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**INDEPENDENT COMMISSION AGAINST
CORRUPTION**

**REVIEW OF THE CODE OF CONDUCT FOR
MEMBERS OF PARLIAMENT**

SUBMISSION

TO THE

LEGISLATIVE COUNCIL PRIVILEGES COMMITTEE

AND

**LEGISLATIVE ASSEMBLY PRIVILEGES AND ETHICS
COMMITTEE**

RECEIVED

13 JUL 2010

**LEGISLATIVE
COUNCIL**

JULY 2010

SUMMARY OF RECOMMENDATIONS

Recommendation 1

The Commission recommends that the term "private financial interests" in clause 1(a) be clarified so that it is made clear these include the financial interests of family (including de facto partners), friends or associates whose financial interests may give rise to a conflict of interest for Members by virtue of their relationship.

Recommendation 2

The Commission recommends that clause 1 of the Code be amended to require Members to take reasonable steps to declare any other material benefit which a Member receives which might reasonably be thought by others to influence his or her actions, speeches, or votes in Parliament, or actions taken in his or her capacity as a Member of Parliament, or which the Member considers might be thought by others to influence his or her actions in a similar manner, even though the Member receives no financial benefit.

Recommendation 3

The Commission recommends that clause 1(b) of the Code be amended to make it clear that disclosure of a conflict of interest when speaking on a matter in the House or a Committee should occur in the House or Committee before the Member speaks on the matter.

Recommendation 4

The Commission recommends the heading of clause 2 be changed to "Paid advocacy" or something similar.

Recommendation 5

The Commission recommends that clause 2 be amended to extend the prohibition on paid advocacy by Members to the promotion of matters to public officials outside the Parliament or its Committees and that the *Constitution (Disclosure by Members) Regulation 1983* be amended to the same purpose.

Recommendation 6

The Commission recommends that the *Constitution (Disclosure by Members) Regulation 1983* be amended so that it is consistent with the clause 2 of the Code of Conduct (as amended in accordance with Recommendations 4 and 5).

Recommendation 7

The Commission recommends widening the scope of clause 5 to include misuse of confidential information generally.

Recommendation 8

The Commission recommends making direct reference in clause 6 to the relevant definitions of what constitutes party activities as set out in the relevant Parliamentary Remuneration Tribunal determinations.

Recommendation 9

The Commission recommends that clause 7 of the Code be amended to require Members to make the disclosures referred to in that clause when voting on a matter as well as when participating in a debate on the matter, unless the disclosure has previously been made in the pecuniary interest register.

Recommendation 10

The Commission recommends that the Code be amended by including a new provision that Members are not to vote on matters where they have a financial conflict of interest.

Recommendation 11

The Commission recommends the Code be amended to provide that the Code has continuing effect unless and until amended or rescinded.

Recommendation 12

The Commission recommends a more comprehensive set of broad ethical principles. Consideration could be given, for example, to incorporating the seven principles of public duty defined by Lord Nolan and which appear in the British House of Commons Code of Conduct for Members (selflessness, integrity, objectivity, accountability, openness, honesty and leadership).

Recommendation 13

The Commission recommends including in the Code what sanctions might apply to a Member who breaches the Code.

Recommendation 14

The Commission recommends that the Code be given a more prominent place on the NSW Parliament website.

INTRODUCTION

1. This submission has been prepared by the Independent Commission Against Corruption ("the Commission") in response to an invitation by the Chairs of the Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee which are currently undertaking a review of the Code of Conduct for Members ("the Code").
2. The major role of the Code is to act as a guide for Members' behaviour by setting standards reflecting the community's expectations of the conduct of Members.
3. The Commission's submission concerns clauses 1, 2, 5, 6, and 7 of the Code. The submission also raises a number of other matters for consideration

