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The Hon Peter Primrose MLC
Chair
Legislative Council Privileges Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

14 July 2006

Dear Mr Primrose

DRAFT AMENDMENTS TO MEMBERS' CODE OF CONDUCT

I refer to your request of 30 June 2006 for comments on the proposed amendments to the Code of Conduct.

Please find attached my submission.

I have also written in similar terms to the Chairman of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.

Yours sincerely

R J Sendt
Auditor-General

Encl:

DRAFT AMENDMENTS TO MEMBERS' CODE OF CONDUCT

SUBMISSION BY THE NSW AUDITOR-GENERAL

INTRODUCTION TO THE CODE

The introductory words to the Code ("This House adopts") could be read that the *only* reason for adopting the Code is for the purposes of the Independent Commission Against Corruption Act ("the ICAC Act").

This could lead to an inference that members only believe in having a code of conduct to satisfy a legal purpose.

Further, because the ICAC Act defines corrupt conduct as only that involving a "*substantial breach* of [the] code of conduct" (emphasis added), it could be inferred that a breach is not important unless it satisfies that higher (ICAC Act) threshold.

Suggestion:

Delete the reference to the ICAC Act from the introduction. Instead, insert a new paragraph 2 to the effect of:

"This Code of Conduct is also adopted for the purposes of Section 9 of the Independent Commission Against Corruption Act 1988".

PREAMBLE

The second dot-point of the Preamble could be read as implying that the re-election of a Member alleged to have breached the Code, means that the electorate has arbitrated favourably on the issue. This would be an unfortunate implication. It is also naïve to suggest that Members' personal behaviour is the only (or even a major) factor influencing voter intentions.

Further, the first sentence of the third dot-point says that "Members of Parliament accordingly acknowledge their responsibility to maintain the public trust placed on them ..." The use of the word "accordingly" (which must refer back to the previous dot-point) could imply that the Members' acknowledgement is only because they could be dismissed at an election.

The proposed fourth dot-point is a far better expression than the existing second dot-point.

Suggestion:

Delete the second dot-point and insert in its place the proposed fourth dot-point.

BRIBERY

There are three changes proposed to this section.

The first proposal seeks to add "knowingly or improperly" to the ban on Members promoting "any matter, vote ..." where this is done "in return for any remuneration, fee ..."

I do not believe these words should be added.

Firstly, if a Member has "promote[d] any matter ... *in return for* any remuneration, fee ..." [emphasis added] that clearly comprehends that it was done "knowingly". If the Member did not know of the remuneration, etc, then the promotion could not have been done "in return for" that remuneration. Hence, "unknowingly" is unnecessary.

Secondly, it is difficult to envisage a circumstance where it would *not* be improper for a Member to promote a matter in return for any remuneration, etc. If there are circumstances envisaged, then it would be far preferable to spell those out as an exception, rather than risk clouding the intent of the provision.

The second proposal seeks to expand or clarify the words "direct or indirect" in relation to the receipt of remuneration, etc, by inserting after "the Member" the words "any member of his or her family, a business associate of the Member or any other person or entity from whom the Member expects to receive a financial benefit ...".

While well-intentioned, the words inserted are confusing and possibly ambiguous. For example, it is not clear whether the words "from whom the Member expects to receive a financial benefit" qualify *each* of the three preceding classes of persons (family member, business associate, other person) or only the last two. If the words qualify family members, then any remuneration, etc, paid to them would only constitute a breach of the Code if the Member then received a financial benefit from that family member. This is not, I assume, the intention.

The proposed words also introduce the term "financial benefit" and it is not clear if they are to have a different meaning to "remuneration, fee, payment or reward".

Suggestion:

Leave the paragraph as it stands. Insert a new paragraph that says:

"An indirect benefit might arise in a number of ways, including:

- (a) a member of the Members' family has received, or receiving or expects to receive a benefit
- (b) a business associate of the Member or the person or entity receives a benefit, and the Member receives or expects to receive a benefit in turn".

The third proposal adds a second paragraph to the Bribery section, to the effect that a breach of the prohibition on bribery is a "serious breach" of the Code.

While I can understand the basis for the provision, its effect is not clear.

Firstly, no other section of the Code contains such wording. This could imply that breaches of any other section are not regarded as serious.

Secondly, the ICAC Act defines corrupt conduct as including a *substantial breach* of the Code.

Suggestion:

If a breach of the bribery provision is to be distinguished from other breaches, use the word "substantial" rather than "serious".

The relationship between the Bribery and Gift sections is unclear. It would appear that a gift would not be captured by the phrase "remuneration, fee payment or reward". This view is supported by the second proposed addition (see above), which appears to summarise this class of benefits as "financial benefits".

It does not seem appropriate to limit bribery to financial benefits when a non-monetary gift could equally be made to secure a Member's promotion of an issue. I note that the UK House of Commons' resolution of 6 November 1995 (prohibiting paid advocacy) uses the phrase "remuneration, fee payment or reward or *benefit in kind*" [emphasis added].

Suggestion:

Either:

- (i) add "or benefit in kind" after the word "reward" in the Bribery section or
- (ii) insert a new paragraph in the Gifts section to the effect that a gift received in the same circumstances as "remuneration" in the Bribery section would also constitute bribery.

The first option is preferable.

GIFTS

Because of the linkage of the Code with the ICAC Act, using the word "corruptly" in paragraph (b) may be inappropriate. Only a "substantial breach" of the Code could be regarded as corrupt.

Suggestion:

Replace "corruptly" with "improperly".

While paragraph (c) could be read as a simple statement of fact, it could also be read that the prohibition in paragraph (b) does not apply to political contributions under the *Election Funding Act 1981*. If this is the intention, it should be clearly stated; if it is not, it should also be clearly stated.

Suggestion:

Delete paragraph (c) and add to the end of paragraph (b) "This applies equally to political contributions under part 6 of the Election Funding Act 1981".

DUTIES AS A MEMBER OF PARLIAMENT

The wording of this heading does not relate well to the content.

Suggestion:

Re-word heading to "Participation in Political Party Activities".

The paragraph as written, gives a blanket exception to party political activities. This should not be the case.

Suggestion:

Re-word the second sentence to say "... participation in their legitimate activities is not, in itself, prohibited by this Code".

SECONDARY EMPLOYMENT OR ENGAGEMENTS

The proposed wording for this section does not set out what conduct the section is seeking to encourage or prohibit. Is this section intended to avoid (or require disclosure of) a potential conflict of interest? Is it intended to limit the potential for paid advocacy?

In the absence of such a values-based statement, the section is simply a rule that should be followed rather than a code to be adhered to.

Suggestion:

The Committee should consider the intended outcome of the proposed section and re-word accordingly.