

## **REVIEW OF THE CODE OF CONDUCT FOR MEMBERS, 57TH PARLIAMENT**

**Organisation:** Independent Commission Against Corruption

**Date Received:** 3 May 2022

Mr Peter Sidgreaves MP  
Chair, Standing Committee on Parliamentary Privilege and Ethics  
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Your Ref: LAC19/020.33

Our Ref: AD22/0027

Dear Mr Sidgreaves

**Review of the Code of Conduct for Members of the NSW Parliament**

Thank you for your letter dated 25 March 2022, and your invitation for the Independent Commission Against Corruption (the Commission) to make a submission to the current review of the Code of Conduct for Members, which is being conducted by the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.

The Commission's submission is **attached**.

If the Commission can be of further assistance, please contact Mr Lewis Rangott, Executive Director Corruption Prevention on [REDACTED]

Thank you for the opportunity to assist your review.

Yours sincerely

[REDACTED]  
The Hon Peter Hall QC  
Chief Commissioner

*John*  
May 2022

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## SUBMISSION BY THE INDEPENDENT COMMISSION AGAINST CORRUPTION TO THE 2022 REVIEW OF THE CODE OF CONDUCT FOR MEMBERS BY THE LEGISLATIVE ASSEMBLY STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

### Promoting an ethical culture via principles and values

1. The office of a member of Parliament carries with it significant authority and public trust. It is imperative that members lead by example and in line with what the community and wider public sector expects of such a high office. Whether citizens have trust in government depends on public perceptions about the actions of public officials and public institutions. The actions of elected public officials need to demonstrate the values they are duty bound to uphold to earn public trust.
2. The Code of Conduct for Members ("Code of Conduct") seeks to reinforce the importance of abiding by the precepts of conduct it embodies. It is an important document to guide the conduct of members of Parliament. As explained in the first edition of the *Members' Entitlements Handbook* in 2011, "a Members' Code of Conduct has been in place since May 1998 with the intention of aiding members to discharge their duties in an ethical and transparent way". A like statement appeared in the second edition in 2015 with the addition of the statement that, the "[Code of Conduct] acknowledges that Members of Parliament have a responsibility to maintain the public trust by '*performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of New South Wales.*'"
3. Of course, members of Parliament must respect the law, which is spelled out in the Code of Conduct. The Commission submits that it would assist members of Parliament if certain principles and standards that inform relevant aspects of the common law are also specifically spelled out in the Code of Conduct.
4. The following cases highlight the fact that members of Parliament have a fiduciary-like obligations and have a public duty to maintain the public trust and act in the public interest.
5. For many years, the High Court has emphasised the need for members of Parliament to only use their influence for the public interest, and not for private interests in a situation where they anticipate payment for their services. As was stated by Griffith CJ:

*The law cannot supervise the conduct of members of Parliament as to the pressure they may bring to bear on Ministers, but if they sell the pressure, the bargain is, in my opinion, void as against public policy.*<sup>1</sup>
6. The case of *Horne v Barber* [1920] HCA 33; (1920) 27 CLR 494 is relevant for the principles of public trust as well as public interest. It established that it is a breach of

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<sup>1</sup> *Wilkinson v Osborne* [1915] HCA; (1915) 21 CLR 89 at 94

public trust for a public official to leverage, or seek to leverage, that position for private gain. As was stated by Rich J:

*Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of person gain or profit. So much is required by the policy of the law.*<sup>2</sup>

7. Similarly, an agreement to pay a member of Parliament to induce him or her to use his or her position as a member outside Parliament for the purpose of influencing or putting pressure on ministers is one with a tendency to public mischief.<sup>3</sup>
8. It can also be inferred from the High Court case of *R v Boston* [1923] HCA 58; (1923) 33 CLR 386 that members of Parliament have a public duty because they hold a public office. As was said by Isaacs and Rich JJ:

*A member of Parliament is, therefore, in the highest sense, a servant of the State; his duties are those appertaining to the position he fills, a position of no transient or temporary existence, a position forming a recognized place in the constitutional machinery of government.*<sup>4</sup>

