



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

Proposal for a Compliance Officer for the NSW Parliament No. 2



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Privileges Committee

Proposal for a Compliance Officer for the NSW Parliament No. 2

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Terms of reference

1. That, noting:
 - a. in May 2021 the Privileges Committee tabled its report no 83 entitled “Proposal for a Compliance Officer” which supported the proposal to establish the position,
 - b. recommendation 12 of the report stated the Privileges Committees in both Houses should attempt to expeditiously find agreement on a form of the resolution acceptable to the members they represent,
 - c. in July 2021 the Legislative Assembly Standing Committee on Privilege and Ethics tabled its report no 1/57 entitled “Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer for NSW Parliament”, which also endorsed the establishment of the position, with 42 recommendations and 6 findings, and
 - d. while there are some differences between the two committees recommendations, none appear to be incapable of resolution by further discussion and negotiation.
2. That the Privileges Committee is therefore to inquire into and report as expeditiously as possible on resolution of the remaining differences between the two privileges committee reports, and include in its report a draft resolution which is supported by the committees of both Houses.

The terms of reference were referred to the committee by the Hon Matthew Mason-Cox MLC on 16 August 2021.

Committee details

Committee members

The Hon Peter Primrose MLC	Australian Labor Party	<i>Chair</i>
Revd the Hon Fred Nile MLC	Christian Democratic Party	<i>Deputy Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	
Ms Cate Faehrmann MLC	The Greens	
The Hon Scott Farlow MLC	Liberal Party	
The Hon Trevor Khan MLC	The Nationals	
The Hon Natasha Maclaren-Jones MLC	Liberal Party	
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Chair's foreword

This is the second report tabled by the Privileges Committee this year following the referral to it from the House of a draft resolution to establish an independent complaints officer, known as the Compliance Officer. This current report is the result of a reference by the President of the Legislative Council requesting that this committee negotiate with the Standing Committee on Parliamentary Privilege and Ethics of the Legislative Assembly to reach agreement on a consistent model able to be supported by both Houses. This followed the tabling of the Assembly Committee's report in July, which differed in a number of respects from the recommendations made by this committee in its first report tabled in May.

I am pleased to say that this inquiry has involved considerable co-operation between the Houses, both between the two Chairs and importantly between the Clerks of both Houses. An important part of this process was that the Committee authorised the Chair and the Clerk to work through and resolve on behalf of the committee the apparent differences. Chapter Two of this report summarises the differences initially between the two committees and the response by the Clerk of the Parliaments provided to the Assembly Chair and Assembly Clerk. These responses in many instances accept the Assembly recommendations as an improvement to the model.

Following this process of consultation, I am confident that the only aspect of the model in which the two committees remain in disagreement is whether a modification of the Members Code of Conduct is required – the Assembly committee believes existing legal obligations are sufficient to give the Office jurisdiction to receive complaints on bullying and harassment, while this committee believes that, whether or not this is the case, an amendment to the Code is important both to put this beyond doubt and to make a public statement of acceptable standards. This may be a matter for both Houses to resolve but it should certainly not prevent this important proposal from being implemented in the near future.

I commend the draft resolution which appears in Chapter Three of this report, and hope that we are near the end of a long journey to establish an independent complaints officer for the NSW Parliament.

I would like to thank all Members from both Houses who have been involved in this process, and both the committee secretariat and the Clerks of both Houses for their work and professionalism.

Hon Peter Primrose MLC
Committee Chair

Recommendations

- Recommendation 1** **3**
That the Compliance Officer be renamed the Independent Complaints Officer
- Recommendation 2** **4**
That:
- (a) the resolution establishing the Officer include an amendment to the Members Code of Conduct to refer to bullying and harassment but with the limits referred to in the Privileges Committee's report of May 2021, and
 - (b) the resolution also incorporate the legal responsibilities of members regarding bullying and harassment as recommended by the Legislative Assembly committee in its report of July 2021.
- Recommendation 3** **5**
That the Officer may appoint a panel of up to three members to assist in receiving or investigating complaints, with up to two members of the panel having expertise in bullying and harassment matters and one with expertise in entitlement issues.
- Recommendation 4** **5**
That the Officer not have an advisory role, so as to avoid any potential conflicts with the main complaints handling and investigation functions.
- Finding 1** **6**
That the two committees are fundamentally in agreement as to the process to appoint the Officer, replicating the process used currently to appoint the Parliamentary Ethics Adviser.
- Recommendation 5** **6**
That the resolution require the Clerks of both Houses to enter into contractual terms of employment with the Officer once the appointment is confirmed.
- Recommendation 6** **7**
That the resolution establishing the position
- (a) defines those individuals that have standing to make complaints as being those in the parliamentary community that is Members of the NSW Parliament, those who work for Members of the Parliament of NSW in their capacity as Members or Ministers, those who work for the parliamentary departments, contractors or subcontractors, volunteers, interns and trainees
 - (b) that an individual under (a) may make a complaint to the Officer up until 21 days following dismissal from their employment, but not after that date if not part of the parliamentary community
 - (c) contains reasonable time limits within which any complaint can be lodged, such as the two year period recommended by the Assembly
 - (d) clarifies that only complaints lodged from the time the Officer position is established can be investigated.

- Recommendation 7** **8**
That the investigation protocol, to be developed by the Officer and approved by both Privileges committees, specifically address how to balance a requirement for complainants to remain confidential, so as to avoid weaponisation of complaints, with the privilege of freedom of speech of members in parliamentary proceedings.
- Recommendation 8** **9**
That any report from the Officer to the Privileges Committee that relates to bullying and harassment only be forwarded if the complainant has given consent to the report.
- Recommendation 9** **9**
That a member who is the subject of a complaint has a right to appeal to the Privileges Committee against the Officer's or investigator's findings following an investigation.
- Recommendation 10** **10**
That the resolution establishing the Officer be amended in the manner recommended by the Legislative Assembly, so that when a member does not co-operate with an investigation the matter is to be referred by the Officer to the Privileges Committee, to consider whether to make recommendations to the House.
- Recommendation 11** **11**
That in the initial year of operation the Officer make quarterly reports with the level of detail recommended by the Legislative Assembly Committee, and subsequently at the level of frequency determined by the Privileges Committees of both Houses.
- Recommendation 12** **12**
That the resolution establishing the position incorporate the process outlined in finding 6 of the Assembly report in regard to how the Officer deals with an investigation that may involve the jurisdiction of the ICAC.
That the resolution specify that the records of the Officer's investigation are not to be provided to the ICAC if it chooses to initiate an investigation into the same matter, unless under legal compulsion.
That the Officer have no requirement to notify the ICAC when it begins an investigation.
- Recommendation 13** **14**
That the operation of the complaints handling scheme be reviewed after the first 12 months of operation.
That subsequently the operation of the scheme be reviewed by the Privileges Committee once each parliamentary term.
- Recommendation 14** **15**
That the House consider adopting the following revised resolution to establish an Independent Complaints Officer:
(1) Establishment of position
That this House directs the President to join with the Speaker to make arrangements for the establishment of the position of an Independent Complaints Officer to expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all members and staff.

That this House also directs the President to make arrangements for the establishment of a panel of people with appropriate skills and expertise ('the Panel') to whom the Independent Complaints Officer can direct complaints for investigation, where he or she does not conduct the investigation him or herself.

(2) Functions of position

The Independent Complaints Officer shall have the following functions:

(a) Receive and investigate complaints

The Independent Complaints Officer 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) allegations of bullying, harassment and other types of inappropriate behaviour,
- (iv) minor breaches of the pecuniary interests disclosure scheme.

In regard to bullying and harassment, consideration of complaints will take note of members' legal obligations including the :

- *Members of Parliament Staff Act 2013;*
- *Anti-Discrimination Act 1977; and*
- *Work Health and Safety Act 2011*

In addition, the Independent Complaints Officer shall have discretion to refer a complaint to a member of the Panel, who has the requisite skills and expertise, to investigate rather than investigating the complaint him or herself.

(b) Monitoring Code of Conduct for Members

The Independent Complaints Officer shall monitor the operation of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation 1983 and the members' entitlements system, and provide advice about reform to the Privileges Committee as required.

(c) Educational presentations

The Independent Complaints Officer and members of the Panel shall assist the Privileges Committee, Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of members about their obligations under the Code of Conduct for Members and the Constitution (Disclosures by Members) Regulation 1983.

(3) Amendment of the Code of Conduct for Members

The Members' Code of Conduct is amended by

(a) the addition of the following paragraph:

"Clause 10

A Member must treat their staff and each other and all those working for Parliament in the course of their parliamentary duties and activities with dignity, courtesy and respect, and free from any behaviour that amounts to bullying, harassment or sexual harassment"

Commentary

Section 22(b) of the Anti-Discrimination Act 1977 makes it unlawful for a member to sexually harass a workplace participant or another member in the workplace, or for a workplace participant to sexually harass a member."

- (b) the insertion into the second paragraph of clause 9 the following words:

"A minor breach of this Code may be the subject of an investigation by the Independent Complaints Officer"

- (4) Term of appointment

- (a) Appointment by Presiding Officers

The Presiding Officers shall appoint an Independent Complaints Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of that Parliament and until the mid-term point of the following Parliament, on such terms and conditions as may be agreed upon with the Presiding Officers, not inconsistent with this resolution. The proposed appointment must have the support of the Privileges Committee in each House. An appointment may be extended for a period of up to six months so as to ensure there is no period in which there is no person holding the position.

- (b) Appointment by Presiding Officers – the Panel

The Presiding Officers are to appoint a panel of three independent persons – the Panel – within three months of the mid-term point of each Parliament – or whenever a position becomes vacant – for the remainder of that Parliament and until the mid-term point of the following Parliament who can be retained as needed to investigate complaints referred to them by the Independent Complaints Officer. Proposed appointments to the Panel must have the support of the Privileges Committees of both Houses.

The Panel must include two persons who have appropriate skills and experience to investigate complaints about bullying, harassment and inappropriate behaviour by Members. The Panel must also include a person who has appropriate skills and experience to investigate complaints about other matters covered by the Independent Complaints Officer system such as breaches relating to Member entitlements and pecuniary interest disclosures.

- (c) Contract with Clerks of both Houses – Independent Complaints Officer

The appointment of the Independent Complaints Officer is to be confirmed by the Clerks of both Houses entering into a contract of employment with the appointee.

- (d) Contract with Clerks of both Houses – the Panel

The appointment of persons to the Panel is to be confirmed by the Clerks of both Houses entering into a contract of employment with the appointees.

- (5) Complaints investigations

- (a) Protocol

The Independent Complaints Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Privileges Committee and tabled in the House by the committee chair, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Independent

Complaints Officer and the Independent Commission Against Corruption and other relevant bodies (including the most appropriate agencies in relation to bullying and harassment matters), subject to relevant legislation (including section 122 of the *Independent Commission Against Corruption Act*).

(b) Standing

This protocol shall include definitions of standing such that:

- only current members of the parliamentary community, that is Members of the NSW Parliament, those who work for Members of the Parliament of NSW in their capacity as Members or Ministers, those who work for the parliamentary departments, contractors or subcontractors, volunteers, interns and trainees, have standing to lodge complaints
- that an individual may make a complaint up until 21 days following termination from their employment, but not have standing after that date if not part of the parliamentary community
- complaints must be lodged within two years of the incident alleged to have occurred, unless this is not fair or reasonable to a complainant or member
- no complaint may be considered which is alleged to have occurred prior to the passing of this resolution.

(c) Confidentiality

Members of the parliamentary community who are not Members of Parliament and who make complaints shall be required to maintain confidentiality concerning complaints and investigations. Others involved in any complaints investigations, for example witnesses shall be required to maintain confidentiality concerning complaints and investigations.

There shall be an expectation that, except in extraordinary circumstances, Members of Parliament will maintain confidentiality about complaints and investigations. However, nothing about this expectation affects parliamentary privilege and, in particular, the parliamentary privilege of freedom of speech.

(d) Protocol with the Independent Commission Against Corruption

Where the Independent Complaints Officer has concerns that a complaint may potentially involve corrupt conduct, he or she should cease the complaint investigation and invite the complainant to raise the matter with the Independent Commission Against Corruption.

The Independent Complaints Officer in determining to draw back from the investigation of a complaint may make a notification to the ICAC but should not hand over papers and records obtained under the Independent Complaints Officer system unless under legal compulsion.

The Independent Complaints Officer is not required to notify the ICAC when he or she begins an investigation.

(e) Investigatory report to the House

Where the Independent Complaints Officer considers that there has been a misuse of an allowance or entitlement, the Independent Complaints Officer may order repayment of funds misused. Where the Independent Complaints Officer considers that a member has otherwise breached the Members' Code of Conduct, the Independent Complaints Officer may recommend corrective action.

Subject to (f) below, the Independent Complaints Officer will make a report if the member does not comply with the order or accept the recommendation as the case may be, and the complainant consents to the making of a report. This report will be presented to the Privileges Committee, which will consider whether to adopt the recommendations of the Independent Complaints Officer and report to the House.

Where the complaint relates to bullying and harassment matters and has been investigated by a member of the Panel appointed for that purpose, the expert will report to the Independent Complaints Officer and the Independent Complaints Officer will report to the Privileges Committee.

(f) Minor breach

Where the Independent Complaints Officer investigates a matter and finds that a member has breached the Code or Regulations, but in his or her opinion considers the breach to have been minor or inadvertent and the member concerned has taken such action to rectify the breach, including the making of appropriate financial reimbursement, the Independent Complaints Officer shall advise in writing the member and the complainant of the finding and the action taken by the member. The investigator shall briefly report his or her findings, and the rectification action taken by the Member, on a confidential basis, to the relevant Privileges Committee (and to the Independent Complaints Officer if the investigator is a member of the Panel). However, if the matter relates to bullying, harassment or inappropriate behaviour, the report must only be made to the Privileges Committee with the complainant's consent. No report to a House is required in this circumstance.

(g) Declines to investigate

If the Independent Complaints Officer receives a complaint but upon assessment declines to investigate the matter, or upon investigation finds no evidence or insufficient evidence to substantiate a breach of the Code of Conduct for Members or the Constitution (Disclosure by Members) Regulation, the Independent Complaints Officer shall advise in writing the member and the complainant of the decision. The Independent Complaints Officer shall also briefly report the decision to the relevant Privileges Committee on a confidential basis. However, if the complaint relates to bullying, harassment or inappropriate behaviour, the decision must only be reported to the Privileges Committee with the complainant's consent. No report to a House is required in this circumstance.

