

Submission  
No 1

## INQUIRY INTO DRAFT CONSTITUTION (DISCLOSURES BY MEMBERS) REGULATION 2024

**Organisation:** NSW Independent Commission Against Corruption

**Date Received:** 7 May 2024

---

The Hon Stephen Lawrence MLC  
Chair, Privileges Committee  
Parliament House

By email: [privilege@parliament.nsw.gov.au](mailto:privilege@parliament.nsw.gov.au)

Our Ref: AD24/0039

Dear Mr Lawrence

**Inquiry into the draft Constitution (Disclosures by Members) Regulation 2024**

Thank you for your email dated 28 March 2024 regarding the Privileges Committee inquiry into the draft Constitution (Disclosures by Members) Regulation 2024 (“the draft Regulation”), and the invitation to make a submission. Thank you also for attaching the terms of reference and the consultation draft of the Regulation as provided under cover letter from the Premier dated 6 February 2024.

As outlined in the Premier’s letter, the intention of the draft Regulation is to implement recommendations 1 and 4 made in the July 2022 report by the Independent Commission Against Corruption (the Commission) titled *Investigation into the conduct of the local member for Drummoyne*, following the Commission investigation known as Operation Witney.

The Commission’s submission is **attached**. Please note that it will also address a range of other recommendations made by the Commission, which relate to the draft Regulation.

Thank you for the opportunity to make this submission. If you require further information or assistance on matters raised in the submission, please contact my office via [john.hatzistergos@icac.nsw.gov.au](mailto:john.hatzistergos@icac.nsw.gov.au) or [02 8281 5999](tel:0282815999).

Yours sincerely

  
The Hon John Hatzistergos AM  
Chief Commissioner

7 May 2024



INDEPENDENT COMMISSION  
AGAINST CORRUPTION

NEW SOUTH WALES

**Submission by the NSW Independent Commission  
Against Corruption to the inquiry into the draft  
Constitution (Disclosures by Members) Regulation  
2024**

**May 2024**

**About the Commission**

1. The NSW Independent Commission Against Corruption (“the Commission”) was established as an independent body in 1988 to investigate and prevent corruption in and affecting the NSW public sector.
2. The Commission’s principal functions are set out in s 13 of the *Independent Commission Against Corruption Act 1988* (“ICAC Act”). In summary, s 13 provides that the Commission:
  - as part of an investigation process, consider whether laws, methods of work, practices or procedures should be changed to reduce the likelihood of the occurrence of corrupt conduct
  - examine laws, practices and procedures of public authorities to facilitate the discovery of corrupt conduct
  - instruct, advise and assist public authorities on ways in which corrupt conduct may be eliminated or reduced, and the integrity and good repute of public administration promoted
  - enlist and foster public support in combating corrupt conduct and in promoting the integrity and good repute of public administration.

**OFFICIAL**

## Scope of the Commission's submission

3. Consistent with the above functions, the Commission's submission is in response to the terms of reference of the Privileges Committee's *Inquiry into the draft Constitution (Disclosures by Members) Regulation 2024* ("the inquiry"), and the consultation draft of the Constitution (Disclosures by Members) Regulation 2024 ("the draft Regulation") as provided under cover letter from the Premier dated 6 February 2024.
4. In line with the summary of the proposed reforms as set out in the Premier's letter, the Commission's submission is organised along the following topics, namely:
  - additional disclosure proposed by the draft Regulation:
    - trusts, superannuation funds and other beneficial or discretionary interests
    - interests of the member's immediate family members
    - disposition of interests
    - conflicts of interest
  - continuous disclosures and publicly accessible register.
5. As outlined in the Premier's letter, the intention of the draft Regulation is to implement recommendations 1 and 4 made in the Commission's July 2022 report titled *Investigation into the conduct of the local member for Drummoyne*, following the Commission investigation known as Operation Witney ("the Operation Witney report"). These recommendations are as follows:

### **Operation Witney: Recommendation 1**

*That the NSW Government, in consultation with NSW Parliament's Legislative Assembly Privilege and Ethics Committee and Legislative Council Privileges Committee ("NSW Parliament's designated committees"), amends the Constitution (Disclosures by Members) Regulation 1983 to require:*

- *the details of interests in trusts, including discretionary trusts and self-managed superannuation funds, to be disclosed as a standalone item*
- *the details of real property held by discretionary trusts, where a member of Parliament is a potential beneficiary, to be disclosed*
- *the details of the interests of immediate family members to be disclosed (noting the option to limit access to certain information for privacy reasons)*
- *the dispositions of interests to family members or other associates to be disclosed*
- *ongoing (within 28 days) requirements to update disclosures of interests, including for members leaving Parliament*
- *electronic databases to improve transparency of the registers.*

### **Operation Witney: Recommendation 4**

*That the NSW Government, in consultation with NSW Parliament's designated committees, amends the Constitution (Disclosures by Members) Regulation 1983 to provide for the mandatory registration of conflicts of interest by members of*

*Parliament via the creation of a register for this purpose (noting the option to limit access to certain information for privacy reasons).<sup>1</sup>*

6. This submission will address other recommendations that have been made by the Commission, as they relate to this inquiry.
7. Of direct relevance to the topic of conflicts of interest is recommendation 3 in the Operation Witney report, as well as recommendation 2 made in the Commission's June 2023 report titled *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others*, following the investigation known as Operation Keppel ("the Operation Keppel report"). These are:

**Operation Witney: Recommendation 3**

*That NSW Parliament's designated committees include a clear, consistent and comprehensive conflict of interest definition in the Code of Conduct for Members. This review should include a consideration of the relevant definitions in the Ministerial Code of Conduct and any opportunities for achieving a consistent approach in regard to avoiding, recognising, disclosing and managing conflicts of interest.<sup>2</sup>*

**Operation Keppel: Recommendation 2**

*That the NSW Parliament, in consultation with the Commission, develops a comprehensive framework applicable to members that addresses the avoidance, disclosure and management of conflicts of interest. The framework should provide members with practical guidance about how to avoid, disclose and manage common conflicts of interest.<sup>3</sup>*

8. Further, the Commission made a recommendation in its 2021 report titled *Investigation into the regulation of lobbying, access and influence in NSW* ("the Operation Eclipse report"), which relates to clause 7A of the Constitution (Disclosures by Members) Regulation 1983 ("the current Regulation"). The Commission will also address this topic, as the draft Regulation still envisages a member using their parliamentary position to provide policy advice, strategic advice, and lobbying activities. The Commission's recommendation states:

**Operation Eclipse: Recommendation 27**

*That the prohibition on paid advocacy – as outlined in clause 2(a) of the Members' Code of Conduct (Legislative Assembly) and the Members' Code of Conduct (Legislative Council) – be extended beyond the promotion of matters in the NSW Parliament or its committees, to any communication with any other*

**OFFICIAL**

---

<sup>1</sup> NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, Sydney, July 2022, pp. 7, 176 and 179.

<sup>2</sup> *Ibid*, p. 179.

<sup>3</sup> NSW ICAC, *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others (Operation Keppel)*, Sydney, June 2023, Volume 2, para. 14.47, p. 334.

*public officials, and that clause 7A of the Constitution (Disclosure by Members) Regulation 1983 (relating to disclosure) be amended accordingly.*<sup>4</sup>

9. Further, this submission will address a recommendation relating to the compliance framework for members with respect to the jurisdiction of courts or investigative bodies and the draft Regulation. The relevant recommendation was made in the Operation Keppel report, namely:

***Operation Keppel: Recommendation 9***

*That the NSW Government reviews the wording of clause 23 of the Constitution (Disclosures by Members) Regulation 1983 to ensure consistency with section 14A of the Constitution Act 1902 (NSW).*

10. For clarity's sake, the Commission advises that its comments and submissions, unless otherwise specified, are in relation to the disclosure regime as it operates for NSW members of Parliament, and not regarding the requirements for ministers and parliamentary secretaries, as these are subject to an additional disclosure regime operating pursuant to the NSW Ministerial Code of Conduct.<sup>5</sup>

## **Additional disclosure requirements proposed by the draft Regulation**

11. The office of a member carries significant authority and involves holding a position of public trust. It is imperative that members lead by example and in accordance with community and wider public sector expectations of such a high office. Because members hold a position of public trust, their conduct is subject to heightened public scrutiny. This intention is also reflected in the Members' Codes of Conduct<sup>6</sup> ("Members' Code"). The "Commentary" section of clause 6 of the Members' Code outlines the purpose of the disclosure regime for members, which is "to promote greater transparency, openness and accountability in the parliamentary process."
12. Having personal interests is common and does not on its own suggest any impropriety on the part of a public official holding a personal interest. Similarly, the disclosure and registration of a relevant interest does not imply any wrongdoing.
13. A common way to regulate potential conflicts of interest is the creation of registers of members' pecuniary and other interests. As Professor Graeme Orr, of the University of Queensland Law School, has observed:

*These registers adapt an idea common to the law of trusts. Just as a fiduciary is not to conceal a personal interest, so someone occupying a public trust should reveal their interests. Such disclosure also encourages divestment of interests that do not pass the smell-test. The primary purpose of MPs'*

---

**OFFICIAL**  
<sup>4</sup> NSW ICAC, *Investigation into the regulation of lobbying, access and influence in NSW*, Sydney, June 2021, p. 88.

<sup>5</sup> See Appendix of the Independent Commission Against Corruption Regulation 2017.

<sup>6</sup> Both Houses of Parliament have adopted a Members' Code of Conduct.

*registers is thus publicisation of interests to inform public scrutiny and debate. They rely on informed questioning by the media and political rivals.*<sup>7</sup>

14. The purpose of a disclosure register is to capture private interests including those that potentially come into conflict with a member's public duty. A disclosure regime also assists members in recognising and avoiding any potential conflict that could arise between their public role and personal interests. Further, this transparency measure assists others to determine whether a member is potentially conflicted.
15. When NSW Parliament initially set up pecuniary interest register in 1979, following a motion introduced by Premier Neville Wran, the Premier stated:

*...although it may be proper for members to have interests outside Parliament, it is in the interests of the State and of the members themselves that they should disclose those interests in a register in order that they may be capable of being perceived by their electorates as able to maintain unimpeachable conduct.*<sup>8</sup>

16. The Premier went on to quote from a report by the Joint Committee of the Legislative Council and Legislative Assembly on Pecuniary Interests, also known as the O'Connell committee, which tabled its report on 4th April 1978, and recommended the establishment of a register:

*The principal reason for establishing a register is to have as its main purpose the facility of enabling the public to attach due weight to the decisions taken by the members in the light of their pecuniary interests or other benefits whilst at the same time safeguarding the member's own character and reputation.*<sup>9</sup>

17. The *Members' Guide 2023* outlines the requirements of the current disclosure regime made pursuant to the current Regulation and section 14A of the *Constitution Act 1902* ("the Constitution Act"). It states:

*All members of the Legislative Council are required to disclose their pecuniary and other interests in order to address potential conflicts of interest between their public and private activities (interests).*<sup>10</sup>

18. The *Integrity Legislation Amendment Act 2022* was passed by both Houses of NSW Parliament in November 2022. It laid the groundwork to implement recommendations 1 and 4 of the Operation Witney report. Among other reforms, it amended section 14A of the Constitution Act concerning the disclosure of pecuniary interests and other matters by members. Section 14A states that "The Governor may, subject to subsections (4) and

---

**OFFICIAL**  
<sup>7</sup> G Orr, "Parliamentary Disqualification for Financial Conflicts" (2019) 47:4 *Federal Law Review* 583 at 597.