9. As has been observed more recently in *Obeid v The Queen*, members of Parliament have a duty to "act according to what they believe to be in the public interest and the interests of the electorate and must not use their position for the purpose of promoting their own pecuniary interests".<sup>5</sup>

#### Recommendation 1

10. **That the Code of Conduct be amended to clearly spell out that members of Parliament have fiduciary-like obligations and make reference to the normative principles of public trust, public interest and public duty.**
11. In addition to the reference about respecting the law, the Code of Conduct itself contains several references to ethical values. The preamble states that:

*Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.*

12. The purpose of the Code of Conduct outlined in clause 1 includes the following text:

*In complying with this Code, Members shall base their conduct on a consideration of the public interest, avoiding a conflict of interest between personal interest and their duties as a Member of Parliament.*

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<sup>2</sup> *Horne v Barber* [1920] HCA 33; (1920) 27 CLR 494 at 501

<sup>3</sup> Per Knox J in *R v Boston* [1923] HCA 58; (1923) 33 CLR 386 at 393

<sup>4</sup> *R v Boston* [1923] HCA 58; (1923) 33 CLR 386 at 402

<sup>5</sup> *Obeid v The Queen* [2017] NSWCCA 221 at 79 per Bathurst CJ (with whom Leeming JA, R A Hulme, Hamill and N Adams JJ agreed).

*Members will not act dishonestly for their personal gain, or that of another person.*

13. It is noted that the Code of Conduct includes several subheadings, including the 'Proper exercise of power', and one titled 'Openness and accountability'.
14. There are some references to ethical principles and standards interspersed in the Code of Conduct, namely references to public trust, honesty, integrity, the public interest, openness and accountability. The Commission submits that these are not sufficiently explicit, prominent nor comprehensive. The Commission submits that ethics, principles, values and standards of behaviour should be clearly listed and codified to ensure they receive greater emphasis. The Commission submits that a greater emphasis on ethical values and principles is required to enhance public confidence and trust in government and the institution of NSW Parliament.
15. One of the best-known sets of values to apply to public officials was developed by the United Kingdom's Committee on Standards in Public Life in 1995. It comprises seven general principles of conduct which underpin public life "which in the Committee's view needed to be restated, they being: selflessness, integrity, objectivity, accountability, openness, honesty and leadership".<sup>6</sup> Those principles applied across the entire public service".<sup>7</sup> The descriptors to the principles were amended by Committee on Standards in Public Life chaired by Lord Evans of Weardale in the Committee's 23rd report, *Upholding Standards in Public Life* in November 2021 to state:<sup>8</sup>

***"Selflessness***

*Holders of public office should act solely in terms of the public interest.*

***Integrity***

*Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.*

***Objectivity***

*Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.*

***Accountability***

*Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.*

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<sup>6</sup> Committee on Standards in Public Life, Nolan Report: Standards in Public Life, May 1995, pp. 3, 14. (Nolan Report).

<sup>7</sup> Nolan Report at 3.

<sup>8</sup> Committee on Standards in Public Life, [Upholding Standards in Public Life: Final report of the Standards Matter 2 review](#), November 2021, p. 92, Appendix 1. (Evans Report)

## **Openness**

*Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.*

## **Honesty**

*Holders of public office should be truthful.*

## **Leadership**

*Holders of public office should exhibit these principles in their own behaviour and treat others with respect. They should actively promote and robustly support the principles and challenge poor behaviour wherever it occurs.”*

16. To strive for best practice, NSW Parliament should develop a similarly explicit set of core values and ethical principles and descriptors for members of Parliament to encourage and guide ethical conduct and decision-making, with which all members are expected to comply. In addition, the Code of Conduct should make explicitly applicable principles of public trust, public interest and public duty in order to promote an ethical culture.
17. Such ethical principles would emphasise the values that need to be exhibited by members to demonstrate the highest standard of probity.
18. Having the principles and values set out explicitly would provide a framework within which public officials could interpret the Code of Conduct and be encouraged to act within the spirit as well as the letter of the Code of Conduct.