(h) Breaches where the Member has failed or declined to take rectification action – reports and appeal rights

Where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a Member has breached the Code of Conduct for Members or the Constitution (Disclosures by Members) Regulation 1983, or has engaged in bullying, harassment or inappropriate behaviour and the Member has failed to undertake the stipulated rectification action or declined to do so pending appeal:

- the investigator shall report his or her findings and conclusions to the Privileges Committee on a confidential basis (and to the Independent Complaints Officer if the investigator is a member of the Panel), including recommendations as to the sanctions, if any, that should be imposed by the House. However, if the matter relates to bullying, harassment or inappropriate behaviour, the report to the Committee must only be made with the complainant's consent.

- the Member in question shall also have the right to lodge an appeal against the investigator's findings, conclusions and recommendations with the Privileges Committee where they have been so reported to the Committee.

Further, after receiving:

- an investigatory report from the Independent Complaints Officer or a member of the Panel about a breach for which the Member has failed to take the stipulated rectification action, and/or;
- an appeal from the Member in question concerning the investigator's findings, conclusions and recommendations;

the Privileges Committee shall:

- form its own conclusions
- have the power to report its conclusions and recommendations – including as regards appropriate sanctions – to the House
- have the power to decide that a report to the House and/or sanctions are not warranted in a particular case e.g. where the Committee disagrees with the investigator's findings.

(4) Expert assistance

The Independent Complaints Officer and persons from the Panel retained to investigate a complaint shall be able to engage the services of a person or persons to assist with or perform services for the Independent Complaints Officer, and in the conduct of an investigation, within budget

(6) Powers of the Independent Complaints Officer

The Independent Complaints Officer and members of the Panel who are retained to investigate a complaint shall have power to request the production of relevant documents and other records from members and officers of the Parliament.

Members, their staff and parliamentary officers are required to reasonably cooperate at all stages with the Independent Complaints Officer's inquiries including giving a full, truthful and prompt account of the matters giving rise to a complaint.

The Independent Complaints Officer may report to the Privileges Committee any failure to comply with a request, and the committee will recommend whether the matter requires the determination of the matter by the House.

(7) Keeping of record

The Independent Complaints Officer and members of the Panel retained to investigate complaints shall be required to keep records of advice given and the factual information upon which it is based, complaints received and investigations. The records of the Independent Complaints Officer are to be regarded as records of the House and are not to be made public without the prior approval of the Independent Complaints Officer and resolution of the House, except for the referral of information between the Independent Complaints Officer and other relevant authorities in accordance with the protocol to be developed in accordance with clause 5 (a), or where the member requests that the records be made public.

A member requesting the records be made public should present the records to the Clerk, to be tabled in the House at the next sitting. During an extended break in sittings the Privileges Committee is empowered to publish records of the Independent Complaints Officer, on the recommendation of the Officer that expeditious publication is required.

(8) Reports to Parliament

In addition to reports on investigations, the Independent Complaints Officer shall provide to the committee chair to table in the House quarterly reports that contain general, de-identified information about matters dealt with under the Independent Compliance Officer system including:

- the number and types of complaints received
- the number of investigations undertaken
- the number of matters found by an investigator to be unsustainable
- the number of matters involving breaches that were dealt with via the rectification procedure, and the rectification action that was taken for these matters, such as repayments
- the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, that were reported to the Privileges Committee but not to the House
- the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, that were reported to the Privileges Committee and to the House
- the results of matters reported to the House including the type of sanctions imposed.

(9) Annual meeting with relevant committees

The Independent Complaints Officer and any persons retained from the Panel to conduct investigations of complaints is to meet annually with the Privileges Committee of the House.

(10) Review of the Independent Complaints Officer System

The privileges committees of both Houses are required to review the Independent Complaints Officer system within 12 months of the establishment of the Independent Complaints Officer position, in consultation with key stakeholders. The committee must examine how the system is operating in practice and whether any changes are needed and in particular:

- the confidentiality provisions applying in respect of complaints and investigations under the system, and
- the timeliness of complaints assessments and investigations conducted under the system.

Following the initial review the committee is also required to review the Independent Complaints Officer system once every parliamentary term, in consultation with key stakeholders, to examine how it is operating in practice and whether any changes are needed.

Chapter 1 The Compliance Officer – progress in 2021

This chapter discusses the events leading to the current inquiry and the process undertaken to reach consensus between the committees of both Houses.

The referral of the draft resolution in both Houses

- 1.1 The report of the Privileges Committee tabled in May of this year¹ outlines the background to proposals for a Parliamentary Standards Commissioner in 2014, which evolved by late 2020 into a proposal for a “Compliance Officer”. This Compliance Officer was charged with the additional task of investigating complaints of bullying and harassment, an expansion of the earlier scope of the position which was focussed on minor breaches of the Members Code of Conduct, primarily use of entitlements.
- 1.2 In November 2020 draft resolutions were tabled by the Leaders of the Government in both Houses. The draft resolution was referred to the Privileges Committee on 17 November 2020. In parallel to this, the Legislative Assembly likewise referred the draft resolution to the Standing Committee on Parliamentary Privilege and Ethics on 12 November 2020.²

The Privileges Committee's May 2021 report

- 1.3 This Committee tabled its report on 11 May 2021, with 12 recommendations and a final chapter which contained a proposed revised resolution.³ The Standing Committee on Parliamentary Privilege and Ethics then tabled its report on 16 July 2021 with 42 recommendations and six findings, and changes to the draft resolution.⁴
- 1.4 Both reports supported the establishment of a Compliance Officer (renamed as an Independent Complaints Officer by the Assembly Committee). The Chair of the Assembly Committee stated in his foreword:

In doing so, the Committee has highlighted the importance of education for Members and staff about their legal rights and obligations in creating a safe, secure and respectful workplace, and guidance about how to do so. It has also highlighted the importance of independent, confidential, trauma-informed support for complainants, witnesses and people who are the subject of allegations under the Independent Complaints Officer system.⁵

¹ Privileges Committee, *Proposal for a Compliance Officer for the NSW Parliament*, Report 83, May 2021.

² Legislative Assembly *Votes and Proceedings* 12/11/2020 pp 931 – 934, Legislative Council *Minutes of Proceedings* 17/11/2020 pp 1650- 1656.

³ Privileges Committee, *Proposal for a Compliance Officer for the NSW Parliament*, Report 83, May 2021

⁴ Standing Committee on Parliamentary Privilege and Ethics *Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer* Report 1/57 – July 2021

⁵ Standing Committee on Parliamentary Privilege and Ethics *Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer* Report 1/57 – July 2021, p iii.

Reference from the President

- 1.5** Following the tabling of the Assembly Committee's report the Speaker, the Hon Jonathan O'Dea MP and the President, the Hon Matthew Mason-Cox MLC requested that the Deputy Clerks of both Houses examine whether the differences between the recommendations were capable of being reconciled. An analysis of the recommendations of both reports was completed and appears as Appendix Two.
- 1.6** The analysis and a summary document were subsequently provided to the President by the Clerk, with an indication that the differences between the two reports could potentially be reconciled. As a result on Monday 16 August 2021, the President, under the authority given by paragraph 2 (a) of resolution of the House establishing the Privileges Committee, referred terms of reference to this Committee.⁶ The terms of reference noted Recommendation 12 of this Committee's report stated that the privileges committees of both Houses should attempt to expeditiously find agreement on a form of the resolution acceptable to the members they represent. The President requested that this be achieved by negotiation and discussion.
- 1.7** At its meeting on 26 August 2021 the committee noted the terms of reference and authorised the Chair, together with the Clerk and Deputy Clerk, to meet with their Legislative Assembly counterparts to discuss options for a single Compliance Officer model and report back to the committee with a new resolution for consideration.
- 1.8** This report represents the outcome of that process of discussion and negotiation, first between the Chairs and subsequently, on matters of detail, between the Clerks.

This report

- 1.9** Chapter Two of this report contains a distillation of the main differences between the recommendations of both committees. Each point of difference then outlines a response from the Clerk of the Parliaments, followed by a recommendation. These responses have been discussed with the Clerk of the Legislative Assembly, who has discussed the matter with her Committee chair. The Assembly Committee met shortly before the meeting at which the Council committee considered this report and was briefed on the discussions.]
- 1.10** Chapter Three provides a draft revised resolution which seeks to incorporate changes suggested by the Assembly committee with which this committee has agreed in the spirit of consensus. This draft resolution has been provided to the Assembly committee for their information prior to the tabling of this report. Ultimately both Houses will need to consider and adopt resolutions to establish the position, and this report has been prepared to assist in reaching a consistent outcome between both Houses.

⁶ The Hon Matthew Mason-Cox, President, correspondence to Chair of the Privileges Committee, 16/7/21.

Chapter 2 Responses to differences between recommendations of the two committees

This chapter discusses the main difference between the committees of both Houses and the response by the Clerk of the Parliaments to each point of difference.

The name of the Officer

- 2.1 The Assembly Committee recommended the Compliance Officer be renamed the “Independent Complaints Officer” (recommendation 1).

Clerk of the Parliaments' response

- 2.2 The name of the position has changed several times from its original proposal as the “Parliamentary Standards Commissioner”, and there is no substantial reason to object to this further name change. The position will be referred to as "the Officer" in comments below, but in the redrafted resolution in Chapter Three the Assembly terminology is used.

Recommendation 1

That the Compliance Officer be renamed the Independent Complaints Officer

Amendments to the Code of Conduct

- 2.3 The Assembly committee (Finding 1 and Recommendation 4) took the view that the proposed change to the Members’ Code of Conduct in the draft resolution of November 2020 was not necessary as members already have work health and safety and other legal responsibilities which would allow complaints of bullying and harassment to be investigated. Consequently the approach taken was to include in the resolution the ambit of complaints that the Officer could receive rather than achieve this by amending the Code. The suggested words to include in the resolution, as stated in Recommendation 4 of the Assembly Committee were:

That the Independent Complaints Officer also have the function of receiving and investigating complaints confidentially in relation to bullying, harassment and inappropriate behaviour by Members of the Legislative Assembly, not related to conduct in proceedings of the Legislative Assembly or its committees, and contrary to their obligations under legislation including the:

- *Members of Parliament Staff Act 2013*
- *Anti-Discrimination Act 1977*
- *Work Health and Safety Act 2011*

Clerk of the Parliaments' response

- 2.4 The Clerk is satisfied the Assembly amendment to the original resolution achieves the same aim of bringing complaints about bullying and harassment into the responsibilities of the Officer. However the Legislative Council committee is likely to be concerned about the reputational damage to the NSW Parliament resulting from potential criticism that members have rejected a proposal that bullying and harassment be a breach of a Member's code of Conduct. Recommendation 1 of this committee's report effectively confined those able to complain about breaches of the Code to those who work for members or for the parliament - so not extending to constituents or to visitors to the parliament. The Officer would also not be able to receive complaints about incidents occurring during parliamentary proceedings (including Question Time and debates)⁷ so there are sufficient protections to confine the scope to workplace complaints.
- 2.5 The committee of each House is required to review the Code of Conduct prior to the end of the Parliament, this review could then consider if the suggested amendment should be modified, and it is understood that this is the Assembly committee's preference if any amendment is to be considered. While the Clerk believes the addition to the Code of Conduct recommended by the committee should be retained, there may be value in incorporating the Assembly committee's listing of legal responsibilities in the resolution.
-

Recommendation 2

That:

- (a) the resolution establishing the Officer include an amendment to the Members Code of Conduct to refer to bullying and harassment but with the limits referred to in the Privileges Committee's report of May 2021, and
 - (b) the resolution also incorporate the legal responsibilities of members regarding bullying and harassment as recommended by the Legislative Assembly committee in its report of July 2021.
-

The appointment of a panel

- 2.6 Recommendations 2, 5 and 17 of the Assembly Committee's report recommended the Officer be assisted by a panel of up to three persons with two of those having expertise in bullying and harassment and one with expertise in entitlements and disclosure issues. The Officer would be able to use panel members to direct them to receive and investigate complaints.

Clerk of the Parliaments' response

- 2.7 The panel appears to be a further extension of the Recommendation 2 in the Legislative Council committee report which recommended a person with expertise in bullying and harassment be empowered to receive complaints on behalf of the Officer. There is no objection to this

⁷ Privileges Committee, *Proposal for a Compliance Officer for the NSW Parliament*, Report 83, May 2021, p14.

proposal, but perhaps the appointment of the panel can be discretionary depending upon the background and expertise of the Officer appointed.

Recommendation 3

That the Officer may appoint a panel of up to three members to assist in receiving or investigating complaints, with up to two members of the panel having expertise in bullying and harassment matters and one with expertise in entitlement issues.

The Officer not to have an advisory role

- 2.8** The Assembly Committee did not want the Officer to have an advisory role as it considered this clashed with its investigatory role. Recommendation 8 of the Assembly committee's report contrasted with the Council committee Recommendation 5 which supported an expanded advisory role, offering members the opportunity to seek confidential advice from the Officer on a matter of interpretation of the Members' entitlements scheme, for the purposes of resolving disagreements, or any other matters within the complaints handling functions of the position including bullying and harassment issues.

Clerk of the Parliaments' response

- 2.9** The Clerk believes there is merit in the Assembly committee's argument. There is a potential conflict between the Officer providing advice to a member when subsequently the Officer may be called upon to investigate a complaint about the same matter. The Members Entitlements and the Human Services sections of DPS, the Clerks and the Parliamentary Ethics Adviser all currently provide sources of advice on these matters.
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Recommendation 4

That the Officer not have an advisory role, so as to avoid any potential conflicts with the main complaints handling and investigation functions.

The appointments process for the Officer

- 2.10** The Assembly and Council committees express the way in which the Officer is to be appointed in different ways, although they do not appear to be fundamentally incompatible.⁸

Clerk of the Parliaments' response

- 2.11** The Clerk agrees there is no fundamental difference between the two committees. The intent of both appears to be to replicate the appointment process currently used for the Parliamentary

⁸ Standing Committee on Parliamentary Privilege and Ethics *Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer* Report 1/57 – July 2021, Recommendations 13-16 and 18, Privileges Committee, *Proposal for a Compliance Officer for the NSW Parliament*, Report 83, May 2021, p56-57.

Ethics adviser. There may need to be further discussion about how to best give effect to the appointment.

