to MPs, and monitoring and making recommendations for changes to the Code of Conduct for MPs. An example of the other work of the Commissioner, is the current review, together with the Standards Committee, of the current rules for the registration of All Party Parliamentary Groups, of which there are currently 584, to address such issues as sources of funding, the risk of the groups being used as vehicles for lobbying and the provision of parliamentary passes for people associated with the groups. In order to undertake this range of duties the Commissioner has a full time equivalent staff of 6 and is herself expected to work two or three days per week.

<sup>24</sup> House of Commons, *The Code of Conduct, The Guide to the Rules relating to the Conduct of Members*, 27 March 2012, pp 40 – 42.

<sup>25</sup> Parliamentary Commissioner for Standards, *Procedural note: Parliamentary Commissioner for Standards, Procedure for inquiries*, 24 April 2012.



- Members and other complainants are discouraged from making public statements about the fact they have made a complaint, although this is not always followed
- Members are required to co-operate with the Commissioner and are the main source of information for the Commissioner, followed by officers of the House
- The Commissioner is very cognisant of the seriousness of a decision to accept a complaint (which information is now automatically published on the Commissioner's website) and the impact such a decision can have on an MP, although with a list of Members subject to accepted complaints now being published routinely this information may come to be regarded as less dramatic than in the past.

Areas outside the Commissioner's remit include:

- Policy matters
- A Member's views or opinions
- A Member's handling of or decision about an individual case
- The funding of political parties
- Alleged breaches of the ministerial code
- Complaints about what members do in their purely private and personal lives
- Anonymous complaints
- Conduct in the chamber.

The most common reasons for not accepting a complaint are: that the conduct in question would not involve a breach of the Code of Conduct; insufficient evidence of a breach; and the complaint being inappropriately targeted (most often where a complainant has lodged complaints about the same matter with multiple authorities).

A number of outcomes are possible in relation to complaints accepted for investigation. Where there appears to be sufficient evidence to uphold a complaint, the Member will be invited to respond to the complaint. Members are expected to co-operate with both the Commissioner and the Committee on Standards, and procedures are in place to ensure procedural fairness. The Commissioner may dismiss the complaint. As outlined above, under recent procedures, complaints may be resolved through "rectification" or "reimbursement." Otherwise, an upheld complaint is the subject of a memorandum from the Commissioner to the Committee on Standards setting out findings and evidence. On specific complaints for which the Commissioner has concluded there has been a breach of the Code of Conduct, and the Committee agrees in full or in part, the Committee may make recommendations to the House on any further action required, including a recommended sanction. The Committee tends to operate on a non-partisan basis, seeking to reach consensus on matters and there has only been one matter on which the Committee has divided in recent years. The Committee takes its responsibilities very seriously and is very conscious of the impact that the precise language used in its reports can have upon an MP's reputation and future political career.<sup>26</sup> The Commissioner and Committee apply the

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<sup>26</sup> The Rt Hon Kevin Barron MP, presentation to 62nd Westminster Seminar on Parliamentary Practice and Procedure, London, 19 June 2013.

civil standard of proof (i.e. the balance of probabilities) in reaching findings, however, in practice a sliding scale is applied with the evidential requirements being treated particularly seriously for more serious matters.

It must be emphasised that the Commissioner is limited to a complaint handling function: receiving and dealing with complaints received. The Commissioner does not have an audit function to proactively look for errors in the registration of interests or respond to media reports about a Member's conduct in the absence of a complaint.

#### *The House of Lords*

The House of Lords appointed a Commissioner for Standards in 2010, following recommendations from the Committee on Standards in Public Life following the expenses scandal.<sup>27</sup> The Lords Commissioner has a similar role to the Commons Commissioner in respect of complaints,<sup>28</sup> and its Committee on Privileges and Conduct has a Sub-Committee on Lords' Conduct which fulfils a similar role to the House of Commons Standards Committee.<sup>29</sup> The Lords Commissioner is a former chief of Police. One key difference between the two Houses that is relevant to the sanctions available under the model is that the House of Lords has no power to expel a Lord, although it has exercised a power to suspend.

