

**INQUIRY INTO PROPOSAL FOR A COMPLIANCE
OFFICER FOR THE NSW PARLIAMENT**

Name: Mr John Evans, Parliamentary Ethics Adviser

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

Dear Mr Primrose

1. I refer to your letter of 14 December 2020 inviting me to make a submission on the Committee's inquiry into a proposal for a Compliance Officer for the NSW Parliament.
2. In making this submission I draw to your attention any perceived conflict of interest from my position as Parliamentary Ethics Adviser.
3. I support the general concept of the position of Compliance Officer.
4. As you mention in your letter, Chapter 4 of the Privileges Committee 2014 report, *"Recommendation of the ICAC regarding aspects of the Code of Conduct for Members of Parliament, the interests disclosure regime and a parliamentary investigator"* provides background to the inquiry.

Proposal for a Compliance Officer

5. There is currently no mechanism to investigate complaints of misconduct by Members which do not fall within the definition of corrupt conduct under the *Independent Commission Against Corruption Act 1988* and which also amount to a substantial breach of an applicable Code of Conduct.¹
6. Before commenting on the matters that the proposed Compliance Officer may investigate, I feel it is useful to discuss my understanding of the situation in the UK House of Commons, and which may assist to clarify the context of my reasoning below for suggested changes to the role of the Compliance Officer.² A similar scheme also applies in the House of Lords.³
7. The Parliamentary Commissioner for Standards (the Commissioner) may only investigate allegations of misconduct of Members involving a breach of paragraphs

¹ *Independent Commission Against Corruption Act 1988*, ss 8 and 9.

² In summarising the role of the Commissioner, I have drawn details from the UK House of Commons "The Code of Conduct" and "Guide to the Rules relating to the Conduct of Members", 8 January 2019; Parliamentary Commissioner for Standards, Commissioner's Information Note, 7 May 2015.

³ House of Lords – "Code of Conduct for Members of the House of Lords, Guide to the Code of Conduct, and Code of Conduct for House of Lords Members' Staff", Tenth edition, July 2020.

9 (Part IV), 10-18 (Part V)⁴ of the Code of Conduct and associated rules. The Commissioner may not investigate allegations of breach of the duties of Members (Part III)⁵ and the general principles of conduct (Part IV).⁶ However, the general principles are taken into account when considering and determination of allegations of breaches of the rules of conduct in Part V of the Code.

8. If the Commissioner concludes that an allegation is not substantiated, the Commissioner will not uphold it and report that conclusion briefly to the Standards Committee (the Committee). The determination letter and relevant evidence is then published on the Commissioner's webpage. Sometimes where an allegation is not upheld, the Commissioner may decide to report to the Committee because of the seriousness of the allegation or it raises matters of wider importance. The Committee then considers the matter and submits a report to the House.
9. Where the Commissioner finds that there has been a less serious breach of the rules the Commissioner can decide that it be resolved through a rectification procedure under Standing Order 150 (4).
10. The rectification procedure applies to minor or inadvertent failure to register or declare an interest and the Member has taken rectification action approved by the Committee. In cases involving parliamentary allowances or use of facilities and resources the Commissioner and Member may agree to appropriate financial reimbursement within such period of time as the Commissioner considers reasonable. These decisions and relevant evidence are published on the Commissioner's webpage.
11. Where the Commissioner finds that a breach cannot be resolved by the rectification procedure and raises more serious issues, the Commissioner reports the facts and reasons to the Committee. The Committee considers the Commissioner's report and determines whether there has been a breach of the rules. If the Committee finds

⁴ (Part V) Para 10 – observe rules and resolutions of the House, Paras 11 to 18.

Para 11 – act in public interest, avoid conflicts of interest and resolve conflicts in favour of public interest.

Para 12 – acting as paid advocate.

Para 13 – accepting a bribe to influence conduct as a Member, including accepting fee, compensation or reward for promotion of a matter.

Para 14 – fulfil conscientiously the requirements of the House in respect of the registration of interests; draw attention to any relevant interest in any proceeding of the House or its Committees, and in communications with Ministers, Members, public officials or public office holders.

Para 15 – use of confidential information only in connection with parliamentary duties, and never use for financial gain.

Para 16 – Members are personally responsible and accountable for ensuring use of any expenses, allowances, facilities and services is in accordance with the rules; that their use of public resources is always in support of parliamentary duties; use of resources not confer any undue personal or financial benefit on themselves, anyone else, or confer undue advantage on a political organisation.