- 2.12 The Clerk notes that the Assembly Committee has recommended the resolution include a requirement that the Clerk of the Legislative Assembly enters into a contract of employment with the Officer. (recommendation 15). The Clerk of the Parliaments supports this as consistent with the approach taken to the appointment of the Parliamentary Ethics Adviser. It also means there is no need to include a dismissal process in the resolution, as this is covered by the contractual terms.
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Finding 1

That the two committees are fundamentally in agreement as to the process to appoint the Officer, replicating the process used currently to appoint the Parliamentary Ethics Adviser.

Recommendation 5

That the resolution require the Clerks of both Houses to enter into contractual terms of employment with the Officer once the appointment is confirmed.

The extent to the investigation protocol should be included in the resolution

- 2.13 The extent to which some aspects of the investigation protocol should be spelled out in the resolution differs significantly between the two committees. The Assembly committee recommendations 20 to 24 recommend that the Assembly consider including in the resolution clauses about standing (who can make a complaint) and time limits for lodgement of complaints. The particular concern is whether there is a retrospective remit, both whether former staff and members may lodge complaints and whether complaints can be lodged for incidents prior to the Officer being established. These were matters originally for the Officer to develop as part of an investigations protocol, to be approved by the Privileges committee and tabled in the House three months after the Officer's appointment (clause 5 (b)), but the Assembly believes these should be determined by both Houses prior to the Officer being appointed.
- 2.14 In contrast, while the Legislative Council committee supports a modification of the words of clause 3 of the original resolution to clarify standing by stating "A Member must treat their staff and each other and all those working for Parliament in the course of their parliamentary duties with dignity, courtesy and respect..." (recommendation 1) its report was based on the assumption that other details around standing, time limits and retrospective remit were a matter for the investigation protocol, not the resolution.

Clerk of the Parliaments' response

- 2.15 Both committees agree as to which categories of people are able to lodge complaints and that an incident occurring during a parliamentary proceeding is not able to be the subject of a complaint. The Legislative Council committee deals with this issue of standing by the wording of the proposed amendment to the Code of Conduct, so only if this amendment was not to
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proceed would the Clerk see the need for this issue of who has standing incorporated into the resolution. However if it resolves differences between the committees there is no difficulty in including this in the resolution.

- 2.16** It is suggested that the complainant should be a current member of the parliamentary community when they lodge the complaint rather than former members or staff. However members' staff and ministerial staff are in an unusual position because of s20 of the *Members of Parliament Staff Act 2013*, which allows a member to terminate a staff member without providing reasons. This could be problematic in some circumstances where for instance a staff member complains to their member that they have been subject to bullying and the member terminates the staff member before they are able to lodge a complaint with the Officer. For that reason allowing a short period from dismissal in which a staff member can lodge a complaint would seem to be fair. Under the *Industrial Relations Act 1996* s85 provides 21 days from dismissal to lodge a complaint, and while the *Members of Parliament Staff Act 2013* excludes that Act this period of time seems to be a good benchmark.⁹ This should be carefully reviewed in the initial evaluation of the scheme to ensure no injustice is caused.
- 2.17** In regard to retrospectivity, the Clerk has no objection to the resolution establishing the position specifying the time limits for a complaint to be lodged, so long as this is fair and reasonable to complainants and to members. Retrospectivity here refers to whether the Officer could receive complaints relating to incidents alleged to have occurred prior to the establishment of the system (Assembly recommendation 23). Time limits are a slightly different issue, referring to whether - regardless of the decision on retrospectivity - there should be a time limit for reporting misconduct to the Officer, for example. complaints must be lodged within two years of the conduct alleged (Assembly recommendation 24). The Clerk supports both these issues being covered by the resolution.

Recommendation 6

That the resolution establishing the position

- (a) defines those individuals that have standing to make complaints as being those in the parliamentary community that is Members of the NSW Parliament, those who work for Members of the Parliament of NSW in their capacity as Members or Ministers, those who work for the parliamentary departments, contractors or subcontractors, volunteers, interns and trainees
- (b) that an individual under (a) may make a complaint to the Officer up until 21 days following dismissal from their employment, but not after that date if not part of the parliamentary community
- (c) contains reasonable time limits within which any complaint can be lodged, such as the two year period recommended by the Assembly
- (d) clarifies that only complaints lodged from the time the Officer position is established can be investigated.

⁹ This should not affect any time frames that apply to complainants to take action under other relevant legislation discussed in the Assembly committee report.

Confidentiality and dealing with vexatious complaints.

- 2.18** Both committees expressed concern about the potential for the complaints process to be used for political purposes. The Assembly committee seeks to address weaponisation of complaints and vexatious complaints by including a confidentiality requirement in the resolution (recommendation 26) while the Council committee supports the Officer seeking to address vexatious use of complaints through an appropriate mechanism in the investigation protocol to be developed. (recommendation 11).

Clerk of the Parliaments' response

- 2.19** The Clerk has some concerns about recommendation 26 of the Assembly committee as currently expressed, because it imposes a requirement of confidentiality for complainants as part of the resolution but acknowledges, correctly, that the member the subject of complaint is not under the same constraint because of their privileges as a member. This may be a matter that the Officer can work through in a protocol, seeking to balance the rights of members to not be the subject of vexatious complaints against the protection of complainants.

Recommendation 7

That the investigation protocol, to be developed by the Officer and approved by both Privileges committees, specifically address how to balance a requirement for complainants to remain confidential, so as to avoid weaponisation of complaints, with the privilege of freedom of speech of members in parliamentary proceedings.

Reporting requirements for complaints/investigations

- 2.20** The Assembly committee supports a requirement for the Officer to report to the Committee in a wider range of circumstances than the Legislative Council Committee (which generally only requires such reports where matters cannot be rectified). These circumstances include:
- Where the Officer decides not to investigate a complaint he/she has received
 - Where the Officer/other investigator has investigated a complaint but found it to be unsubstantiated
 - Matters where breaches have been resolved through rectification processes.
- 2.21** In addition, the Assembly committee has recommended any report to it from the Officer or investigator could only be made with the consent of the complainant if it relates to a bullying or harassment matter (recommendations 29-33). For the Council committee, the reports - only on matters that cannot be rectified - can only be made to it with the complainant's consent, regardless of what type of matter it is, bullying or otherwise. This is consistent with clause 5(b) of the original resolution.
- 2.22** The Assembly Committee has also recommended a right of appeal by a Member to the Assembly committee against the Officer/investigator's findings (recommendation 33). This is not necessarily incompatible with the expanded role for the Privileges Committee discussed in the May 2021 report.

Clerk of the Parliaments' response

- 2.23** The Assembly committee recommendations provide for a wider range of circumstances in which the Officer can report to the Parliamentary Privilege and Ethics Committee, so it is important the Council's Privileges Committee is supportive of having access to reports where unsubstantiated complaints or quickly resolved complaints are reported to it. Under the model proposed in November 2020 the committee would only be informed of unresolved complaints. If these reporting requirements are adopted it may be preferable that the privileges committees of either House are given some discretion as to how these reports are made, such as providing them the ability to request that in these "resolved" complaints only de-identified details are provided unless they request further details. In any case the Clerk would support the consent of the complainant being required in the case of a bullying and harassment complaint being reported to the committee.
- 2.24** The Clerk supports the Assembly committee's recommendation for a right of appeal by a member to the Privileges Committee against the Officer or investigator's findings (recommendation 33).

Recommendation 8

That any report from the Officer to the Privileges Committee that relates to bullying and harassment only be forwarded if the complainant has given consent to the report.

Recommendation 9

That a member who is the subject of a complaint has a right to appeal to the Privileges Committee against the Officer's or investigator's findings following an investigation.

Whether Members will be compelled to cooperate with an investigation

- 2.25** The original resolution at clause 6 states that members are compelled to co-operate with an investigation:

The Compliance Officer shall have power to call for the production of relevant documents and other records from members and officers of the Parliament.

Members, their staff and parliamentary officers are required to reasonably cooperate at all stages with the Compliance Officer's inquiries including giving a full, truthful and prompt account of the matters giving rise to a complaint.

The Compliance Officer may report any failure to comply with these provisions to the President, for determination of the matter by the House.

- 2.26** The Council committee accepted this as the way the complaints investigation process would operate.¹⁰ However the Assembly committee favoured a resolution where members were asked to co-operate but only the Standing Committee on Privileges and Ethics could recommend an unwilling member participate after referral, with enforcement a matter for the House (Finding 2).

Clerk of the Parliaments' response

- 2.27** The Assembly committee approach requires the Committee to effectively assess whether the complaint is sufficiently serious so as to recommend the House use its powers to compel the member to co-operate with the investigation if a member is refusing to respond to the Officer. This differs from the original proposed resolution where the House only uses its powers at the end of a matter which has been unable to be rectified. The Legislative Council committee needs to determine the extent of the role it wishes to undertake if the resolution is amended so the Officer does not have the power to compel co-operation. It is very much a question for the committee, but the Clerk believes the Legislative Assembly approach is feasible. The enforcement of co-operation by the member would be by the House, on recommendation of the Privileges Committee. Initially if a member was refusing to co-operate with an investigation the Clerk would expect the Officer would contact the Privileges Committee. The committee would then need to consider if the member needed to co-operate. If the member continued to refuse to co-operate the committee would then make recommendations to the House to enforce co-operation with the investigation.

Recommendation 10

That the resolution establishing the Officer be amended in the manner recommended by the Legislative Assembly, so that when a member does not co-operate with an investigation the matter is to be referred by the Officer to the Privileges Committee, to consider whether to make recommendations to the House.

Regularity and detail of routine reporting

- 2.28** The Council committee supported the model in clause 8 of the original resolution of an annual report by the Officer to the Privileges Committee similar to the requirement for the Parliamentary Ethics Adviser. The Assembly committee (recommendation 37) supported instead quarterly reports and more detailed reporting, de-identified, on the following:
- the number and types of complaints received
 - the number of investigations undertaken
 - the number of matters found by an investigator to be unsustainable
 - the number of matters involving breaches that were dealt with via the rectification procedure, and the rectification action that was taken for these matters (e.g. repayments)
 - the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, and that were reported to the Assembly Committee but not to the House

¹⁰ See Privileges Committee, *Proposal for a Compliance Officer for the NSW Parliament*, Report 83, May 2021, p59.

Clerk of the Parliaments' response

- 2.29** The Clerk has no objection to quarterly reporting, other than to suggest the Privileges committee be given the discretion to determine whether reporting should be quarterly or only an annual report. It may be that quarterly reporting is appropriate in the first year of operation, or perhaps for a longer period.

Recommendation 11

That in the initial year of operation the Officer make quarterly reports with the level of detail recommended by the Legislative Assembly Committee, and subsequently at the level of frequency determined by the Privileges Committees of both Houses.

Issues surrounding the interaction between the Officer and the ICAC

- 2.30** Both Committees agree that parliamentary privilege and the interaction between the Officer and the Independent Commission Against Corruption (ICAC) are significant issues in developing the investigations protocol envisaged by clause 5(a) of the original resolution.

- 2.31** However, on specific issues there are some differences, at least as far as the main focus is concerned. The Legislative Council committee has noted that

“There is a very strong need for the Compliance Officer to hold discussions with the ICAC during the development of an investigations protocol. A memorandum of understanding would be an important outcome from these negotiations...a notification process when an investigation is to be pursued by the Compliance Officer could form part of this MoU”¹¹

- 2.32** The committee’s recommendation 8 stated:

“That as part of the development of an investigation protocol the Compliance Officer prepare a draft Memorandum of Understanding with the ICAC including a notification process”.

- 2.33** In contrast, the Legislative Assembly committee report does not contain a recommendation that the ICAC be notified when the Compliance Officer is to pursue an investigation. Its focus in finding 6 is that the Officer should not hand over records to the ICAC. Finding 6 states (in part):

“Where the Independent Complaints Officer has concerns that a complaint to him or her may potentially involve corrupt conduct, he or she should cease the complaint investigation and invite the complainant to raise the matter with the ICAC. The Independent Complaints Officer can also determine to draw back from the

¹¹ Privileges Committee, *Proposal for a Compliance Officer for the NSW Parliament*, Report 83, May 2021, p37.

investigation of a complaint and make a notification to the ICAC but should not hand over papers and records obtained under the Independent Complaints Officer system".¹²

Clerk of the Parliaments' response

- 2.34** There is a threshold question as to whether the relationship between the ICAC and the Officer's investigations, the so called investigations protocol, should be determined by the Officer and approved by the Privileges Committee or determined by the House by the resolution establishing the position. The Clerk has no objection to the Assembly's preferred approach that aspects of this investigation protocol in relation to the ICAC, be determined by the House in the first instance provided the Officer is able to come back to the Committee as part of the review (see below) to request changes if the relationship proves unworkable.
- 2.35** The issue of whether the ICAC should be notified of an investigation being conducted by the Officer by the Legislative Council is aimed at avoiding overlapping investigations being conducted into the same complaint. One of the concerns of the Assembly committee seems to be that a member co-operating with the Officer in the hope of a quick resolution of a complaint is by this notification process at risk of being drawn into a very long ICAC inquiry. There is the further understandable concern that material voluntarily provided to the Officer by the member later being used in ICAC investigations.
- 2.36** The Clerk believes that Finding 6 of the Assembly Committee could be effective to protect against this scenario. Here where the Officer determines that the matter is serious enough for the ICAC, the Officer ceases the investigation, requests the complainant to take their matter to the ICAC and notifies the ICAC it has done so, but none of the records of the Officer's investigation are handed over to the agency. This process is similar to that which already occurs when for instance a committee inquiry or an order for papers uncovers an issue relevant to the ICAC – the agency has to begin their investigation afresh. It should be noted, however, that under the *Independent Commission Against Corruption Act 1988* there are currently powers under s21 and s22.
- 2.37** The other issue is whether the Officer should notify the ICAC when it begins an investigation, noting the ICAC will not notify the Officer if it is conducting an investigation. The complaints framework could be established without this notification protocol and the value of such a protocol could be considered as part of the 12 month review (see below).

Recommendation 12

That the resolution establishing the position incorporate the process outlined in finding 6 of the Assembly report in regard to how the Officer deals with an investigation that may involve the jurisdiction of the ICAC.

That the resolution specify that the records of the Officer's investigation are not to be provided to the ICAC if it chooses to initiate an investigation into the same matter, unless under legal compulsion.

