

INQUIRY INTO REVIEW OF MEMBERS' CODE OF CONDUCT (2018)

Organisation: NSW Independent Commission Against Corruption
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BY EMAIL: privilege@parliament.nsw.gov.au

Our Ref: AD18/0059

Dear Ms Foley

I refer to the Inquiry into the Members' Code of Conduct and relevant aspects of the pecuniary interest disclosure regime for members conducted by the Legislative Council's Privileges Committee. The Commission's submission to the Inquiry is attached.

If the Commission can be of further assistance, please do not hesitate to contact me.

Thank you for providing the Commission with an opportunity to provide a submission.

Yours sincerely



The Hon Peter Hall QC
Chief Commissioner

20 July 2018

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INDEPENDENT COMMISSION AGAINST CORRUPTION

**REVIEW OF MEMBERS' CODE OF CONDUCT AND
CONSTITUTION (DISCLOSURES BY MEMBERS)
AMENDMENT REGULATION 2018**

**SUBMISSION
TO THE
LEGISLATIVE COUNCIL'S
PRIVILEGES COMMITTEE**

July 2018

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Introduction

1. The NSW Independent Commission Against Corruption's ("the Commission") submission is made in response to an email dated 1 June 2018 from the Hon Natasha Maclaren-Jones MLC, Chair of the Legislative Council's Privileges Committee, inviting the Commission to provide comments on its review into the Code of Conduct for Members ("the Code") and any relevant aspects of the pecuniary interest disclosure regime for members under the Constitution (Disclosures by Members) Regulation 1983 ("the Regulation").
2. The Commission acknowledges that it has provided previous submissions to the Legislative Council's Privileges Committee and the Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics regarding the Code.
3. The Legislative Council's Privileges Committee has produced a discussion paper to provide guidance on issues for consideration in the current review.

Preamble to the Code

4. The current preamble to the Code refers to "...honesty and integrity, respecting the law and the institution of Parliament, and using their [members'] influence to advance the common good of the people of New South Wales." A more comprehensive set of conduct principles could be included in the preamble. For example, the House of Common's Code of Conduct includes selflessness, integrity, objectivity, accountability, openness, honesty and leadership.

Clause 1: Disclosure of conflict of interest

5. A conflict of interest arises when a reasonable person might perceive that a public official has a personal interest that could come into conflict with his or her public duties. For the sake of clarity, the Code should include a definition of conflict of interest in the relevant clause.
6. Clause 1(b) requires members to declare their private financial *interests* by an entry in the Register of Disclosures by Members for the relevant House, when speaking on a matter in a House or a Committee, "or in any other public and appropriate manner." In practice, the Regulation requires the submission of returns in or to the effect of its Schedule 1.
7. The heading to this clause of "disclosure of conflict of interest" and clause 1(b) describe entries in the relevant Register of Disclosures by Members as declarations of *conflicts of interest*. A register of disclosures however, as its title suggests, contains details of members' financial interests. These private interests may never come into conflict with a member's public duty and are not in themselves conflicts of interest.
8. The two concepts (personal interest and conflict of interest) are connected, in that the purpose of a disclosure regime is to alert the member and others to conflicts of interest arising from ongoing financial interests, if they arise. They are not, however, the same thing, and the distinction is important.

9. Whether or not the involvement of a member in any particular matter would constitute a *conflict of interest* is a distinct issue. A register of disclosures can only capture financial interests in existence at a particular point in time and does not extend beyond direct financial implications for a member. The Code needs to deal with conflicts of interest going beyond those that can be identified by inspection of the relevant Register of Disclosures by Members.
10. In the Commission's view, clause 1 would more appropriately be headed "Disclosure of financial interests" and confined to that subject. A general requirement for members to fulfil the requirements in respect of the relevant Register of Disclosures by Members should be included in this clause. The issue of *conflict of interest* can then be dealt with in more detail and under that specific heading.
11. Notwithstanding the existence of a formal disclosure system for private financial *interests*, a provision requiring disclosure of *conflicts of interest* when speaking on a matter in a House or a Committee is still warranted and belongs in a new section on conflicts of interest. The Code should also 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.
12. The Standing Orders for both Houses generally disqualify members from voting on matters where they have a direct financial interest not held in common with other citizens of the State.¹ 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 either by cross-referencing or by including this disqualification in the Code.
13. In addition to the above specific requirements, as a general proposition the Code should require all conflicts of interest to be declared and resolved in the public interest in line with the obligation placed on most NSW public officials through their relevant codes of conduct. The particular course of action for resolving a conflict of interest should depend on the significance of the matter. Examples of significant conflicts of interest include those involving a direct pecuniary interest of a member and situations where a member anticipates receiving a material financial benefit. The default position for significant conflicts of interest should be for the member to have no official involvement in the matter.
14. There is no provision in the Code dealing with non-pecuniary conflicts of interest, whether a matter comes before the Parliament or its Committees or is decided by a Minister or another public official. Non-pecuniary interests would include matters such as those that affect a close friend of a member or those providing a material benefit to the member that is not of a direct financial nature. At a local government level, and throughout the public sector, non-pecuniary conflicts of interest are recognised as having the potential to adversely affect the impartial

