

Ref: A6075361
19 June 2024

Mr Steven Reynolds
Deputy Clerk
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Re: Draft Constitution (Disclosures by Members) Regulation 2024

Dear Mr Reynolds,

Thank you for your email of 20 May 2024 to The Cabinet Office regarding the Privileges Committee's inquiry into the draft Constitution (Disclosures by Members) Regulation 2024 (**Draft Regulation**).

I **enclose** responses to the Privileges Committee's questions, which I hope are of assistance to the Committee.

Please contact Matt Richards and Mark Hare, A/Deputy Secretary, General Counsel on _____ or _____ should the Privileges Committee have any further questions or require any further assistance regarding the Draft Regulation.

Sincerely,

Kate Boyd PSM
Secretary
Encl.

Responses to questions

Legislative Council Privileges Committee

Introduction

The *Constitution Act 1902 (Constitution Act)* provides for the making of regulations, currently the *Constitution (Disclosures by Members) Regulation 1983 (Current Regulation)*, requiring Members of Parliament to disclose certain pecuniary and other interests for inclusion on Registers of Disclosure maintained by the Clerks of Parliament.

The Independent Commission Against Corruption (ICAC) considered the current arrangements for the disclosure of pecuniary and other interests by Members in the July 2022 report entitled *Investigation into the conduct of the local member for Drummoyne*, following an investigation known as ‘Operation Witney’ (**Operation Witney Report**).

The Operation Witney Report noted that the policy intent of the Registers of Disclosure is to:

- act as an accountability measure that requires a person holding a position of public trust to reveal their interests rather than conceal them
- assist members in recognising and avoiding any potential conflicts of interest that could arise between their public role and their private interests
- provide transparency to assist others in determining whether a Member is potentially conflicted.

The ICAC identified what it described in the Operation Witney Report as the following weaknesses and shortcomings in the current disclosure system:

- there are limited disclosure requirements where Members use family trusts to hold investments
- in comparison with other Australian jurisdictions, the NSW Members disclosure system ‘does not reflect best practice and community expectations, and provides opportunities for hidden interests’
- the existing conflict of interest regime for Members relies heavily on self-regulation and lacks effective mechanisms to monitor and enforce its requirements.

The ICAC made two recommendations for the reform of the Current Regulation. Recommendation 1 of the Operation Witney Report was:

That the NSW Government, in consultation with NSW Parliament’s Legislative Assembly Privilege and Ethics Committee and Legislative Council Privileges Committee (“NSW Parliament’s designated committees”), amends the *Constitution (Disclosures by Members) Regulation 1983* to require:

- the details of interests in trusts, including discretionary trusts and self-managed superannuation funds, to be disclosed as a standalone item
- the details of real property held by discretionary trusts, where a member of Parliament is a potential beneficiary, to be disclosed
- the details of the interests of immediate family members to be disclosed (noting the option to limit access to certain information for privacy reasons)
- the dispositions of interests to family members or other associates to be disclosed
- ongoing (within 28 days) requirements to update disclosures of interests, including for members leaving Parliament

- electronic databases to improve transparency of the registers.

Recommendation 4 of the Operation Witney Report was:

That the NSW Government, in consultation with NSW Parliament's designated committees, amends the Constitution (Disclosures by Members) Regulation 1983 to provide for the mandatory registration of conflicts of interest by members of Parliament via the creation of a register for this purpose (noting the option to limit access to certain information for privacy reasons).

The NSW Government has prepared the draft Constitution (Disclosures by Members) Regulation 2024 (**Draft Regulation**) that, if made, will repeal the Current Regulation and make a new regulation prescribing the disclosure of pecuniary interests and other matters by Members and implement recommendations 1 and 4 of the Operation Witney Report.

The Constitution Act requires consultation with designated committees of both Houses of Parliament before a regulation regarding disclosures by Members may be made.

The Government tabled the Draft Regulation in Parliament on 8 February 2024 and moved motions referring the Draft Regulation to the Legislative Council Privileges Committee and the Legislative Assembly Parliamentary Privilege and Ethics Committee (**Parliamentary Committees**) for inquiry and report by 2 September 2024.