That the Officer have no requirement to notify the ICAC when it begins an investigation.

¹² Standing Committee on Parliamentary Privilege and Ethics *Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer Report 1/57 – July 2021.*

Parliamentary privilege as protection for member disclosure of records of an investigation

2.38 Recommendation 14 of the Council committee report states:

"That the following words be added to the end of Clause 7: 'A member requesting the records be made public should present the records to the Clerk, to be tabled in the House at the next sitting'".

2.39 This is because the Parliamentary Ethics Adviser raised concerns, in his written submission to the committee, about a Member choosing to make records of an investigation public without a recommendation of the Officer and a resolution of the House, raising doubts about whether the publication would be covered by parliamentary privilege. Hence, the committee considered that to avoid any risk to Members, a provision should be included in clause 7 of the resolution about exactly how a Member is to publish records in such a case.¹³

2.40 The Assembly committee has made no recommendation in this area.

Clerk of the Parliaments' response

2.41 On the issue of recommendation 14 of the Legislative Council committee report, the Clerk believes this is a useful protection for members to ensure the member making the records public does so with the protection of parliamentary privilege and would welcome the Assembly's view on the Parliamentary Ethics Adviser's suggestion.

Requirement to review the Independent Complaints Officer/Compliance Officer scheme

2.42 The Assembly committee recommendations 40 and 41 and clause 9 of its revised resolution outline requirements to review the operation of the complaints handling scheme once it has operated for a sufficient period of time – firstly after its first 12 months of operation then a review once each parliamentary term. The Council committee report contains no such recommendations but does raise the possibility of a review of the resolution for the Officer following the initial period of its operation.¹⁴

2.43 The positions of the committees do not appear to be fundamentally inconsistent although the Assembly has given the issue more in depth consideration.

Clerk of the Parliaments' response

2.44 The Clerk supports the need for such a review.

¹³ Privileges Committee, *Proposal for a Compliance Officer for the NSW Parliament*, Report 83, May 2021, p51-53.

¹⁴ Privileges Committee, *Proposal for a Compliance Officer for the NSW Parliament*, Report 83, May 2021, p50.

Recommendation 13

That the operation of the complaints handling scheme be reviewed after the first 12 months of operation.

That subsequently the operation of the scheme be reviewed by the Privileges Committee once each parliamentary term.

- 2.45** A more detailed comparison of the differences between the reports of the two committees appears as Appendix Two.
- 2.46** Based upon the analysis in the chapter above, the only area of disagreement between the two committees is whether to amend the Members Code of Conduct to make bullying and harassment a breach of the Code. It is possible for the Houses to take a differing position on this, although undesirable as it would lead to different two different Codes of Conduct.
- 2.47** Subject to this exception, the Committee believes the draft resolution which appears as Chapter Three is one which has the support of both committees, as it incorporates much of the words used by the Legislative Assembly committee in its report.

Chapter 3 A revised resolution for the Independent Complaints Officer

This chapter provides a redrafted resolution based upon the recommendations made in the earlier chapters of this report.

- 3.1** The recommendation below contains the revised resolution which the committee submits for consideration by the House, in response to the current referral given to it by the President to reconcile the current differences between the privileges committees of each House on an appropriate model. It incorporates most of the changes suggested by the Assembly committee, with the exception of the amendment to the Code of Conduct, where the recommendation in this committee's first report has been retained.

Recommendation 14

That the House consider adopting the following revised resolution to establish an Independent Complaints Officer:

(1) Establishment of position

That this House directs the President to join with the Speaker to make arrangements for the establishment of the position of an Independent Complaints Officer to expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all members and staff.

That this House also directs the President to make arrangements for the establishment of a panel of people with appropriate skills and expertise ('the Panel') to whom the Independent Complaints Officer can direct complaints for investigation, where he or she does not conduct the investigation him or herself.

(2) Functions of position

The Independent Complaints Officer shall have the following functions:

- (a) Receive and investigate complaints

The Independent Complaints Officer 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) allegations of bullying, harassment and other types of inappropriate behaviour,
- (iv) minor breaches of the pecuniary interests disclosure scheme.

In regard to bullying and harassment, consideration of complaints will take note of members' legal obligations including the :

- *Members of Parliament Staff Act 2013;*
- *Anti-Discrimination Act 1977; and*

- *Work Health and Safety Act 2011*

In addition, the Independent Complaints Officer shall have discretion to refer a complaint to a member of the Panel, who has the requisite skills and expertise, to investigate rather than investigating the complaint him or herself.

- (b) Monitoring Code of Conduct for Members

The Independent Complaints Officer shall monitor the operation of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation 1983 and the members' entitlements system, and provide advice about reform to the Privileges Committee as required.

- (c) Educational presentations

The Independent Complaints Officer and members of the Panel shall assist the Privileges Committee, Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of members about their obligations under the Code of Conduct for Members and the Constitution (Disclosures by Members) Regulation 1983.

(3) Amendment of the Code of Conduct for Members

The Members' Code of Conduct is amended by

- (a) the addition of the following paragraph:

"Clause 10

A Member must treat their staff and each other and all those working for Parliament in the course of their parliamentary duties and activities with dignity, courtesy and respect, and free from any behaviour that amounts to bullying, harassment or sexual harassment"

Commentary

Section 22(b) of the Anti-Discrimination Act 1977 makes it unlawful for a member to sexually harass a workplace participant or another member in the workplace, or for a workplace participant to sexually harass a member."

- (b) the insertion into the second paragraph of clause 9 the following words:

"A minor breach of this Code may be the subject of an investigation by the Independent Complaints Officer"

(4) Term of appointment

- (a) Appointment by Presiding Officers

The Presiding Officers shall appoint an Independent Complaints Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of that Parliament and until the mid-term point of the following Parliament, on such terms and conditions as may be agreed upon with the Presiding Officers, not inconsistent with this resolution. The proposed appointment must have the support of the Privileges Committee in each House. An appointment

may be extended for a period of up to six months so as to ensure there is no period in which there is no person holding the position.

(b) Appointment by Presiding Officers – the Panel

The Presiding Officers are to appoint a panel of three independent persons – the Panel – within three months of the mid-term point of each Parliament – or whenever a position becomes vacant – for the remainder of that Parliament and until the mid-term point of the following Parliament who can be retained as needed to investigate complaints referred to them by the Independent Complaints Officer. Proposed appointments to the Panel must have the support of the Privileges Committees of both Houses.

The Panel must include two persons who have appropriate skills and experience to investigate complaints about bullying, harassment and inappropriate behaviour by Members. The Panel must also include a person who has appropriate skills and experience to investigate complaints about other matters covered by the Independent Complaints Officer system such as breaches relating to Member entitlements and pecuniary interest disclosures.

(c) Contract with Clerks of both Houses – Independent Complaints Officer

The appointment of the Independent Complaints Officer is to be confirmed by the Clerks of both Houses entering into a contract of employment with the appointee.

(d) Contract with Clerks of both Houses – the Panel

The appointment of persons to the Panel is to be confirmed by the Clerks of both Houses entering into a contract of employment with the appointees.

(5) Complaints investigations

(a) Protocol

The Independent Complaints Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Privileges Committee and tabled in the House by the committee chair, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Independent Complaints Officer and the Independent Commission Against Corruption and other relevant bodies (including the most appropriate agencies in relation to bullying and harassment matters), subject to relevant legislation (including section 122 of *the Independent Commission Against Corruption Act*).

(b) Standing

This protocol shall include definitions of standing such that:

- only current members of the parliamentary community, that is Members of the NSW Parliament, those who work for Members of the Parliament of NSW in their capacity as Members or Ministers, those who work for the parliamentary departments, contractors or subcontractors, volunteers, interns and trainees, have standing to lodge complaints
- that an individual may make a complaint up until 21 days following termination from their employment, but not have standing after that date if not part of the parliamentary community

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- complaints must be lodged within two years of the incident alleged to have occurred, unless this is not fair or reasonable to a complainant or member
 - no complaint may be considered which is alleged to have occurred prior to the passing of this resolution.

(c) Confidentiality

Members of the parliamentary community who are not Members of Parliament and who make complaints shall be required to maintain confidentiality concerning complaints and investigations. Others involved in any complaints investigations, for example witnesses shall be required to maintain confidentiality concerning complaints and investigations.

There shall be an expectation that, except in extraordinary circumstances, Members of Parliament will maintain confidentiality about complaints and investigations. However, nothing about this expectation affects parliamentary privilege and, in particular, the parliamentary privilege of freedom of speech.

(d) Protocol with the Independent Commission Against Corruption

Where the Independent Complaints Officer has concerns that a complaint may potentially involve corrupt conduct, he or she should cease the complaint investigation and invite the complainant to raise the matter with the Independent Commission Against Corruption.

The Independent Complaints Officer in determining to draw back from the investigation of a complaint may make a notification to the ICAC but should not hand over papers and records obtained under the Independent Complaints Officer system unless under legal compulsion.

The Independent Complaints Officer is not required to notify the ICAC when he or she begins an investigation.

(e) Investigatory report to the House

Where the Independent Complaints Officer considers that there has been a misuse of an allowance or entitlement, the Independent Complaints Officer may order repayment of funds misused. Where the Independent Complaints Officer considers that a member has otherwise breached the Members' Code of Conduct, the Independent Complaints Officer may recommend corrective action.

Subject to (f) below, the Independent Complaints Officer will make a report—if the member does not comply with the order or accept the recommendation as the case may be, and the complainant consents to the making of a report. This report will be presented to the Privileges Committee, which will consider whether to adopt the recommendations of the Independent Complaints Officer and report to the House.

Where the complaint relates to bullying and harassment matters and has been investigated by a member of the Panel appointed for that purpose, the expert will report to the Independent Complaints Officer and the Independent Complaints Officer will report to the Privileges Committee.

(f) Minor breach

Where the Independent Complaints Officer investigates a matter and finds that a member has breached the Code or Regulations, but in his or her opinion considers the

breach to have been minor or inadvertent and the member concerned has taken such action to rectify the breach, including the making of appropriate financial reimbursement, the Independent Complaints Officer shall advise in writing the member and the complainant of the finding and the action taken by the member. The investigator shall briefly report his or her findings, and the rectification action taken by the Member, on a confidential basis, to the relevant Privileges Committee (and to the Independent Complaints Officer if the investigator is a member of the Panel). However, if the matter relates to bullying, harassment or inappropriate behaviour, the report must only be made to the Privileges Committee with the complainant's consent. No report to a House is required in this circumstance.

(g) Declines to investigate

If the Independent Complaints Officer receives a complaint but upon assessment declines to investigate the matter, or upon investigation finds no evidence or insufficient evidence to substantiate a breach of the Code of Conduct for Members or the Constitution (Disclosure by Members) Regulation, the Independent Complaints Officer shall advise in writing the member and the complainant of the decision. The Independent Complaints Officer shall also briefly report the decision to the relevant Privileges Committee on a confidential basis. However, if the complaint relates to bullying, harassment or inappropriate behaviour, the decision must only be reported to the Privileges Committee with the complainant's consent. No report to a House is required in this circumstance.

(h) Breaches where the Member has failed or declined to take rectification action – reports and appeal rights

Where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a Member has breached the Code of Conduct for Members or the Constitution (Disclosures by Members) Regulation 1983, or has engaged in bullying, harassment or inappropriate behaviour and the Member has failed to undertake the stipulated rectification action or declined to do so pending appeal:

- the investigator shall report his or her findings and conclusions to the Privileges Committee on a confidential basis (and to the Independent Complaints Officer if the investigator is a member of the Panel), including recommendations as to the sanctions, if any, that should be imposed by the House. However, if the matter relates to bullying, harassment or inappropriate behaviour, the report to the Committee must only be made with the complainant's consent.
- the Member in question shall also have the right to lodge an appeal against the investigator's findings, conclusions and recommendations with the Privileges Committee where they have been so reported to the Committee.

Further, after receiving:

- an investigatory report from the Independent Complaints Officer or a member of the Panel about a breach for which the Member has failed to take the stipulated rectification action, and/or;
 - an appeal from the Member in question concerning the investigator's findings, conclusions and recommendations;
-

the Privileges Committee shall:

- form its own conclusions
- have the power to report its conclusions and recommendations – including as regards appropriate sanctions – to the House
- have the power to decide that a report to the House and/or sanctions are not warranted in a particular case e.g. where the Committee disagrees with the investigator's findings.

(i) Expert assistance

The Independent Complaints Officer and persons from the Panel retained to investigate a complaint shall be able to engage the services of a person or persons to assist with or perform services for the Independent Complaints Officer, and in the conduct of an investigation, within budget

(6) Powers of the Independent Complaints Officer

The Independent Complaints Officer and members of the Panel who are retained to investigate a complaint shall have power to request the production of relevant documents and other records from members and officers of the Parliament.

Members, their staff and parliamentary officers are required to reasonably cooperate at all stages with the Independent Complaints Officer's inquiries including giving a full, truthful and prompt account of the matters giving rise to a complaint.

The Independent Complaints Officer may report to the Privileges Committee any failure to comply with a request, and the committee will recommend whether the matter requires the determination of the matter by the House.

(7) Keeping of record

The Independent Complaints Officer and members of the Panel retained to investigate complaints shall be required to keep records of advice given and the factual information upon which it is based, complaints received and investigations. The records of the Independent Complaints Officer are to be regarded as records of the House and are not to be made public without the prior approval of the Independent Complaints Officer and resolution of the House, except for the referral of information between the Independent Complaints Officer and other relevant authorities in accordance with the protocol to be developed in accordance with clause 5 (a), or where the member requests that the records be made public.

A member requesting the records be made public should present the records to the Clerk, to be tabled in the House at the next sitting. During an extended break in sittings the Privileges Committee is empowered to publish records of the Independent Complaints Officer, on the recommendation of the Officer that expeditious publication is required.

(8) Reports to Parliament

In addition to reports on investigations, the Independent Complaints Officer shall provide to the committee chair to table in the House quarterly reports that contain general, de-identified information about matters dealt with under the Independent Compliance Officer system including:

- the number and types of complaints received
- the number of investigations undertaken

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- the number of matters found by an investigator to be unsustainable
 - the number of matters involving breaches that were dealt with via the rectification procedure, and the rectification action that was taken for these matters, such as repayments
 - the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, that were reported to the Privileges Committee but not to the House
 - the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, that were reported to the Privileges Committee and to the House
 - the results of matters reported to the House including the type of sanctions imposed.