#### *Independent Parliamentary Standards Authority*

Following the 2009 expenses scandal the Committee on Standards in Public Life recommended the establishment of an independent regulatory body to oversee and administer MPs expenses. The UK Parliament subsequently enacted the *Parliamentary Standards Act 2009*, which established the Independent Parliamentary Standards Authority (IPSA). Included in the legislative scheme was the creation of a position within IPSA known as the Compliance Officer, whose role includes the investigation of complaints that a Member has received an amount from IPSA to which they were not entitled under the relevant rules. The Compliance Officer has discretion to assess the complaint privately or to launch a full public investigation into complaints, and to publish a report when deemed necessary. IPSA, and its Compliance Officer, only covers Members of the House of Commons; the House of Lords staff continues to administer Lords entitlements. The current Compliance Officer, Mr Peter Davis, is a former Police Officer. Like the Parliamentary Commissioner for Standards, the IPSA Compliance Officer deals with complaints received and does not proactively audit MPs use of entitlements. A protocol has been established between the IPSA Compliance Officer and the House of Commons Parliamentary Commissioner for Standards, for the referral of relevant complaints to the other body if more appropriate in view of the details of the complaint.<sup>30</sup>

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<sup>27</sup> MPs expenses and allowances: Supporting Parliament, safeguarding the taxpayer, fn 20.

<sup>28</sup> Unlike the Commons Commissioner, the Lords Commissioner does not maintain registers of disclosures, the registrar of Lords disclosures remaining a senior Clerk of the House.

<sup>29</sup> House of Lords, *Code of Conduct for Members of the House of Lords and Guide to the Code of Conduct*, Second Edition, November 2011, pp 22-27.

<sup>30</sup> *Procedural note: Parliamentary Commissioner for Standards*, pp 4-5.

*The complaints regime in practice*

At the height of the expenses scandal in 2009-10 the Parliamentary Commissioner for Standards was receiving in the order of 300 complaints a year. In 2009-2010, 72 complaints were accepted for inquiry.<sup>31</sup> The average time taken to resolve accepted complaints is four months. During the 2011-12 financial year, the Commissioner received 109 complaints, of which the overwhelming majority fell outside of the Commissioner's remit. Only eight of these complaints were accepted for inquiry, with four others carried over from the previous year. Four of these were resolved through the rectification procedure, while four were the subject of memoranda to the Standards Committee. The statistics for the 2012/13 year are likely to be similar, although a number of recent media reports suggest a number of complex matters involving potential breaches of the Code of Conduct can be expected to be received shortly. Matters that are resolved by way of "rectification" are generally settled within three to four months at the most. More complex matters requiring more thorough investigation may take seven to eight months to be finalised. The matters dealt with in the four memoranda submitted to the Committee for Standards in 2011-12 and the subsequent outcomes provide a snapshot of the contemporary operation of the model:<sup>32</sup>

1. A self-referral by a member requesting inquiry into arrangements for parliamentary funded accommodation until 2009. A serious breach was upheld. The member accepted responsibility, apologised and had repaid an amount of 56,592 pounds. The Committee for Standards agreed with the Commissioner's findings and recommended the Member be suspended from the House for seven sitting days and apologise to the House by way of personal statement. The House agreed to the recommended suspension and the member made his apology.
2. A complaint about a Member's use of pre-paid envelopes and House of Commons stationery to send unsolicited and "party political" letters. The complaint was upheld as conduct contrary to relevant rules, but not at the serious end of spectrum. The Committee for Standards agreed with the Commissioner's findings, and the Member made a written apology to the House and repaid the cost of the postage.
3. Complaints that a Member had failed to comply with pecuniary interest disclosure requirements. The Commissioner upheld the complaints and concluded they were serious matters. The Member had co-operated with inquiry and taken the first available opportunity to acknowledge the breach and apologise. The Committee for Standards agreed the matter was serious and recommended the Member apologise to the House and update the entry in the register, with the update to appear in bold, italic type with an appropriate footnote. The recommendations were implemented.