<sup>8</sup> Hansard Transcript, Legislative Assembly, introduced by motion of the Hon Neville Wran, p. 2526, 6 Nov 1979.

<sup>9</sup> Ibid.

<sup>10</sup> NSW Parliament, *New South Wales Legislative Council: Members' Guide 2023*, March 2023, p. 44.

(5), make regulations for or with respect to— (a) the disclosure by Members of either House of Parliament of all or any of the following pecuniary interests or other matters ...”. The Integrity Legislation Amendment Act resulted in the following insertions into section 14A(1) of the Constitution Act:

- (vii) *details of Members’ interests in trusts, including discretionary trusts and self-managed superannuation funds,*
- (viiia) *details of real property held by discretionary trusts, if a Member is a potential beneficiary of the discretionary trust,*
- (viiib) *other matters relating to trusts,*
- (viiic) *water entitlements and other interests in water,*

19. Section 14A(1)(a)(xii) of the Constitution Act was amended and the words “or other matters” were inserted. The section now states:

- (xii) *any other direct or indirect benefits, advantages or liabilities or other matters, whether pecuniary or not, of a kind specified in the regulations,*

20. The following section 14A(1A) was inserted in the Constitution Act:

- (1A) *If a regulation is made under subsection (1)(c) requiring the compilation and maintenance of registers, the regulation must include the following requirements—*
  - (a) *that the registers be kept in an electronic format, that is searchable, within 12 months after the making of the regulation,*
  - (b) *that the registers be accessible by members of the public, subject to any limitations prescribed in the regulations to protect—*
    - (i) *the privacy of persons other than Members of either House of Parliament, or*
    - (ii) *the safety of a person or class of persons.*

21. Further, the following section 14A(4A) was inserted in the Constitution Act:

- (4A) *Without limiting subsection (1), regulations made under that subsection may relate to the disclosure of the pecuniary interests, or other matters, of members of the immediate family of Members of either House of Parliament.*



## *Trusts, superannuation funds and other beneficial or discretionary interests*

22. As outlined in the Operation Witney report, the disclosure requirements for members' interests, including those relating to trusts, have shifted over the years. Further, the report noted that the disclosure regime for members of Parliament pursuant to the current Regulation has weaknesses and gaps when it comes to disclosure requirements regarding trusts and superannuation funds.<sup>11</sup> For example, the Commission identified a relevant discretionary trust, under which the member was a general beneficiary. Under the current disclosure regime, the Commission was satisfied that the member was not obliged to disclose that he and his wife were general beneficiaries of this trust and that an obligation of disclosure to NSW Parliament only arose when he received a distribution.<sup>12</sup>
23. The Commission has previously considered the issue of family trusts. In 2013, the Commission published an investigation report titled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others* ("the Operation Jasper report"). It concerned events resulting in the granting of a coal exploration licence in the Bylong Valley in the area of Mount Penny, where a member's family owned a rural property known as Cherrydale Park. The Operation Jasper report noted that there was a complex structure of trusts and corporate vehicles through which the family conducted their business and financial affairs.<sup>13</sup> The Commission observed that "all of the family's diverse business interests operate for the benefit of the family as a whole. The family operates, in effect, as a single economic unit."<sup>14</sup>
24. These complexities and relationships are set out in detail in a subsequent judgment by Fullerton J, which also considered the various dealings of the trusts, directorships, family companies and beneficial interests affecting the family.<sup>15</sup> For example, Fullerton J observed that certain correspondence "was designed to give the appearance of an arm's length transaction whereas it was in truth a construct to attempt to distance the member's family from the direct ownership of Cherrydale Park".<sup>16</sup> [Footnotes omitted] In this case, the decision of the court included a finding that the member participated in a conspiracy, which included his efforts to conceal his family's ownership of Cherrydale Park.<sup>17</sup>
25. In combination with another investigation, the Operation Jasper report resulted in recommendations being made by the Commission in its 2013 publication, *Reducing the*

**OFFICIAL**

---

<sup>11</sup> NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, Sydney, July 2022, p. 175ff.

<sup>12</sup> *Ibid*, p. 26ff

<sup>13</sup> NSW ICAC, *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, Sydney, July 2013 p. 28.

<sup>14</sup> *Ibid*, p. 30.

<sup>15</sup> *R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 17)* [2021] NSWSC 858

<sup>16</sup> *Ibid*, para 1943.

<sup>17</sup> *Ibid*, para 1981ff.

*opportunities and incentives for corruption in the state's management of coal resources.* One such recommendation was to expand the register of disclosures for members to specifically include family trusts.<sup>18</sup>

26. As detailed in the Operation Witney report, even though this recommendation was considered by various parliamentary committees, it was not implemented.
27. Another discretionary family trust featured in a 2014 investigation report by the Commission known as Operation Cyrus, involving the company Circular Quay Restaurants Pty Ltd.<sup>19</sup> Further details about this trust are outlined in a subsequent judgment by Beech-Jones J.<sup>20</sup>
28. The Operation Witney report provides details and examples regarding how trusts are regulated in other Australian jurisdictions.<sup>21</sup> For example, members of both the federal House of Representatives and the Senate are required to register interests including in family and business trusts, and nominee companies.<sup>22</sup>
29. The Commission has considered the minimum standards for codes of conduct as recommended by the Commonwealth Parliamentary Association (“CPA”). The 2024 edition of the standards advises that, as a minimum, there should be a mandate that members disclose and register trusteeships, as well as trusts and blind trusts of which the member is a beneficiary.<sup>23</sup>
30. The draft Regulation contains the following proposed clause regarding trusts:

### **11 Trusts**

- (1) *A Member must disclose a trust if the Member or an immediate family member of the Member—*

---

**OFFICIAL**  
<sup>18</sup> NSW ICAC, *Reducing the opportunities and incentives for corruption in the state's management of coal resources*, Sydney, October 2013, p. 43.

<sup>19</sup> NSW ICAC, *Investigation into the conduct of the Hon Edward Obeid MLC and others concerning Circular Quay retail lease policy*, June 2014, p. 14.

<sup>20</sup> *R v Obeid (No 12)* [2016] NSWSC 1815 at [11-12]

<sup>21</sup> NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, Sydney, July 2022, p. 174ff.

<sup>22</sup> *Resolutions relating to Senators' Interests*, see [https://www.aph.gov.au/-/media/Committees/Senate/committee/interests\\_ctte/reg\\_interests.pdf?la=en&hash=2D61778CD4049C1901D2AA47C1DC3CEDE611BBE7](https://www.aph.gov.au/-/media/Committees/Senate/committee/interests_ctte/reg_interests.pdf?la=en&hash=2D61778CD4049C1901D2AA47C1DC3CEDE611BBE7), accessed 8 April 2024. Clause (2)(b) Resolutions of the House, Registration of Members' interests, Resolution adopted 9 October 1984 a.m., amended 13 February 1986, 22 October 1986, 30 November 1988, 9 November 1994, 6 November 2003, 13 February 2008 a.m. and 19 September 2019.

<sup>23</sup> Commonwealth Parliamentary Association, *Standards for codes of conduct for members of parliament and the parliamentary workplace: minimum standards, additional measures and supporting structures*, London, 2024, p. 13.

- (a) *has a beneficial interest in the trust, including a mere expectancy as a beneficiary of a discretionary trust, or*
  - (b) *is a trustee of the trust.*
- (2) *The following information must be disclosed about the trust—*
- (a) *the name of the trust,*
  - (b) *a description of the activities of the trust,*
  - (c) *the nature of the interest the Member or immediate family member has in the trust,*
  - (d) *the interests held by the trust, including interests in real property and investments.*
- (3) *A trust is not required to be disclosed by a Member under subsection (1)(b) if the Member or immediate family member is trustee—*
- (a) *as the executor or administrator of the estate of a deceased person and the Member or immediate family member is not a beneficiary under the will or intestacy, or*
  - (b) *in the ordinary course of an occupation of the Member or immediate family member that is not related to the Member's duties as a Member.*
- (4) *To avoid doubt, trusts that are superannuation funds, whether public or self-managed, and listed investment trusts must be disclosed under this section.*
- (5) *A Member may give the following information about a parcel of real property in which a trust has an interest as an alternative to disclosing the address of the parcel if the parcel is used by the Member or immediate family member for residential purposes—*
- (a) *a statement that the parcel is, for the Member or immediate family member—*
    - (i) *the principal place of residence, or*
    - (ii) *a secondary place of residence,*
  - (b) *the location of the parcel by suburb or area.*

31. Registers of members' interests act as an accountability measure and must be sufficiently robust so as to require a person holding a position of public trust to reveal their interests rather than conceal them.

32. The Commission notes that the proposed clause 11 seeks to strike a balance both in the scope of what has to be disclosed (by detailing exemptions) and the level of detail required. That is reasonable, as disclosure requirements should not be unnecessarily onerous. The Commission will address this topic of exemptions regarding interests that

are not related to the member's duties as a member under the 'Conflicts of interest' sub-heading, below.

33. The Commission reports outlined above show that the relevant beneficial interest pertaining to trusts and other entities including superannuation funds have not been disclosed. As such, these are significant corruption risks. The Commission supports the implementation of these aspects of the draft regulation.

### Submission 1

34. **That the NSW Parliament supports the additional disclosure requirements as outlined in clause 11 of the draft Constitution (Disclosures by Members) Regulation 2024.**

#### *Interests of the member's immediate family members*

35. The issue of whether the interests of family members ought to be disclosed is not new. As outlined in the Operation Witney report, the initial disclosure regime set up in NSW in 1979 required the disclosure of the interests of family members.<sup>24</sup> When the disclosure regime was initially introduced, the former Premier noted that any such scheme which failed to require the disclosure of such interests would rightly be perceived to be a "massive loophole":

*...if our Parliament's scheme were to confine disclosure of a member's interests to himself or herself alone, this would be perceived as constituting such a massive loophole that the credibility of the whole exercise would be undermined. It is for this reason, no doubt, that it is customary for registration schemes to contain provisions relating to immediate members of the family and why the O'Connell committee recommended such a provision for New South Wales.<sup>25</sup>*

36. In 1994, the Joint Committee on the ICAC considered whether the interest of family members ought to be disclosed. Professor Gerard Carney's submission to the inquiry outlined three reasons why there should be such a requirement:

- (i) That a conflict of interests can as easily arise when the interest in question is that of a Member's family or spouse;*
- (ii) A Member may choose to transfer his or her assets to his or her family to avoid the provisions of the Register; and*

---

<sup>24</sup> NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, Sydney, July 2022, p. 172.

<sup>25</sup> Hansard Transcript, Legislative Assembly, introduced by motion of the Hon Neville Wran, p. 2526, 6 Nov 1979.

