

**Submission
No 6**

**REVIEW OF THE CONSTITUTION (DISCLOSURES BY MEMBERS)
REGULATION 1983**

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Mr Mark Taylor MP
Chair
Standing Committee on Parliamentary Privilege and Ethics
Legislative Assembly

Dear Mr. Taylor,

Thank you for the opportunity to provide initial comments on the *Constitution (Disclosures by Members) Regulation 1983*. These comments are provided on the understanding that the Committee on Parliamentary Privilege and Ethics is seeking initial opinions on the functioning of the Regulation.

Overall the Regulation is thorough in defining the matters to be disclosed and the manner by which they are disclosed. I will therefore concentrate on the issue of the appropriateness of the gift threshold, the value and costs of shifting to continuous disclosure, and the usability of the Regulation.

The appropriateness of a \$500 (\$250 travel) disclosure threshold.

In my experience, the giving of gifts to influence a public official rarely functions as a financial transaction in Australia. The value of the gift is not being exchanged for goods or services of the same value. Rather gifts act to create a psychological obligation, social relationship or to flatter the recipient. It is these effects of gifts on the recipient that are liable to give rise to inappropriate influence and conflicts of interest rather than the absolute value of the gift.

For these reasons, those seeking to influence a Member may prefer offering hospitality such as an invitation to a community sporting event or an opening night of a show. The shared time and experience allows a relationship to be developed.

Nevertheless the Regulation works on the basis of defining an objective threshold using a dollar value (\$500) at which disclosure must occur. Given the way that gifts affect the recipient, and the importance of viewing gifts and hospitality as creating conflicts of interest, it is reasonable to ask whether a dollar value is the appropriate way of dealing with the issue.

I note that for Ministers the *Independent Commission Against Corruption Regulation 2017* (the Ministerial Code) focuses on the intent of the giver, and the real or perceived conflict created when dealing with the same issue.

A Minister must not solicit or accept any gift, hospitality or other benefit of any kind that:

(a) could reasonably be expected to give rise to a conflict of interest, or

(b) could reasonably be perceived as an inducement (or attempted inducement) or reward for doing or not doing something in the exercise of official functions or for showing or not showing favour or disfavour to any person in the exercise of official functions.

(2) Any such gift, hospitality or benefit (whether offered or suggested, directly or indirectly) must promptly be disclosed in writing by the Minister to the Secretary of the Department of Premier and Cabinet.

(3) *A Minister must otherwise avoid all situations in which it could reasonably be perceived that any person, through the provision of a gift, hospitality or other benefit of any kind, is attempting to secure the influence or favour of the Minister.*

Such an approach to declaration goes to the heart of the concerns with gifts and hospitality, and links it directly to the conflict of interest elements of the code of conduct. It is noted that the Ministers must also comply with the quite different *Constitution (Disclosures by Members) Regulation 1983*. Harmonising the two regulations by adopting a similar approach in the *Constitution (Disclosures by Members) Regulation 1983* may have value.

If the decision is to continue with a dollar value threshold in the Regulation, then the appropriate dollar value must be determined, and the disclosure of hospitality considered.

Hospitality is rightly not included in the current Regulation as the acceptance of hospitality is intertwined with the proper role of a Member to engage with the community. While the Ministerial requirements above can deal with conflicts arising from some hospitality, it is difficult to conceive of an objective set of criteria that would guide the declaration of all hospitality.

This is not the case with gifts. While, within reason, the value of the gift is not the primary matter of concern, value is a useful way to draw a line in the sand. Value may also be an important factor in the formation of community perceptions of the integrity of parliament.

If, as argued above, the value is not the primary concern then it may be reasonable to adjust the \$500 threshold. \$500 in 1983 dollars appears to be worth about \$1,200, which is above the reportable political donation threshold and may not be well received by the community.

If the Committee explores a threshold value approach rather than the conflict of interest approach to declaration, then there may be more value in determining community acceptance rather than attempting to set a limit based on an unknowable threshold over which a member is improperly influenced. That is, the limit might better be considered in terms of community confidence in the integrity of Parliament than the objective prevention of wrongdoing.

Continuous disclosure and disclosure of relatives interests

The register of disclosures remains, as far as I am aware, as a paper based system in accordance with the Regulation. There do appear to be some PDFs available on line. Each Member must make an ordinary disclosure and can make a discretionary disclosure.

In effect the bones of continuous disclosure are there, and could be strengthened by:

1. Improving transparency by making disclosures accessible and searchable, and
2. Linking discretionary disclosures to the Conflict of Interest elements of the Code, as occurs for Ministers.

However to simply require the continuous disclosure of all gifts over a given dollar value is liable to increase the “gotcha” risk for the Members who forgot the gift, didn’t realise its value, thought someone else had declared it, didn’t realise two gifts were from the same company or some other mistake. The time to fix the mistake is lost.

The increased “gotcha” risk may be justifiable if there was evidence that continuous disclosure over a dollar value was significantly better at mitigating a serious problem. There is no such evidence that I am aware of that shows a significant benefit from continuous disclosure, and there is no obvious problem to be mitigated.

Again, the Ministerial conflict triggered approach to declaration may be superior to a continuous dollar value based approach.

The conflict based trigger may also be appropriate for disclosure of relatives' interests. It is, for example, an unreasonable loss of privacy for the business interests of an adult child of a Member to be published if the Member undertakes no activity remotely related to the child's business. However, should a matter arise where the Member can influence the outcome for the child's business, then a conflict of interest has arisen and should be disclosed.

The usability of the Regulation

I note that compliance with regulations and policies in general is enhanced when they are easily understood, remembered and complied with.

The current Regulation is extraordinarily dense and legalistic in construction relative to the *Independent Commission Against Corruption Regulation 2017*. Consider, for example, the definition of "gift" in the *Constitution (Disclosures by Members) Regulation 1983*.

gift means any disposition of property made otherwise than by will (whether with or without an instrument in writing), without consideration in money or money's worth passing from the donee to the donor, or with such consideration so passing if the consideration is not fully adequate, but does not include any financial or other contribution to travel.

Or

relative, in relation to any Member, means any of the following:

- (a) the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of the Member or of the Member's spouse or de facto partner, or
- (b) the spouse or de facto partner of the Member or of any other person specified in paragraph (a).

Note. "De facto partner" is defined in section 21C of the Interpretation Act 1987.

Such an approach to Regulation increases the likelihood of mistakes, without adding to the integrity of the Parliament. There is some relief in the templates and worked examples available. If it is necessary to retain such complexity, then an online form with prompts and examples may improve compliance.

Alternatively the Regulation is simplified where possible and constructed in a way that emphasizes ease of use.

Thank you for the opportunity to comment

Robert Waldersee