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<sup>31</sup> John Lyon CB, Parliamentary Commissioner for Standards, Keynote Address by the Commissioner: "Lessons in Government" Oxford Seminar, 9 February 2012, reproduced in Parliamentary Commissioner for Standards, *Annual Report 2011-12*, p 49.

<sup>32</sup> Parliamentary Commissioner for Standards, *Annual Report 2011-12*, pp 22-28.

4. A complaint about a number of matters in relation to one Member including a breach of the rules for parliamentary allowances concerning accommodation, and the use of his office for non-parliamentary purposes. These two complaints were upheld, but some mitigating factors were identified. The Committee for Standards accepted the findings and recommended a repayment of 3,000 pounds and a written apology. The recommendations were implemented.

*Current views about the model*

From discussions with MPs and Clerks in London in June 2013 it is apparent that there is strong support for the current standards regime. Some views expressed in either interviews or formal presentations during June 2013 are set out below:

- “We are better off with an independent commissioner to whom complaints can be directed and who can conduct investigations than we were without one. It is an altogether sensible approach.”
- “When serious matters arise there is a real sense of relief that the Commissioner is there to deal with them.”
- “The Commissioner and Committee are now widely accepted – they have become part of the furniture.”
- “The only complaints from MPs about the Commissioner or Standards Committee these days tend to arise from a minority of those investigated who sometimes feel their own matter has taken too long to resolve or who, very occasionally these days, will disagree with the finding and seek to convince the Committee the Commissioner was wrong – not a very wise course and likely to backfire.”
- “There has been one instance where the Committee dissociated itself from a finding of a previous Commissioner and which caused considerable grief. However, for more than ten years now there has not been a single instance in which the Committee has been dissatisfied with an investigation or the reasoning of a Commissioner – there is complete respect for the Commissioner.”
- “It is better to have an independent person who can decide when to investigate matters than to have politicians making such decisions on the run in response to the ebbs and flows of media pressure about particular matters.”
- “The Code of Conduct and Guidance material cannot cover every scenario – the Committee tends to focus upon the intent of the Member – was a breach of the Code intentional and how has the Member dealt with the matter since being alerted to the issue at hand?”
- “The Commissioner is an important part of ensuring ethical conduct by MPs, however, the importance of embedding Codes of Conduct, sound induction programs and above all exemplary leadership examples cannot be under-estimated.”
- “It is important to have a senior parliamentary officer supporting the Standards Committee, in view of the links between standards issues, parliamentary privilege and parliamentary administration.”

### Previous consideration of the UK model as an option for NSW<sup>33</sup>

The UK model of a Parliamentary Commissioner for Standards and Standards Committee was highlighted by the Legislative Council Privileges Committee as early as October 1996, although without expressing any concluded view.<sup>34</sup> The model received renewed interest in the context of the limited capacity of the ICAC to investigate or adjudicate on breaches of the Code of Conduct for Members where matters of parliamentary privilege arise. As noted above, in 2002 it was recognised that the ICAC had no jurisdiction to investigate a matter concerning paid advocacy and the asking of questions by a member. Subsequently, the Legislative Assembly resolved to request the ICAC to report with recommendations for the future regulation of the secondary employment of Members. The ICAC's 2003 report to the Speaker of the Legislative Assembly raised the parliamentary standards commission model as one option to address this issue. However, the ICAC concluded that in view of its own jurisdiction to investigate all corrupt conduct allegations apart from those to which parliamentary privilege applies, the likely need to call on a parliamentary commissioner would be relatively seldom. The ICAC preferred a legislated waiver of privilege to allow the Houses to authorise the ICAC to itself investigate any such instances.<sup>35</sup>

In 2004, the Hon Peter Breen MLC (who had been the subject of a public inquiry and report by the ICAC, and upon whose Parliament House office a search warrant had been executed) gave notice in the Council of a bill for an Act relating to the appointment and functions of a parliamentary commissioner for standards. The Commissioner was to be the final authority on members' use of parliamentary resources and their obligations with respect to their entitlements and allowances. As such, the bill was to follow the model already in place in other Parliaments, such as the British House of Commons. Notice of the bill was given on a number of occasions and remained on the business paper until 2007, but the bill was never introduced into the House.