The Government will carefully consider any recommendations by the Parliamentary Committees in their inquiries into the Draft Regulation.

The Government has also invited the Chief Commissioner of the ICAC to provide feedback on the Draft Regulation.

The Cabinet Office (**TCO**) wishes to thank the Legislative Council Privileges Committee (**Committee**) for its engagement on this important integrity reform. TCO remains available to assist the Committee.

Answers to questions from the Committee received on 20 May 2024

QUESTION

Best practice in other jurisdictions

1. In preparing the draft regulation did TCO use aspects of any other Australian jurisdiction's disclosure regimes, and if so, which were used as models? If the new regulation was not based on a specific model, did the government undertake consultation with jurisdictions with similar regimes in drafting the regulation?

ANSWER

The Draft Regulation, if made, will implement recommendations 1 and 4 of the Operation Witney Report. Those recommendations were made by the ICAC after considering the arrangements for the disclosure of interests by Members in other Australian jurisdictions, and in particular, the Commonwealth (noting that different arrangements apply to the House of Representatives and the Senate), Queensland, South Australia and Victoria.

The Government did not consult with other jurisdictions in preparing the Draft Regulation, however the Committee may wish to consider consulting with the relevant parliamentary ethics committees in these jurisdictions regarding their experience of the relevant arrangements.

QUESTIONGuidelines

2. The committee understands the draft regulation allows the Clerk to produce guidelines. Given the potential consequences of a breach of the regulation, including ICAC proceedings or a members' seat being declared vacant, will the government also be publishing its own guidelines or issue any statement to aid in interpretation when the final regulation is made?

ANSWER

Whether a Member has wilfully contravened a regulation made pursuant to section 14A of the Constitution Act requiring the disclosure of pecuniary interests or other matters by Members is a matter for the relevant House.

The Draft Regulation does not currently make provision for the Clerks (or a Minister) to publish guidelines. The Committee can consider whether it recommends that the Clerks or a Parliamentary Committee be given authority in the regulation to issue guidelines in relation to matters dealt with in the regulation, that are not inconsistent with the regulation.

Clause 4 of the Draft Regulation provides that a relevant portion of a form required to be completed by a Member (referring to the interest disclosure return form at Schedule 1 and the annual declaration form at Schedule 2) must be completed in accordance with directions specified in the form, and any guidelines issued or approved from time to time by the appropriate parliamentary committee for the Member (the Committee or the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics). This is consistent with section 3A of the Current Regulation.

QUESTIONFamily interests

3. Under the current proposed regulation, how can the privacy of immediate family members, particularly children, be protected in light of s14A (1A) of the Constitution Act? Is there any scope under the current draft regulation for details about children to remain confidential to either the Office of the Clerk or The Cabinet Office and not made available to other members of the Legislative Council?

ANSWER

The registers of disclosures under the Current Regulation are accessible to the public and Members.

As the Committee has identified, subsection 14A(1A) of the Constitution Act requires that the registers of disclosure be accessible by Members of the public subject to any limitations prescribed by the regulations to protect the privacy of persons other than Members, or the safety of a person or class of persons.

Consistent with the requirements of subsection 14A(1A), clause 25 of the Draft Regulation, if made, would provide that a Clerk can exclude information from the public copy of the registers of disclosure to protect the privacy of persons other than Members or the safety of a person.

Clause 26 of the Draft Regulation, providing that a Clerk is to make searchable copies of the complete register available for inspection by Members or an officer of the ICAC, is currently drafted in such a way as to not diminish (compared with the Current Regulation) the access of Members and officers of the ICAC to the registers of disclosure, given the proposed ability of a Clerk to exclude information from the copy of the register of disclosure publicly available on the NSW Parliament website under clause 25(2).

The Commonwealth Senate provides that the registerable interests of a Senator's spouse, partner or any dependent children are confidential to the Committee of Senators' Interests, and in Queensland the Register of Related Persons' Interests may only be inspected by certain Members (the leader of a political party and members of the Ethics committee) and integrity agencies. Other jurisdictions that require Members of Parliament to disclose the interests of immediate family members, the Commonwealth House of Representatives, South Australia, and Tasmania (which requires the disclosure of the interests of spouses and not children), do not restrict access to disclosures in this way. The Committee may wish to consult with relevant parliamentary ethics committees in these jurisdictions to seek their experiences regarding these arrangements.

