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

14 AUG 2006

Dear Mr Primrose

I refer to your letter concerning the draft *Constitution (Disclosures by Members) Amendment Regulation 2006* and the amendments to the Code of Conduct.

The Legislative Council has referred the draft regulation and amendments to the Code of Conduct to your Committee for review. To assist in this review, a briefing note is enclosed as requested. The briefing note covers the background, purpose and precedents for the amendments.

You may also be interested to know, that The Cabinet Office recently provided a briefing to the Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics, on these amendments at a meeting of that Committee.

If your Committee would like a similar briefing, please contact Catherine Chang, Principal Legal Officer, Legal Branch, The Cabinet Office on 9228 5545. A briefing could be arranged for a time convenient to your Committee when Parliament resumes in September.

Yours sincerely

John Della Bosca

Encl: Briefing note

DRAFT CONSTITUTION (DISCLOSURES BY MEMBERS) REGULATION 2006 AND AMENDMENTS TO THE CODE OF CONDUCT

1 BACKGROUND

In November 2002, considerable public debate arose after it was revealed that a Member had been engaged by PricewaterhouseCoopers (through his private company) to provide consultancy services. This engagement highlighted a number of problems with secondary employment of Members. Uncertainty arose as to whether questions were asked in Parliament as part of the Member's engagement as a consultant.

Such circumstances can create uncertainty in the minds of the public as to whether a Member is acting in the best interests of his or her constituents. While there was no evidence of a UK style "Cash for Questions" scandal in New South Wales, such circumstances highlighted the need for more rigorous disclosure obligations on Members.

In response to community concerns, the Legislative Assembly requested that the Independent Commission Against Corruption (ICAC) report on what steps might be taken in respect of regulating or limiting the engagement of Members to provide advice on public affairs.

ICAC's Report, released in September 2003, recommends a framework to regulate the engagement of Members in the public affairs area. The principal means which ICAC proposed to achieve this was through the disclosure of engagements in the consultancy area.

ICAC did not deal with whether secondary employment of Members should be prohibited. In relation to secondary employment in "public affairs" it noted, however, "that any attempt to define public affairs, with a view to prohibiting it, would be problematic" (page 66). It also noted that almost any type of secondary employment and not just that in public affairs, "may conflict or be seen to conflict, with a Member's parliamentary duties so it raises the broader issue of establishing a disclosure regime that deals with all types of secondary employment" (page 66).

ICAC considered that refining the current system of disclosure would be an effective way of dealing with secondary employment and would "promote a more transparent and accountable framework that could deal with all perceived or actual conflicts arising from any secondary employment" (page 66).

The draft regulation and amendments to the Code of Conduct are the Government's response to ICAC's recommendations and matters raised by the former Legislative Assembly Standing Ethics Committee.

2 DRAFT REGULATION - KEY CHANGES

A key component of the Government's overall strategy to deal with secondary employment and therefore, enhance the public's confidence in Members, is to impose more rigorous disclosure requirements on Members regarding secondary employment.

Disclosure in the register of pecuniary interests.

The main changes proposed by the regulation are to impose more onerous obligations on Members through disclosures in the register of pecuniary interests.

The increased level of disclosure proposed to be required of Members is as follows:

1. Members will be required to describe in the pecuniary interests register, details of the actual services provided in any employment, engagement or other arrangement where services are provided to third parties. This is provided for at item [16].
2. The description of services must be sufficiently detailed so that a reasonable person can determine the nature of the services to be provided. This is provided for at item [16].
3. Where the services relate to the Member's parliamentary position, the Member will also be required to disclose details of the persons to whom services are to be provided, including the nature of the business of each such person. This is provided for at item [18].

The regulation provides that a position relates to a person's position as a Member if the position involves:

- (i) the provision of public policy advice, or
 - (ii) the development of strategies or the provision of advice on the conduct of relations with the Government or Members; or
 - (iii) lobbying the Government or other Members on a matter of concern to the person to whom the service is provided (See item [13]).
4. Where the services relate to the Member's parliamentary position, the Member will also be required to disclose details of any clients of the person who employs or engages the Member, if those clients benefit from the Member's services, and descriptions of the business of those clients which are reasonably sufficient to identify the nature of those businesses. This is provided for at item [19].