In 2005 Mr Bruce McClintock SC reported on an independent review of the *ICAC Act*. Mr McClintock's report included a thoughtful discussion of the complex issues surrounding the ICAC's jurisdiction in relation to Members of Parliament. Mr McClintock noted the strong community support for ICAC continuing to have jurisdiction to investigate all public officials including Members of Parliament, but also recognised that ICAC's jurisdiction in enforcing "the ethical standards that apply to parliamentarians sits uncomfortably with the principle of parliamentary sovereignty upon which the Westminster system ... is based." He commented that Members may be subject to complaints made to the ICAC on political grounds and that this factor, combined with the absence of a mechanism to deal with minor complaints, can result in Members being subject to high profile ICAC investigations for minor matters. Mr McClintock therefore recommended the establishment of a parliamentary investigator or parliamentary committee to investigate: minor matters involving members of Parliament, so as to permit the ICAC to focus on serious and systemic allegations of corruption; and allegations of corruption that the ICAC is unable to investigate because of parliamentary privilege as preserved by section 122 of the *ICAC Act*.

In my view the establishment of a parliamentary investigator to examine minor allegations involving parliamentarians is worth considering. It would be consistent with the principle that ICAC's investigations should be directed towards serious and systemic corruption. The proposal would place Members of Parliament in a position similar to that which exists.

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<sup>33</sup> This section draws from the discussion in the report on *Reforms to Parliamentary Processes and Procedure*, n 4, pp 64-65.

<sup>34</sup> Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry into the establishment of a Draft Code of Conduct for Members*, October 1996, pp 77-89.

<sup>35</sup> *Regulation of secondary employment of Members of the Legislative Assembly*, n 9, pp 75-80.

for other public officials whereby ICAC may refer allegations of corruption to another person or body for investigation or other action under Part 5 of the Act. The proposal should not adversely impact on ICAC's ability to promote the honesty and integrity of public administration, as long as ICAC retains the capacity to investigate parliamentarians if the parliamentary investigator fails to do so, or if that investigation proves inadequate. ICAC has expressed support for this recommendation and has suggested that it should also apply where ICAC cannot investigate a serious allegation because of parliamentary privilege. I agree with this suggestion.<sup>36</sup>

Mr McClintock's report noted that the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics at that time did not support the appointment of an external third party or commissioner to investigate members of the Legislative Assembly.<sup>37</sup> However, he did note that the proposal was supported by the Hon Jenny Gardiner MLC (who is now Deputy President of the Legislative Council).<sup>38</sup> Whilst recommending consideration be given to the establishment of a parliamentary investigator or committee to investigate minor matters concerning Members, Mr McClintock did not support the terms of Mr Breen's proposed bill, apparently at least in part because Mr Breen's Bill sought to oust the ICAC's jurisdiction in relation to Members entirely.<sup>39</sup> Subsequently, amendments to the *ICAC Act* were made to give effect to certain recommendations contained in Mr McClintock's report. However, these did not include any changes to the ICAC's capacity to investigate members of Parliament, or any provision for a parliamentary investigator.