## **Recommendation 2**

19. **That the Code of Conduct be amended to provide for a set of normative ethical principles and values applicable to all members of Parliament including the seven general principles of conduct which underpin public life developed by the United Kingdom’s Committee on Standards in Public Life and the 2021 descriptors to those principles (as well as the principles of public trust, public interest and public duty mentioned in recommendation 1, above).**

## **Promoting an ethical culture via conflicts of interest reforms**

20. The Code of Conduct has a sub-section titled ‘Openness and Accountability’, which includes a clause 6 titled “Disclosure of interests” and clause 7 titled “Conflicts of interest”. It states:

*Members must take reasonable steps to avoid, resolve or disclose any conflict between their private interests and the public interest. The public interest is always to be favoured over any private interest of the Member.*

*Members shall take reasonable steps to draw attention to any conflicts between their private interests and the public interest in any proceeding of the House or its*

*committees, and in any communications with Ministers, members, public officials or public office holders.*

*A conflict of interest does not exist where the Member is only affected as a member of the public or a member of a broad class.*

21. The Code of Conduct states that members must disclose their conflicts of interest “in any communication” including with public officials. This means that the Code of Conduct emphasises that conflicts of interest should be disclosed at the relevant time. The Code of Conduct also stipulates that members of Parliament must not only disclose, but also take reasonable steps to avoid and resolve, their conflicts of interest. The clear implication is that members have to disclose their conflicting interests at the relevant time so the conflict can be considered and possibly managed.
22. Senior public officials are required to disclose certain relevant personal interests via registers of interest, whether or not they presently conflict with a public duty. The two concepts of personal interests and conflicts of interest are connected in that conflicts of interest may arise from ongoing personal interests. Personal interests may also be potential conflicts of interest.
23. The Commission’s position is that a conflict of interest exists when a reasonable person might perceive that a public official’s personal interest(s) could be favoured over their public duties.<sup>9</sup> It means that a conflict of interest arises if the relevant personal interest(s) could be improperly favoured over public duties. The test is an objective, or ‘reasonable person’ test as conflicts of interest arise where a reasonable person might perceive that a public official’s personal interest could be favoured over their public duties. A personal relationship that is more than being a mere acquaintance is a personal interest that could conflict with a public official’s duties. In the Commission’s experience, public officials find it difficult to take an objective view of the status of their own personal relationships. It is therefore imperative to consider how others might view the situation.<sup>10</sup>
24. NSW Parliament has adopted separate conflict of interest disclosure requirements via codes of conduct for members of Parliament and for Parliamentary Secretaries/Ministers. The Ministerial Code is the responsibility of the Executive Government.
25. The Commission submits that the complex working environment of members of Parliament requires detailed guidelines and clear processes to assist them to navigate ethical challenges involving conflicts of interest. The Commission submits that the current conflict of interest disclosure obligations pursuant to the Constitution (Disclosures by Members) Regulation 1983 are inadequate, as they still refer to such requirements being discretionary. This is also inconsistent with the requirements of the Ministerial Code of Conduct, which stipulates that there is duty to disclose conflicts of interest. These concerns will be the subject of more comprehensive recommendations by the Commission in due course.
26. The Commission submits that there are a range of systemic weaknesses relating to the conflicts of interest requirements of the Code of Conduct, namely:

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<sup>9</sup> NSW ICAC, *Managing conflicts of interest in the NSW public sector*, April 2019, p. 4.

<sup>10</sup> Ibid, p. 16.

- (i) the current mechanisms regarding the recognition, disclosure and management of conflicts of interest rely heavily on self-regulation, as the conflict of interest regime envisaged by the Code of Conduct lacks mechanisms to monitor and enforce its requirements (apart from the oversight provided by the Commission)<sup>11</sup>
- (ii) there are separate and distinct conflict of interest disclosure requirements via separate codes of conduct for members and for Parliamentary Secretaries/Ministers; the separate requirements are quite different and lack consistency; the lack of uniformity and differing standards can potentially create confusion for those subject to both Codes i.e., Ministers and Parliamentary Secretaries
- (iii) ideally the separate regimes should still have an internal consistency about core aspects, including a:
  - consistent definition of a conflict of interest
  - generally consistent approach to the principles and steps taken regarding avoiding, recognising, disclosing and managing conflicts of interest.

