

Submission

No 12

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

Name: Lloyd Babb SC
Position: Director of Public Prosecutions
Date Received: 19/03/2014

OUR REFERENCE

DIRECTOR'S CHAMBERS



YOUR REFERENCE

DATE
19 March 2014

The Clerk
Legislative Council Privileges Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Sir,

Joint Inquiry into the recommendations of the ICAC

Thank you for your letter dated 22 January 2014 inviting me to make a submission the Joint Inquiry.

I will deal with each of the recommendations in turn.

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.

I would support amendment of the Code of Conduct so that "improper influence" is dealt with in more than a general way in the preamble.

The draft provisions in paragraph 1.11 of Background Paper No.1 seem to be a reasonable exposition of the concept of "improper influence".

From a practical point of view, the type of offences that are likely to be prosecuted by my Office in this area are:

- The common law offence of *Misconduct in public office*.
- *Corrupt commissions or rewards* under s.249B, of the *Crimes Act 1900*.
- General fraud offences under Part 4AA of the *Crimes Act 1900*, for example the general offence of *Fraud* under s.192E.

I understand that new Members of Parliament are given an induction by the Clerk of the Parliaments or the Clerk of the Legislative Assembly. This induction includes drawing the new Member's attention to the Code of Conduct.

In so far as a prosecution might rely on the Member's knowledge of the Code of Conduct as evidence of the accused knowledge or mental state I would submit that the Parliament should adopt a register system that is now common throughout the Public Sector where a new employee (or in this case new Member) signs a document to the effect that they have been provided with and read the Code of Conduct.

This would provide direct evidence of this fact rather than the Crown having to rely on evidentiary inferences, or a statement by the Clerk that he or she provided the Code to the new Member of Parliament.

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.

I note that other Australian Parliaments, with the exception of Western Australia and Tasmania, have a form of spouse/partner disclosure, accompanied by privacy provisions that restrict the publication of this information.

I would support the implementation of a similar requirement here in NSW. The fight against corruption requires multiple checks and balances acting together. If appropriate restrictions are placed on the publication and access of this register the measure can be seen as a positive addition to the range of checks and balances already in place.

The proposal does not seem to have direct application to the recent ICAC Inquiries *Operation Jasper* and *Operation Acacia*.

Operation Jasper concerned the involvement of adult children in a business deal that would not have been caught by this proposal.

The issues highlighted by the questioning of Mr Edward Obeid Snr on 5 February 2013 about his past pecuniary interest declarations are probably better addressed by considering the current requirements under the *Constitution (Disclosure by Members) Regulation 1983* and any loopholes that may exist in relation to the use of trusts and loans from family members.

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.

I am of the view that the proposal to create a Parliamentary Investigator position has merit.

I am concerned, however, that any such office has well defined investigation powers and clear protocols as to how the proposed office intersects with the roles of ICAC, the NSW Police and the criminal justice system.

The creation of a system where the remedies are limited to "rectification", "reimbursement" and apology, risks creating a closed system where appropriate matters are not dealt with by the criminal justice system.

Private citizens who dishonestly misuse company funds, for example, face investigation by the NSW Police and possible criminal charges under fraud offences.

Where dishonesty has been involved in any claim for Parliamentary expenses, Members of Parliament should also face this possibility. I understand this is how the "Minchin Protocol" is supposed to operate at the Commonwealth level.

Additionally, where it is revealed that the matter could possibly involve corruption, referral to the ICAC should also be an option.

As such, I am also anxious that any Investigator have defined powers that will lead to the collection of evidence that is admissible in any possible criminal prosecution.

The *Parliamentary Standards Act 2009* (UK) creates an offence of providing false or misleading information for allowances claims (s.10) with a maximum penalty, both summarily and on indictment, of 12 months.

Section 307A and s.307B of the *Crimes Act 1900* probably already apply to false and misleading application for parliamentary expenses but these are summary offences subject to a statute of limitation of six months. Generally, cases such as these come to light well after the limitation period has expired. As the UK offence can be dealt with on indictment, it does not suffer this problem.

Thank you for the opportunity to make submissions to the Joint Committee.

I you have any further questions please contact

Yours faithfully

Lloyd Babb SC
Director of Public Prosecutions