*(iii) The Register may not have public confidence unless a Member's family interests are disclosed.<sup>26</sup>*

37. The Commission's evidence in the 1994 inquiry was also in support of requiring the interests of family members being disclosed, stating:

*The basis of making public and disclosing this information can be seen as preventing a conflict of interest arising, bringing to the attention of the Member or others that there are certain interests and recognising that there are interests which can influence a Member in the exercise of his or her public duties. It is thought that the interests of close associates - in the sense of family members - would be as capable of exercising that influence as if it were the Member's own interests. Therefore, the nexus is so close as to require disclosure.<sup>27</sup>*

38. The 1994 report by the Joint Committee of the ICAC noted that it received no evidence showing that the family interest exemption is being abused.<sup>28</sup>

39. That situation has changed. The Operation Witney report, as well as the Operation Jasper report, outlined above, provide examples of the interests of family members being capable of influencing a member's conduct and the potential loopholes that can arise in relation to these interests.

40. In addition, the Commission has made findings regarding members failing to disclose family interests. For example:

- in 2014 the Commission had made a finding in the Operation Cyrus report that a member had failed to disclose to ministers that his family had interests in certain Circular Quay leases and would benefit financially from a change in policy, for which he was advocating.<sup>29</sup>
- in 2017, in an investigation known as Operation Credo, it was noted that a member made various representations to ministers and the premier, including asking the premier to intervene in a dispute that a government agency had with a company. There is evidence that this member failed to mention his family's interest in the company, or that his son was working with that company.<sup>30</sup>

**OFFICIAL**

---

<sup>26</sup> NSW Parliament, Joint Committee on the ICAC, *Report on inquiry into the pecuniary interest provisions for members of Parliament and senior executives and a code of conduct for members of Parliament*, Sydney, 14 April 1994, p. 16.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, p. 18.

<sup>29</sup> NSW ICAC, *Investigation into the conduct of the Hon Edward Obeid MLC and others concerning Circular Quay retail lease policy*, June 2014, pp. 7 and 60.

<sup>30</sup> NSW ICAC, *Investigation into dealings between Australian Water Holdings Pty Ltd and Sydney Water Corporation and related matters*, August 2017 pp. 80 - 81.

41. The Operation Witney report provides details and examples regarding how family interests are regulated in other comparable Australian jurisdictions.<sup>31</sup> For example, members of both the federal House of Representatives and the Senate are required to disclose interests of a spouse or partner and dependent children.<sup>32</sup> In addition, the CPA's minimum standards recommend that the following personal interests be declared:

*Relevant interests held by the Member's spouse, partner or close family members are clearly included in the requirements of a register of interests.*<sup>33</sup>

42. The Operation Witney and Operation Keppel reports observe that whilst there are separate and distinct conflict of interest disclosure requirements because of separate codes of conduct for members of Parliament and for parliamentary secretaries/ministers, it is important that there is an internal consistency (to the extent possible) about the core aspects of conflicts of interest management. Consequently, it will assist to consider the relevant disclosure requirements pursuant to the current NSW Ministerial Code of Conduct regarding the interests of immediate family members and procedural requirements, which are detailed below:

- Part 2 and the "Standing disclosures of interests" as set out in the Schedule to the NSW Ministerial Code of Conduct, is applicable to ministers and parliamentary secretaries. It provides at clause 6(1)(c) of the Schedule to the NSW Ministerial Code of Conduct for the following initial disclosures to be provided to the Premier:

*a notice in writing of any pecuniary and other interests of their immediate family members, the disclosure of which would be required under the Constitution (Disclosures by Members) Regulation 1983 if the relevant interest were instead that of the Minister.*

- Further, there is an obligation pursuant to clause 7 of the Schedule to the NSW Ministerial Code of Conduct to provide continuous updates, including regarding the relevant interests of immediate family members. Clause 7(1)(c) states:

*a notice in writing of any event that has occurred in relation to the pecuniary and other interests of their immediate family members, the disclosure of which would be required under the Constitution (Disclosures by Members) Regulation 1983 if the relevant interest*

**OFFICIAL**

---

<sup>31</sup> NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, Sydney, July 2022, p. 174ff.

<sup>32</sup> *Resolutions relating to Senators' Interests*, see [https://www.aph.gov.au/-/media/Committees/Senate/committee/interests\\_ctte/reg\\_interests.pdf?la=en&hash=2D61778CD4049C1901D2AA47C1DC3CEDE611BBE7](https://www.aph.gov.au/-/media/Committees/Senate/committee/interests_ctte/reg_interests.pdf?la=en&hash=2D61778CD4049C1901D2AA47C1DC3CEDE611BBE7), accessed 8 April 2024. Clause (2)(b) Resolutions of the House, Registration of Members' interests, Resolution adopted 9 October 1984 a.m., amended 13 February 1986, 22 October 1986, 30 November 1988, 9 November 1994, 6 November 2003, 13 February 2008 a.m. and 19 September 2019.

<sup>33</sup> Commonwealth Parliamentary Association, *Standards for codes of conduct for members of parliament and the parliamentary workplace: minimum standards, additional measures and supporting structures*, London, 2024, p. 14.

*were instead that of the Minister, as soon as practicable after the event occurs.*

- Pursuant to clause 9 of the Schedule to the NSW Ministerial Code of Conduct, a schedule of the disclosures of current interests made by all ministers and parliamentary secretaries under Part 2 is to be kept on the confidential Ministerial Register of Interests and is to be available for inspection by all Ministers at any meeting of the Cabinet or any Cabinet Committee and otherwise by arrangement with the Premier.

43. Turning back to the proposed requirements as outlined in the draft Regulation, the 'Explanatory note' states that it provides for the ongoing disclosure by members of pecuniary interests and other matters relating to members and their immediate family members. Specifically, the draft Regulation requires disclosure of the interests of an immediate family member concerning:

- Real property (clause 10)
- Trusts (clause 11)
- Interests in positions in corporations (clause 12)
- Positions in trade unions and professional or business associations (clause 13)
- Debts (clause 14)
- Sources of income (clause 16)
- Gifts (clause 17)
- Contributions to travel (clause 18)
- Water access licences (clause 21).

44. The term "immediate family members" is defined in the dictionary in Schedule 3 of the draft Regulation, and states [original emphasis]:

***immediate family member***, in relation to a Member, means—

(a) *the Member's spouse or de facto partner, or*

**Note—** *De facto partner* is defined in the Interpretation Act 1987, section 21C.

(b) *a child of the Member or of the Member's spouse or de facto partner if one or more of the following apply—*

(i) *the child less than 18 years of age,*

(ii) *the child is a dependant of the Member or of the Member's spouse or de facto partner,*

(iii) *the child resides with the Member or the Member's spouse or de facto partner.*

45. The Commission notes that this definition is in line with the definition of "immediate family member" as outlined in clause 11 of the NSW Ministerial Code of Conduct.

46. The draft Regulation includes the following clauses that are also relevant regarding access to disclosed information:

**OFFICIAL**

## **25 Registers to be publicly available**

- (1) *A Clerk must make searchable copies of the registers publicly available for inspection on the website of the NSW Parliament.*
- (2) *A Clerk may exclude information from the copy of a register made publicly available under this section if the Clerk is satisfied it is necessary to protect—*
  - (a) *the privacy of persons other than Members of either House of Parliament, or*
  - (b) *the safety of a person.*
- (3) *This section takes effect immediately before the end of a period of 12 months after this regulation is made.*

## **26 Registers to be available to Members and officers of ICAC**

*A Clerk must make searchable copies of the complete registers available for inspection by the following—*

- (a) *a Member,*
- (b) *an officer of the Commission within the meaning of the Independent Commission Against Corruption Act 1988.*

47. In the Commission's view, the proposed clauses 25 and 26 are appropriate in this regard. Clause 26 and the topic of accessibility is addressed in a separate submission, below.
48. The Privileges Committee's inquiry might consider whether it is sufficient to require the interests of an 'immediate family member' be disclosed, given the Commission's investigation reports demonstrate that interests of other relatives (including the interests held by a parent, or by adult children) can also influence a member in the exercise of his or her public official functions.<sup>34</sup>
49. The Commission's view is that the proposed suite of reforms will complement each other. The Commission anticipates that the requirement to disclose beneficial interests relating to trusts and superannuation funds, as outlined above, will result in additional transparency regarding interests involving relatives that potentially extend beyond the interests of immediate family members. Further, the Commission anticipates that the conflicts of interest provisions discussed further below, will result in additional disclosures of interests that arise, as set out in clause 15(2) of the draft Regulation. The proposed conflicts of interest requirement will also capture ad hoc situations that involve

**OFFICIAL**

---

<sup>34</sup> NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, Sydney, July 2022, pp. 35 - 37, 53 - 54, 81, 178. NSW ICAC, *Investigation into dealings between Australian Water Holdings Pty Ltd and Sydney Water Corporation and related matters*, August 2017 pp. 47 – 48, 77 - 85, 141. NSW ICAC, *Investigation into the conduct of the Hon Edward Obeid MLC and others concerning Circular Quay retail lease policy*, June 2014, pp. 13 – 15, 60.



interests held by other relatives or close associates if these “could objectively have the potential to influence the performance of the Member’s public duty”.

50. The proposed additional transparency measures regarding the interests of immediate family members would seem appropriate, as it is likely that members have detailed knowledge of interests of their immediate family members. It is less likely that a member possesses detailed knowledge of the interests held by other relatives.
51. The Commission maintains its view that there are grounds for the disclosure regime operating for members to extend to the interests of their immediate family members. These include:
- such a requirement is consistent with the existing disclosure requirement pursuant to the Ministerial Code of Conduct
  - the Commission’s investigations show that the interests of family members can influence a member in the exercise of his or her public duties
  - having to proactively disclose the interests of their immediate family members would assist members to recognise their potential conflicts of interest; this in turn would assist members in demonstrating their commitment to principles, such as transparency and accountability and acting with integrity.

## Submission 2

- 52. That the NSW Parliament supports the additional disclosure requirements relating to the interests of immediate family members as outlined in the draft Constitution (Disclosures by Members) Regulation 2024.**

### *Disposition of interests*

53. As observed by Professor Carney, above, the transfer of assets owned by a member to their family member is potentially a way to avoid the disclosure provisions.<sup>35</sup>
54. Clause 15 of the current Regulation requires that the dispositions of property be disclosed.
55. The draft Regulation requires that instead, the dispositions of relevant interests be disclosed. Clause 19 states:

#### **19 Dispositions of interests**

- (1) *A Member must disclose particulars of each disposition of a relevant interest by the Member if the Member kept, wholly or in part—*

---

**OFFICIAL**

<sup>35</sup> NSW Parliament, Joint Committee on the ICAC, *Report on inquiry into the pecuniary interest provisions for members of Parliament and senior executives and a code of conduct for members of Parliament*, Sydney, 14 April 1994, p. 16.

(a) *the use and benefit of the interest, or*

(b) *the right to reacquire the interest at a later time.*

(2) *A Member must disclose particulars of each disposition of property by another person under arrangements made by the Member if the Member kept, wholly or in part, the use and benefit of the property.*

(3) *In this section*

***relevant interest***, *in relation to a Member means an interest that would, but for the disposition of the interest by the Member, be required to be disclosed under this regulation.*

56. The broader definition that the dispositions of a relevant interest (not only property) be disclosed is likely to result in fewer ways to avoid the disclosure provisions. In the Commission's view, the proposed reform is appropriate.