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¹ See Standing Orders 176-177 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 relates to Committee Inquiries.

exercise of official functions. There is no compelling argument for failing to similarly recognise and deal with this issue in the case of members.

15. Similarly, conflicts of interest can also involve a conflict between a member's public duties and the private interests of a member's immediate family. Currently, the Code does not contemplate that the financial interests of family members or other close associates may give rise to a conflict of interest for members by virtue of their relationship.
16. The proviso that there is no conflict of interest where the member is affected as a common citizen or as a member of a broad class is appropriate. Nor should the Code's provisions apply where a member is acting solely in a private capacity and as such there is no conflict with their public official duties.

Clause 2 – Bribery

17. Bribery is a crime, and it is difficult to understand why it is necessary to include a prohibition on bribery in a code of conduct. Moreover, the heading "Bribery" is at odds with the content of the clause and should be removed.
18. The words "promote any matter...in return for any remuneration, fee, payment..." in clauses 2(a) and 2(b) seem to be a description of what has been referred to as 'paid advocacy' in the United Kingdom. The asking of questions in exchange for payments seems to be a reference to the activity called 'cash for questions' that has also caused disquiet in the United Kingdom.
19. Clauses 2(a) and 2(b) also appear to prohibit members engaging in both 'paid advocacy' and 'cash for questions', and to prohibit them from casting a vote in return for payment. Clause 2(b) also extends to payments made to family members and other stipulated persons and entities. Accordingly, the heading of clause 2 should be changed to include paid advocacy and other forms of improper influence.
20. The words "in the Parliament or its Committees" in clauses 2(a) and 2(b) suggests that the Code does not prohibit a member from "promoting" a matter in return for payment, provided it is outside the Parliament and its Committees. This ignores the reality that major decisions of considerable value are taken by the executive and do not come before Parliament.
21. The Commission believes members should not receive rewards in return for using their position to advocate the taking of a particular course of action by public officials. Quite plainly, a paid advocate is remunerated for advancing the good of the person or entity that pays him or her. The corruption risk is plain and unacceptable. Consequently, any prohibition on paid advocacy (and lobbying for reward in general) should not be restricted to the promotion of matters in the Parliament or its Committees, but should extend to approaches to Ministers and other decision-makers exercising executive discretions.
22. In October 2013, the Commission released *Reducing the opportunities and incentives for corruption in the state's management of coal resources*. Chapter 6 of the report included

recommendations concerning the conduct of members and ministers. Recommendation 22 provided:

That the NSW Parliament's Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee consider amending the Code of Conduct for Members to deal comprehensively with improper influence by members.

