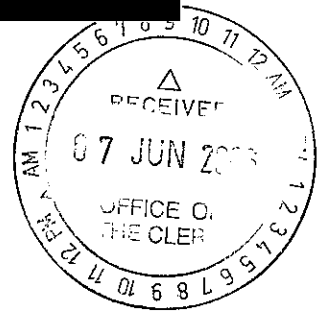




INDEPENDENT COMMISSION AGAINST CORRUPTION



6 June 2006

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

Our Ref: Z06/0017

Dear Sir

RE: Review of Members' Code of Conduct

I thank you for giving the Commission an opportunity to make a submission to the Privileges Committee of the Legislative Council in relation to its review of the Code of Conduct for Members.

The Commission's submission is enclosed.

Please advise if you require any additional information or clarification of any of the matters set out in the submission.

Yours faithfully

The Hon Jerrold Cripps QC
Commissioner

duties and obligations, and shall at all times act responsibly in the performance of their public duties.

Integrity

Members shall, at all times, seek to advance the common good of the community which they service, in recognition that public office involves a public trust. In particular, Members shall ensure that their official powers are not used improperly for personal advantage. Any conflict between personal interests and public duty which may arise must be resolved in favour of the public interest. .

Diligence

Members shall exercise due diligence, care and attention, and shall at all times seek to achieve the highest standards practicable in relation to their duties and responsibilities in their official capacity as a Member of Parliament.

Economy and efficiency

Members shall avoid waste, abuse and extravagance in the provision or use of public resources, and shall expose any fraud and corruption of which they are aware.

Some of these principles are set out in the Code. The Preamble to the Code already includes honesty and integrity and accountability is alluded to in the reference to responsibility in paragraph 2 of the Preamble. However consideration should be given to setting out 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).

2.5 Breaches of the Code

Consideration should be given to including in the Code what sanctions might apply to a Member who breaches the Code. Such a clause should 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.

2.6 Accessibility of the Code

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. It is currently located with a number of other publications under the "Publications" section of the website. Consideration should be given to giving it a more prominent place on the website.

**INDEPENDENT COMMISSION AGAINST
CORRUPTION**

SUBMISSION

TO THE

PARLIAMENT OF NEW SOUTH WALES

LEGISLATIVE COUNCIL PRIVILEGES COMMITTEE

**CODE OF CONDUCT FOR MEMBERS OF
PARLIAMENT**

JUNE 2006

INTRODUCTION

This submission has been prepared by the Independent Commission Against Corruption ("the Commission") in response to an invitation by the Hon. Peter Primrose MLC, the chair of the Legislative Council Privileges Committee which is currently undertaking a review of the Code of Conduct for Members ("the Code").

The Code was adopted by the Legislative Council in May 1999.

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.

The Code is also of relevance to the Commission. The 1994 amendments to the *Independent Commission Against Corruption Act 1988* expanded the definition of corrupt conduct to include conduct of a Minister of the Crown or a Member of a House of Parliament that could constitute or involve a substantial breach of an applicable Code of Conduct. The amendments give the Commission jurisdiction over the conduct of Members where that conduct does not involve a criminal offence.

The Commission also notes the appointment of a Parliamentary Ethics Adviser whose role is to assist and advise Members in resolving ethical issues and problems. Such advice and assistance can be of particular relevance in relation to resolving potential conflicts of interest that may arise in the course of a Member's duties and provide guidance on the application of the Code to particular situations.

This submission is divided into two parts. Part 1 deals with recommendations previously made by the Commission in its reports. Part 2 sets out a number of additional matters for consideration.

PART 1: PREVIOUS RECOMMENDATIONS

Since 1998 the Commission has made a number of recommendations in relation to the Code arising out of various investigations conducted by the Commission.

The Commission believes most of these recommendations remain relevant and recommends they be considered in the current review.

Report on investigation into Parliamentary and Electorate Travel: Second Report – analysis of administrative systems and recommendations for reform (December 1998)

The following recommendations in relation to the Code were made in this report:

Recommendation 54: The Ethics Committees of each House should consider the appropriateness of the phrases "private financial interests" and "decisions in which they participate" used in clause 1 of the Members' Code of Conduct and recommend clarification of the meaning by appropriate amendment.

Comment: Clause 1(a) of the Code places the emphasis on private financial interests. This is too narrow an emphasis and fails to address two important issues:

1. Members may have family (including de facto partners), friends or associates whose financial interests may give rise to conflict of interest for Members by virtue of their relationship.
2. Such conflicts may not be limited to pecuniary interests.

The Code at present does not capture these circumstances.

Other jurisdictions have attempted to address these two issues, for example:

1. Under s.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.
2. The *Model Code of Conduct for Local Councils in NSW* recognises that there are pecuniary and non-pecuniary conflicts of interest.
3. 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.

Clause 1 of the Code also fails to address circumstances in which Members may be capable of wielding considerable influence but do not formally participate in the decision-making process.