### Submission 3

**57. That the NSW Parliament supports the revised disclosure requirements relating to the dispositions of interests as outlined in the draft Constitution (Disclosures by Members) Regulation 2024.**

### *Conflicts of interest*

58. As outlined from paragraph 14 onwards, above, the purpose of a disclosure register is to capture a member's private interests including those that **potentially** come into conflict with a member's public duty. It is uncontroversial that a member attends to these so-called standing disclosures of interest on a regular basis. These tend to involve mostly pecuniary, or financial interests. The current disclosure regime is not limited to financial interests, as the disclosable interests includes non-pecuniary interests, such as certain positions held in trade unions and professional or business associations, whether remunerated or not.<sup>36</sup>

59. There are additional or ad hoc situations that arise for members when they are faced with situations where other relevant interests (including non-pecuniary interests) overlap with their public duties. This includes situations that arise outside of parliament and in any communications with ministers, other members, or public officials. It is important to view the situation objectively and consider how the interest is being **perceived** by a reasonable bystander. In the Commission's view, a robust disclosure regime ought to result in these interests being recorded as well.

60. Before considering the regulatory framework, this submission will initially consider some practical examples of situations that have arisen in public life, which resulted in members

---

<sup>36</sup> Clause 13

failing to avoid, resolve, disclose or manage relevant interests. The submission contains some references regarding the outcomes of legal proceedings and findings.

#### Commission reports and subsequent legal proceedings

61. Firstly, the Operation Witney report, which contained relevant recommendations made by the Commission, considered the conduct of the former member for Drummoyne in public office. The conduct investigated by the Commission was not about decisions taken by him in the execution of his office, but instead concerned the significant property interests his family had acquired in the City of Canada Bay (CCBC) local government area. As observed by the Commission, there was a conflict between the member's pursuit of his family's private property interests, and his duty to act in the public interest, as he was utilising his public official position in communication with other public officials:

*...in circumstances where [...] was seeking certain planning outcomes in relation to the Five Dock town centre that would have benefited his family's property interests, at the same time as being the local member for the area, a conflict necessarily arose between his pursuit of his family's private interests and his duty as a representative of others, to act in the public interest...*

*A primary obligation held by [...] in appropriately managing the conflict of interest between his family's private interests in planning decisions involving the Five Dock town centre and his duty to act in the public interest as the local member when engaging with CCBC councillors in relation to these matters, was the appropriate disclosure of the nature and extent of his personal interest in these same matters.*

*The Commission is satisfied that it would be one thing to engage private consultants to represent the private property interests of his family and then to have no further involvement with the matter. But it is quite another matter for the local member to continue to purport to represent the interests of his constituents in a matter in which he has an undisclosed vested interest, and to engage in a course of conduct that included dealing with the Liberal councillors who could vote on the matter to achieve an objective that would work against the public interest.*

*While [...] was not the decision-maker in relation to matters concerning the Five Dock town centre, the Commission's investigation examined, in particular, his use of his public official position to seek to influence those decisions made by the Liberal councillors to achieve particular planning outcomes that would benefit his family's interests.*

*[...] position as the state representative of the same constituents served by CCBC gave him considerable access to the Liberal councillors, and it lent considerable weight to his representations about the purported interests of those constituents. In this way, his official position had the significant capacity to influence and even interfere with the decision-making processes of the*

*relevant Liberal councillors and the exercise of their public official functions.*<sup>37</sup>  
[Name omitted]

62. The Operation Witney report made a range of findings regarding the conduct of the former member for Drummoyne including that it involved the use of his official position as a member of Parliament and the local member for Drummoyne and it:

- *was wholly motivated by the desire to advance his family's property interests, despite those interests being in conflict in several key respects with what CCBC had determined, based on the analyses of its expert planning consultants, to be in the public interest*  
...
- *involved [...] ongoing misrepresentation that, at all times he was acting in the interests of his constituents and the community and his ongoing non-disclosure of a serious and growing conflict of interest.*<sup>38</sup>  
[Name omitted]

63. Secondly, the 2023 Operation Keppel report provides several salutary examples of the former member for Wagga Wagga keeping relevant interests hidden. This conduct was not constrained by any specific prohibitions on certain interests such as the management of businesses or interests in private companies.<sup>39</sup> The Operation Keppel report provides details of the member intentionally seeking to monetise his parliamentary position with a view to making money for himself and his associates, including by:

- referring constituents to the immigration or “cash-for-visas scheme”, in circumstances where there was a conflict, or a real or substantial possibility of conflict, because there was potential profit for him.<sup>40</sup> In fact, the Commission’s findings are that the member personally received and retained in excess of \$100,000 in cash in connection with his involvement in the immigration scheme.<sup>41</sup>
- using his position as the chair of the Asia Pacific Friendship Group (“APFG”) and the network of contacts it provided him to set up various meetings, including with consuls general, for the benefit of the Shenzhen Asia Pacific Commercial Development Association (“SAPCDA”), but he never disclosed, when setting up such meetings, that he hoped to benefit financially from the activities of SAPCDA.<sup>42</sup>
- assisting vendors and property developers, including a close friend,<sup>43</sup> to gain access, whether directly or indirectly, to members of Parliament, their staff and

**OFFICIAL**

<sup>37</sup> NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, Sydney, July 2022, p. 23ff.

<sup>38</sup> *Ibid*, p. 167ff.

<sup>39</sup> Part 1 of the Schedule to the NSW Ministerial Code of Conduct does not apply to a parliamentary secretary.

<sup>40</sup> NSW ICAC, *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others*, Sydney, June 2023, Volume 1, para. 6.2, p. 126, para 6.234, p. 163.

<sup>41</sup> *Ibid*, para 6.211, p. 160.

<sup>42</sup> *Ibid*, para. 7.26, p. 193.

<sup>43</sup> *Ibid*, para. 8.310ff.

other public sector employees, but at no stage did he disclose to those he approached on behalf of the developers his expectation of receiving a personal pecuniary benefit.<sup>44</sup> This included the member's "hoped for" financial interest in assisting a property developer and the representations he made on his behalf.<sup>45</sup>

- advocating on behalf of the 'Smartwest.Sydney' matter, without disclosing that the principal reason he was doing so, was the hope of receiving a commission or fee.<sup>46</sup> By his own submission to the Commission, he did not disclose and should have disclosed that he was assisting the land owner in relation to a property.<sup>47</sup>

64. Thirdly, in its 2017 Operation Credo report, the Commission outlined evidence that a member did not raise the family's interest in a company when he interacted with other public officials, including asking the premier to intervene in a dispute that a government agency had with that company. The Commission found that the promotion of these interests by the member amounted to a misuse of his position and a breach of public trust, because the member knew that the advancement of those interests would financially benefit his family.<sup>48</sup> As reported in the media, the former member has since been charged with misconduct in public office.<sup>49</sup>

65. Fourthly, in its 2014 Operation Cyrus report, the Commission found that a member made representations to ministers to have commercial leases renewed at Circular Quay without a tender process without disclosing that his family was effectively a lessee and would benefit financially from the policy change. The Commission found that the member's representations could amount to the criminal offence of misconduct in public office.<sup>50</sup>

66. The former member was convicted of wilful misconduct in public office for intervening in processes in which he and his family held an interest.<sup>51</sup> In 2017, the Court of Criminal Appeal, Supreme Court of NSW, dismissed an appeal by the former member against conviction and sentence.<sup>52</sup> In upholding the conviction, Bathurst CJ noted that the matter was about the misuse of the member's parliamentary position to advance his financial position or that of his family or associates.<sup>53</sup> Further, it was noted by Bathurst CJ that neither the Members' Code of Conduct, the current Regulation nor the attached

---

## OFFICIAL

<sup>44</sup> Ibid, para. 8.3, p. 219.

<sup>45</sup> Ibid, pp. 222 – 226.

<sup>46</sup> Ibid, para. 8.199, p. 253.

<sup>47</sup> Ibid, para 8.286, p. 269.

<sup>48</sup> NSW ICAC, *Investigation into dealings between Australian Water Holdings Pty Ltd and Sydney Water Corporation and related matters*, Sydney, August 2017 pp. 79ff, 138.

<sup>49</sup> Rani Hayman, "Three former New South Wales MPs hit with criminal charges", ABC News, 18 July 2022.

<sup>50</sup> NSW ICAC, *Investigation into the conduct of the Hon Edward Obeid MLC and others concerning Circular Quay retail lease policy*, Sydney, June 2014, p. 6ff, 61.

<sup>51</sup> *R v Obeid (No 12)* [2016] NSWSC 1815 at [3] and at [51].

<sup>52</sup> *Obeid v R* [2017] NSWCCA 221

<sup>53</sup> *Obeid v R* [2017] NSWCCA 221 at [254]

guidance to the Regulation define the totality of the member's obligations.<sup>54</sup> A subsequent application by the member for special leave to appeal to the High Court was refused.<sup>55</sup>

67. Finally, the Commission notes the findings of its April 2024 report regarding the conduct of a member in his capacity as the minister for the Hunter. The report was released by the NSW Government on 11 April 2024.<sup>56</sup> Although these findings were made pursuant to the NSW Ministerial Code of Conduct, they illustrate the importance of avoiding, recognising, disclosing and managing conflicts of interest. The Commission made the following findings about the minister's conduct, which amounted to a breach of public trust (but, for reasons set out in the report, did not amount to a finding of corrupt conduct):

- the minister knowingly failed to declare a conflict of interest arising from interests in property in or around the Broadmeadow Investigation Area and the Hunter Park Sport and Entertainment Precinct held by him, his wife and his in-laws, and that this failure amounted to breach of public trust, and
- the minister participation in meetings that could affect his and his extended family's properties also constituted a breach of public trust.

68. The Commission did not accept the minister's argument that he did not have a conflict because certain properties on Broadmeadow Road owned by his wife and father-in-law would be impacted no more or less than neighbouring properties such that they became a member of a broad demographic group. The Commission held that the exception about belonging to a broad demographic group did not apply and that the wife and in-laws were "significant property owners in a small geographic area".<sup>57</sup>

69. These above examples serve to illustrate that there are various challenges for members to maintain their integrity and be seen to do so. Members face risks because:

- they have a duty to act in the public interest
- many members have outside interests, including secondary employment
- many if not all members have families or associates with relevant interests that can intersect with a member's use of their public official functions or role
- an objective rather than subjective test is used in determining whether a member has a conflict of interest
- members have a broad remit and a broad exposure to the community.

70. The Commission reiterates its view expressed in the Operation Keppel report, namely that members' complex working environment requires detailed guidelines and clear

---

<sup>54</sup> *Obeid v R* [2017] NSWCCA 221 at [144] and at [269] **OFFICIAL**

<sup>55</sup> [2018] HCATrans 054

<sup>56</sup> NSW ICAC, *Report to the Secretary of The Cabinet Office and the Hon Chris Minns MP Premier of NSW*, April 2024, see <https://www.nsw.gov.au/the-cabinet-office/resources/reviews/icac-tim-crakanthorp>, accessed 12 April 2024.