THE CODE

Clause 1 – the issues

4. The heading of this clause is "Disclosure of conflict of interest". Clause 1(a) of the Code places the emphasis on "private financial interests". The Commission submits that this may be interpreted as excluding two important issues. First, Members may have family (including de facto partners), friends or associates whose financial interests may give rise to a conflict of interest for Members by virtue of their relationship. Secondly, conflicts of interest may not be connected with pecuniary (financial) interests.
5. The Code should make it clear that these issues are included in the requirement to disclose conflicts of interest.
6. The Commission notes that other NSW legislation and other jurisdictions have attempted to address these two issues, for example:
 - a) Under section 443(1) of the *NSW Local Government Act 1993*, pecuniary interests also include those of the person's spouse, de facto partner, relative, a partner or employer of the person, or a company or other body of which the person, or a nominee, partner or employer of the person, is a member.
 - b) The *Model Code of Conduct for Local Councils in NSW* recognises that there are pecuniary and non-pecuniary conflicts of interest.
 - c) The *Guide to the Rules relating to the Conduct of Members* that accompanies the *British House of Commons Code of Conduct for Members of Parliament* requires a Member to include in the Register of Interests any pecuniary interest or other material benefit which a Member receives which might reasonably be thought by others to influence his or her actions, speeches, or votes in Parliament, or actions taken in his or her capacity as a Member of Parliament, or which the Member considers

might be thought by others to influence his or her actions in a similar manner, even though the Member receives no financial benefit.

7. Clause 1(b) of the Code provides that disclosure “may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner”.
8. In its September 2003 report: “Regulation of secondary employment for Members of the NSW Legislative Assembly” the Commission recommended that “A Member should be required to disclose a conflict of interest at the start of any proceedings in Parliament which relate to the interests of any employer, association or client who has employed, or is currently employing, the Member. In developing the detail for the operation of a disclosure-before-proceedings rule, consideration should be given to the experience in the British House of Commons, the Scottish Parliament and the Ontario Legislative Assembly” (recommendation 8).
9. The British House of Commons, the Scottish Parliament and the Ontario Legislative Assembly models discussed in the report require Members not only to disclose interests in a register but to disclose interests prior to proceedings in Parliament where the Member is aware that the proceedings may relate to the interests of their secondary employer or, in some cases, any former secondary employer. The purpose of declaration in the House of Commons is explained in the following way:

The main purpose of declaration of interests is to ensure that fellow Members of the House and the public are made aware, at the appropriate time when a Member is making a speech in the House or in Committee or participating in any other proceedings of the House, of any past, present, or expected future pecuniary interest which might reasonably be thought to be relevant to those proceedings.

The Commission supports this approach.

Clause 1 – recommendations

Recommendation 1

The Commission recommends that the term “private financial interests” in clause 1(a) be amended so that it is made clear these include the financial interests of family (including de facto partners), friends or associates whose financial interests may give rise to a conflict of interest for Members by virtue of their relationship.

Recommendation 2

The Commission recommends that clause 1 of the Code be amended to require Members to take reasonable steps to declare any other material benefit which a Member receives which might reasonably be thought by others to influence his or her actions, speeches, or votes in Parliament, or actions taken in his or her capacity as a Member of Parliament, or which the Member considers might be thought by others to

influence his or her actions in a similar manner, even though the Member receives no financial benefit.

Recommendation 3

The Commission recommends that clause 1(b) of the Code be amended to make it clear that disclosure of a conflict of interest when speaking on a matter in the House or a Committee should occur in the House or Committee before the Member speaks on the matter.

