

Submission

No 3

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

**Organisation:** Australian Senate  
**Name:** Dr Rosemary Laing  
**Position:** Clerk of the Senate  
**Date Received:** 18/02/2014

---



AUSTRALIAN SENATE

PARLIAMENT HOUSE  
CANBERRA ACT 2600

CLERK OF THE SENATE

clsubprnpv\_18754

18 February 2014

Mr Trevor Khan MLC  
Chair  
Legislative Council Privileges Committee

Mr John Sidoti MP  
Chair  
Legislative Assembly Privileges and Ethics Committee

Dear Chairs

#### **JOINT INQUIRY INTO RECOMMENDATIONS OF THE ICAC**

Thank you for your invitation to make a submission to your committees' joint inquiry into several recommendations of the Independent Commission Against Corruption in its report, "Reducing the opportunities and incentives for corruption in the state's management of coal resources". The recommendations concern possible amendment of the code of conduct for members, possible disclosure of the interests of spouses/partners and dependent children, and the creation of a parliamentary investigator position.

By way of background, the Senate operates a pecuniary interest disclosure regime based on resolutions of the Senate. It does not have a code of conduct for senators or a parliamentary investigator position. However, senators are subject to numerous provisions, in both laws and resolutions, concerning their conduct as senators. Those senators who are ministers are also subject to the Statement of Ministerial Standards, most recently revised in December 2013. That statement is issued and enforced by the Prime Minister who may seek advice from his departmental secretary. In all other respects, senators are subject to the ordinary law of the land.

#### ***Improper interference by members***

Recommendation 22 of the ICAC report is for consideration of amendments to the Code of Conduct for members to deal comprehensively with improper influence by members.

The behavior that such amendments are designed to address is the kind of behavior revealed by the ICAC inquiry involving decisions by a minister that financially benefitted the family of another member. It was noted that the code of conduct did not address the behavior of the

member seeking to influence ministerial decisions affecting the private interests of the member and his family.

The Senate does not have a formal code of conduct, although proposals for such a code have been mooted and examined over several decades. The most recent examination of the issue was by the Committee of Senators' Interests which reported in November 2012 on a code of conduct. The inquiry was undertaken in the context of two developments:

- the agreements on parliamentary reform regarding the operation of the House of Representatives, struck in September 2010, and
- a draft code of conduct with a Parliamentary Integrity Commissioner to uphold the code, contained in a discussion paper issued by the House of Representatives Committee of Privileges and Members' Interests.

The committee did not support the adoption of a code of conduct unless it was meaningful, workable and reasonably likely to be effective. Instead, it concluded that a better approach would be to consolidate the numerous provisions which regulate the conduct of senators, identify any gaps in conduct or ethical matters and implement specific measures to address those gaps.<sup>1</sup>

There are two main methods of dealing with improper influence under existing provisions affecting senators. The first method is under the contempt jurisdiction and the second is under the criminal law.

The contempt jurisdiction is designed to address conduct (including the use of words) that amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member. This is the threshold test for contempt set out in section 4 of the *Parliamentary Privileges Act 1987*. The focus is on protecting the integrity of parliamentary proceedings.

In elucidating the matters it may treat as contempts, the Senate has identified breaches of the following prohibitions, relevant to the question of improper influence, as potentially contemptuous conduct:

#### **Improper influence of senators**

- (2) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence a senator in the senator's conduct as a senator or induce a senator to be absent from the Senate or a committee.

#### **Senators seeking benefits etc.**

- (3) A senator shall not ask for, receive or obtain, any property or benefit for the senator, or another person, on any understanding that the senator will be influenced in the discharge of the senator's duties, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of

---

<sup>1</sup> Committee of Senators' Interests, Report 2/2012, Code of Conduct Inquiry, November 2012, p. 18.

controlling or limiting the senator's independence or freedom of action as a senator, or pursuant to which the senator is in any way to act as the representative of any outside body in the discharge of the senator's duties.

While it could be argued that a senator whose family interests benefitted financially from a ministerial decision might be vulnerable to ongoing control by the minister in relation to the discharge of the senator's duties, such a proposition may not be sustainable in practice. Any threat by the minister to disclose the senator's receipt of benefits, in an attempt to exert control over the senator, must also reveal the minister's part in the offence. Likewise, the recipient is also vulnerable to exposure if improper influence is exerted in the other direction towards the minister.