<sup>57</sup> *Ibid*, p. 24ff.

processes to assist them to navigate ethical challenges involving conflicts of interest.<sup>58</sup> As stated in the Operation Keppel report, as well as the Witney report, ideally, the separate conflicts of interest regimes relevant for elected public officials (pursuant to the Members' Code and the Ministerial Code of Conduct) should be internally consistent about core aspects (to the extent possible), including consistency in the:

- *definition of a conflict of interest*
- *the ways to avoid, recognise, disclose and manage conflicts of interest*
- *approach to maintaining centralised register(s) of conflicts of interest.*<sup>59</sup>

71. As outlined in paragraph 7, above, the Commission in its Operation Keppel report recommended that the mechanisms to disclose and manage conflicts of interest for members be further improved in line with the Commission's better practice conflicts of interest framework by providing for greater:

- *consistency and clarity regarding what constitutes a conflict of interest and the level of detail that is required in a disclosure*
- *consistency and clarity on how to make a disclosure*
- *consistency and clarity on how disclosures should be managed*
- *emphasis on avoiding conflicts of interest*
- *transparency and accountability by requiring continuous updating of registered interests*
- *enforcement mechanisms*
- *ongoing professional education to raise awareness and promote an ethical culture.*<sup>60</sup>

72. The Commission's report further indicates that there is utility in having consistency about core aspects of the separate conflicts of interest regimes. Given most ministers and/or parliamentary secretaries are likely to have spent time in NSW Parliament as backbenchers or in opposition, aligning these regimes more closely would assist them in transitioning to the additional disclosure requirements pursuant to the Ministerial Code of Conduct.

## Other examples

73. At the federal level, there are also reported instances and criticisms relating to conflicts of interest, which further demonstrate the importance of avoiding as well as managing conflicts of interest. One such example concerns the conduct of a Senator in relation to the administration of the Community Sport Infrastructure Grant Program. The then

### OFFICIAL

<sup>58</sup> NSW ICAC, *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others*, Sydney, June 2023, Volume 2, para. 14.28, p. 331.

<sup>59</sup> Ibid, para. 14.28, p. 331ff. NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, Sydney, July 2022, p. 179.

<sup>60</sup> NSW ICAC, *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others*, Sydney, June 2023, Volume 2, para. 14.30, p. 331.

secretary of the Department of the Prime Minister and Cabinet, provided advice to the Prime Minister in 2020 about the Senator's conduct. The secretary noted that his advice was based on relevant standards and "whether a reasonable person would consider whether the principles of integrity and fairness have been met", also noting that "Ministers must be vigilant in avoiding any perceived or actual conflict between their ministerial responsibilities and their private interests".<sup>61</sup> The secretary found that the Senator had a conflict of interest, that should have been avoided. He observed:

*On the question of any conflict of interest, I note that Senator [...] was a member of the Wangaratta Clay Target Club and the time she approved funding the Program to that organisation. I consider the Minister's approval of funding to an organisation of which she is a member represents an actual conflict of interest which should and could have been, and is an apparent breach of the Standards.*

*The timing is such that the potential of conflict should have been clear to the Minister. By failing to put appropriate arrangements in place to avoid the potential for conflict, such as asking another Minister to make any decisions relating to the organisations of which she was a member, the Minister has failed to maintain the trust of the Australian people.<sup>62</sup> [Name omitted]*

74. In 2023, an independent review of a consultancy firm considered its conflicts of interest framework.<sup>63</sup> The report observed that conflicts of interest were not adequately managed, including that that firm lacked a framework and failed to centralise relevant information:

*There has not been, and does not yet appear to be, an overarching framework providing clear instructions to partners and staff as to how to identify or manage the various types of actual, potential, or perceived conflicts. There is also insufficient guidance for how to differentiate between various types of conflicts of interest. The lack of a clear framework makes it challenging for partners and staff to understand when, and how, to seek approval, or how to escalate concerns regarding conflicts. Further, conflict risk awareness is not sufficiently embedded within the DNA of the firm to rely on 'risk muscle memory'....*

*In addition, [...] appears to lack a process for, or practice of, consolidating all conflicts of interest information. Without a readily obtainable enterprise-wide view of conflicts, the ability to manage conflicts is compromised.<sup>64</sup> [Name omitted]*

**OFFICIAL**

---

<sup>61</sup> Advice provided by Secretary Philip Gaetjens to Prime Minister Scott Morrison, under cover letter dated 1 February 2020, p. 1-2.

<sup>62</sup> Ibid, p. 4.

<sup>63</sup> Dr Ziggy Switkowski AO, *Review of Governance, Culture and Accountability at PwC Australia*, August 2023.

<sup>64</sup> Ibid, p. 32ff.



## Existing framework relating to conflicts of interest

75. This submission will next consider the existing framework that regulates members' conflicts of interest. Clause 1 of the Members' Code specifies that "Members shall base their conduct on a consideration of the public interest, avoiding conflict between personal interest and their duties as a Member of Parliament". It specifies that it "does not apply to Members in their purely private and personal lives, in relation to conflicts of interest".
76. The topic is dealt with in further detail in clause 7 of the Members' Code, which outlines the following obligations:

### **7. Conflicts of interest**

*Members must take reasonable steps to avoid, resolve or disclose any conflict between their private interests and the public interest. The public interest is always to be favoured over any private interest of the Member.*

*Members shall take reasonable steps to draw attention to any conflicts between their private interests and the public interest in any proceeding of the House or its committees, and in any communications with Ministers, Members, public officials or public office holders.*

77. Similar to clause 1 of the draft Regulation, clause 7 states that a "conflict of interest does not exist where the Member is only affected as a member of the public or a member of a broad class".
78. It is relevant to consider the "Commentary" of clause 7 of the Members' Code, which states:

*Members should be aware of the important distinction between disclosing an interest and having a conflict of interest.*

*There are certain pecuniary interests that must be disclosed on the Register of Disclosures although these may never come into conflict with a Members' duties. There are also interests that are not required to be disclosed on the Register of Disclosures but which could give rise to a conflict of interest if they are not managed appropriately.*

*It is open to any Member to seek advice on these matters from the Clerks of the House or the Parliamentary Ethics Adviser.*

79. It is noted that the second paragraph of the text contained as "Commentary" of the Member's Code may need to be updated, to take account of the mandatory requirement to disclose conflicts of interest, as proposed by the draft regulation. This topic is addressed in a separate submission, below.

80. The Privileges Committee's paper, published as part of its *Inquiry into the recommendations of the ICAC arising out of Operation Keppel*, notes that the 2023 updates of the Legislative Council's *Members' Guide* include some guidance regarding what are reasonable steps that members **may** undertake to avoid, resolve or disclose any conflict between their private interests and the public interest.<sup>65</sup> [Emphasis added] The *Members' Guide* states:

3.28 *General guidance on avoiding, resolving and disclosing conflicts of interest is provided below:*

- *Reasonable steps to **avoid** a conflict of interest may include refraining from voting, asking questions in the House or making representations to ministers in relation to the matter that would give rise to the conflict.*

*Members should also be aware that under the standing orders:*

*A member may not vote in any division on a question in which the member has a direct pecuniary interest unless it is in common with the general public or is a matter of state policy and if a member does vote, the vote of that member is to be disallowed (SO 117(2)).*

*No member may take part in a committee inquiry where the member has a direct pecuniary interest in the inquiry of the committee, unless it is in common with the general public or a class of persons within the general public, or it is on a matter of state policy (SO 217(10)).*

- *Reasonable steps to **resolve** a conflict of interest may include ensuring the conflict is disclosed and either renouncing the interest or ceasing to participate further in the proceedings that have led to the conflict arising.*
- *Reasonable steps to **disclose** a conflict of interest may include drawing attention to the existence of the conflict at the time the conflict arises, even if the interest itself has already been disclosed in the Register of Disclosures.*

3.29 *Further information concerning the steps members can take to avoid, resolve or disclose a conflict of interest can be obtained from the Clerk or the Parliamentary Ethics Adviser.*<sup>66</sup>

81. According to clause 16 of the current Regulation, a member may, at their discretion, disclose any direct or indirect benefit, advantage or liability, whether pecuniary or not that

## OFFICIAL

<sup>65</sup> Legislative Council, *Discussion Paper - Members' Code of Conduct and training and guidance*, 14 February 2024, p. 9, see <https://www.parliament.nsw.gov.au/lcdocs/other/18997/Discussion%20paper%20-%20Code%20of%20Conduct%20and%20training%20recommendations.pdf>, accessed 15 April 2024.

<sup>66</sup> NSW Parliament, *New South Wales Legislative Council: Members' Guide 2023*, March 2023, p. 34.

“might appear to raise a conflict” between their private interests and their public duty. Such disclosure is merely discretionary.

82. The Commission has reviewed recent discretionary disclosures made by members of the Legislative Council (MLCs) and notes that these include a variety of disclosures, including various declarations regarding trusts, superannuation funds, as well as interests of family members and other close associations, some of which are likely to become mandatory if the respective reform proposals in the draft Regulation are implemented.

#### Draft Regulation and the conflict of interest definition

83. Clause 15 of the draft Regulation stipulates that a member must disclose all conflicts of interest and also provides a definition of a conflict of interest. It states:

##### **15 Conflicts of interest**

- (1) *A Member must disclose all conflicts of interest.*
- (2) *A **conflict of interest** arises in relation to a Member if there is a conflict between the public duty and private interest of the Member in which the Member’s private interest could objectively have the potential to influence the performance of the Member’s public duty.*
- (3) *A conflict of interest need not be pecuniary in nature.*
- (4) *To avoid doubt, a Member’s public duty as a Member does not include the Member’s public duty as a Minister or Parliamentary Secretary.*

84. In light of previous recommendations made by the Commission, as outlined in paragraph 7, above, the Commission has reviewed and compared this definition in clause 15 of the draft Regulation with the existing definition of a conflict of interest as outlined in clause 7(3) of the NSW Ministerial Code of Conduct, as well as considered the Members’ Code. The Commission is of the view that the proposed definition of a conflict of interest is clear, consistent and comprehensive for the following reasons:

- the definition is consistent with the definition contained in the NSW Ministerial Code of Conduct
- the definition is also consistent with the Members’ Code, which stipulates that a member “must take reasonable steps to ... disclose any conflict between their private interests and the public interest”
- the definition is comprehensive as it utilises an objective rather than a subjective test in determining whether a member has a conflict of interest
- the definition is clear and comprehensive as it stipulates that a relevant interest includes non-pecuniary or non-financial interests
- the definition is clear in delineating the obligations that arise pursuant to the Members’ Code from those in the Ministerial Code of Conduct

- the Members' Code is clear that a conflict of interest does not exist where the member is only affected as a member of the public or a member of a broad class.

85. The word "interest" itself is referenced throughout the draft Regulation, as well as being defined in the dictionary in Schedule 3 of the draft Regulation in relation to property and to a corporation.
86. The CPA's *Standards for Codes of Conduct* defines "interest", and states that it "may be a financial or non-financial interest (such as an affiliation or membership) but is different from an opinion, view, life experience or party affiliation."<sup>67</sup>
87. The Commission has provided guidance about situations when a member is only affected as a member of the public or a member of a broad class. Clause 5 of the Members' Code clarifies that there are limitations regarding breaches. As such, the disclosure requirement for members is reasonable and not too onerous, as there is an exemption regarding interests that only affect them as a member of the public or a broad class. The Commission's view is that members are part of the local communities in which they live, and as such, have multiple interests and connections as well as being affected by government decisions and policies. It is important that members can voice their opinions and advocate for change without being accused of improper influence. Similarly, having private interests is normal and not every interest will amount to a conflict with public duties. Each case will depend on its circumstances. However, if a member has a close association, or is the driving force or instigator of an item of parliamentary business, then the interest is likely to amount to a conflict of interest.<sup>68</sup>
88. The Commission notes that it has provided detailed submissions to the Privileges Committee's current *Inquiry into the recommendations of the ICAC arising out of Operation Keppel* relating to conflicts of interest, the Members' Code as well as training and guidance. These submissions will not be reiterated here, but are also relevant to the topic of providing guidance to members.