Para 17 – any action of a Member causing significant damage to the reputation and integrity of the House of Commons as a whole, or of Members generally.

Para 18 – Member must treat their staff and all those visiting or working for or with Parliament with dignity, courtesy and respect. A Member must treat their staff and all those visiting or working for or with Parliament with dignity, courtesy and respect.

⁵ Part III – Para 4 – allegiance to the Queen.

Para 5 – duty to uphold the law, including law against discrimination.

Para 6 – duty to act in the interests of the nation, and a special duty to their constituents.

Para 7 – act on in accordance with the public trust, and always behave with probity and integrity, including in their use of public resources.

⁶ Part IV – Para 8 – in carrying out their parliamentary and public duties, Members are expected to observe the general principles of conduct identified by the First Report of Committee on Standards in Public Life – Selflessness, integrity, objectivity, accountability, openness, honesty and leadership.

Para 9 – observe the principles of the Parliamentary Behaviour Code of respect, professionalism, understanding others' perspectives, courtesy, and acceptance of responsibility.

there has been a breach of the rules it may recommend to the House that a penalty be imposed. (Of course, a fine cannot be imposed in NSW).

12. The House of Commons has determined that the Commissioner may not investigate complaints about:
 - policy matters
 - a Member's views or opinions
 - a Member's handling or decision of a case, including correspondence, whether or not the person is a constituent
 - the conduct of a Member in public life which does not relate to membership of the House.
13. A Behaviour Code was approved by both the House of Lords and House of Commons on 19 July 2018, following a report from an all-party Programme Team of Members and parliamentary officials of both Houses and expert advisers.⁷ The behaviour code is not a set of rules but rather a statement of principles and intent.
14. Bullying, harassment and sexual misconduct⁸ are dealt with under a Parliamentary Behaviour Code. The Code instituted a separate Independent Complaints and Grievance Scheme (ICGS) where independent case managers deal with these complaints and report to the Commissioner, who reports to the Committee.
15. ICGS cases are strictly confidential and since July 2018 are no longer published, except statistical information.
16. Since 2010 breaches of the scheme for parliamentary expenses (PRT Members entitlements scheme in NSW) is the remit of the Independent Parliamentary Standards Authority (IPSA) or Compliance Officer. However, the IPSA may refer a matter to the Commissioner who may decide to inquire into a potential breach of the Code of Conduct and associated rules. The Committee then decides what action, if any, to recommend to the House.
17. Persons making allegations to the Commissioner are not protected by the law of defamation unless and until the Commissioner accepts a matter for inquiry, when relevant correspondence and evidence are protected by parliamentary privilege, which is a moot point for the Compliance Officer procedure in NSW.

⁷ UK Parliament, "*Independent Complaints and Grievance Policy Programme Team - Independent Complaints and Grievance Scheme Delivery Report*" July 2018. This report followed from earlier recommendations from a "*Cross-Party Working Group on an Independent Complaints and Grievance Policy*", 8 February 2018, resulting from allegations and media reports about inappropriate behaviour and a culture of bullying and sexual harassment at Westminster.

⁸ Para 18 of the Code of Conduct

18. The declarations and registration of financial interests in the House of Commons is administered by the Commissioner, who may investigate allegations of failure to register or disclose relevant interests under the Code of Conduct. The Commissioner reports to the Committee.
19. A finding by the Commissioner of non- registration of an interest requires an entry in the register in ***bold italics***, with an explanatory note. Non-declaration of an interest requires an apology to the House.
20. The House of Lords also has a Commissioner for Standards to investigate alleged breaches of the Code of Conduct and other matters.⁹
21. Following an investigation, the Commissioner reports findings of fact to the Conduct Committee in cases where a complaint is upheld and remedial action has not been agreed with the member concerned. The Commissioner also recommends an appropriate sanction. The member concerned has a right of appeal against both the Commissioner's findings and any recommended sanction. In a case of bullying, harassment or sexual misconduct, the complainant has a right of appeal to the Conduct Committee against the Commissioner's findings. Having considered any appeal, and having agreed to any appropriate sanction, the Conduct Committee reports to the House and, for the most serious sanctions, the final decision rests with the House. In cases where the Commissioner has dismissed the complaint or where remedial action has been agreed, the Commissioner's reports are normally published on the Commissioner's webpage. However, the Commissioner has discretion to submit a report to the Conduct Committee.¹⁰

General comments on the proposal for a Compliance Officer

Clauses 1 and 2

22. Clause 1 of the proposed resolution establishes a position of Compliance Officer to deal with "low level, minor misconduct", which under clause 2 relate to:
 1. alleged breaches of the Members' code of conduct,
 2. less serious misconduct falling short of corrupt conduct
 3. allegations of bullying, harassment and other types of grievances
 4. minor breaches of the pecuniary interests disclosure scheme.
23. It is unclear what is meant by "low level, minor misconduct", "less serious misconduct" and "minor breaches". Surely the Compliance Officer should be able to investigate any matter relating to alleged breaches of the Member's Code of

⁹ See Note 3.