It would be open to the Committee to recommend amendments to the Draft Regulation to better protect the privacy of immediate family members, noting that amendment of subsection 14A(1A) of the Constitution Act may be required.

QUESTIONFamily interests

4. Will a member be notified if another member or ICAC has accessed their confidential information? If not does this need to be put into the regulation or can it be a design feature of the searchable electronic register in the absence of reference to it in the regulation?

ANSWER

The Regulation does not currently make provision for a Member to be notified if another member or the ICAC has accessed the complete register.

TCO notes that:

- the registers of disclosure maintained by the Clerks under the Current Regulation are typically tabled as a compilation of returns by all Members of the relevant House. Depending on how the registers of disclosure are maintained by the Clerks under the provisions of the Draft Regulation should it be made, it may not be possible to identify which disclosures were accessed by a Member
- there may be policy considerations against notifying a Member that the ICAC has accessed their disclosures and potentially alerting the Member to an ICAC investigation.

QUESTIONFamily interests

5. In the event that a person who would be considered an immediate family member under the regulation does not provide certain information or cannot be contacted, can you outline what steps would a member be required to undertake to demonstrate they do not 'wilfully contravene' the regulation?
6. What evidence will members require to demonstrate steps taken to obtain information from an immediate family member, and will they be required to certify this and to whom? What will be the status of this information?

ANSWER

It is a matter for the Houses of Parliament to determine if a Member has wilfully contravened the disclosure obligations. The relevant circumstances of the failure to comply with disclosure obligations would be relevant to any consideration by the Houses.

Should the immediate family member of a Member refuse to provide the Member with information about their relevant interests, it would be prudent for the Member to keep records of their attempts to obtain the information.

What would constitute reasonable steps will differ in each circumstance, however examples could include:

- providing the immediate family member with written correspondence requesting the disclosure of interests, and keeping a copy of the correspondence and any reply
- conducting searches of relevant property and other registers available to the Member
- disclosing any relevant interests of the immediate family member that are known or suspected by the Member.

QUESTIONFamily interests

7. The definition of 'child' covered by the regulation is quite broad, covering children under the age of 18, those living with the member, and dependent children. How is 'dependant child' defined? Is there any scope to limit what a dependent child is based on degree of dependency? Is there any scope to limit other categories, such as limiting those living with a member by age, to allow for circumstances where adult children move back home?
8. If a child under the age of 18 is no longer living with a member, are members still required to disclose their interests? Is there any scope to modify the definition of child so that a member is only required to disclose their interests when all three conditions (age, residency and dependency) are satisfied?

ANSWER

As the Committee has identified, the Draft Regulation defines 'immediate family member' in relation to a Member to include a child of the Member or of the Member's spouse or de facto partner if the child:

- is less than 18 years of age or
- is a dependant of the Member or the Member's spouse or de facto partner or
- resides with the Member or the Member's spouse or de facto partner.

The Draft Regulation does not define when a child is a 'dependant', however the concept arises in multiple contexts, including, for example, social security, worker's compensation and succession, and is typically interpreted as a child being wholly or partly dependent for financial support. For example, an unemployed adult may be a dependant of their parents, even if they no longer reside with them.

The definition of 'immediate family member' proposed in the Draft Regulation is consistent with the NSW Ministerial Code of Conduct (**Ministerial Code**), which is an Appendix to the *Independent Commission Against Corruption Regulation 2017*. The policy intent is to recognise that, in many circumstances, an immediate family member's interests will be closely connected with the interests of the Member.

The Committee may wish to consider the definitions that the Commonwealth, Queensland, and South Australia have adopted in relevant resolutions and legislation for the purpose of determining who is a family member or related person for whom a Member is required to disclose relevant interests. The Committee may also wish to consider the arrangements in Tasmania, where Members are required to disclose interests of spouses, but not children.