#### Submission 4

- 89. That NSW Parliament should progress the implementation of the proposed definition of a conflict of interest as outlined in clause 15 of the draft Constitution (Disclosures by Members) Regulation 2024.**

#### Draft Regulation and managing conflicts of interest

90. The Operation Whitney report raised concerns that NSW Parliament currently lacks mechanisms to collate disclosures regarding conflicts of interest and had recommended

---

**OFFICIAL**  
<sup>67</sup> Commonwealth Parliamentary Association, *Standards for codes of conduct for members of parliament and the parliamentary workplace: minimum standards, additional measures and supporting structures*, London, 2024, p. 15.

<sup>68</sup> NSW ICAC, *Annotated Code of Conduct for Members: a guide for members of NSW Parliament*, 2<sup>nd</sup> ed, Sydney, January 2024, pp. 16 - 17.

a centralised register for that purpose.<sup>69</sup> The CPA's *Standards for Codes of Conduct* also considers that it would be ideal that one reporting process captures most relevant interests.<sup>70</sup>

91. The draft regulation will implement this best practice model, as clause 15 stipulates that a member must disclose all conflicts of interest.
92. Disclosing a relevant conflict of interest (including in writing) is only one aspect of a conflict of interest regime. It may not be sufficient to identify and disclose a conflict of interest. Once disclosed, it has to be assessed, managed, monitored and reviewed.<sup>71</sup> This includes considering what must be disclosed, when, to whom and how. It usually requires considering what options there are for monitoring and reviewing conflicts of interest that have been disclosed, which is part of the management process. However, because members do not have a “manager”, many of the conventional approaches to managing their conflicts cannot be applied.
93. Before examining existing accountability processes regarding conflicts of interest, it is important to consider the role of members when compared with ministers and/or parliamentary secretaries.
94. The *Members' Guide 2023* outlines the roles of a member of the Legislative Council, and states:
  - ... *members of the Legislative Council generally define their roles by reference to the broader roles of the Legislative Council within the New South Wales system of government, namely:*
    - *to represent the people*
    - *to scrutinise the Executive Government as a 'House of Review'*
    - *to legislate.*<sup>72</sup>
95. Parliament's power to regulate its own affairs in any proceedings of the House or its committees extends to the use of Standing Orders. As outlined in paragraph 80, above, the Legislative Council's standing orders 117(2) and 217(10) are relevant.<sup>73</sup> These standing orders outline when and how a member has to recuse themselves from participating in any proceedings of the House or its committees in regard to pecuniary interests.
96. Notwithstanding the existence of these standing orders, the conflicts of interest regime or framework needs to go further because, as specified in clause 7 of the *Members'*

---

**OFFICIAL**

<sup>69</sup> NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, Sydney, July 2022, p. 178ff.

<sup>70</sup> Commonwealth Parliamentary Association, *Standards for codes of conduct for members of parliament and the parliamentary workplace: minimum standards, additional measures and supporting structures*, London, 2024, p. 14.

<sup>71</sup> NSW ICAC, *Managing conflicts of interest in the NSW public sector*, Sydney, April 2018, p. 19ff.

<sup>72</sup> NSW Parliament, *New South Wales Legislative Council: Members' Guide 2023*, March 2023, p. 2.

<sup>73</sup> Legislative Council, *Standing Rules and Orders*, adopted by the Legislative Council of NSW on 17 November 2022, approved by her Excellency the Governor on 20 February 2023, pp. 41 and 77.

Code, it is required that members “must take reasonable steps to avoid, resolve or disclose any conflict between their private interests and the public interest...”. Further, that members “... shall take reasonable steps to draw attention to any conflicts between their private interests and the public interest ... in any communications with Ministers, members, public officials or public office holders”.

97. As the above case studies demonstrate (see paragraph 61 onwards, above): it is precisely in situations involving communications with ministers and public officials or public office holders that certain members have failed to take reasonable steps regarding their relevant interest.
98. The role of ministers is different, as is the relevant accountability framework. In addition to being members of the legislature, the ministry, including the premier, make up the executive government.<sup>74</sup> By convention, all ministers in NSW are members of the cabinet. Ministers may bring matters to cabinet for consideration with the premier’s approval, and “Cabinet is the apex decision-making body of the NSW Government”.<sup>75</sup> Further, ministers administer designated portfolio areas, and, in heading up a Government department or departments, ministers are responsible for the effectiveness and efficiency of the agencies within their portfolio.<sup>76</sup>
99. Because ministers have additional responsibilities, they are also faced with increased risks, and, when compared to members of Parliament, subject to additional obligations regarding secondary employment and business interests, prohibited interests, and their employment after leaving ministerial office.
100. The premier, in turn, has a central role in the administration of the NSW Ministerial Code of Conduct.<sup>77</sup> The premier’s key role is outlined, for example in the detailed requirements as set out in clause 7 of the NSW Ministerial Code of Conduct as well as Part 3 of the Schedule to the NSW Ministerial Code of Conduct. It is clear that ministers and parliamentary secretaries do not self-regulate their conflicts of interest.
101. When compared to the NSW Ministerial Code of Conduct, the Members’ Code lacks details of the reasonable steps that members “must take to avoid, resolve or disclose any conflict” and the reasonable steps they “shall take” to draw attention to any conflicts between their private interests and the public interest in any communications with other public officials. In addition, the enforcement mechanism is different for members when compared to ministers and parliamentary secretaries.

---

**OFFICIAL**

<sup>74</sup> <https://www.parliament.nsw.gov.au/about/Pages/Executive-Government.aspx#:~:text=The%20%22Ministry%22%20is%20the%20group,The%20Executive%20actually%20governs>, accessed 17 April 2024.

<sup>75</sup> The Cabinet Office, *NSW Cabinet Practice Manual*, Sydney, November 2023, pp. 2 – 3.

<sup>76</sup> <https://www.parliament.nsw.gov.au/about/Pages/Roles-and-Responsibilities-of-the-Premier-and-Min.aspx>, accessed 17 April 2024.

<sup>77</sup> NSW ICAC, *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others*, Sydney, June 2023, Vol 2, p. 20ff.

102. The CPA's *Standards for Codes of Conduct* notes that the standards of expected behaviour for members should be equal to or higher than comparable standards expressed in other codes, such as those applicable for other public officials.<sup>78</sup>
103. The *Model Code of Conduct for Local Councils in NSW 2020* recognises that relationships may amount to a "non-pecuniary conflict of interest". As a general rule, a significant non-pecuniary conflict of interest will arise from, amongst other things, a relationship that is particularly close and an affiliation that is particularly strong. The Commission notes that the code applicable to elected public officials at the local government level stipulates not only that conflicts of interest must be disclosed, but also provides details regarding how these must be managed.<sup>79</sup>
104. A conflict of interest framework needs to be tailored to the circumstances relevant for members.
105. The draft Regulation, regarding the disclosure of conflicts of interest that must be disclosed within one month, envisages the following processes:
- pursuant to Part 1 and Part 2, there will be forms that must be completed by a member and lodged
  - pursuant to Part 2, clause 6: a further interest disclosure must be lodged, within 1 month, including if a matter arises that is required to be disclosed
  - pursuant to Part 3, Division 2, clause 15: a member must disclose all conflicts of interest
  - pursuant to Schedule 1 and the "Interest disclosure return form, there is provision for a member to provide written details and disclose conflicts of interest referenced in the form under "Part 6 Conflicts of interest".
106. It is noted that, pursuant to Part 3, Division 3, clause 22, a member has the discretion to disclose an interest, whether pecuniary or not, that is not required to be disclosed by another provision of the draft Regulation and, which the member considers "...might appear to raise a conflict between the Member's private interest and the Member's public duty...".
107. The 2023 updates of the Legislative Council's *Members' Guide* were detailed, above. It provides guidance regarding what are reasonable steps that members **may** take to avoid, resolve or disclose any conflict between their private interests and the public interest.<sup>80</sup> These include:
- refraining from making representations to ministers
  - renouncing the interest
  - ceasing to participate in the proceedings that have led to the conflict arising

**OFFICIAL**

---

<sup>78</sup> Commonwealth Parliamentary Association, *Standards for codes of conduct for members of parliament and the parliamentary workplace: minimum standards, additional measures and supporting structures*, London, 2024, p. 6.

<sup>79</sup> Department of Planning and Environment, *Model Code of Conduct for Local Councils in NSW 2020*, para 5.9, p. 23ff.

<sup>80</sup> NSW Parliament, *Legislative Council: Members' Guide 2023*, March 2023, p. 29ff.

- disclosing the interest at the relevant time, even if the related interest has already been registered.
108. In the Commission’s view, this guidance is a good foundation. It could be further finessed to ensure it is in line with the mandatory language expressed in the Members’ Code and be updated in line with additional conflict of interest requirements (once the draft Regulations take effect). In addition, the guidance could either be replicated or referenced in the “Commentary” section of the Members’ Code, to further assist members to locate advice and guidance. In particular, members would benefit from guidance about how to respond to common conflict of interest scenarios such as:
- being approached to provide assistance to a constituent or lobbyist, who is also an associate/friend
  - managing representations from political donors, party members and individuals who play a role in the member’s pre-selection or election
  - communicating with a minister about an issue that could also affect the private interest of the member, or be perceived to affect their private interest
  - making representation to other public officials or public office holders that could also affect the private interest of the member’s family, or be perceived to affect the private interest of their family
  - making public representations about an issue relevant to the member’s electorate, which could also affect the private interest of the member or that of their family
  - engaging staff who might be close friends
  - procuring goods and services from friends, relatives or associates
  - when duties such as committee work, private members’ statements, petitions or questions on/without notice could intersect with a member’s personal interests
  - when voting on, debating or moving amendments to legislation could intersect with a member’s personal interests.
109. Further, it would assist members if they were provided with guidance when a relationship or association is likely to amount to a personal interest that requires disclosure.
110. Disclosing conflicts of interest at the relevant time, even if the related interest has already been registered, is another area where further guidance could be of assistance. The Commission’s view is that members must disclose their conflicting interests at the relevant time so the conflict can be considered and managed.<sup>81</sup>
111. The processes as outlined in Part 3 of the Schedule to the Ministerial Code of Conduct state that notice must be given promptly of any conflict of interest that arises in relation to any matter, even if the relevant interest has previously been disclosed as a standing disclosure of interests or as a conflict of interest in respect of a different matter.

**OFFICIAL**

---

<sup>81</sup> NSW ICAC, *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others*, Sydney, June 2023, Volume 2, para. 14.22, p. 329.