These changes were recommended by ICAC as the current regulation only requires Members to simply describe their occupation in relation to secondary employment but is silent on how extensive that description should be. ICAC noted that generally only the title of the occupation is provided (such as solicitor) and that such descriptions do not provide sufficient information to enable determination of whether or not a Member could potentially have a conflict of interest.

As the register is open to the public to facilitate accountability and transparency, ICAC noted that greater details of the services provided should be required so that the entry in the register is meaningful to the public.

ICAC noted a similar requirement of the British House of Commons as a precedent for the greater level of disclosure proposed if a Member provides services which relate to the Member's parliamentary position.

The Government considers that the obligation to disclose clients will also reduce the attractiveness of engaging Members as consultants in relation to parliamentary matters.

Updating the register.

The draft regulation also proposes to require Members to update the register every six months instead of every 12 months. This is provided for at items [2], [3] and [8].

ICAC recommended "continuous" disclosure of all pecuniary interests, that is, disclosure within 30 calendar days of any change. However, the Government is concerned that this is considerably more onerous than the current system which only requires yearly disclosures and might be too onerous for Members. Effectively, a new disclosure will be made during the Budget and Spring sittings.

The Government also proposes through amendments to the Code of Conduct to require Members to disclose a matter which affects the interests of a person who employs or engages a Member at the start of proceedings, if details of the person, any clients and the nature of their interest in the proceedings are not already disclosed in the register. This will ensure that any matters not already disclosed in the register will become a matter of public record.

Members also will be permitted to disclose any changes to interests at any time. These measures are considered sufficient to make it easier to identify whether a Member does have a conflict of interest.

The Clerk of the Legislative Assembly and of the Legislative Council will be required to update the register within seven days after receiving a disclosure from a Member. This was recommended by ICAC.

It is proposed that the new requirements will commence on the date of the next election. Transitional arrangements are set out in item [21].

Forms

As recommended by ICAC, to assist with the updating of the register, a new form has been designed to allow Members to notify changes in interests at any time.

The forms, however, remain complicated. ICAC recommended that the current forms be redesigned to improve usability as it considered the current forms to be poorly designed and not user-friendly. ICAC did not, however, specify how the forms should be redesigned.

The Government is considering strategies for streamlining the forms so that Members will only be required to disclose changes to their previous forms. Currently, Members are required each time to disclose in full all interests held during the relevant reporting period. The Privileges Committee, therefore, has been asked to report on strategies to move to "exceptions based reporting," that is, Members would only be required to notify changes since the last return that was filed.

Guidelines to assist Members

It is proposed that the Privileges Committee and the Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics prepare guidelines to assist Members to comply with their new obligations under the regulation and the Code of Conduct for Members.

This was also recommended by ICAC not only to clarify for Members their obligations but also to bring a level of transparency as to what is required.

ICAC noted that the British House of Commons has such guidelines. Their Guide to the Rules Relating to the Conduct of Members sets out how the disclosure regime operates in practice by setting out in detail how the relevant rules should be interpreted and providing examples of what should or should not be disclosed.

DRAFT REGULATION - RECOMMENDATIONS NOT ADOPTED

Written agreements

ICAC also recommended that Members be required to enter into a written contract where the income received for services which relate to the Member's parliamentary position exceeds one percent of the Member's salary. It was recommended that these agreements set out the duties to be undertaken as part of the services provided and be accessible by the person investigating the engagement for the purpose of investigating any matter relating to a Member's secondary employment.

The Government considers that a written agreement offers little in addition to the requirement that a detailed description of services be disclosed in the register of pecuniary interests. Further the monetary threshold is likely to be confusing and difficult to apply. Accordingly, the Government has not adopted this recommendation.

Publication of register on the Internet

ICAC and the former Standing Ethics Committee of the Legislative Assembly also recommended that the register be published on the Internet so that it can be easily accessed by the general public and Members.

The Government is not progressing this recommendation at this stage. The Government considers that the feasibility of adopting this recommendation requires further detailed consideration by Parliament.

CODE OF CONDUCT FOR MEMBERS - KEY CHANGES

To enhance the public's confidence that Members are acting in the best interests of their constituents, despite any secondary employment, amendments have been proposed to the Code of Conduct principally to prevent Members from advancing in Parliament the interests of persons outside of Parliament with whom they have business relationships.