QUESTIONConflicts of interest

9. Please provide more information on what conflicts of interest would be required to be disclosed under the proposed regulation. Would perceived or only actual conflicts need to be disclosed? How does this differ from current obligations to disclose conflicts of interest under the Members' Code of Conduct?

ANSWER

The Legislative Council Members' Code of Conduct and the Legislative Assembly Code of Conduct for Members require Members to take reasonable steps to:

- avoid, resolve or disclose any conflict between their private interests and the public interest
- draw attention to any conflicts in any proceeding of the House or its Committees, and in any communications with Ministers, Members, public officials or public office holders.

The *Annotated Code of Conduct for Members a guide for members of NSW Parliament* (January 2024) published by the ICAC (**ICAC Annotated Code of Conduct**) advises Members to be cautious regarding any conflict between their private or personal interests and the public interest and to err on the side of caution by disclosing private or personal interests. The ICAC Annotated Code of Conduct advises that an objective test of the reasonable person, a hypothetical, fair-minded and informed observer, is used in determining whether there is a conflict of interest.

In its Operation Witney Report, the ICAC found that the existing conflict of interest regime for Members relies heavily on self-regulation and lacks effective mechanisms to monitor and enforce its requirements. Recommendation 4 of the Operation Witney report was that the Current Regulation be amended to provide for the mandatory registration of conflicts of interests by Member via a register.

Clause 15 of the Draft Regulation would implement recommendation 4 by requiring Members to disclose all conflicts of interest, being a conflict between the public duty and the private interests of the Member in which the Member's private interest could objectively have the potential to influence the performance of the Member's public duty.

The ICAC recommended at p 179 of the Operation Witney Report that the separate conflict of interest disclosure requirements for Members and Ministers and Parliamentary Secretaries 'have an internal consistency about core aspects'. The drafting of clause 15 of the Draft Regulation is based on the drafting of subsection 7(3) of the Ministerial Code, which provides that a 'conflict of interest arises in relation to a Minister if there is a conflict between the public duty and the private interest of the Minister, in which the Minister's private interest could objectively have the potential to influence the performance of their public duty'.

It is intended that:

- Members disclose all conflicts of interest arising in relation to a Member's public duty as a Member (and not as a Minister or Parliamentary Secretary) under the Draft Regulation (noting that, in respect of Ministers and Parliamentary Secretaries, these disclosures will continue to be disclosed to the Premier under Part 2 of the Schedule to the Ministerial Code)
- Ministers and Parliamentary Secretaries continue to disclose all conflicts of interest as required by the Ministerial Code.

The Committee may wish to also consider recommendation 3 of the Operation Witney Report, which provides:

That NSW Parliament's designated committees include a clear, consistent and comprehensive conflict of interest definition in the Code of Conduct for Members. This review should include a consideration of the relevant definitions in the Ministerial Code of Conduct and any

opportunities for achieving a consistent approach in regard to avoiding, recognising, disclosing and managing conflicts of interest.

QUESTION

Trusts

10. Will industry superannuation funds be required to be disclosed under the proposed regulation? If so, what details of a members' interests in an industry superannuation would be required?
11. Can you confirm that for self-managed super funds a member or their immediate family member would need to disclose the specific shares held by the fund?

ANSWER

Clause 11 of the Draft Regulation proposes requiring Members to disclose each trust in which the Member or an immediate family member of the Member:

- has a beneficial interest, including a mere expectancy as a beneficiary of a discretionary trust, or
- is a trustee.

Subclause 11(4) provides that, to avoid doubt, trusts that are superannuation funds, whether public or self-managed, and listed investment trusts must be disclosed under clause 11.

Clause 11(2) provides that the following information must be disclosed about the trust:

- the name of the trust
- a description of the activities of the trust
- the nature of the interest the Member or immediate family member has in the trust
- the interests held by the trust, including interests in real property and investments.

Although what would constitute sufficient disclosure under the Draft Regulation is a matter for the relevant House, and could potentially be the subject of guidelines issued by the Committee or the Legislative Assembly Parliamentary Privilege and Ethics Committee, TCO contemplates that Members would disclose:

- the general interests held by an industry superannuation fund (for example, 'diversified Australian assets')
- the specific shares and other interests held by a self-managed superannuation fund.