(9) Annual meeting with relevant committees

The Independent Complaints Officer and any persons retained from the Panel to conduct investigations of complaints is to meet annually with the Privileges Committee of the House.

(10) Review of the Independent Complaints Officer System

The privileges committees of both Houses are required to review the Independent Complaints Officer system within 12 months of the establishment of the Independent Complaints Officer position, in consultation with key stakeholders. The committee must examine how the system is operating in practice and whether any changes are needed and in particular:

- the confidentiality provisions applying in respect of complaints and investigations under the system, and
- the timeliness of complaints assessments and investigations conducted under the system.

Following the initial review the committee is also required to review the Independent Complaints Officer system once every parliamentary term, in consultation with key stakeholders, to examine how it is operating in practice and whether any changes are needed.

Appendix 1 Minutes

Minutes no. 21

Monday 23 August 2021

Privileges Committee

Via Webex, 2.30 pm

1. Members present

Mr Primrose (*Chair*)

Revd Mr Nile (*Deputy Chair*)

Mr Donnelly

Ms Faehrmann

Mr Farlow

Mr Khan

Mrs Maclaren-Jones

Mr Mallard.

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay, Taylah Cauchi.

2. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 20 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- 16 August 2021 – Letter from the President of the Legislative Council, Hon Matthew Mason-Cox to the Chair, noting the recent reports tabled by this committee and its Legislative Assembly counterpart on possible models for a Compliance Officer, and forwarding a new terms of reference to inquire into a single model for a Compliance Officer.

4. Inquiry into the proposal for a Compliance Officer for the NSW Parliament (No. 2) .Consideration of disputed claims of privilege as referred by the House

The committee noted the following terms of reference referred by the President under on Monday 16 August 2021, under paragraph 2 (a) of resolution of the House establishing the Privileges Committee, 8 May 2019:

1. That, noting:
 - (a) In May 2021 the Privileges Committee tabled its report no 83 entitled “Proposal for a Compliance Officer” which supported the proposal to establish the position
 - (b) Recommendation 12 of the report stated the Privileges Committees in both Houses should attempt to expeditiously find agreement on a form of the resolution acceptable to the members they represent
 - (c) in July 2021 the Legislative Assembly Standing Committee on Privilege and Ethics tabled its report no 1/57 entitled “Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer for NSW Parliament”, which also endorsed the establishment of the position, with 42 recommendations and 6 findings, and

- (d) while there are some differences between the two committees recommendations, none appear to be incapable of resolution by further discussion and negotiation.
2. That the Privileges Committee is therefore to inquire into and report as expeditiously as possible on resolution of the remaining differences between the two privileges committee reports, and include in its report a draft resolution which is supported by the committees of both Houses.

Resolved, on the motion of Reverend Nile: That the Chair, together with the Clerk of the Parliaments and the Committee Clerk, meet with their Legislative Assembly counterparts to discuss options for a single Compliance Officer model and report back to the committee with a new resolution for consideration.

5. Report of the Independent Legal Arbiter on the disputed claim of privilege regarding Strike Force Wyndarra

Resolved, on the motion of Revd Mr Nile:

1. That in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, on the disputed claim of privilege on papers regarding Strike Force Wyndarra, dated 6 August 2021, the committee orders that documents C4, C5, C8, C9, C10 and C11 considered by the Independent Legal Arbiter not to be privileged be returned to the Clerk of the Parliaments within 7 days, subject to the following redactions being made, as recommended by the Independent Legal Arbiter:
 - (a) all references to the name of and pseudonym used to refer to the complainant and their friend,
 - (b) all contact details such as email addresses and phone numbers,
 - (c) all references to the names and signatures of police officers below Assistant Commissioner,
 - (d) all material relating to cases other than the complainant's, and
 - (e) all information referring to the actual or perceived mental health of the complainant, including:
 - (i) the sentence in document C4 commencing with the words 'Concerns exist',
 - (ii) the sentence in document C11 commencing with the words '[X] disclosed to investigators',
 - (iii) the sentence in document C11 commencing with the words '[X] also advised'.
2. The committee orders the redacted documents be laid upon the table by the Clerk and, on tabling, the documents are authorised to be published.
3. That the secretariat or the Office of the Clerk attempt to contact the family of the deceased to notify them of the impending release of the redacted documents.
4. That the secretariat consider developing a protocol for issues of this nature, for consideration by the committee.

6. Report of the Independent Legal Arbiter on the disputed claim of privilege regarding courses offered by TAFE NSW

Resolved, on the motion of Mr Nile:

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- (1) That in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, on the disputed claim of privilege on papers regarding courses offered by TAFE NSW, dated 6 August 2021, the committee orders that the following documents in the privileged return to order received by the Clerk on 21 July 2021, considered by the Independent Legal Arbiter not to be privileged be laid upon the table by the Clerk:
 - (a) all documents listing information from 2011 to 2019 be laid upon the table by the Clerk this day, and
 - (b) on 1 March 2022, all remaining documents be laid upon the table by the Clerk.
 - (2) That on tabling, the documents are authorised to be published.

7. Other business

The Committee Clerk confirmed that redacted documents had been received from NSW Ambulance regarding the incident on Lockyer St Goulburn and published as per the committee's previous resolution.

8. Adjournment

The committee adjourned at 2.46 pm.

Steven Reynolds
Committee Clerk

Minutes no. 22

Tuesday 7 September 2021

Privileges Committee

Via Webex, 2.30 pm

1. Members present

Mr Primrose (*Chair*)
Revd Mr Nile (*Deputy Chair*)
Mr Donnelly
Ms Faehrmann
Mr Farlow
Mr Khan
Mrs Maclaren-Jones
Mr Mallard (*from 1.10pm*)

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay, Taylah Cauchi.

2. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 21 be confirmed.

3. Report of the Independent Legal Arbiter on the disputed claim of privilege regarding Monaro Farming Systems

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The committee noted that it had previously resolved that, wherever possible and unless circumstances require otherwise, the committee follow the established practice in the House and adopt a two-step process. The committee also noted that the House was scheduled to sit in one week on Tuesday 14 September 2021.

Resolved, on the motion of Reverend Nile:

- (1) That the report of the Independent Legal Arbiter on the disputed claim of privilege regarding Monaro Farming Systems be published.
- (2) That:
 - (a) if the House sits as scheduled on Tuesday 14 September, consideration of whether to publish documents considered by the arbiter to be not privileged be a matter for the House, and
 - (b) if the House does not sit at this time, that the committee meet on Wednesday 15 September to consider publication of these documents.

4. Consideration of disputed claims of privilege as referred by the House

The committee considered the Chair's draft report, entitled 'Consideration of disputed claims of privilege as referred by the House'.

Resolved, on the motion of Mr Nile:

- (1) That the draft report be the report of the committee and that the committee present the report to the House.

Resolved, on the motion of Mrs Maclaren-Jones:

- (2) That the secretariat be authorised to insert an additional paragraph prior to tabling, reflecting the decisions of this meeting relating to the disputed claim of privilege regarding Monaro Farming Systems.

Mr Mallard joined the meeting.

5. Other business

The Committee Clerk informed the committee that a report outline for its inquiry into the execution of search warrants by the Australian Federal Police No 3 would be circulated prior to the next meeting.

The Chair updated the committee on his work with the Chair of the Legislative Assembly Privileges Committee regarding the reports of each House on models for a Compliance Officer. The Committee Clerk confirmed a document would be circulated to the committee, outlining items requiring further discussion between each House.

6. Adjournment

The committee adjourned at 1.17 pm.

Steven Reynolds
Committee Clerk

Draft Minutes no. 24
Friday 12 November 2021
Privileges Committee

Room 1043, 2.02 pm

1. Members present

Mr Primrose (*Chair*)
Revd Mr Nile (*Deputy Chair*)
Mr Donnelly
Mr Farlow
Mr Khan
Mrs Maclaren-Jones (*from 2.11 pm*)
Mr Mallard.

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay.

2. Apologies

Ms Faehrmann

3. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 23 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- 3 November 2021 – Correspondence from the Hon Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption to the Chair, regarding corruption prevention recommendations proposed for Operation Whitney.

5. Inquiry into the proposal for a Compliance Officer for the NSW Parliament (No. 2)

5.1 Consideration of Chair's draft report

Resolved, on the motion of Mr Donnelly: That:

- (a) the draft report be the report of the committee and that the committee present the report to the House,
- (b) the submissions and correspondence relating to the inquiry be tabled in the House with the report,
- (c) upon tabling, all unpublished submissions and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- (d) the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling,
- (e) the committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee, and
- (f) dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting.

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Resolved, on the motion of Mrs Maclaren-Jones: That a copy of the committee's final report be provided to the Hon Leslie Williams MP in her capacity as Chair of the Advisory Group on Bullying, Sexual Harassment and Serious Misconduct.

5.2 Circulation of revised resolution for the Independent Complaints Officer to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics

The Chair indicated to the committee that he had been informally advised by the Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics of two issues of possible concern – the most significant being the proposed change to the Members' Code of Conduct.

Resolved, on the motion of Mr Donnelly: That prior to the tabling of this report, a copy of the revised resolution contained in Chapter 3 be sent to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.

5.3 Report tabling

The Chair advised the committee that the report would be tabled in the House on Tuesday 16 November.

6. Other business

6.1 Correspondence from Chief Commissioner, Independent Commission Against Corruption

The Chair noted that he had been advised that the President had also received an invitation to make a submission.

Resolved, on the motion of Reverend Nile: That the committee indicate to the Office of the President that the committee is happy to consider and endorse any submission the President makes but will not be making its own submission.

6.2 Annual report of the Parliamentary Ethics Adviser 2020-2021

The committee noted the receipt of the Annual Report and that it would defer discussion of dates for the annual meeting with Mr John Evans, Parliamentary Ethics Adviser, until early 2022.

7. Adjournment

The committee adjourned at 2.38 pm.

Steven Reynolds
Committee Clerk

Appendix 2 Comparison of recommendations and findings in respective reports of the Legislative Assembly and Legislative Council Committees

RECOMMENDATION OR FINDING	COMPARISON OF LEGISLATIVE ASSEMBLY COMMITTEE AND LEGISLATIVE COUNCIL COMMITTEE POSITIONS
<p>LA Committee Recommendation 1: That the Speaker make arrangements for the establishment of the position of Independent Complaints Officer to expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all Members and staff.</p>	<p>The LA and LC Committee positions on this recommendation are similar.</p> <p>Both committees support the establishment of the position, and both require a resolution to be passed in the respective Houses.</p> <p>The only difference is that the LA Committee would call the position an ‘Independent Complaints Officer’, while the LC Committee has not recommended any change from ‘Compliance Officer’ which is the term used in the original resolution.</p>
<p>LA Committee Recommendation 2: That the Speaker make arrangements for the establishment of a panel of people with appropriate skills and expertise (‘the Panel’) to whom the Independent Complaints Officer could direct complaints for investigation, where he or she does not conduct the investigation him or herself.</p> <p>LA Committee Recommendation 5: That the Independent Complaints Officer also have discretion to refer a complaint to a member of the Panel, who has the requisite skills and expertise, to confidentially investigate rather than investigating the complaint him or herself.</p> <p>LA Committee Recommendation 17: That there be two persons appointed to the Panel who have appropriate skills and experience to investigate complaints about bullying, harassment and inappropriate</p>	<p>The LA and LC Committee positions on these recommendations are fairly similar although it is only the LA Committee that recommends a panel of three.</p> <p>Recommendation 2 of the LC Committee report is that an expert in dealing with bullying and harassment be able to receive and investigate complaints and where a complaint is made directly to the investigator, the Compliance Officer be notified.</p> <p>In each case there is the option for an expert to conduct investigations instead of the Complaints/Compliance Officer. However, the LC expert could also <i>receive</i> complaints directly – under the LA Committee proposal this would continue to be the sole responsibility of the Independent Complaints Officer.</p>

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<p>behaviour by Members; and that there also be a person appointed to the panel who has appropriate skills and experience to investigate complaints about other matters covered by the Independent Complaints Officer system such as breaches relating to Member entitlements and pecuniary interest disclosures.</p>	<p>Another difference is that while the expert recommended by the LC Committee would lend expertise around bullying and harassment to the process, the Panel recommended by the LA Committee would lend expertise around bullying and harassment-type matters <u>and</u> other matters, e.g. pecuniary interest and entitlements matters, as one of the three people appointed to the Panel would need expertise in these areas – see LA Committee recommendation 17.</p>
<p>LA Committee Recommendation 3: That the Independent Complaints Officer have the functions of receiving and investigating complaints confidentially in relation to alleged breaches of the Code of Conduct for Members by Members of the Legislative Assembly, not related to conduct in proceedings of the Legislative Assembly or its committees, including:</p> <ul style="list-style-type: none"> • misuse of allowances and entitlements • other less serious misconduct matters • minor breaches of the pecuniary interest disclosures scheme. <p>LA Committee Recommendation 4: That the Independent Complaints Officer also have the function of receiving and investigating complaints confidentially in relation to bullying, harassment and inappropriate behaviour by Members of the Legislative Assembly, not related to conduct in proceedings of the Legislative Assembly or its committees, and contrary to their obligations under legislation including the:</p> <ul style="list-style-type: none"> • <i>Members of Parliament Staff Act 2013</i> • <i>Anti-Discrimination Act 1977</i> • <i>Work Health and Safety Act 2011.</i> 	<p>The LA and LC Committees are similar in that they envisage a role for the Officer to receive and investigate complaints, not related to proceedings in the House or its Committees, confidentially.</p> <p>However, the LC Committee has elected to stick to the original drafting of Clause 2(a) of the resolution (p55, LC Report).</p> <p>This means that the LC Committee supports an amendment to the Code of Conduct for Members to give the Compliance Officer jurisdiction over matters of bullying and harassment.</p> <p>The LA Committee considers such amendment to the Code to be unnecessary. It considers the jurisdictional hook for the Officer to investigate bullying and harassment matters would be resolution of the House and the relevant workplace legislation. In particular, the LA Committee argues on the basis of legal advice received by the Clerk that Members are liable for harm to their staff caused by bullying or harassment through the operation of the <i>Work Health and Safety Act 2011</i> and the <i>Anti-Discrimination Act 1977</i>. Presiding Officers are also liable, according to this advice, through the operation of the <i>Members of Parliament Staff Act 2013</i>.</p> <p>Recommendations 3 and 4 and Clause 2(a) of the revised resolution in the LA Committee report (p48) reflect these considerations.</p>