### Recommendation 3

27. **That the conflicts of interest provisions of the Code of Conduct be reviewed to introduce a clear, consistent and comprehensive conflict of interest definition. The Code should also be amended to make it clear that personal interests can arise from non-financial matters and close associations.**

### Promoting an ethical culture of proper use of public resources

28. Clause 3 of the Code of Conduct is titled "Use of public resources", and states:

*The use of public resources should not knowingly confer any undue private benefit on the Member or, on any other person, or entity.*

*Members must take reasonable steps to apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.*

29. The additional commentary in the Code of Conduct states:

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<sup>11</sup> The Commission notes that both Houses have now approved (slightly different) proposals to establish an Independent Complaints Officer, who may receive and investigate complaints confidentially in relation to alleged breaches of the members' code of conduct, not related to conduct in proceedings of the Legislative Council or Legislative Assembly or their committees, including: (i) misuse of allowances and entitlements; (ii) other less serious misconduct matters falling short of corrupt conduct; (iii) minor breaches of the pecuniary interests disclosure scheme. In addition, it is envisaged that the Independent Complaints Officer shall also have the function of receiving and investigating complaints confidentially in relation to bullying, harassment and inappropriate behaviour by members, not related to conduct in proceedings of the Legislative Council or Legislative Assembly or their committees. See Hansard, Legislative Assembly 29 March 2022, pp. 25 - 28. See also Hansard, Legislative Council, 30 March 2022, p. 5.



*There is a range of information available to Members to assist them in determining the accurate and appropriate use of resources including:*

- *The Legislative Assembly Members' Guide;*
- *The Legislative Council Members' Guide;*
- *The Department of Parliamentary Services Members' Entitlements Handbook; and*
- *The Parliamentary Remuneration Tribunal's Annual Report and Determination of Additional Entitlements for Members of the Parliament of New South Wales.*

30. For the purposes of the Code of Conduct, guidelines and rules about the use of public resources are included the first and second editions of the *Members' Entitlements Handbook* (2011, 2015). They set out the following guidelines from the Parliamentary Remuneration Tribunal concerning the intermingling of a member's parliamentary duties and private activities:

*3.1 Some intermingling of a Member's parliamentary duties and private activities is, in practical terms, not always easily avoided, but the onus is always on the Member to show that any expenditure or any claim for reimbursement relates to parliamentary duties, or to the parliamentary duties component of costs incurred for intermingled parliamentary duties and private purposes.*

31. Both editions also state that there are a number of resources that **should not be intermingled under any circumstances** [emphasis added]. These include:

- parliamentary staff
- parliamentary offices
- stationery
- allowances relating to travel.

32. The Commission has held several investigations that involve members' misuse of public resources. In 2019, the NSW Parliament published a *Summary of ICAC investigations into the conduct of members of Parliament*. It summarises 25 reports, which have, at least in part, dealt with the conduct of members. It notes that a recurring theme has been a failure of members to comply with the guideline and rules relating to the use of public resources.

33. The 'intermingling' of public duties with private activities is a common corruption risk and can include a public official:

- making excessive use of public resources for private purposes
- using public resources for outside employment or personal interests, (for example, their work time, vehicle, staff, entitlements, stationery, tools, email and telephone)

- using the authority and privileges that come with public office for private gain.<sup>12</sup>