The Commission is aware that recommendation 54 was previously considered as part of the 2002 review of the Code conducted by the Standing Ethics Committee. That review recommended against making any changes to clause 1(a) apparently on the basis that if "interests" was not qualified by "financial" it could place Members in a conflict of interest in relation to a wide range of matters. However, this objection could be overcome by providing a definition of the term "interests" or setting out detailed guidance on what constitutes "interests".

It does not appear that the 2002 review addressed the issue of widening the ambit of clause 1(a) to include the financial interests of Members' families (including de facto partners), friends or associates whose financial interests might give rise to a conflict of interest.

Recommendation 55: The Ethics Committees of each House should consider the appropriateness of the phrase “payment or any other personal financial benefit” in clause 2 of the Members’ Code of Conduct and recommend an appropriate amendment to clarify its meaning.

Comment: Clause 2 of the Code relates to bribery and may also encompass the common law offence of misconduct in public office. The clause refers to “payment or any other personal financial benefit” which appears to limit the restriction to the Member. It takes no account of the fact that Members may also be influenced by the provision of benefits or advantages to the Member, family members (including de facto partners), friends, associates or even favoured causes.

The 2002 review recommended that clause 2 be amended to read:

Clause 2 – Bribery

Members must not knowingly or improperly promote any matter, vote on any bill or resolution, or ask any questions in the Parliament or its Committees, for private benefit of themselves or others.

The Commission supports that recommendation, although it may be necessary to specify what is meant by “others”.

Recommendation 56: 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.

Comment: Clause 5 of the Code relates to the misuse of confidential information. 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, information could be used where it is difficult to substantiate a direct private benefit, such as information leaked to discredit a political opponent’s policy proposals or even an opponent in an electorate or parliamentary contest. While such a misuse of confidential information may be a benefit to the Member’s own political party it would be difficult to substantiate that any particular Member received a private benefit.

The *Model Code of Conduct for Local Councils in NSW* provides clarification for councillors on the issue of misuse of confidential information. Among other provisions, it requires that councillors must:

- Protect confidential information
- Only access information needed for council business
- Not use confidential information for any non-official purpose
- Only use confidential information for the purpose it is intended
- Not use council information for personal purposes.

The Commission notes that the 2002 review recommended clause 5 remain unchanged. While the Commission recognises there are difficulties in widening the scope of the clause it recommends this matter be given further consideration as part of the current review.

Recommendation 57: 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.

Comment: The Commission notes that the Parliamentary Remuneration Tribunal has now 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. Consideration should be given to making direct reference to the relevant Determinations in clause 6.

Regulation of secondary employment for Members of the NSW Legislative Assembly (September 2003)

This report made a number of recommendations in relation to the Legislative Assembly Code however the recommendations are also applicable to the Legislative Council Code.

Recommendation 2: That the NSW Legislative Assembly consider the development of a guide, similar to the British House of Commons *Guide to the Rules relating to the Conduct of Members* to assist Members in understanding and applying the Code and any other rules relating to the conduct of Members, including those set out in the *Constitution Act 1902* and the Constitution (Disclosures by Members) Regulation 1983.

Comment: The current Code is somewhat similar to that used by the British House of Commons – both seek to be aspirational documents that set out the values and broad principles that should underpin the conduct of Members. However, there is a significant difference in that the British House of Commons has a *Guide to the Rules relating to the Conduct of Members* that accompanies the House of Commons Code of Conduct. It sets out in detail how that Code and other rules should be interpreted, the legislation and resolutions that underpin the rules, and it provides examples of what should and should not be disclosed and how, if disclosure is needed, that disclosure should be made. The NSW Parliament has no such equivalent document and, without adopting a more detailed Code, for example that used in the Scottish Parliament, the solution to address this issue is to establish a document similar to the House of Commons guide.

This would not only clarify the operation of the Code and rules but bring an increased level of transparency as to what is required of Members.

In its 24 month final report on implementation of the recommendations in this report (received by the Commission on 6 April 2006) the Legislative Assembly advised that the Committee on Parliamentary Privilege and Ethics has drafted a handbook in response to this recommendation. The Commission understands this handbook is being updated to include changes recently announced by the Premier.

Recommendation 3: That the NSW Legislative Assembly considers an amendment to the Code of Conduct to include an additional principle or responsibility which sets out that a Member's primary obligation is to their constituents, and to the people of NSW.

Comment: The Commission considers that it is important that there is an underpinning principle in the Code which makes it explicit that Members owe their primary obligations to the people of New South Wales. Such a principle should underpin any framework for the regulation of Parliamentary standards.

This recommendation was repeated in the Commission's report on its investigation into the conduct of the Hon. Peter Breen MLC. The Legislative Council recently provided a progress report on its implementation of the Commission's recommendations in the Breen report. The progress report advised that this recommendation would be considered as part of the Privileges Committee review of the Code. The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics has advised that it has considered the recommendation but decided against implementation.

Recommendation 4: That the title in clause 2 in the Members' Code of Conduct be amended to read "bribery and paid advocacy" to reflect the fact that the description of activities contained in that clause is not confined to bribery.