	The LA Committee has also replaced the words ‘other types of grievances’ with the words ‘inappropriate behaviour’ in Clause 2(a) of its revised resolution (p48).
LA Committee Recommendation 6: That the Independent Complaints Officer monitor the operation of the Code of Conduct for Members, the <i>Constitution (Disclosures by Members) Regulation 1983</i> and the Members' entitlements system, and provide advice about reform to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics ('the Assembly Committee') as required, consistent with Clause 2(b) of the proposed resolution for a Parliamentary Compliance Officer that is before the House ('the proposed resolution').	The LA and LC Committee positions on this function are consistent – neither recommend any material change from Clause 2(b) of the original resolution.
LA Committee Recommendation 7: That the Independent Complaints Officer and members of the Panel have a function of assisting the Assembly Committee, the Parliamentary Ethics Adviser and the Clerk of the Legislative Assembly as requested in relation to the education of Members about their obligations under the Code of Conduct for Members and the <i>Constitution (Disclosures by Members) Regulation 1983</i> , consistent with Clause 2(c) of the proposed resolution.	The LA and LC Committee positions on this function are largely consistent – both support this educative function for the Officer under Clause 2(c). The only difference is that the LA Committee would also grant members of the Panel this function.
LA Committee Recommendation 8: That the Independent Complaints Officer and members of the Panel be given no function of providing informal advisory services as envisaged by clause 2(d) of the proposed resolution as this function would be incompatible with their investigatory functions.	The LA and LC Committee positions on this function are inconsistent . The LA Committee considers that an advisory role for the Officer would conflict with the investigatory functions central to the position. In contrast, the LC Committee has recommended expansion of the Compliance Officer's advisory role. The LC Committee has recommended that the Compliance Officer have the advisory role envisaged by Clause 2(d) of the original resolution and that it be expanded so that he or she can also give advice on bullying and harassment matters. Recommendation 5 of the LC Committee report is: “That the words ‘or any other matter within the complaints handling function of the position’ be added to the end of

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	<p>clause 2(d) to enable the officer to provide advice on issues of bullying and harassment” (p28).</p> <p>In the circumstances, the LA Committee has no subclause within clause 2 of its revised resolution relating to advisory services. In contrast, the LC Committee has proposed clause 2(d): “Informal Advisory Services: A member of the parliamentary administration may seek confidential advice on a matter of interpretation of the Members’ Entitlements Scheme, for the purposes of resolving disagreements, or any other matters within the complaints handling functions of the position” (p56).</p>
<p>LA Committee Finding 1: That, in light of legal advice concerning the application of work, health and safety and anti-discrimination legislation to Members, the case for an amendment to the Code of Conduct for Members does not appear to be fully made out.</p>	<p>As touched upon above (discussion of LA recommendations 3 and 4), the LA and LC Committee positions with regard to changes to the Code of Conduct for Members are inconsistent.</p> <p>While the LA Committee does not recommend any amendments to the Code of Conduct, the LC Committee has recommended a change to the Members' Code of Conduct through Clause 3 of the proposed resolution, and that it be in the following terms:</p> <p>"A Member must treat their staff and each other and all those working for Parliament in the course of their parliamentary duties and activities with dignity, courtesy and respect, and free from any behaviour that amounts to bullying, harassment or sexual harassment" as well as including a reference to section 22(b) of the <i>Anti-Discrimination Act 1977</i> which makes it an offence for a Member to sexually harass a workplace participant or another Member in the workplace, or for a workplace participant to sexually harass a Member (See Recommendation 1, p15 and p56).</p> <p>In addition, recommendation 6 of the LC Committee report states that the second paragraph of clause 9 of the Code of Conduct for Members should be amended to refer to the Compliance Officer as follows:</p>

	<p>“Breaches of this Code may result in actions being taken by the House in relation to the Member. A substantial breach of this Code may constitute corrupt conduct for the purposes of the <i>Independent Commission Against Corruption Act 1988</i>. A minor breach of this Code may be the subject of an investigation by the Compliance Officer”.</p>
<p>LA Committee Recommendation 9: That the NSW Department of Parliamentary Services and the Clerk of the Legislative Assembly provide regular, up-to-date information and guidance to Members of the Legislative Assembly, as employers of staff under the <i>Members of Parliament Staff Act 2013</i> – and to Members' staff and parliamentary staff – on Member and staff rights and obligations under:</p> <ul style="list-style-type: none"> • the <i>Members of Parliament Staff Act 2013</i> • the <i>Anti-Discrimination Act 1977</i> • the <i>Work Health and Safety Act 2011</i>. <p>LA Committee Recommendation 10: That the regular, up-to-date information to be provided to Members, Members' staff and parliamentary staff on their legal rights and obligations also include:</p> <ul style="list-style-type: none"> • information on recognising, identifying and responding to bullying, harassment and inappropriate behaviour in the workplace • guidance on creating a safe, secure and respectful working environment. <p>LA Committee Recommendation 11: That the Assembly Committee review the regular, up-to-date information each time before it is distributed to Members and staff, in consultation with relevant bodies, to check its accuracy and suitability and recommend changes if necessary.</p>	<p>The LC Committee did not make any recommendations that the Clerk or the NSW Department of Parliamentary Services provide training or information to Members and staff.</p> <p>However, these LA recommendations regarding training/information do not affect the content of the resolution for the establishment of a Compliance Officer/Independent Complaints Officer.</p>
<p>LA Committee Recommendation 12: That the NSW Department of Parliamentary Services review support services currently available to Members, Members' staff and staff of the NSW Parliament under the Employee Assistance Program and assess where adjustments may be necessary to provide timely, independent, confidential and trauma-</p>	<p>The LC Committee made recommendation 7 which relates to the human resources section of the Department of Parliamentary Services. However, the LC Committee did not consider the role of the human resources section of the Department of Parliamentary Services except to discuss it as a potential source of referral.</p>

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<p>informed support for complainants, witnesses and people who are accused in relation to a complaint under the Independent Complaints Officer system, should such a system be established.</p>	<p>Recommendation 7 of the LC Committee report is “That the referral protocol to be developed by the Compliance Officer include guidance as to:</p> <ul style="list-style-type: none"> a. how to receive complaints or potential complaints originally referred from the human resources function of the parliamentary administration; b. in what circumstances it is appropriate to refer a potential complainant to human resources if they do not wish to proceed with their complaint but require other support; c. in what circumstances human resources may be able to assist members with advice on staff matters” (p35). <p>It is further noted that these recommendations concerning support and referral do not affect the content of the resolution for the establishment of a Compliance Officer/Independent Complaints Officer.</p>
<p>LA Committee Recommendation 13: That the Speaker appoint an Independent Complaints Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of the Parliament and until the mid-term point of the following Parliament; and that the appointment be able to be extended for a period of up to six months to ensure that there is no period during which there is no person holding the position.</p> <p>LA Committee Recommendation 14: That the proposed appointment to the role of Independent Complaints Officer be required to have the support of the Assembly Committee.</p>	<p>A discussion is needed about the details of the process to appoint an Officer but the LA and LC Committee positions do not appear to be incompatible.</p> <p>The LC Committee supports the appointment of a Compliance Officer by the Presiding Officers in a way that is broadly consistent with the original resolution, and that this should be on such terms and conditions as may be agreed upon with the Presiding Officers and consistent with the way in which the Ethics Adviser is appointed.</p> <p>Hence, clause 4(a) as revised by the LC Committee reads: “The Presiding Officers shall appoint a Compliance Officer within three months of the mid-term point of each Parliament, or whenever the</p>

<p>LA Committee Recommendation 15: That the appointment of the Independent Complaints Officer be confirmed by the Clerk of the Legislative Assembly entering into a contract of employment with the appointee.</p>	<p>position becomes vacant, for the remainder of that Parliament and until the mid-term point of the following Parliament, on such terms and conditions as may be agreed upon with the Presiding Officers, not inconsistent with this resolution. The proposed appointment must have the support of the Privileges Committee in each House. An appointment may be extended for a period of up to six months so as to ensure there is no period in which there is no person holding the position” (pp56-57 LC Committee report).</p> <p>LA Committee recommendation 15 requires the Clerk to enter into a contract with the appointee. This is consistent with the current practice of appointment of the Ethics Adviser where both Clerks enter into the contract of employment.</p> <p>It is also consistent with 1998 Crown Solicitor’s advice in relation to the employment contract for the Ethics Adviser which indicated that there is doubt over whether the Presiding Officers can engage persons by way of contract to perform services for the Parliament.</p> <p>The Crown Solicitor recommended that the Clerks enter into the contract with the Ethics Adviser "for and on behalf of the State of New South Wales" (the Crown). The Crown Solicitor further advised that though the contract would be a contract with the Crown, it could provide that the Ethics Adviser would be subject to directions from the Presiding Officers and required to comply with requests from the Parliament.</p>
<p>LA Committee Recommendation 16: That the Speaker also appoint the Panel – a panel of three independent persons – within three months of the mid-term point of each Parliament, or whenever a position becomes vacant, for the remainder of the Parliament and until the mid-term point of the following Parliament and:</p>	<p>The LC Committee supports clause 5(e) of the original Proposed resolution insofar as the Officer could draw on expert assistance to investigate complaints (p58).</p> <p>The LC Committee did not recommend the formal appointment of a panel nor that such appointments to assist the Officer be approved by the LC Committee.</p>

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<ul style="list-style-type: none"> • persons on the Panel be able to be retained as needed to investigate complaints delegated to them by the Independent Complaints Officer • appointments to the Panel be required to have the support of the Assembly Committee. <p>LA Committee Recommendation 18: That the appointment of persons to the Panel be confirmed by the Clerk of the Legislative Assembly entering into a contract of employment with the appointees.</p>	
<p>LA Committee Recommendation 19: That the Independent Complaints Officer and members of the Panel only be able to be dismissed by the Clerk of the Legislative Assembly in consultation with the Speaker and the Assembly Committee.</p>	<p>Regarding dismissal, contrary to Clause 4(b) of the original resolution, both the LA and LC Committees have agreed that it is not appropriate that the Chief Executive of the Department of Parliamentary Services has the ability to dismiss the Compliance Officer/Independent Complaints Officer.</p> <p>The LC Committee has noted that clause 12 of the current contract between the two Clerks and the Parliamentary Ethics Adviser sets out the circumstances under which the Clerks may terminate the contract, and the LC Committee has recommended (recommendation 3): “That clause 4(b) be omitted from the proposed resolution and the terms of the dismissal be instead included in the contract of employment offered by the Presiding Officers, expressed in similar terms to that of the Parliamentary Ethics Adviser”.</p> <p>The LA Committee has recommended a clause be included in the revised resolution concerning dismissal (proposed clause 3(e) that “The Independent Complaints Officer and members of the Panel can only be dismissed by the Clerk of the Legislative Assembly in consultation with the Speaker and the Assembly Committee” (p57).</p> <p>In short, the LA and LC Committee recommendations are similar in intent but the LA Committee recommendation would provide a role for the LA Committee in any dismissal, which is not currently required for dismissal of the Ethics Adviser.</p>

LA Committee Recommendation 20: That 'members of the parliamentary community' being:

- Members of the Parliament of NSW
- all those who work for Members of the Parliament of NSW in their capacity as Members or Ministers, including contractors and volunteers
- all those who work for, or carry out work for, the Parliament of NSW including contractors and volunteers have standing to make a complaint to the Independent Complaints Officer.

LA Committee Recommendation 21: That the House consider whether former members of the parliamentary community should have standing to make a complaint to the Independent Complaints Officer about bullying, harassment or inappropriate behaviour.

LA Committee Recommendation 22: That former members of the parliamentary community not have standing to make complaints to the Independent Complaints Officer about matters within jurisdiction of the Independent Complaints Officer that do not relate to bullying, harassment or inappropriate behaviour (e.g. breaches around entitlements or disclosures of pecuniary interests).

LA Committee Recommendation 23: That the House consider whether the Independent Complaints Officer system should have any retrospective remit, that is, whether the Independent Complaints Officer should be able to receive complaints relating to incidents that occurred before the establishment of the Independent Complaints Officer position.

LA Committee Recommendation 24: That the House consider:

- whether there should be a time limit for reporting misconduct to the Independent Complaints Officer e.g. complaints must be lodged within two years of the conduct in question

LA Committee recommendations 20-24 relate to lodgement and standing, and whether the Independent Complaints Officer should have retrospective remit.

This is an area for which it appears **further discussion** would be needed about whether to deal with these matters – in whole or part – within the resolution, or within the investigations protocol to be developed by the Officer after the position is established.

In short, the LA Committee proposes that Clause 4(a) of the resolution provide that 'Members of the parliamentary community being: Members of the Parliament of NSW; all those who work for Members of the Parliament of NSW in their capacity as Members or Ministers including contractors and volunteers; and all those who work for or carry out work for the Parliament of NSW including contractors and volunteers have standing to make a complaint to the Independent Complaints Officer.

The LA Committee also noted in its report that further possible additional clauses for the House to consider include: former members of the parliamentary community having standing to make a complaint; retrospective remit of the Independent Complaints Officer system; and time limits for lodging complaints.

LC Committee regarding standing – visitors and ministerial staff

The LC Committee report does not contain a recommendation that specifically relates to standing but there is relevant matter throughout. For example, as noted earlier, recommendation 3 of the LC Committee report is for an amendment to the Code of Conduct for Members that would require a Member to treat their staff and all those working for Parliament in the course of their parliamentary duties with dignity, courtesy and respect.