¹⁰ Extracted from House of Lords – "*Code of Conduct for Members of the House of Lords, Guide to the Code of Conduct, and Code of Conduct for House of Lords Members' Staff*", Tenth edition, July 2020, para 3, page 6

Conduct and failure to disclose pecuniary interests. Conduct amounting to corrupt conduct would necessarily be brought to the attention of the Independent Commission Against Corruption.

24. Clause (2) (b) (c) and (d) – I would leave these matters for inclusion in a protocol and consequent resolution of the House rather than include in the initial resolution establishing the position. Similar comments are made below in regard to other clauses.
25. For reasons discussed below in my submission, in my view the resolution for appointment of a Compliance Officer should simply be confined to the terms of appointment and functions of the Compliance Officer.
26. I would suggest a proposal for the establishment of a Compliance Officer in the following terms:

1 Appointment of Compliance Officer

- (1) That this House directs the President to appoint a Compliance Officer (*jointly with the Speaker of the Legislative Assembly*).
- (2) The President is to refer the proposed appointment of a person as Compliance Officer to the Privileges Committee, who may veto the appointment.

2 Functions of Compliance Officer

- (1) The Compliance Officer has the following functions:
 - (a) to receive and investigate complaints of alleged breaches of the Code of Conduct for Members, but not in relation to any proceedings in the House or a Committee, (*proposed (2) (a)*)
 - (b) to receive and investigate complaints of bullying, harassment and sexual harassment under the Code of Conduct for Members, (*proposed (2) (a) (iii)*)
(*this is presuming a provision is inserted in the Code of Conduct*)
 - (c) to receive and investigate complaints of alleged breaches of the disclosure of pecuniary interests under the Constitution (Disclosures by Members) Regulation 1983, (*proposed (2) (a) (iv)*)
 - (d) to receive and investigate complaints of the misuse of additional entitlements provided to Members under Part 3 of the Parliamentary Remuneration Tribunal Act 1989, (*proposed (2) (a) (i)*)

- (e) to provide advice to the Privileges Committee on any reform necessary on matters within the functions of the Compliance Officer, *(proposed (2) (b))*
- (f) to provide confidential advice, on request, to a Member or relevant staff of the Parliament on the interpretation of additional entitlements available to Members under the Parliamentary Remuneration Tribunal Act 1989, solely for the purpose of resolving any disagreement on interpretation of additional entitlements, and *(proposed (2) (d))*
- (g) to provide, information, training and education to Members of their obligations under the Code of Conduct and pecuniary interest regime. *(proposed (2) (c))*
(Note: Clause 2 (1) (g) is to be done in conjunction with the Privileges Committee, the Clerk of the Parliaments and the Parliamentary Ethics Adviser)

(Proposed paragraphs (1) (e), (f) and (g) might otherwise be included in the protocol as discussed in paragraph 28)

- (2) The Compliance Officer has such other functions as are conferred by resolution of the House.
- (3) In investigating any allegations of non-compliance with the Code of Conduct, the Compliance Officer must recognise the principle of freedom of speech in parliamentary proceedings, including but not limited to the need for members to be able to express their views fully and frankly in parliamentary proceedings.¹¹

27. It may well transpire that both Privileges Committee cannot agree on the precise terms of the proposed resolution for a Compliance Officer. In that event the Privileges Committee should propose a scheme to meet the needs of the Legislative Council, but with a common Compliance Officer for both Houses.
28. Under this approach any protocol to be approved by the Privileges Committee and resolution of the House, could be accompanied by an appropriate resolution encapsulating as appropriate the matters now included in clauses (2) (b) (c) and (d), clause (4) and clause (5).

¹¹ See para 23, House of Lords Code of Conduct.