If the impact of the improper influence does not manifest itself as an influence on a person's conduct as a senator then it may not be able to be dealt with as a matter of parliamentary discipline under the contempt jurisdiction.

The other method of dealing with such conduct by, or in relation to, a senator is under the criminal law. The old offence in the *Crimes Act 1914* of corruption and bribery of members of Parliament has been replaced by several offences in the *Criminal Code Act 1995* relating to Commonwealth public officials, a term which is defined to include members of either House of the Parliament. These offences include:

- section 139.2 – unwarranted demands made by a Commonwealth public official (an unwarranted demand being the equivalent of blackmail or extortion)
- section 141.1 – bribery of a Commonwealth public official (subsection (3) makes it an offence to seek or obtain a benefit in return for the official's duties)
- section 142.1 – corrupting benefits given to or received by a Commonwealth public official (a lesser offence than bribery and the equivalent of the old secret commissions)
- section 142.2 – abuse of public office (a new offence covering the use of influence, conduct or information to dishonestly obtain a benefit or cause detriment).

The Commonwealth approach thus distinguishes between a person's conduct as a member of parliament, which comes under the contempt jurisdiction, and their conduct otherwise, for example, as a minister or property developer, which is covered by the criminal law.

The Senate has not been persuaded, to date, that a code of conduct would provide such meaningful and effective remedies.

### ***Disclosure of interests of spouses/partners and dependent children***

The Senate's scheme for the registration of interests is established by resolution and is overseen by a Committee of Senators' Interests established by standing order 22A. Failure to comply with requirements of the resolutions may be dealt with as a serious contempt. The Senate's approach to registration of interests of a senator's spouse/partner and dependent children differs from the approach of the House of Representatives in that statements of such interests are confidential to the Committee of Senators' Interests.

Senators are required to lodge statements of interests of their spouse/partner and dependent children **of which they are aware** (emphasis added). These statements are kept in a separate part of the register and are not made public unless the committee considers that a conflict of interest arises in which case it may agree to table the statement. The committee may not exercise its inquiry powers or undertake an investigation of the private interests of any person unless the decision is agreed by three members of the committee other than the chair.<sup>2</sup>

Explanatory notes issued by the Committee of Senators' Interests emphasise that the responsibility for interpreting the resolution and applying it to their own circumstances belongs to senators, not to any third party.

The notes provide other guidance as follows:

- senators are not required to disclose the name of a spouse, partner or dependent child;
- a statement is not required if the senator does not have a spouse, partner or dependent children or is not aware of their interests;
- “dependent children” means dependent children under 16 years of age or dependent full-time students under 25 years of age;
- “partner” means a person who is living with another person in a bona fide domestic relationship;
- where interests are held jointly with a spouse or partner, former spouse or partner, or dependent children the interests need to be included only as interests of the senator, with appropriate notation such as “jointly owned with [former] spouse/partner”.
- in relation to shares held by a family or business trust, a nominee company or partnership, the actual shareholdings of the entity should be declared if the senator, the senator’s spouse or dependent child (or two or more of the senator, the spouse or the child or children, acting together) can exercise control over voting rights of the shares or over the disposal of the shares.

It is considered that the resolutions as framed balance the obligations of senators as holders of public office with the right to privacy of non-elected third parties.

### *A parliamentary investigator?*

The Senate’s arrangements do not involve either an ethics advisor, as in some jurisdictions, or a parliamentary investigator position. The occasion has not arisen where a parliamentary investigator has emerged as the solution to the problems posed by any particular set of circumstances. Instead, particular problems have been addressed by existing mechanisms as the following table of examples shows:

<i>Problem</i>	<i>Addressed by</i>
Allegations of misuse of travel allowance	Criminal investigation
Failure to declare extensive shareholdings	Resignation
Allegations of failure to declare changes in shareholdings	Inquiry by Privileges Committee

<sup>2</sup> The composition of the committee is 8 members, 3 nominated by the Leader of the Government in the Senate and 1 nominated by minority groups or independent senators. The chair is an opposition senator.

In the absence of any experience of such a role, I am unable to provide insights to the committees on the practical operation of a parliamentary investigator. However, the committees would be aware of the need to clarify any issues of parliamentary privilege that could arise from the creation of such a position, particularly if it were to be created by statute and given coercive powers.

Please let me know if I can provide any further assistance.

Yours sincerely

(Rosemary Laing)