112. It will assist members if they have clear guidance what are reasonable steps to take about:
- conflicts of interest that have previously been the subject of an interest declaration, and
  - how to draw attention to a relevant interest in any subsequent communication with Ministers, members, public officials or public office holders.
113. The Commission notes that the CPA's *Standards for Codes of Conduct* states that additional guidance can be developed to accompany the code, but that it should not form part of it unless the guidelines have been separately resolved by the parliament as enforceable rules.<sup>82</sup> This could be achieved via the use of Standing Orders.
114. A conflict of interest, once disclosed, also has to be managed, and monitored. Just as a conflict of interest disclosure must be in writing, so should the management response.<sup>83</sup>
115. The draft Regulation does not provide details of any management options for conflicts of interest that have been declared.
116. The wording contained in the "Commentary" section of clause 7 of the Members' Code and the guidance outlined in the *Members' Guide* point to the Parliamentary Ethics Adviser as well as the Clerk, to obtain further advice.
117. The role of the Parliamentary Ethics Adviser is to advise any member on ethical issues, including concerning potential conflicts of interest.<sup>84</sup>
118. Parliament has the power to regulate its own affairs. The NSW Ministerial Code of Conduct provides for the Premier or cabinet to manage executive conflicts. The *Model Code of Conduct for Local Councils in NSW 2020* provides for how to manage a conflict. However, members are left to manage the conflict themselves (albeit with advice from the Clerks and the Parliamentary Ethics Adviser). In the Commission's view, the advisory role of the Clerks and the Parliamentary Ethics Adviser could be utilised further.
119. The Commission maintains that conflict of interest regime requires detailed guidance and practical examples of how to avoid, resolve, disclose and manage a conflict of interest. It will assist members to have unequivocal guidance about their obligations regarding conflicts of interest and what are "reasonable steps" that members "must take" and "shall take".

---

**OFFICIAL**

<sup>82</sup> Commonwealth Parliamentary Association, *Standards for codes of conduct for members of parliament and the parliamentary workplace: minimum standards, additional measures and supporting structures*, London, 2024, p. 3.

<sup>83</sup> NSW ICAC, *Managing conflicts of interest in the NSW public sector*, Sydney, June 2019, p. 22.

<sup>84</sup> Legislative Assembly, Votes and Proceedings, 23 September 1998, p. 883; Legislative Council, Minutes of Proceedings, 24 September 1998, p. 728.

120. Clause 22 of the draft Regulation will provide members with the discretion to disclose an interest, whether pecuniary or not, that "...might appear to raise a conflict". Discretionary disclosure mechanisms provide flexibility. Having said that, in this case the language of clause 22 could lead to some confusion and uncertainty for members whether a relevant interest "might appear to raise a conflict" (and potentially result in a discretionary disclosure) or whether, pursuant to clause 15 of the draft Regulation, it is an interest that "could objectively have the potential to influence" their public duty (and require a mandatory disclosure).
121. The Operation Witney report provides a relevant example regarding a member's interest in a property located in Five Dock, which he held as trustee of a superannuation fund. In that case, the Commission found that he should have disclosed this interest but deliberately failed to declare it from the time he entered NSW Parliament in March 2011 until 4 April 2017.<sup>85</sup> It is noted that the member's disclosure of this interest was only made as a discretionary disclosure.<sup>86</sup>
122. The Commission can provide further guidance about this<sup>87</sup> and would welcome further consultation with NSW Parliament to clarify these points. Concepts such as **potential**, **actual** and **perceived** conflicts of interest commonly require additional guidance. As mentioned above, the topics of training and guidance have already been addressed by the Commission in submissions to the current *Inquiry into the recommendations of the ICAC arising out of Operation Keppel*. Designing a complete conflict of interest framework that is adapted to the possible scenarios faced by members goes beyond the scope of this current inquiry. The Commission would welcome further consultation with the NSW Parliament to adapt the Commission's conflicts of interest control framework to the workings of the NSW legislature.
123. The Commission is considering publishing a list of different scenarios involving public officials that it has previously considered particularly as to where their relationships amounted to private interests. It is anticipated that such a publication could also assist elected public officials in identifying relevant interests.
124. It follows that the proposed mandatory disclosure of conflicts of interest by members, provided disclosures are not false, understated or misleading, will represent proactive actions that demonstrate integrity and professionalism. A disclosure and registration of an interest does not imply any wrongdoing. However, as the above discussions have set out, this disclosure requirement ought to be accompanied by further details and guidance.

---

**OFFICIAL**

<sup>85</sup> Ibid, pp. 30, 35 - 36.

<sup>86</sup> Ibid, p. 30; see also Exhibit 37, Part 1, p. 145. Exhibits are accessible via the Commission's website, see, for example, [NSW State Member for Drummoyne – allegations concerning improper influence and breach of public trust \(Operation Witney\) - Independent Commission Against Corruption](#).

<sup>87</sup> For example, see the four elements to consider when determining whether a conflict of interest exists: NSW ICAC, *Managing conflicts of interest in the NSW public sector*, Sydney, June 2019, p. 4.

#### Submission 5

125. That NSW Parliament establishes a comprehensive framework applicable to members that:
- addresses the avoidance, disclosure and management of conflicts of interest
  - is in line with the mandatory language expressed in the Members' Code of Conduct
  - outlines what reasonable steps must be taken:
    - regarding conflicts of interest that have previously been the subject of an interest, and
    - to draw attention to any conflicts between members private interests and the public interest in any communication with ministers, members, other public officials or public office holders
  - could either be replicated or referenced as "Commentary" in the Members' Code of Conduct, to assist members to locate advice and guidance.

#### Submission 6

126. That NSW Parliament's comprehensive conflict of interest framework includes management options that are tailored to the circumstances affecting members.

#### Submission 7

127. That NSW Parliament develops advice to assist members to differentiate between mandatory and discretionary disclosures pursuant to clause 15 and clause 22 of the draft Constitution (Disclosures by Members) Regulation 2024.

#### Submission 8

128. That NSW Parliament ensures that the "Commentary" of the Members' Code of Conduct is consistent with the mandatory requirement of clause 15 of the draft Constitution (Disclosures by Members) Regulation 2024.

### **Continuous disclosures and the publicly accessible register**

129. Clause 6 of the draft Regulation specifies that relevant interests must be disclosed continuously (within 1 month).

130. The Operation Witney report considered the continuous disclosure requirements in other, comparable jurisdictions.<sup>88</sup> For example, the federal “Register of Senators’ Interests” is a searchable electronic register.<sup>89</sup> The CPA’s *Standards for Codes of Conduct* is explicit that interests that need to be registered also need to be continuously updated within a reasonable period.<sup>90</sup>
131. In the Commission’s view, the proposed continuous disclosure obligation is in line with recommendation 1 as outlined in the Operation Witney report.
132. As detailed in paragraph 20, above, section 14A(1A) of the Constitution Act mentions the privacy and safety regarding details that must be disclosed on the register. Clause 25(2)(b) of the draft Regulation takes privacy and safety into account as it provides that the Clerk may exclude information from the public view (presumably via redaction, or similar).
133. As similarly noted in paragraph 32 concerning clause 11, The Commission’s view is that this section strikes an appropriate balance and is in line with recommendations 1 and 4 as outlined in the Operation Witney report.
134. Further, it is noted that clause 10(2)(b) of the disclosure requirements (regarding real property) limits the disclosure requirements to the location of the suburb or area. This would further assist alleviating privacy and security concerns. It is also in line with the CPA’s *Standards for Codes of Conduct* suggestion to require only the name of a town or city, but not the street address, due to privacy concerns.<sup>91</sup>
135. Clause 26 of the draft regulation specifies that the complete registers be made available to other members and officers of the ICAC. This measure would ensure the purpose of the disclosure regime is being maintained, whilst also protecting the privacy and safety.
136. However, NSW Parliament may wish to consider whether the access to the register as proposed by clause 26 needs to be broadened. The functions of the Independent Complaints Officer include monitoring the operation of the current Regulation as well as the Members’ Code.<sup>92</sup> The Parliamentary Ethics Adviser’s remit includes providing

**OFFICIAL**

---

<sup>88</sup> NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, Sydney, July 2022, p. 175ff.

<sup>89</sup>[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Senators\\_Interests/Senators\\_Interests\\_Register](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Senators_Interests/Senators_Interests_Register), accessed 24 April 2024.

<sup>90</sup> Commonwealth Parliamentary Association, *Standards for codes of conduct for members of parliament and the parliamentary workplace: minimum standards, additional measures and supporting structures*, London, 2024, p. 12.

<sup>91</sup> Commonwealth Parliamentary Association, *Standards for codes of conduct for members of parliament and the parliamentary workplace: minimum standards, additional measures and supporting structures*, London, 2024, p. 15.

<sup>92</sup><https://www.parliament.nsw.gov.au/lcdocs/other/18451/Resolution%20establishing%20the%20Independent%20Complaints%20Officer.pdf>, accessed 1 May 2024.

advice on ethical issues and the role may also benefit from having unrestricted access to the register.

#### Submission 9

137. **That the NSW Parliament supports the clauses relating to continuous disclosure requirements and the public access of information as outlined in the draft Constitution (Disclosures by Members) Regulation 2024.**

#### Submission 10

138. **That the NSW Parliament considers amending clause 26 draft Constitution (Disclosures by Members) Regulation 2024 to provide access to others with a legitimate reason to inspect the complete register (in addition to Members and officers of ICAC).**

### **Payment to perform lobbying activities or paid advocacy**

139. Clause 2(a) of the Members' Code provides that "No member shall act as a paid advocate in any proceeding of the House or its committees".
140. This provision in the Members' Code stands in contrast to clause 7A of the current Regulation and clause 9 of the draft Regulation, which is essentially the same as the existing clause 7A. It states:

#### ***Use of Member's parliamentary position to provide services***

*A reference in this part to a service provided by a Member involving the use of the Member's parliamentary position is a reference to any service provided by the Member to another person that arises from or relates to the use of the Member's position as a Member, including one or more of the following services:*

- (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.*

141. The current Regulation includes "Guidance Notes and Examples" as Schedule 1 for the current forms. By way of example the guidance for Table 2.1.4 suggests the following text to disclose services provided that relate to a position as a member:

*Public affairs consultant—Providing public affairs advice, including lobbying MPs and government departments on the issue of regulation of electrical appliances.*

142. There are further requirements that are linked to clause 7A of the current Regulation and clause 9 of the draft Regulation, namely the requirements to provide further details

of the provision of client services. These are outlined in 15A of the current Regulation and in clause 20 of the draft Regulation.

143. On its face, the current Regulation still permits members to be paid lobbyists, advisers, consultants or strategists, if the necessary details are disclosed, even though the Members' Code prohibits it, albeit only in limited circumstances. The draft Regulation has not remedied this situation.