Clause 3 – amendment of the Code of Conduct for Members

29. Clause 3 proposes an amendment to the Member’s Code of Conduct requiring members to treat staff and others “in a manner compatible with a safe workplace, free from harassment.”
30. What is meant by safe workplace and free from harassment? Is this meant to cover, bullying and harassment as well a sexual harassment?
31. If under proposed clause (2) (a) (iii) the Compliance Officer may investigate “allegations of bullying, harassment and other types of grievances”, then any amendment of the Members’ Code should include bullying.
32. Of course, sexual harassment by Members is unlawful under section 22B (7) of the *Anti-Discrimination Act 1977*, as well as workplace participants sexually harassing Members under section 22B (8).
33. I suggest a variation of the wording of clause 3, which is based on the rules in the UK Parliament¹², as follows:

“10 Behaviour of Members

A Member must treat all those with whom they come into contact in the course of their parliamentary duties and activities (including parliamentary proceedings) with dignity, courtesy and respect, and free from any behaviour that amounts to bullying, harassment or sexual harassment.”

34. There is a typographical error in the commentary on clause 3 and “Section 22(b) should read “Section 22B”.
35. In the UK Parliament since July 2018 a Behaviour Code applies to members of both Houses, following recommendations from two reports from a working group of members of both Houses for an Independent Complaints and Grievance Scheme (ICGS) to deal with bullying, harassment and sexual misconduct.¹³
36. The ICGS recognises that sexual harassment and sexual violence are different from other forms of inappropriate behaviour, including harassment and bullying, and require separate definition and procedures. Thus, the ICGS has two new Parliament-

¹² House of Commons rules 9 and 18; House of Lords rules 10 and 17.

¹³ Report of “Cross-Party Working Group on an Independent Complaints and Grievance Policy”, 8 February 2018; *Report of “Independent Complaints and Grievance Policy Programme Team - Independent Complaints and Grievance Scheme Delivery Report”*, July 2018

wide policies for responding to and managing complaints of sexual harassment¹⁴ and bullying and harassment¹⁵.

37. Significantly, the schemes provide specialist independent support and guidance to complainants, to offer a specialist independent investigation process where required and to arrange access to informal resolutions (where appropriate and agreed by both parties).¹⁶
38. Of course, if there is to be an amendment to the Code of Conduct for Members to promote dignity and respect, there should equally be a Parliament wide behaviour code applicable to all those whose place of work is Parliament House and electoral offices. This should apply to all passholders, including visitors, media and contractors.
39. In my humble view it would be difficult for a Compliance Officer primarily intended to deal with complaints concerning the Members' Code of Conduct, parliamentary entitlements and the pecuniary interests regime to also fulfill the role of a grievance officer dealing with bullying and harassment and sexual harassment. I believe such role should be undertaken by an independent investigator with relevant expertise (for example a person seconded from the Anti-Discrimination Board) but with oversight by the Compliance Officer. The protocol under proposed clause 5 (a) should have a process for dealing with remedies - such as, training, apology or behaviour agreement - and reporting to the Compliance Officer, who in turn, in appropriate cases, could recommend sanctions against a Member to the Privileges Committee.
40. A framework for agreed remedies, which should include an appeal process to the Compliance Officer should be approved by the Privileges Committee. The Privileges Committee should hear appeals against a finding of the Compliance Officer.
41. I note that under proposed clause (5) (e) the Compliance Officer may engage expert assistance.

Clause 4

42. In my view the term of appointment and dismissal of the Compliance Officer should be left for inclusion in the contract of appointment of the Compliance Officer, which can only be executed between the Department Heads and the Compliance Officer. Since the Compliance Officer is appointed by the President (*Presiding Officers*) any scheme for dismissal should be on the recommendation of the Clerk (*Joint Clerks*)

¹⁴ "Independent Complaints and Grievance Scheme - Sexual Misconduct Policy Procedure", July 2018 - a useful list of behaviours that may constitute sexual misconduct at paragraphs 5.2 to 5.4.

¹⁵ "Independent Complaints and Grievance Scheme - Bullying & Harassment Policy & Procedure", July 2018, has a useful discussion of examples of harassment at paragraphs 2.5 to 2.8, and bullying at paragraphs 2.9 to 2.11.

¹⁶ Para 29 *Working Group Report*, *ibid* note 6.

rather than the Chief Executive Officer of the Department of Parliamentary Services.