Clause 2 – the issues

10. The heading of this clause is “Bribery”. It is not clear why this heading is used.
11. In NSW bribery remains a common law offence. Part 4A of the *Crimes Act 1900* also covers the giving and receiving of corrupt rewards. The ambit of both extends beyond what is set out under clause 2.
12. Clause 2 is designed to prohibit Members engaging in both “paid advocacy” and “cash for questions”, and to prohibit them casting a vote in return for payment. The clause also prohibits advocacy in return for payment made to family members and other specified persons and entities, rather than directly to a Member.
13. While the use of the heading “Bribery” may have been intended to express disapproval of paid advocacy and cash for questions it potentially introduces confusion. It is possible that a Member might argue that unless a criminal offence of “bribery” is established there is no breach of the clause. It would be appropriate to change the title of clause 2 to reflect more accurately what is prohibited.
14. The general prohibitions on paid advocacy in clause 2 are qualified by the use of the phrase “in the Parliament or its Committees”. This suggests that the Code is not intended to prohibit a Member from promoting a matter in return for receiving any remuneration, fee, payment, reward or benefit of a private nature, if the promotion takes place outside Parliament or its Committees. This ignores the reality that Members can, through their advocacy, affect major decisions involving public interest and amenity and of potential considerable value both to the State and those entities that benefit from those decisions.
15. The Commission does not consider that it is appropriate for Members to accept any “remuneration, fee, payment, reward or benefit of a private nature” in return for using their position to advocate the taking of a particular course of action by public officials. There is a strong perception that a Member who is advocating a position in return for reward is primarily motivated by that reward (or the prospect of the reward) rather than the public interest and as such is not using their position “to advance the common good of the people of New South Wales” (as set out in the Preamble to the Code) but rather to advance their own private interest.

16. The prohibition on paid advocacy should not be restricted to the promotion of matters in the Parliament and its Committees but should extend to the promotion of matters to public officials outside the Parliament or its Committees.

17. The Commission notes however that the *Constitution (Disclosure by Members) Regulation 1983* contemplates that Members may derive income from providing a service arising from or relating to their position as Members. Clause 7A of the Regulation defines such a service to include:
 - a) the provision of public policy advice,
 - b) the development of strategies, or the provision of advice, on the conduct of relations with the Government or Members,
 - c) lobbying the Government or other Members on a matter of concern to the person to whom the service is provided.

18. The Commission notes that any provision in the Code banning paid advocacy needs to be accompanied by amendment to the *Constitution (Disclosure by Members) Regulation 1983*.

Clause 2 - recommendations

Recommendation 4

The Commission recommends the heading of clause 2 be changed to "Paid advocacy" or something similar.

Recommendation 5

The Commission recommends that clause 2 be amended to extend the prohibition on paid advocacy by Members to the promotion of matters to public officials outside the Parliament or its Committees and that the *Constitution (Disclosure by Members) Regulation 1983* be amended to the same purpose.

Recommendation 6

The Commission recommends that the *Constitution (Disclosure by Members) Regulation 1983* be amended so that it is consistent with the clause 2 of the Code of Conduct (as amended in accordance with Recommendations 4 and 5).

Clause 5 – the issue

19. This clause deals with improper use of confidential information for the "private benefit" of the Member or others.

20. In its December 1998 report: "Report on investigation into Parliamentary and Electorate travel: Second Report – analysis of administrative systems and

recommendations for reform” the Commission recommended that “the Ethics Committees of each House should consider the appropriateness of the term “private benefit” used in clause 5 of the Members Code of Conduct and recommend an appropriate amendment to clarify its meaning” (recommendation 54).

21. The Commission’s concern, expressed in its report, was that the test in this clause is whether there is a private benefit for the Member or others. Conceivably, confidential information could be used where it is difficult to substantiate a direct private benefit, such as the leaking of information to discredit a political opponent’s policy proposals, or even an opponent, in an electorate or parliamentary contest. The Code should make it clear that misuse of confidential information in this way would amount to an abuse.

Clause 5 - recommendation

Recommendation 7

The Commission recommends widening the scope of clause 5 to include misuse of confidential information generally.

Clause 6 – the issue

22. In its December 1998 report: “Report on investigation into Parliamentary and Electorate travel: Second Report – analysis of administrative systems and recommendations for reform” the Commission recommended that “the Ethics Committees of each House should consider whether the term “legitimate activities” used in clause 6 of the Members’ Code of Conduct should be amended to define these as activities whose principal purpose is for Parliamentary or electorate benefit” (recommendation 57).
23. The Commission notes that the Parliamentary Remuneration Tribunal has since delineated what party activities do or do not fall within the definition of “Parliamentary activities” for the purpose of use of Parliamentary resources and allowances.