34. The use of public resources is a vexed issue. The Commission accepts that in some cases it may be difficult to prevent the intermingling of parliamentary duties and private activities. However, such instances should not be permitted in cases where the risk of corruption or other improper conduct is significant. The Code of Conduct needs to be unambiguous to address this issue. It is proposed that the Code of Conduct should reflect the current guidance, namely that certain resources should not be intermingled under any circumstances. Lack of clarity is an obvious corruption risk. The clear prohibition contained in the guidance material needs to be elevated and should not be buried in the guidelines. The standards in the Code of Conduct should reflect these clear prohibitions.
35. The Commission is not aware of any formal guidance material or procedure regarding the NSW Parliament's official crest or insignia being used, including on official letterheads. There are risks associated with members of Parliament using their parliamentary letterheads to articulate purported positions of government, which, according to practice or convention, is the domain of the relevant minister, department or agency. The Commission submits the prohibition that such official parliamentary resources must not be intermingled with private interests under any circumstances, should include a specific reference to the parliamentary crest and/or government emblem.

#### Recommendation 4

36. **That the Code of Conduct be amended to clarify that the intermingling of parliamentary duties with personal or private activities should not, under any circumstances, involve a member of Parliament using their office for personal or private activities nor should it involve the intermingling of those personal or private activities with the following resources:**
  - (i) **parliamentary staff**
  - (ii) **parliamentary offices**
  - (iii) **parliamentary crest, government emblem and stationery**
  - (iv) **allowances relating to travel.**

#### Promoting an ethical culture to counter improper influence

37. The Code of Conduct includes a heading titled 'Proper Exercise of Power', and a subheading 'Improper influence', which states:
  - (a) *No member shall act as a paid advocate in any proceeding of the House or its committees.*

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<sup>12</sup> In its recent report *Investigation into political donations facilitated by Chinese Friends of Labor in 2015*, the Commission found that a member of Legislative Council engaged in corrupt conduct by misusing the privileges to which he was entitled. See chapter 22.

*(b) A Member must not knowingly and improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which any of the following persons has received, is receiving or expects to receive as a consequence:*

*(i) The Member;*

*(ii) A member of the Member's family;*

*(iii) A business associate of the Member; or*

*(iv) Any other person or entity from whom the Member expects to receive a financial benefit*

*(c) A Member must not knowingly and improperly use his or her influence as a Member to seek to affect a decision by a public official including a Minister, public sector employee, statutory officer or public body, to further, directly or indirectly, the private interests of the Member, a member of the Member's family, or a business associate of the Member.*

38. The Commission's position is that a prohibition on improper influence should be extended to members seeking to influence other public officials on behalf of "any other person with whom the Member is closely connected." Currently the clause is limited to the private interests of the Member, a member of their family, a business associate of the Member or to those from whom the Member expects to receive a financial benefit.

39. In addition, in its 2021 report *Investigation into the regulation of lobbying, access and influence in NSW* (known as Operation Eclipse), the Commission recommended

*That the prohibition on paid advocacy – as outlined in clause 2(a) of the Members' Code of Conduct (Legislative Assembly) and the Members' Code of Conduct (Legislative Council) – be extended beyond the promotion of matters in the NSW Parliament or its committees, to any communication with any other public officials, and that clause 7A of the Constitution (Disclosure by Members) Regulation 1983 (relating to disclosure) be amended accordingly.*

This recommendation was brought to the attention of the Presiding Officers but the Commission has not received a reply. The Commission urges the Committee to consider this recommendation.

40. The Commission also submits that the relevant prohibition in clauses 2(b) and 2(c) of the Code of Conduct must be broad enough to prohibit improper influence on behalf of all persons closely connected with the member of Parliament.

41. By analogy, the Model Code of Conduct for Local Councils in NSW 2020 recognises that relationships can be significant even though they are non-pecuniary, and can arise from

relationships that are particularly close, from friendships, and from affiliations with an organisation.<sup>13</sup>

#### Recommendation 5

42. **That the prohibition on improper influence as outlined in clauses 2(b) and 2(c) of the Code of Conduct be amended, to ensure it extends to a member of Parliament seeking to improperly influence other public officials on behalf of any other person with whom the member is closely connected.**

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<sup>13</sup> Department of Planning and Environment, [\*Model Code of Conduct for Local Councils in NSW 2020\*](#), para 5.9, p. 23 ff