This is essentially **consistent** with the LA Committee recommendation 20 which specifically mentions contractors and

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<ul style="list-style-type: none"> • whether such time limits should differ according to the type of case e.g. bullying and inappropriate conduct matters versus other matters. 	<p>volunteers as having standing to make a complaint. Both Committees also appear to agree that the Officer’s role does not extend to receiving complaints from members of the public or casual visitors to the parliamentary precinct.</p> <p>Similarly, on page 31 of the LC Committee report, under a heading “Do the powers to investigate extend to Ministers and Ministerial staff?” the LC Committee has noted mechanisms available to deal with misconduct in Ministers’ offices but has indicated that a Ministerial staffer could make a complaint about a Minister using these mechanisms <u>or</u> the Compliance Officer process.</p> <p>This is consistent with the recommendation 20 of the Legislative Assembly Committee that all those who work for the NSW Parliament in their capacity as Members or Ministers, including contractors and volunteers, should have standing to make a complaint to the Independent Complaints Officer. This would mean that ministerial staffers could make a complaint under the Independent Complaints Officer system about a Minister engaging in bullying or inappropriate behaviour but he or she would also be covered by the relevant bullying, harassment and discrimination policies in place for Ministers’ offices.</p> <p><u>Standing – former members of the parliamentary community</u> The LC Committee does not consider whether former members of the parliamentary community should have standing to complain but clause 5(a) of the original resolution requires the Officer to develop an investigations protocol which could consider this aspect.</p> <p><u>Retrospective remit of the Compliance Officer and time limits</u> The LC Committee report does not specifically address whether there should be time limits within which complaints must be lodged with the Compliance Officer.</p>
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	<p>However, the LC Committee report does comment on a related question of whether the Compliance Officer will be able to investigate complaints about incidents that occurred prior to the Compliance Officer position being established, i.e. whether the Compliance Officer will have any retrospective remit.</p> <p>The LC Committee notes: “In a recent debate on responses to sexual assault and harassment in the Legislative Assembly, a Member indicated that she had received a large amount of material relating to complaints in the ministerial workplace. If any of these complaints relate to actions by Members and are not of the severity requiring referral to the Police, the question is whether the Compliance Officer can investigate so-called legacy issues”.</p> <p>The LC Committee states that it considers this is a matter for the Compliance Officer to decide on in developing the investigation protocol and that “Any complaint lodged should refer to the current serving Member (at the time of the complaint being made) and relate to the time that they were Member. The decision should be made on the basis of need, not the resources available; such resources may need to be supplemented if the officer considered it appropriate to investigate earlier matters” (p20).</p>
<p>LA Committee recommendation 25: That the Independent Complaints Officer develop the investigations protocol envisaged by Clause 5(a) of the proposed resolution within three months of his or her appointment, to be approved by the Assembly Committee and tabled in the House by the Chair.</p>	<p>The LA Committee and LC Committee positions on this recommendation are broadly consistent.</p> <p>There are differences with regard to the LA and LC Committee approaches to the Protocol.</p> <p>The LA Committee recommended that the part of the original resolution relating to the protocol – Clause 5(a) – proceed largely unamended only that the Chair of the LA Committee would table the protocol in the House rather than the Speaker (p65).</p>

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	<p>Hence, under the LA Committee proposal, the Clause in question (Clause 5(b) under the revised resolution) would read:</p> <p>“The Independent Complaints Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Assembly Committee and tabled in the House by the <u>Chair</u>, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Independent Complaints Officer system and the Independent Commission Against Corruption and other relevant bodies, subject to relevant legislation (including section 122 of the <i>Independent Commission Against Corruption Act 1988</i>)” (p65, emphasis added).</p> <p>The LC Committee also recommended that this part of the resolution proceed largely unamended – the only change would be pursuant to recommendation 10 “That the words ‘including the most appropriate body in relation to bullying and harassment matters’ be added after the words ‘other relevant bodies’ in clause 5(a) to ensure that the protocol to be developed includes consideration of referral to agencies able to address bullying and harassment”. Hence, under the LC Committee proposal, Clause 5(a) of the revised resolution would read:</p> <p>“The Compliance Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Privileges Committee and tabled in the House by the President, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Compliance Officer and the Independent Commission Against Corruption and other relevant bodies (<u>including the most appropriate agencies in relation to bullying and harassment matters</u>), subject to relevant legislation (including section 122 of the</p>
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	<p>Independent Commission Against Corruption Act)” (p57, emphasis added).</p> <p>The LC Committee also made the following further recommendation (recommendation 7 – also detailed earlier) in relation to the protocol:</p> <p>“That the referral protocol to be developed by the Compliance Officer include guidance as to:</p> <p>a. how to receive complaints or potential complaints originally referred from the human resources function of the parliamentary administration;</p> <p>b. in what circumstances it is appropriate to refer a potential complainant to human resources if they do not wish to proceed with their complaint but require other support;</p> <p>c. in what circumstances human resources may be able to assist members with advice on staff matters” (p35).</p> <p>In contrast, the LA Committee made no recommendations about these matters.</p>
<p>LA Committee recommendation 26: That under the Independent Complaints Officer system:</p> <ul style="list-style-type: none"> • Members of the parliamentary community who are not Members of Parliament and who make complaints be required to maintain confidentiality concerning complaints and investigations. • There be an expectation that, except in extraordinary circumstances, Members of Parliament will maintain confidentiality about complaints and investigations. However, it should be made clear that nothing about this expectation affects parliamentary privilege and, in particular, freedom of speech. 	<p>Both Committees agree that there is potential for complaints to be weaponised and that there is a need for confidentiality as per clause 1 of the original resolution.</p> <p>The LA Committee has included a specific recommendation in its report (recommendation 26) regarding confidentiality to address these concerns, while the LC Committee has focussed on the use of the protocol to resolve underlying issues.</p> <p>The LC Committee report notes the potential for vexatious complaints under the Compliance Officer system and for the abuse of the complaints process for political purposes.</p>

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<ul style="list-style-type: none"> Others involved in any complaints investigations e.g. witnesses, are required to maintain confidentiality concerning complaints and investigations. 	<p>It also recommends (recommendation 11) “That the protocol to be developed by the Compliance Officer consider the most appropriate way to deal with vexatious complaints and how to prevent the potential for the abuse of the complaints process for political purposes” (pp42-43).</p>
<p>LA Committee recommendation 27: That on receiving complaints, the Independent Complaints Officer be required to assess complaints in a reasonably timely manner having regard to any relevant factors including the complexity of the complaint and available resources.</p> <p>LA Committee recommendation 28: That investigations by the Independent Complaints Officer and members of the Panel be required to be conducted in a reasonably timely manner having regard to any relevant factors including the complexity of the investigation and available resources.</p>	<p>The Committees agree. While the LA Committee has made these two recommendations concerning timeliness, the LC Committee has referred to the Compliance Officer framework being an expeditious process consistent with Clause 1 of the original resolution (see in particular para 3.16, p24).</p> <p>It is noted in relation to the vexatious complaints and abuse of process discussed directly above that a timeliness requirement may also reduce the opportunity for abuse of the complaints process for political purposes i.e. if complaints are dealt with as quickly as possible.</p>
<p>LA Committee recommendation 29: That where the Independent Complaints Officer decides to dismiss a complaint and that it is not suitable for investigation, he or she is to:</p> <ul style="list-style-type: none"> Write to the Member in question, and the complainant, advising of the decision. Briefly report the decision to the Assembly Committee on a confidential basis. However, in the case of bullying, harassment and inappropriate behaviour complaints, a report to the Committee must only be made with the complainant’s consent. <p>LA Committee recommendation 30: That the Independent Complaints Officer and persons retained from the Panel to investigate a matter <u>not</u> have the power to make reports about specific investigations <i>direct to the House</i>.</p> <p>LA Committee recommendation 31: That where, after investigating a complaint, the Independent Complaints Officer or a person retained</p>	<p>The LA and LC Committee positions on reporting are partly consistent.</p> <p>Like the LA Committee, the LC Committee does not want the Compliance Officer to report direct to the House but instead recommends that where necessary he or she report to the relevant oversight Committee which can then recommend to the House what action should be taken.</p> <p>Recommendation 13 of the LC Committee's report is:</p> <p>That clause 5(b) and clause 6 of the proposed resolution be amended to require:</p> <p>(a) The Compliance Officer to report to the Privileges Committee in relation to breaches of the Code and disclosure requirements when the matter is not capable of rectification.</p>

from the Panel to investigate finds that a Member has not breached the Code of Conduct for Members or the *Constitution (Disclosures by Members) Regulation 1983*, nor engaged in bullying, harassment or inappropriate conduct, the investigator be required to:

- Write to the Member and complainant advising of his or her findings.
- Briefly report his or her findings on a confidential basis to the Assembly Committee (and to the Independent Complaints Officer if the investigator is a member of the Panel). However, in the case of bullying, harassment and inappropriate behaviour matters, a report to the Committee must only be made with the complainant's consent.

LA Committee recommendation 32: That where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a Member has breached the Code of Conduct for Members or the *Constitution (Disclosures by Members) Regulation 1983*, or has engaged in bullying, harassment or inappropriate behaviour:

- The investigator be required to write to the Member advising of his or her findings and specifying what action is required to rectify the breach. A table listing possible examples of standard rectification actions is at Appendix Four to this report.
- Should the Member take the rectification action, the investigator be required to write to the complainant advising of his or her findings and noting the rectification action taken by the Member.
- The investigator be required to briefly report his or her findings, and the rectification action taken by the Member, on a confidential basis, to the Assembly Committee (and to the Independent Complaints Officer if the investigator is a member of the Panel). However, in the case of bullying, harassment and inappropriate behaviour matters, a report to the Committee must only be made with the complainant's consent.

(b) That on bullying and harassment issues, an independent investigator reports to the Compliance Officer, who then reports to the Privileges Committee when the matter is not capable of rectification.

(c) That the Privileges Committee then recommend to the House any action required by the Member or the House.

However, unlike the LC Committee, which focusses on reporting where matters are incapable of rectification, the LA Committee's proposed recommendations provide for reporting in more circumstances. That is, the Independent Complaints Officer, or the investigating member of the Panel, would:

- briefly inform the LA Committee of matters where there have been breaches resolved through rectification processes (recommendation 32), or
- where the investigator has found the matter in question is unsubstantiated (recommendation 31).

Similarly, the LA Committee makes provision for the Independent Complaints Officer to briefly report complaints to the LA Committee that he or she has dismissed without investigation (recommendation 29).

The LC Committee would only require any publication of a report in these additional circumstances to the extent covered by Clause 7 of the original resolution i.e. referral of information between the Compliance Officer and relevant authorities in accordance with the protocol, or where the Member so requests.

In addition, the LA Committee has recommended that any reports to the LA Committee by the Independent Complaints Officer or other

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LA Committee recommendation 33: That where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a Member has breached the Code of Conduct for Members or the *Constitution (Disclosures by Members) Regulation 1983*, or has engaged in bullying, harassment or inappropriate behaviour and the Member has failed to undertake the stipulated rectification action or declined to do so pending appeal:

- The investigator report his or her findings and conclusions to the Assembly Committee on a confidential basis (and to the Independent Complaints Officer if the investigator is a member of the Panel), including recommendations as to the sanctions, if any, that should be imposed by the House. However, in the case of bullying, harassment and inappropriate behaviour matters, a report to the Committee must only be made with the complainant's consent.
- The Member in question also have the right to lodge an appeal against the investigator's findings, conclusions and recommendations with the Assembly Committee, where they have been so reported to the Committee.

LA Committee recommendation 34: That after receiving:

- an investigatory report from the Independent Complaints Officer or a member of the Panel about a breach for which the Member has failed to take the stipulated rectification action, and/or
- an appeal from the Member in question concerning the investigator's findings, conclusions and recommendations
- the Assembly Committee:
- form its own conclusions
- have the power to report its conclusions and recommendations – including as regards appropriate sanctions – to the House

investigator, that relate to bullying/harassment matters, only be able to be made with the consent of the complainant.

For the LC Committee, the reports that can be made to the LC Committee about matters that cannot be rectified can only be made with the complainant's consent – regardless of what type of matter it is, bullying or otherwise. This is consistent with clause 5(b) of the original resolution.

LA Committee recommendation 33 also provides a right of appeal to a Member against the Officer/investigator's findings. The LC Committee has made no such recommendation but it is understood the LC Committee would be unlikely to oppose such appeal rights.

<ul style="list-style-type: none"> • have the power to decide that a report to the House and/or sanctions are not warranted in a particular case e.g. where the Committee disagrees with the investigator's findings. 	
<p>LA Committee recommendation 35: That the Independent Complaints Officer and persons from the Panel who are retained to investigate a complaint be able to engage the services of persons to assist with or perform services for them in the conduct of an investigation, within budget.</p>	<p>The LA and LC Committee positions on these matters is somewhat consistent.</p> <p>Both committees acknowledge the desirability of people with appropriate expertise conducting investigations (N.B. see also earlier discussion of LA Committee recommendations 2, 5 and 17).</p> <p>The LC Committee has recommended that the Compliance Officer be able to engage the services of a person to assist with or perform services for the Compliance Officer including receiving complaints regarding bullying and harassment in the first instance, and in the conduct of an investigation, within budget; with the Compliance Officer to be notified when a complaint has been made (see recommendation 2 and revised resolution, clause 5(e), pp17 and 58).</p> <p>In a similar vein, the LA Committee has recommended (recommendation 2) that a panel of experts be created to whom the Independent Complaints Officer could direct complaints for investigation where he or she does not conduct the investigation him or herself; and that both the Independent Complaints Officer and members of the panel be able to engage the services of persons to assist with or perform services for them in the conduct of investigations within budget (recommendation 35 and revised resolution clause 4(i), p78).</p>
<p>LA Committee Finding 2: The power of the Independent Complaints Officer or any person from the Panel who is retained to investigate a complaint, to <u>compel</u> the production of documents or other records would be problematic, and would not accord with the Legislative Assembly's approach to such questions. As the Independent Complaints Officer and members of the Panel are to operate pursuant to a resolution of the House, they could only request documents or</p>	<p>Whether the Officer could <u>compel</u> the production of documents or other records is a significant area of disagreement between the two Committees.</p> <p>The LC Committee accepts clause 6 of the original resolution (p58) and its view is that in so accepting the clause, this would give the Officer the power to compel the production of documents from the</p>

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<p>records and report non-compliance to the Assembly Committee which, if necessary, could report to the House to resolve the matter.</p>	<p>Member with the LC Committee only having a role if the Member is refusing to cooperate; and that pursuant to clause 6, a Member refusing to cooperate is potentially in breach of a resolution of the House.</p> <p>In contrast, the LA Committee considers that the relevant clause should be drafted to allow the Officer and the Panel to <u>request</u> documents (clause 5, p78). The LA Committee considers that as the Officer is to operate pursuant to a resolution of the House, he or she can only <u>request</u> documents and report non-compliance to the LA Committee which could, if necessary, report to the House to resolve the matter. In short, under the LA approach, only the House itself could enforce compliance.</p>
<p>LA Recommendation 36: That the Independent Complaints Officer and members of the Panel retained to investigate complaints be required to keep confidential records of their assessments and investigations. These records should be regarded as records of the House, and not be made public except for:</p> <ul style="list-style-type: none"> • the referral of information between the Independent Complaints Officer, a member of the Panel retained to investigate a complaint, and relevant authorities in accordance with the protocol (to be developed by the Independent Complaints Officer, approved by the Assembly Committee and tabled in the House by the Chair) for the operation of the Independent Complaints Officer system • where the Member who is the subject of the complaint requests that the records be made public. 	<p>The LA and LC Committee positions on the keeping of records are largely consistent but the LC Committee has recommended some additions to the resolution (Clause 7) to cover how records are to be published where a Member requests such publication, and to cover publication during extended breaks in sittings of the House. The LA Committee report is silent on these additional matters.</p> <p>Recommendation 14 of the LC report is "That the following words be added to the end of Clause 7: 'A member requesting the records be made public should present the records to the Clerk, to be tabled in the House at the next sitting'".</p> <p>This is because the Ethics Adviser asked questions, in his written submission to the LC Committee, about a Member choosing to make records of an investigation public without a recommendation of the Compliance Officer and a resolution of the House, raising doubts about whether the publication would be covered by parliamentary privilege.</p> <p>Hence, the LC Committee considered that to avoid any risk to Members, something should be included in clause 7 about exactly how a Member is to publish records in such a case (pp51-53).</p>

Recommendation 15 of the LC report also relates to records and states "That in circumstances where a more expeditious publication is required due to a long break between sittings, the Privileges Committee be empowered to publish such records following a recommendation from the Compliance Officer".