Clause 6 - recommendation

Recommendation 8

The Commission recommends making direct reference in clause 6 to the relevant definitions of what constitutes party activities as set out in the relevant Parliamentary Remuneration Tribunal determinations.

Clause 7 – the issue

24. Clause 7 of the Code requires disclosure of secondary employment or other engagements when a Member participates in debates. The Member is specifically exempted from making a disclosure if the Member is “simply” voting on a matter.

The Commission does not regard this exemption as being consistent with requisite or desirable standards of transparency.

25. The Commission does not regard as onerous a requirement that Members make the disclosures referred to in clause 7 when voting on a matter as well as participating in a debate on the matter. The Commission notes that under clause 7 it would not be necessary for a Member to make a declaration every time the Member voted if the Member has already disclosed the information in the Member's entry in the pecuniary interest register.

Clause 7 - recommendation

Recommendation 9

The Commission recommends that clause 7 of the Code be amended to require Members to make the disclosures referred to in that clause when voting on a matter as well as participating in a debate on the matter unless the disclosure has previously been made in the pecuniary interest register.

OTHER MATTERS FOR CONSIDERATION

26. In addition to issues relating to specific clauses of the Code, the Commission also raises a number of other matters for consideration.

Disqualification from voting

27. The Standing Orders for both Houses generally disqualify members from voting on matters where they have a financial conflict of interest¹. It is not clear to the reader of the Code that this is the case and it would be preferable for this to be rectified. It is also preferable that the Code make it clear that a financial conflict of interest includes any situation where the Member has received or anticipates receiving a material benefit.

Recommendation 10

The Commission recommends the Code be amended by including a new provision that Members are not to vote on matters where they have a financial conflict of interest.

Application of the Code

¹ See Standing Order 176 of the Legislative Assembly and Standing Order 113(2) of the Legislative Council. See also Standing Order 276 of the Legislative Assembly and Standing Order 210(10) of the Legislative Council which related to Committee Inquiries.

28. Some doubt has previously been expressed as to whether the Code applies to the actions of Members that occur after Parliament has been prorogued and before the Code is adopted by a Sessional Order at the start of a new session. This issue was examined in some detail by the 2002 and 2006 reviews which recommended that the Code be amended to specifically acknowledge that it is intended to apply during prorogation.

Recommendation 11

The Commission recommends the Committees include an amendment to provide that the Code has continuing effect unless and until amended or rescinded.

Statement of Principles

29. In its November 1995 submission to the Legislative Assembly Standing Committee on Ethics and its June 2006 submission to the Legislative Council Privileges Committee the Commission stated that “the principles on which expected standards of behaviour are based should be included in the Code so that the rationale for the obligations of Members can be understood”.

30. The Preamble to the Code already includes honesty and integrity. Accountability is alluded to in the reference to responsibility in paragraph 2 of the Preamble.

Recommendation 12

The Commission recommends a more comprehensive set of broad ethical principles. Consideration could be given, for example, to incorporating the seven principles of public duty defined by Lord Nolan and which appear in the British House of Commons Code of Conduct for Members (selflessness, integrity, objectivity, accountability, openness, honesty and leadership).

Breaches of the Code

31. The Code does not set out what sanctions might apply to a Member who breaches the Code. Such a clause could address:

- the accountabilities of a Member
- the powers of the Ethics Committee
- the role of the Commission
- the relationship of the Code to other accountability mechanisms.

Recommendation 13

The Commission recommends including in the Code what sanctions might apply to a Member who breaches the Code.

Accessibility of the Code

32. In line with the principles of openness and accountability consideration should be given to improving the accessibility of the Code by members of the public. For example it is not immediately apparent from the NSW Parliament website that there is a Code of Conduct for Members.

Recommendation 14

The Commission recommends the Code be given a more prominent place on the NSW Parliament website.