144. This is despite the decision of *R v Boston* (1923) 33 CLR 386, where, under an agreement for payment, a member agreed to use their position to influence an officer of the Crown on proceedings outside the parliament, which was determined to “tend to produce a public mischief” and amount to a criminal offence. Knox CJ observed:

*Payment of money to a member of Parliament to induce him to persuade or influence or put pressure on the Minister to carry out a particular transaction tends to the public mischief in many ways, **irrespective of whether the pressure is to be exercised by conduct inside or outside Parliament.** It operates as an incentive to the recipient to serve the interest of his paymaster regardless of the public interest, and to use his right to sit and vote in Parliament as a means to bring about the result which he is paid to achieve. It impairs his capacity to exercise a disinterested judgement on the merits of the transaction from the point of view of the public interest, and makes him a servant of the person who pays him instead of a representative of the people.<sup>93</sup> [Emphasis added]*

145. Further, the High Court has stressed the need for members to only use their influence for the public interest, and not for private interests, in a situation where they anticipate payment for their services. As was stated by Griffith CJ in *Wilkinson v Osborne*:

*The law cannot supervise the conduct of members of Parliament as to the pressure they may bring to bear on Ministers, but if they sell the pressure, the bargain is, in my opinion, void as against public policy.<sup>94</sup>*

146. More recently, the NSW Court of Criminal Appeal (“NSWCCA”) an appeal brought by a former member of the Legislative Council regarding the offence of misconduct in public office for making representations while lobbying a public servant with the intention of securing benefits for himself and his family. The NSWCCA observed that members have a duty to “act according to what they believe to be in the public interest and the interests of the electorate and must not use their position for the purpose of promoting their own pecuniary interests”.<sup>95</sup>

147. The Operation Keppel report provides examples of a member misusing his parliamentary position and leveraging, or seeking to leverage, his position as a

---

<sup>93</sup> At [393].

## OFFICIAL

<sup>94</sup> *Wilkinson v Osborne* [1915] HCA; (1915) 21 CLR 89 at 94

<sup>95</sup> *Obeid v The Queen* [2017] NSWCCA 221 at [79] per Bathurst CJ (with whom Leeming JA, R A Hulme, Hamill and N Adams JJ agreed)

member. This involved the member taking steps and engaging with other public officials with a view to advancing his own private financial interest and/or those associated with him in connection with the sale and/or development of land, by using his position as “door opener” when advocating on behalf of landowners and property developers.<sup>96</sup> The Commission made a finding that the member’s conduct in this regard could amount to misconduct in public office.<sup>97</sup>

148. Further, Operation Keppel demonstrates that the member’s advocacy took place outside parliamentary or committee proceedings.
149. The Commission has reviewed the relevant codes of conduct and guides applicable in the United Kingdom (UK) for the House of Commons as well as the House of Lords. Clause 11(b) of the House of Lord’s code prohibits members to seek profit from membership of the house for providing parliamentary advice or services.<sup>98</sup> As the attached guide clarifies:

*The prohibition from accepting payment in return for parliamentary advice means that members may not act as paid parliamentary consultants, advising outside organisations or persons on process, for example how they may lobby or otherwise influence the work of Parliament.*<sup>99</sup>

150. The guide relating to the UK’s House of Commons includes the following guidance relating to lobbying:

*Taking payment in return for advocating a particular matter in the House is strictly forbidden. Members may not speak in the House, vote, or initiate parliamentary proceedings for payment in cash or kind. Members may not make in approaches to Ministers, other Members or public officials in return for such payment. Nor may they pursue interests which are wholly personal and particular to the Member, such as may arise from a profession or occupation outside the House.*<sup>100</sup>

151. The UK’s House of Commons’ code of conduct prohibits members from providing paid parliamentary advice, including as a strategist, adviser, or consultant.<sup>101</sup> The attached guidance provides members with the following additional guidance:

---

**OFFICIAL**

<sup>96</sup> NSW ICAC, *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others (Operation Keppel)*, Sydney, June 2023, Volume 1, chapter 8.

<sup>97</sup> *Ibid*, p. 15ff, para 1.7.5

<sup>98</sup> House of Lords, *Code of Conduct for Members, the Guide to the Code of Conduct and the Code of Conduct for Members’ Staff*, 13<sup>th</sup> ed, September 2023, p. 3.

<sup>99</sup> *Ibid*, clause 24, p. 13.

<sup>100</sup> House of Commons, *The Code of Conduct together with the guide to the rules relating to the conduct of member*, 12 December 2022, p. 34.

<sup>101</sup> House of Commons, *The Code of Conduct together with the guide to the rules relating to the conduct of member*, 12 December 2022, clause 9, p. 4.

*This prohibits Members from advising outside organisations or persons on process, for example, how they may lobby or otherwise influence the work of Parliament, in return for payment.*<sup>102</sup>

152. The CPA's *Standards for Codes of Conduct* is also unequivocal in prohibiting paid lobbying or advocacy. It states:

*Members shall not engage in paid lobbying, paid advice or paid advocacy in any way that relates to their parliamentary work (or that might be perceived as such).*<sup>103</sup>

153. As noted in the Commission's Operation Eclipse report, for members to accept any further payment to perform lobbying activities is completely incompatible with their parliamentary role, and amounts to a substantial conflict of interest, and should be prohibited. Further, the prohibition in the Members' Code should be extended beyond the promotion of matters in the NSW Parliament or its committees, to any communication with any other public officials.
154. This aspect of the current Regulation seems to be an anachronism that ought to be remedied by the draft Regulation. This inquiry provides an opportunity for NSW Parliament to address recommendation 27 (see paragraph 8, above), made by the Commission in the Operation Eclipse report. The draft Regulation should be unambiguous and align with the Code of Conduct, which prohibits paid advocacy.
155. The Commission has reviewed recent disclosures by MLCs made under Part 2.1.4, and found that it is barely used. This analysis further strengthens the Commission's view that this aspect of the current Regulation seems to be an anachronism.
156. Clause 9 of the draft Regulation (and the further disclosure requirements as required in clause 20) do not align with the prohibition on paid advocacy as outlined in the Members' Code, nor does it align with the view expressed by the NSWCCA that members must not use their position for the purpose of promoting their own pecuniary interests.
157. Clause 9 of the draft Regulation serves no useful purpose that is evident to the Commission. On the converse, retaining this clause only creates uncertainty. This inquiry by the Privileges Committee in conjunction with its current *Inquiry into the recommendations of the ICAC arising out of Operation Keppel* provides an opportunity to remedy this situation.

---

<sup>102</sup> Ibid, p. 39.

**OFFICIAL**

<sup>103</sup> Commonwealth Parliamentary Association, *Standards for codes of conduct for members of parliament and the parliamentary workplace: minimum standards, additional measures and supporting structures*, London, 2024, p. 9.



## Submission 11

158. **As recommended by the Commission in the Operation Eclipse report and demonstrated by conduct exposed in several of the Commission’s investigation reports, the Commission submits that:**
- (i) all regulations affecting NSW Parliament must be clear that its members must not use their position for the purpose of promoting their own pecuniary interests**
  - (ii) the prohibition on paid advocacy, as outlined in clause 2(a) of the Members’ Code of Conduct, be extended beyond the promotion of matters in the NSW Parliament or its committees, to any communication with any other public officials, and**
  - (iii) clause 9 and clause 20 of the draft Constitution (Disclosures by Members) Regulation 2024 be amended accordingly.**

## Compliance framework

159. As foreshadowed at paragraph 9, this submission will also address recommendation 9 made in the Operation Keppel report, namely that the wording of clause 23 of the current Regulation be reviewed to ensure it is consistent with section 14A of the Constitution Act.
160. Clause 27 of the draft Regulation titled “Contravention of the regulation” remains very similar to clause 23 of current Regulation. It states:
- A contravention of this regulation does not attract criminal or civil liability, except to the extent expressly provided by the Act, section 14A.*
161. Section 14A(2) and s14(A)(3) of the Constitution Act outline processes whereby either House of Parliament can declare a member’s seat vacant for a wilful contravention of any regulation made pursuant to section 14A(1) of the Constitution Act.
162. Declaring a seat vacant or expelling a member of the House has been described as “the ultimate sanction that is rarely used”.<sup>104</sup>
163. The Operation Keppel report considered the authorities on the topic of exclusive cognisance of NSW Parliament, noting that s 14A of the Constitution Act provides nothing to suggest an exclusive jurisdiction of a chamber of Parliament. Further, the Operation Keppel report noted that it is at least arguable that clause 23 is invalid to the extent that it is inconsistent with s 14A of the Constitution Act, as it gives the impression that there are limits to the jurisdiction of courts, or an investigative body, for that matter.<sup>105</sup>

**OFFICIAL**

---

<sup>104</sup> NSW Parliamentary Library Research Service, *Expulsion of Members of the NSW Parliament*, G Griffith, Briefing Paper No 17/2003, p. 5.

<sup>105</sup> *Obeid v R* [2015] NSWCAA 309, see Bathurst CJ at [47]; NSW ICAC, *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others (Operation Keppel)*, Sydney, June 2023, Volume 1, p. 50ff.

164. In fact, the Commission in its Operation Keppel report made a finding that a former member's deliberate failure to disclose certain interests, positions and income would "bring the integrity of the office of a member of Parliament into serious disrepute" and was a breach of the current Regulation. Further, it amounted to serious corrupt conduct. The Operation Keppel report recommended that the advice of the Director of Public Prosecution be sought for a specified criminal offence.<sup>106</sup>
165. An effective compliance program requires effective deterrence. Clause 27 of the draft regulation could be seen as sending the message that a contravention of the disclosure Regulation is, to some degree, permissible. This undermines deterrence and sends the wrong message.
166. Clause 27 of the draft Regulation gives the impression that there is just one "ultimate sanction" for a contravention of the regulation. This is not correct.
167. As discussed above, Parliament's power to regulate its own affairs extends to the use of standing orders. These could also be adopted for the purpose of ensuring there are appropriate sanctions.
168. An option that NSW Parliament could consider is to provide for a proportionate range of sanctions regarding contravention of the draft Regulation. The range of sanctions could include, but is not limited to the following:
- (i) rectification
  - (ii) reimbursement
  - (iii) attendance at additional training
  - (iv) apology to the relevant House
  - (v) for the member to provide an explanation at the Bar of the House
  - (vi) admonish or reprimand the member
  - (vii) suspend the member from the service of the House.
169. The topic of appropriate sanctions has also been considered by relevant committees as part of its inquiries into a parliamentary compliance or complaints officer.<sup>107</sup> The

**OFFICIAL**

---

<sup>106</sup> NSW ICAC, *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others (Operation Keppel)*, Sydney, June 2023, Volume 1, chapter 5.

<sup>107</sup> Legislative Council Privileges Committee, *Proposal for a Compliance Officer for NSW Parliament: Report 83*, NSW Parliament, 11 May 2021. Privileges Committee, *Proposal for a Compliance Officer for the NSW Parliament No. 2: Report No. 85*, 16 Nov 2021. Legislative Assembly Parliamentary Privilege and Ethics Committee, *Review of proposed resolution for the establishment of a Parliamentary Compliance Officer: Report 1/57*, 19 July 2021.

Commission notes that the issue also relates to the current 12-month reviews of the Independent Complaints Officer system, which were established in August 2023.<sup>108</sup>

170. Further, the CPA's *Standards for Codes of Conduct* outlines various rectifications and sanctions that are proportionate to the seriousness of the contravention.<sup>109</sup>

## Submission 12

171. **That NSW Parliament revise clause 23 of the draft Constitution (Disclosures by Members) Regulation 2024 to strengthen compliance measures by providing for a range of potential and proportionate sanctions regarding contravention of the Regulation.**

---

**OFFICIAL**  
<sup>108</sup> <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3007>, accessed 26 April 2024; <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2983>, accessed 26 April 2024.

<sup>109</sup> Commonwealth Parliamentary Association, *Standards for codes of conduct for members of parliament and the parliamentary workplace: minimum standards, additional measures and supporting structures*, London, 2024, p. 34ff.