As noted above, in 2010 two NSW parliamentary committees briefly commented on the Parliamentary Commissioner for Standards model and recommended further consideration of the model in the new (now current) Parliament. The Joint Select Committee on Parliamentary Procedure was established to consider the applicability to the NSW Parliament of any of the reforms to parliamentary procedure introduced in the Australian Parliament, under the "Agreement for a Better Parliament: Parliamentary Reform" which followed the 2010 federal election. As that agreement canvassed the possible appointment of a parliamentary integrity commissioner, this issue was considered by the Joint Select Committee. Members of the committee from both Houses agreed that the merits of a parliamentary integrity commissioner should be considered by the Privileges Committees of each House in the new Parliament.<sup>40</sup>

The Legislative Council Privileges Committee also discussed this issue in its 2010 review of the Members' code of conduct. The Public Interest Advocacy Centre (PIAC), in its submission to the inquiry, recommended the investigation of the establishment of a parliamentary standards commission:

The role of the Privileges Committee could be supported by a Parliamentary Standards Commissioner as appointed in the UK for recording and monitoring statements of interest to parliament, conflicts of interest and ensure observance of ethical practices. A Commissioner could also take over the educative role of the committee, providing guidance and training for all Members of Parliament on matters of conduct, propriety and conflicts of interest. The Australasian Study of Parliament

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<sup>36</sup> Bruce McClintock SC, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, January 2005, pp 87.

<sup>37</sup> *Ibid*, p 99.

<sup>38</sup> *Ibid*, pp 100-101.

<sup>39</sup> *Ibid*, p 100.

<sup>40</sup> *Reforms to Parliamentary Processes and Procedure*, n 4, pp 29-30 & 64-65.

Group reported on the role a Commissioner could take, suggesting it could also monitor and propose modifications to any guides or codes, receive and investigate complaints and possible breaches. The Commissioner in this model would report to Parliament, and be appointed on the recommendation of an all-party Parliamentary committee.<sup>41</sup>

The Privileges Committee endorsed the recommendation of the Joint Select Committee, that the merits of a parliamentary integrity commissioner be considered by the Privileges Committees of each House in the new Parliament.<sup>42</sup>

### **Adapting the UK model in NSW**

Set out below are some initial thoughts as to how the addition of a Parliamentary Commissioner for Standards could work in NSW.

No change is envisaged in relation to the ICAC's jurisdiction in relation to Members of Parliament. The ICAC would still be able to receive complaints, conduct investigations and report to Parliament in respect of allegations of corrupt conduct against Members. In extreme cases, Parliament would still be able to refer a matter to the ICAC. A Parliamentary Commissioner for Standards would therefore be an additional check and source of scrutiny of the conduct of Members.

All complaints concerning the conduct of Members in respect of the Code of Conduct would, initially at least, be considered by the Parliamentary Commissioner for Standards, although complaints about alleged corrupt conduct could be taken straight to ICAC as at present. An agreed assessment process would be developed by the Parliamentary Commissioner and agreed by the relevant parliamentary committees. Serious matters (to be appropriately defined and no doubt including prima facie evidence of a substantial breach of the code of conduct) would be referred on to the ICAC. A Parliamentary Commissioner for Standards would respond to complaints about the conduct of Members. It would not have a proactive audit function.

Less serious matters (appropriately defined, perhaps involving a breach of the code but not a substantial breach, and one-off breaches of guidelines regarding the use of entitlements as opposed to repeat matters or matters involving a substantial sum) would stay with the Parliamentary Commissioner (or be referred to the Parliamentary Commissioner if received directly by the ICAC). Straight forward matters would be dealt with in an agreed benchmark timeframe and resolved (eg through a "rectification" or "reimbursement" and apology procedure), with the outcome communicated to the Member, published by the Parliamentary

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<sup>41</sup> *Review of the Members' Code of Conduct 2010*, n 3, p 44. The reference to the Australian Study of Parliament Group is to a publication entitled *Be Honest, Minister! Restoring Honest Government in Australia*, 2007. This document was published as an "Accountability Working Party" under the rubric of the ASPG. The working party included a number of eminent former members, including former NSW Speaker, the Hon Kevin Rozzoli. The report focussed on reforms to enhance ministerial accountability but also included a recommendation for the appointment of a Parliamentary Commissioner for Standards in the Commonwealth Parliament along the lines of the UK model: pp 61-62.