The LC Committee stated that this recommendation was in response to concerns that there may be a need for timely publication sometimes e.g. in a scenario where an initial complaint is published and a Member is later cleared of fault. In such circumstances, the LC Committee found that there needs to be a process whereby the Privileges Committee can publish out of session if, in its view, it should not wait until the House sits (pp53-54).

Hence, according to the LC Committee proposal, the revised resolution, clause 7, would read: "The Compliance Officer shall be required to keep records of advice given and the factual information upon which it is based, complaints received, and investigations. The records of the Compliance Officer are to be regarded as records of the House and are not to be made public without the prior approval of the Compliance Officer and resolution of the House, except for the referral of information between the Compliance Officer and other relevant authorities in accordance with the protocol to be developed in accordance with clause 5(a), or where a member requests the records be made public.

"A member requesting the records be made public should present the records to the Clerk to be tabled in the House at the next sitting. During an extended break in sittings the Privileges Committee is empowered to publish records of the Compliance Officer, on the recommendation of the Officer that expeditious publication is required" (pp58-59, emphasis added).

<p>LA Committee recommendation 37: That the Independent Complaints Officer be required to table in the House quarterly reports that contain general, de-identified information about complaints dealt with under the Independent Complaints Officer system including:</p> <ul style="list-style-type: none"> • the number and types of complaints received • the number of investigations undertaken • the number of matters found by an investigator to be unsustainable • the number of matters involving breaches that were dealt with via the rectification procedure, and the rectification action that was taken for these matters (e.g. repayments) • the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, and that were reported to the Assembly Committee but not to the House • the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, that were reported to the Assembly Committee and to the House • the results of matters reported to the House i.e. type of sanctions imposed. 	<p>The LA and LC Committee positions on the routine reports of the Officer are inconsistent.</p> <p>The LC Committee has opted for no change to Clause 8 of the original resolution (p59), which requires annual reports: “In addition to reports on investigations, the Compliance Officer shall be required to report to the Parliament annually on the performance of his or her functions including the number of members who sought his or her advice, the number and types of complaints received and the number of investigations undertaken and the findings of those investigations. All reports from the Compliance Officer are to be tabled by the Speaker on the next sitting day after receipt”.</p> <p>In contrast, the LA Committee has opted for <u>quarterly</u> reports and requires more information that is to be included in those reports (recommendation 37 and revised resolution, clause 7, pp80-81).</p>
<p>LA Committee recommendation 38: That each calendar year the Assembly Committee meet with:</p> <ul style="list-style-type: none"> • the Independent Complaints Officer • any persons retained from the Panel to conduct investigations of complaints in that calendar year. 	<p>The LA and LC Committee positions with regard to annual meetings with the Officer are consistent.</p> <p>Neither Committee has raised any objection to the relevant Committee meeting with the Officer as per Clause 9 of the original resolution though the LA Committee has also recommended that the LA Committee meet annually with any member of the Panel who has conducted an investigation under the Independent Complaints Officer system in that calendar year.</p>
<p>LA Committee Finding 3: That on receiving a report from the Assembly Committee, arising from an investigation under the Independent Complaints Officer system, which details Member</p>	<p>Sanctions are a matter for the LA and LC Committees to consider further but it is not necessary to include this matter as part of the</p>

<p>misconduct, it would be open to the House to impose sanctions on the Member of a self-protective nature including:</p> <ul style="list-style-type: none"> • seeking an apology from the Member • requiring the Member to provide an explanation at the Bar of the House • admonishing or reprimanding the Member • suspending the Member from the service of the House, depending on the context. <p>LA Committee Finding 4: There may also be some scope for financial penalties in support of the operation of the statutory scheme. For example, it may be possible for amendments to be made to the <i>Parliamentary Remuneration Act 1989</i> so that Members who have breached requirements around entitlements – and who have been required by the Independent Complaints Officer or a member of the Panel to repay monies – can be required to pay a small loading e.g. linked to the consumer price index.</p>	<p>resolution for the establishment of the Officer (and neither Committee has recommended otherwise).</p> <p>In its report, the LC Committee does not comment on the type of sanctions that could be imposed by the House. However, the LC Committee does discuss sanctions a little when commenting on reporting to the House.</p> <p>The LC Committee appears to envisage at page 50 that the Compliance Officer could recommend sanctions to the oversight committee in appropriate cases whilst noting that requiring such recommendations to go through the oversight committee with its experience in such matters (rather than direct to the House) would be beneficial.</p>
<p>LA Committee recommendation 39: That the Independent Complaints Officer system be thoroughly costed prior to its establishment.</p>	<p>The LC Committee does not include a specific recommendation regarding costing in its report. However, it did not recommend any amendment to clause 5(e) of the original resolution, as far as it requires the Officer to operate within budget in engaging expert assistance (p58).</p>
<p>LA Committee recommendation 40: That the Assembly Committee be required to review the Independent Complaints Officer system within 12 months of the establishment of the Independent Complaints Officer position, in consultation with key stakeholders. The review should examine how the system is operating in practice and whether any changes are needed, and in particular:</p> <ul style="list-style-type: none"> • the confidentiality provisions applying in respect of complaints and investigations under the system • the timeliness of complaints assessments and investigations conducted under the system. 	<p>The LA and LC Committee positions on this point are not incompatible.</p> <p>There is no <u>recommendation</u> in the LC Committee report concerning the LC Committee reviewing the Compliance Officer scheme, and nothing in its revised resolution about this.</p> <p>However, the LC Committee does mention on page 50 of its report the possibility of a review of the resolution for a Compliance Officer following the initial period of its operation.</p>

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<p>LA Committee recommendation 41: That the Assembly Committee also be required to review the Independent Complaints Officer system once every parliamentary term, in consultation with key stakeholders, to examine how it is operating in practice and whether any changes are needed.</p>	<p>The LA Committee proposes that its revised Clause 9 (pp84&85) implement its recommendations 40 and 41 for reviews.</p>
<p>LA Committee Finding 5: The resolution for the proposed Compliance Officer raises questions around confidentiality, protection against defamation and parliamentary privilege. Some of these matters necessitate appropriate safeguards within any independent complaint handling mechanism that is established, to provide confidentiality for a complainant, and to provide for the appropriate use of information supplied for specific purposes. For example, conducting investigations into allegations and accounting for complaints officer activities. The question of how the work of an Independent Complaints Officer and the handling of any records or information held or obtained by him or her, is to be balanced against parliamentary privilege is a matter that will require detailed review during the implementation of any independent complaint handling mechanism. Consequently, questions concerning parliamentary privilege are matters for the Assembly Committee to examine in light of input from the Independent Complaints Officer and consultation with external bodies on possible protocols and memoranda of understanding, consistent with agreements currently in place with bodies such as the Independent Commission Against Corruption (‘the ICAC’) and the NSW Police Force. The Assembly Committee notes that this is an area it currently has under review as part of its Inquiry into the Adequacy of Current Procedures to Protect Parliamentary Privilege in Circumstances where Law Enforcement and Investigative Bodies seek to use Coercive, Intrusive and Covert Investigative Powers.</p> <p>LA Committee Finding 6: The Independent Complaints Officer should not provide complaint handling records to the ICAC and the</p>	<p>Both Committees appear to agree that parliamentary privilege and the interaction between the officer and the ICAC would be significant issues in developing the investigations protocol envisaged by clause 5(a) of the original resolution.</p> <p>However, on specific issues there are some differences, at least so far as the main focus is concerned. The LC Committee has noted that “There is a very strong need for the Compliance Officer to hold discussions with the ICAC during the development of an investigations protocol. A memorandum of understanding would be an important outcome from these negotiations... <u>a notification process when an investigation is to be pursued by the Compliance Officer could form part of this MoU</u>” (p37 – emphasis added).</p> <p>LC Committee recommendation 8 is “That as part of the development of an investigation protocol the Compliance Officer prepare a draft Memorandum of Understanding with the ICAC including a notification process”.</p> <p>In contrast, the LA Committee report <u>does not contain a recommendation that the ICAC be notified when the Compliance Officer is to pursue an investigation. Its focus in finding 6 is that the Officer should not hand over records to the ICAC</u> i.e. records obtained under the Officer’s scheme, a different scheme from the one established under the <i>Independent Commission Against Corruption Act 1988</i>.</p> <p>On parliamentary privilege specifically – and as noted earlier in discussion of LA Committee recommendation 36 – recommendation 14 of the LC Committee report is “That the following words be added</p>

<p>ICAC should not 'take over' complaint investigations that the Independent Complaints Officer has commenced.</p> <p>Where the Independent Complaints Officer has concerns that a complaint to him or her may potentially involve corrupt conduct, he or she should cease the complaint investigation and invite the complainant to raise the matter with the ICAC.</p> <p>The Independent Complaints Officer can also determine to draw back from the investigation of a complaint and make a notification to the ICAC but should not hand over papers and records obtained under the Independent Complaints Officer system.</p>	<p>to the end of Clause 7: 'A member requesting the records be made public should present the records to the Clerk, to be tabled in the House at the next sitting'".</p> <p>This is because the Ethics Adviser asked questions, in his written submission to the LC Committee, about a Member choosing to make records of an investigation public without a recommendation of the Compliance Officer and a resolution of the House, raising doubts about whether the publication would be covered by parliamentary privilege. Hence, the LC Committee considered that to avoid any risk to Members, something should be included in clause 7 of the resolution about exactly how a Member is to publish records in such a case (pp51-53).</p> <p>As already noted, the LA Committee has made no recommendation in this area.</p>
<p>LA Committee recommendation 42: That the House consider changes to the composition of the Assembly Committee so that it comprises:</p> <ul style="list-style-type: none"> • five Government Members • two Opposition Members • one Cross Bench Member. 	<p>This recommendation is not applicable for the LC Committee.</p>
<p>LC Recommendation 4: That the Compliance Officer, once appointed, liaise with the Audit Office and Parliament's internal audit provider to establish a cooperative working relationship in regard to the monitoring of entitlements.</p>	<p>The LA Committee has not made any recommendations in this area.</p> <p>However, this LC Committee recommendation does not appear to affect the content of the resolution for the establishment of a Compliance Officer/Independent Complaints Officer.</p>
<p>LC Recommendation 9: That:</p> <ol style="list-style-type: none"> a. the Compliance Officer be nominated as a 'disclosure officer' under the Parliament's public interest disclosure policies, b. processes be developed to ensure that the Compliance Officer properly assesses complaints to ensure that they are public interest disclosures, and 	<p>The LA Committee has not made a recommendation in this area.</p> <p>However, this LC Committee recommendation does not appear to affect the content of the resolution for the establishment of a Compliance Officer /Independent Complaints Officer. It appears to</p>

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<p>c. arrangements be put in place to ensure that, in cases where a complaint is or might be a public interest disclosure, it is dealt with in compliance with the <i>Public Interest Disclosures Act 1994</i> and expected standards of practice including the Parliament's public interest disclosure policies.</p>	<p>be largely a matter for the internal administration of the Parliament and the investigation protocol that is to be developed by the Officer.</p> <p><u>Background to the recommendation:</u></p> <p>The LC Committee makes a recommendation (recommendation 9) to address the potential overlap between the Compliance Officer's proposed role and existing laws concerning the protection of disclosures about the wrongdoing of public officials pursuant to the <i>Public Interest Disclosures Act 1994</i>.</p> <p>The LC Committee notes that the Parliament's public interest disclosure policies currently require that reports of wrongdoing by Members be made to a 'principal officer' i.e. a Presiding Officer or Department Head to attract the protections of the <i>Public Interest Disclosures Act 1994</i>. However, if a Compliance Officer were established, complaints about Members' conduct would be more likely to go to the Compliance Officer.</p> <p>Therefore, the LC Committee supported a suggestion by the NSW Ombudsman for the Compliance Officer to be nominated as a 'disclosure officer' in the Parliament's public interest disclosure policies. This would mean that a report of misconduct made in accordance with the <i>Protected Disclosures Act 1994</i> would attract the protections of the Act if it were made to either a 'principal officer' or to the Compliance Officer and referred to a 'principal officer'.</p> <p>The Compliance Officer would have the functions of a 'disclosure officer' set out in the policy – receiving a report of wrongdoing, carrying out a preliminary assessment and forwarding the report to the 'principal officer' for full assessment.</p> <p>The LC Committee also agreed with the Ombudsman that procedures would need to be developed so that the Compliance Officer complies</p>
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	with relevant requirements and standards relating to public interest disclosures (page 40).
LC Committee Recommendation 12: That the Privileges Committees in both Houses attempt to expeditiously find agreement on a form of the resolution acceptable to the members they represent and only as a last resort should the Legislative Council establish a Compliance Officer solely under its own procedures.	It is clear now that the Committees have tabled reports, that both Committees support the establishment of a Compliance Officer/Independent Complaints Officer type position. However, as noted, there are various differences in the details of the framework that each Committee has recommended.

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