Clause 5

43. Clause (5) (a) – I would envisage that in the development of any protocol the Compliance Officer would consult with the Presiding Officers, relevant leaders in the House, Department Heads and the Parliamentary Ethics Adviser.
44. Both the House of Lords and House of Commons Guide to the Code of Conduct provide a useful starting point in developing a protocol. The Commons Standards Commissioner *Information Note* also outlines procedures for how a complaint is investigated and ultimately referred to the Standards Committee, and then to the House.
45. In regard to investigatory reports under clause (5) (b) in my opinion the Compliance Officer should not report directly to the House but rather to the Privileges Committee in regard to matters involving the Members' Code of Conduct and breaches of the pecuniary interests regime.
46. I posit this view on the basis of my experience that parliamentary law and practice requires a unique knowledge, experience and practical understanding. Members of the Privileges Committee with the expert advice of senior officials of the House, such as the Clerk and Deputy Clerk, are best placed to formulate recommendations to the House, while having regard to the nuisances of parliamentary practice.
47. The Privileges Committee would consider any report to it from the Compliance Office and report its conclusions and recommendations to the House.
48. Recommendations could include, for example, a written apology from the Member to the House; an apology to the House by means of a personal explanation; suspension from the service of the House for a specified number of days; or in the most serious cases, the Committee may recommend the Member's expulsion.
49. Depending upon the nature of the allegation or complaint there should be a different reporting scheme for decision and sanction depending on the relevant decision-making authority. For example, sanctions for breaches of the Code of Conduct and pecuniary interests regime should be reported to the Privileges Committee in the first instances; sanctions regarding PRT additional entitlements should be reported to the President, who would then refer matters to the Privileges Committee, as appropriate. Ultimately, the Privileges Committee would then report to the House with recommendations for appropriate sanction by the House.

50. In matters involving misuse of Parliamentary Remuneration Tribunal entitlements, and bullying harassment and other grievances, the Compliance Officer should be reporting to the relevant Presiding Officer, who would then bring matters to the attention of the Privileges Committee or the House, as appropriate.

General comments on clause 5

51. Other than requiring the Compliance Officer to develop a protocol under clause 5 (a), I would leave the mechanics of clause 5 (b) to (e) for inclusion in the protocol rather than being included in the resolution establishing the position.

Clause 6

52. As indicated above I would leave the powers of the Compliance Officer to any resolution accompanying approval of the final protocol. Either House may have differing views on the manner of conferring this power, either by resolution or Standing Order.

Clause 7

53. Again, I would leave the matter of record keeping until after development of the protocol and for inclusion in a resolution of the House.
54. I do have a concern with the wording of records not to be made public except “or where the member requests that the records be made public”. How is this to occur?
55. As Parliamentary Ethics Adviser I have previously informed the Committee that there needs to be provision in a resolution of the House for a document which a Member agrees to be made public to be able to be presented to Clerk and deemed to tabled and presented to House at next sitting. It is only in this manner that the document attracts parliamentary privilege.
56. The reference to “paragraph 12 of the protocol” should read “5”.

General comment about drafting

57. The proposed resolution has paragraphs and sub-paragraphs with no numbering and does not allow for ease of citation and reference. The document should be drafted with heading and paragraph numbering similar to a Bill.

Role of Privileges Committee

58. In my recommendation above that the Privileges Committee should have oversight of the Compliance Officer, rather than the Compliance Officer having direct

reporting to the House, and to allay concerns that allegations and appeals involving bullying, harassment and sexual misconduct are not heard by Members considering the behaviour of another Member, consideration should be given to the appointment of say three lay members to the Privileges Committee to allow them to participate in decisions and voting on motions.

59. Such a scheme applies in both Houses of the UK Parliament, and if I may be so bold as to suggest, the Parliamentary Ethics Adviser could possibly be one of the lay members.

Parliamentary privilege

60. In order to somewhat mitigate any doubt as to the application of parliamentary privilege to the proceedings of the Compliance Officer, I would suggest a resolution of the House in the following terms:

“For the avoidance of doubt, the provisions of Article 9 of the Bill of Rights 1688, applies in relation to the proceedings of the Compliance Officer for the purposes of “proceedings in Parliament” and the test of necessity of the proper functions the House is intended to execute.”

61. To compliment the above suggestion, I would also include the appointment of the Compliance Officer as an independent officer of the House in the Standing Orders, in terms as follows:

“Compliance Officer

- (1) An Officer of the House, called the Compliance Officer, is to be appointed by the President.
 - (2) The Compliance Officer has and may exercise the functions authorised by resolution of the House, but not in relation to any proceedings in the House or a Committee of the House.”
62. If I can be of further assistance to the Committee, I am happy to elaborate on my views at a meeting of the Committee, preferably at a deliberative meeting.

Yours sincerely

John Evans
Parliamentary Ethics Adviser