<sup>42</sup> *Ibid*, p 45.

Commissioner and disclosed to relevant parliamentary committee (probably the Privileges Committees of each House) to ensure enhanced transparency and accountability.

More difficult matters (e.g. a breach of pecuniary interest disclosure provisions or a possible breach of a clause in the Code of Conduct) would be the subject of investigation by Parliamentary Commissioner (possibly with assistance from ICAC staff if necessary?), in accordance with agreed procedural guidelines, with the Parliamentary Commissioner's findings reported to the relevant parliamentary committee. The parliamentary committee would review each such report and decide whether or not to confirm the findings. The Committee would recommend appropriate sanctions to the House. The relevant parliamentary committees could possibly include "lay members."

The question of what sort of sanctions could be recommended and imposed requires careful consideration. In the absence of legislation dealing with parliamentary privilege in NSW, the Houses only possess self-protective and not punitive powers to deal with contempt. Either House would be able to require an apology from, or reprimand, a Member. In the most extreme case (likely to be a matter involving a finding of corrupt conduct by the ICAC rather than an adverse finding by the Parliamentary Commissioner) the Houses could dismiss a Member for conduct unworthy. However, legislation would probably be required to provide for one of the key sanctions in the UK model: the imposition of a fine on a Member through loss of pay while suspended from the service of the House, as it would be difficult to construe such action as self-protective rather than punitive.

#### **A final note: "Broken windows" and social norms**

In understanding the value of a Parliamentary Commissioner for Standards in reducing the type of events currently before the ICAC, the "Broken Windows" theory of crime prevention, famously argued by James Q Wilson and George Kelling in the 1990s<sup>43</sup> is an analogy which may be useful. By dealing quickly and effectively with minor vandalism and social disorder, the Broken Windows theory postulates that more serious crimes can be deterred because potential offenders respond to a more orderly environment. Arguments continue as to whether the implementation of the theory explains the rapid reduction in crime rates in New York and other major US cities during the 1990s. However recent European studies have also demonstrated that an orderly environment free of graffiti or litter influences ethical behaviour: it "fosters a sense of responsibility not so much by deterrence... as by the signalling of a social norm: this is the kind of place where people obey the rules."<sup>44</sup> A Parliamentary Commissioner for Standards that resolves more common minor infringements quickly and effectively may help create a parliamentary environment where more serious corruption is inhibited.

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<sup>43</sup> "Broken windows: the police and neighbourhood safety", *Atlantic Monthly*, 1982, p 249.

<sup>44</sup> K Keizer, S Lindeberg and L Steg, "The spreading of disorder", 2008 *Science* 322, pp 1681-85, quoted in S Pinker, *Better Angels of Our Nature*, 2011, Penguin, p 147.



## **Conclusion**

This paper will have served its purpose if it provokes discussion and facilitates consideration of the merits and possible application to NSW of the UK Parliamentary Commissioner for Standards model as a means of enhancing the scrutiny of the conduct of Members of Parliament. This is not the first time the model has been suggested as an addition to the jurisdiction of the ICAC over Members' conduct. It is not clear why the model was not supported when proposed by Bruce McClintock SC in 2005. Perhaps it was out of fear that an additional body of this nature would attract additional and possibly vexatious complaints. This is a risk with any such new watchdog. However, a clear advantage of this model is that any such vexatious complaints would be able to be resolved in a timely manner. The model would also formally provide for the resolution of less serious matters through "rectification" or "reimbursement", and apology (and possibly through a range of other appropriate sanctions), hand in hand with increased accountability and transparency. If there is ever going to be an ideal time for the current regime for the scrutiny of the conduct of Member of Parliament in NSW to be reformed and improved, it will be in the wake of the forthcoming report of the ICAC on its current inquiry into mining licences and related matters, with its inevitable focus on the accountability framework for Members of Parliament.