Duty to constituents and the people of New South Wales

The first amendment to the Code of Conduct will include an additional principle in the Preamble to clarify that the principal responsibility of Members is to their constituents and to the people of New South Wales. This was recommended by ICAC noting that the Scottish Code and the British House of Commons' Code explicitly places a "public duty" on Members. It was considered important that such a principle underpin the framework for regulating all parliamentary standards. It would also enhance the public's confidence that Members are acting in their interests and not those of their employers.

Bribery

Bribery is currently defined as the taking of action in Parliament in return for payment to the Member. An amendment is proposed to extend this definition so that a Member cannot take action in Parliament in return for benefits to be received in the future or benefits to third parties who are closely associated with a Member. This is provided for in clause 2 of the Code of Conduct.

The Standing Ethics Committee recommended a broader version of this amendment, namely that the prohibition on bribery be extended to catch benefits to any third party. This was recommended because of a concern that bribes can take the form of benefits not only to a Member but also to family members and friends.

The Government's proposed amendment to the Code more clearly defines who a third party includes. The amendment will catch benefits to a family member, business associate or a person with whom the Member has a financial relationship. Accordingly, it will prevent Members from inappropriately asking questions in Parliament for the benefit of any employers or others who engage the Member in secondary employment.

The Government also proposes to limit the prohibition on bribery so that it will apply only where the Member "knowingly or improperly" takes the relevant action in Parliament. This was recommended by the Standing Ethics Committee as a Member cannot be expected to have a complete knowledge of what benefits might accrue to their family or friends as a result of that Member's actions in Parliament. The prohibition on bribery, therefore, should only extend to where a Member knowingly or improperly takes action in Parliament in return for benefits to third parties who are closely associated with a Member.

The Government also proposes to make a breach of the prohibition on bribery a serious breach of the Code of Conduct. This is also provided for in clause 2 and was recommended by ICAC. This amendment will make bribery a matter which falls within the definition of "corrupt conduct" under the *Independent Commission Against Corruption Act 1988* and therefore, will make it clear in advance that ICAC will be able to investigate any complaint or allegation of bribery.

Disclosure during proceedings

Members will be required to make certain disclosures at the start of any proceedings in Parliament where a former or current employer, a person who has engaged or is currently engaging the Member to provide services, or a current or former client of such employers or persons, may have an interest in those proceedings.

The obligation will only apply where the Member proposes to participate in those proceedings other than by voting on the matter and the Member knows or ought to know that these persons have an interest in the proceedings.

The obligation also will only apply where the Member has not already disclosed in the register, the identity of the employer, person, client and the nature of their interest in the proceedings.

The obligation extends to any person who has employed or engaged the Member in the previous two years or to any client who has benefited from the Member's services in the previous two years. This is provided for in clause 7.

ICAC recommended that this disclosure should occur during debate even if relevant disclosures have been made in the register. In doing so, ICAC noted precedents overseas and that the main purpose of such declarations is to ensure that fellow Members and the public are aware of pecuniary interests of employers or others who have engaged the Member in secondary employment which may be relevant to those proceedings.

In New South Wales, however, a Member is only required to make such disclosures in proceedings in relation to that Member's own interests, if the particular details have not already been disclosed in the register.

To maintain consistency with this approach, the Government considers it appropriate that the new obligation should only apply where the disclosures have not already been made in the register. ICAC also recommended that the new obligation apply in relation to all former employers. As this is too onerous, however, the Government considers the obligation should be limited to apply in relation to employers, persons who have engaged the Member and clients from the previous two years.

CODE OF CONDUCT - RECOMMENDATIONS NOT ADOPTED

Paid advocacy

ICAC recommended that the prohibition on bribery be extended to prohibit "paid advocacy," that is, the paid lobbying of another Member. ICAC noted precedents in the British House of Commons, the Scottish Parliament and the Canadian House of Commons. While ICAC noted that paid advocacy may fall within clause 2 of the Code of Conduct, as Clause 2 is headed "Bribery," it considered there may be an implication that the prohibition is confined to the definition of bribery in the *Crimes Act 1900* which would not include paid advocacy.

The Government considers, however, that it is unnecessary to adopt this recommendation as the current prohibition on bribery already captures any payment to a Member to lobby another Member to take action in proceedings in Parliament. Also, the new disclosure requirements will mean that any paid lobbying will also need to be disclosed.

The Premier has also recently released comprehensive Guidelines for Ministers and public officials when dealing with lobbyists.