23. In 2014, the Legislative Council's Privileges Committee recommended that the Code be amended by the addition of a new clause dealing with improper influence in accordance with the Commission's recommendation. The Commission supports the Legislative Council's Privileges Committee's proposed clause concerning improper influence.
24. Any new section of the Code dealing with improper influence should also directly address the issue of members using their parliamentary status as a vehicle for commercial gain, for example by leveraging off their status as a parliamentarian to secure a private commercial arrangement. The current Code and the proposed new clause dealing with improper influence do not address such scenarios in the absence of a public official making a specific decision.
25. Additionally, the Commission notes with concern that clause 7A of the Regulation contemplates that a member may, for reward, provide services to another person arising from or relating to the member's position as a member, that includes:
 - (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.*
26. The activities listed in clause 7A of the Regulation are those typically undertaken by paid lobbyists. A practical issue is how this involvement fits with the NSW Lobbyists Code of Conduct and the regulatory system in which this Code sits.
27. More importantly, it is hard to see the practical difference between promoting a matter in return for reward (paid advocacy), which it appears is rightly intended to be prohibited by the Code, and lobbying, which is countenanced by clause 7A(c), but needs to be disclosed as a source of income.
28. The involvement of members in the activities listed in clause 7A of the Regulation is incompatible with the advancement of the common good of the people of NSW. Furthermore, for the sake of consistency any amendment to the Code to address the issue of improper influence should be accompanied by an amendment to clause 7A.
29. The making of bona fide representations on behalf of constituents is recognised as part of the role of a member and is not of concern to the Commission.

Clause 5 – Use of confidential information

30. Clause 5 prohibits a member from knowingly and improperly using confidential information “for the private benefit of themselves and others.” This clause could be broadened to include types of improper advantage where it is difficult to substantiate a direct private benefit, for example the improper leaking of information to discredit a political rival.

Clause 6 – Duties as a Member of Parliament

31. Clause 6 recognises that participation in the activities of organised political parties is within the legitimate activities of members. For the sake of completeness, this clause should also refer to the Parliamentary Remuneration Tribunal’s annual determinations concerning the use of members’ entitlements.

Clause 7 – Secondary employment or engagements

32. Secondary employment and engagements have the potential to create serious integrity issues for public officials. The undertaking of lobbying activities as a form of secondary employment is discussed above.
33. Clause 7 requires members to disclose secondary employment or other engagements when they participate in debates. This obligation on members does not apply if a member simply votes on a matter. The Commission does not regard this as an appropriate provision and believes that at the very least a conflict of interest ought to be disclosed in all cases.

Breaches of the Code

34. The effectiveness of the Code is reliant on clear enforcement mechanisms. The Code does not include guidance on what sanctions might apply to members who breach its provisions. Ideally, this information should be included in the Code to provide members with an understanding of some of the implications of breaching the Code.
35. In *Reducing the opportunities and incentives for corruption in the state’s management of coal resources* the Commission noted that there is no effective mechanism in place for dealing with minor breaches of the Code. While the role of the Commission, as far as practicable, is to direct its attention to serious and systemic corrupt conduct, there is no corresponding mechanism for dealing with minor breaches of the Code.² The Commission accordingly supported the establishment of a parliamentary investigator via recommendation 25 of the report. The establishment of this position will help enforce the provisions of the Code through the formation of a timely and independent system for dealing with complaints. The creation of the position will also help provide a graded approach to non-compliance.

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² While the s 14A(2) of the *Constitution Act 1902* provides that either House may declare a member’s seat vacant if they wilfully contravene the requirements of the Regulation, a member’s seat has never been declared vacant under these provisions.

Accessibility of the Code

36. The Commission recommends that a link to the Code be placed in a prominent position on the Parliament of NSW's website.

The Registers of Disclosures by Members

37. At present, the statutory regime regarding the disclosure of pecuniary interests does not require members to disclose the interests of spouses, domestic partners or dependent children. This issue was the subject of recommendation 24 in *Reducing the opportunities and incentives for corruption in the state's management of coal resources*. In the interests of transparency, the Commission supported expanding the existing Registers of Disclosures by Members to include third party disclosures. Expanding the Registers to include spouses, domestic partners and dependent children would minimise perceptions of members avoiding scrutiny and deal with the potential for family interests to influence decision-making. In addition, many other Australian parliaments require the disclosure of third-party interests in a register.
38. In line with the principles of transparency and accountability, the Commission supports publishing the Registers of Disclosures by Members, subject to any privacy constraints that may arise. The current review into aspects of the pecuniary interest disclosure regime for members also provides an opportunity to consider issues such as the timeliness with which pecuniary interest disclosures are made and the cumbersome nature of the disclosure regime.

Educative function

39. The Commission notes the Legislative Council's Privileges Committee's statutory obligation to undertake educative work concerning members' ethics and is supportive of any attempts to develop plain English guidelines and case studies to help explain members' obligations, and the provision of briefings for members on ethical issues.