Comment: Most other Parliaments considered in this report prohibited paid advocacy of Members. Paid advocacy is where Members receive a personal benefit (cash or otherwise) to take up a cause in the Parliament.

To some extent this issue is addressed in clause 2 of the Code however the clause is headed "Bribery", thereby implying that it is confined to a criminal offence. It should be made clear that the clause also includes paid advocacy. There is no legitimate justification for Members being paid by external parties for undertaking activities in the Parliament, such as asking questions, making speeches or voting on legislation.

The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics has advised that it has considered the recommendation but decided against implementation.

Recommendation 8: 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.

Comment: The British House of Commons, the Scottish Parliament and the Ontario Legislative Assembly models discussed in the report require Members to not only 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 and is of the view, based on the practices of some of the overseas jurisdictions examined in the report, that the disclosure before proceedings in Parliament should apply not only to current secondary employment, but also to past secondary employment where a reasonable person would consider that the work or activities formally undertaken would appear to conflict with the topic of the current proceedings.

The Commission understands that the Premier has announced that changes will be introduced to require Members to disclose an interest before proceedings, if such interests are not already recorded. The Commission recommends these changes be reflected by specific provision in the Code.

Report on the investigation into the conduct of the Hon. J Richard Face (June 2004)

A number of recommendations were made in this report that do not go to the contents of the Code but rather to processes that need to be put in place to ensure Members are able to better understand the application of the Code.

Recommendation 6: That induction briefings for Members should cover not only the administrative and procedural matters that are the province of the Clerk but also:

- the legal and ethical basis on which Members additional entitlements are provided;
- the role of the Parliamentary Ethics Adviser;
- the content of the Code of Conduct for Members, parliamentary and electorate staff; and
- the consequences of non-compliance such as the relationships between the Members' Code of Conduct, the PRT Determinations and the jurisdiction of the Commission.

Comment: This recommendation was repeated in the Breen report. The Legislative Council recently provided a progress report on its implementation of the Commission's recommendations in the Breen report. The progress report advised that "Following on from the 2003 induction process a series of breakfast seminars were held for the newly elected Members in late 2004. Several seminars covered the topics of Members' entitlements, the Code of Conduct and the role of the ICAC." The progress report did not indicate the seminar attendance rates or whether there was any evaluation conducted and if so the results of the evaluation.

Recommendation 7: That the ethics education program being developed by the Legislative Assembly Privileges and Ethics Committee should include opportunities for Members to increase their understanding of the routine application of the PRT Determinations and the Code of Conduct to their work as Members of Parliament.

Report on the investigation into the conduct of the Hon. Peter Breen MLC (December 2004)

This report reiterated recommendation 6 from the Face report and recommendation 3 from the *Regulation of Secondary Employment Report*. The following additional recommendation was made which again, while not going to the content of the Code, relates to developing a better understanding of the application of the Code.

Recommendation 6: That the Legislative Council Standing Committee on Privileges provide access to resources (such as education, advice and other guidance) for developing and understanding by Members of the ethical dimension of their role as Members of Parliament and the practical ethics issues of conflict between private interests and public duty and the routine application of the PRT Determinations and the Code of Conduct in their work.

Comment: The Legislative Council recently provided a progress report on its implementation of the Commission's recommendations. The progress report advised that this recommendation would be considered as part of the review of the Code.

PART 2: OTHER MATTERS FOR CONSIDERATION

There are a number of other matters which the Commission submits should be considered by the Committee as part of the current review. These are set out below.

2.1 Clause 3(b) of the Code

Clause 3(b) of the Code provides that:

Members must not accept gifts that may pose a conflict of interest or which might give the appearance of an attempt to corruptly influence the Member in the exercise of his or her duties.

Comment: These are two very different requirements. It would be clearer to separate them into two provisions relating to:

1. gifts that could create a conflict of interest for a Member or create the perception in the eye of a reasonable and informed person of a conflict.
2. gifts that may appear to be an attempt to corruptly influence the Member in the exercise of his or her duties.

2.2 Application of the Code

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 review which recommended that the Code be amended to specifically acknowledge that it is intended to apply during prorogation.

The Committee should consider whether such an amendment is still required.

2.3 Statement of Purpose

Consideration should be given to commencing the Code with a general statement of purpose which might include reference to the following:

- the role of Parliament
- the role and responsibilities of Members of Parliament
- why it is important to have a Code
- the purposes of the Code

2.4 Statement of Principles

In its November 1995 submission to the Legislative Assembly Standing Committee on Ethics 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". That submission suggested a set of general principles which would provide a framework within which more specific general obligations could sit. They are:

Respect for the law and system of Government

Members shall uphold the laws of NSW and Australia, and shall not, without just cause, be a party to their breach, or subversion. Members shall act with respect towards the institution of Parliament and shall ensure that their conduct, whether in a personal or official capacity does not bring the Parliament into disrepute or damage public confidence in the system of Government.

Respect for persons

Members shall treat other Members, members of the public and other officials and staff honestly and fairly, with proper regard for their rights, entitlement,