

INQUIRY INTO DRAFT CONSTITUTION (DISCLOSURES BY MEMBERS) REGULATION 2024

Organisation: Parliamentary Ethics Adviser

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The Honourable Stephen Lawrence MLC
Committee Chair
Legislative Council Privileges Committee
Parliament House
SYDNEY NSW 2000

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

Dear Stephen

1. You have invited me to make a submission to the Committee on the inquiry into the draft Constitution (Disclosures by Members) Regulation 2024.
2. I make the following comments on the draft regulation relating to conflicts of interest.
3. The Preamble to the Code of Conduct for Members (Members Code) requires Member to “base their conduct on a consideration of the public interest, avoiding conflict between personal interest and their duties as a Member of Parliament.”
4. Section 7 of the Members Code stipulates that Members “must take reasonable steps to avoid, resolve or disclose any conflict between their private interests and the public interest” with the public interest to always be favoured over any private interest.
5. Apart from proceedings in the House or a committee, Members are also required under section 7 to 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.”
6. A conflict of interest is not required to be disclosed “where the Member is only affected as a member of the public or a member of a broad class.”
7. Section 15 (1) of the draft regulation proposes that Members must disclose conflicts of interest.

8. Section 15 (2) defines a conflict of interest as “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.” This definition is like that which applies to Ministers under section 7 (3) of the NSW Ministerial Code of Conduct (Ministerial Code).

What are private interests?

9. The ICAC describes personal (private) interests as those “interests that can bring benefits or disadvantages to public officials as individuals, or to others whom public officials may wish to benefit or disadvantage. Private interests are not limited to pecuniary interests or to interests that can bring direct personal gain or help avoid personal loss. They also include many social and professional activities and interests.”¹
10. Private interest “can involve the interests of the public official, members of the official’s immediate family or relatives (where these interests are known), business partners or associates, or friends. Enmity as well as friendship can give rise to an actual or perceived conflict of interests.”²
11. Under section 15 (3) conflicts of interest need not be pecuniary in nature. This means that non-financial private interests that conflict with public duty must also be disclosed. A pecuniary interest would potentially include an actual or potential financial gain or loss. A non-financial interest “may arise from personal or family relationships, or involvement in sporting, social or cultural activities. They include any tendency toward favour or prejudice resulting from friendship, animosity, or other personal involvement with another person or group.”³
12. The section does not stipulate the details of a conflict of interest that must be disclosed, unlike section 11 (1) (b) of the Ministerial Code which requires a Minister to “specify the nature and extent of the relevant interest, the matter to which it relates, and the reason why a conflict of interest arises.” A similar requirement should apply to disclosures by Members.
13. The Ministerial Register of Interests (Ministers and Parliamentary Secretaries) is a confidential register kept by the Cabinet Office on behalf of the Premier. I believe declarations of conflict of interests by Members should similarly remain confidential. I return to this topic later.

¹ ICAC *Managing conflicts of interest in the NSW public sector*, June 2019, p. 4

² NSW Ombudsman *Fact Sheet Conflicts of Interest*

³ ICAC & Queensland Crime and Misconduct Commission *Managing Conflicts of Interest in the Public Sector – Guidelines 2004*, p. 8

Conflicts between a Members private interest and public duties

14. There are many publications and investigation reports of public authorities dealing with the topic of conflicts of interest. Relevantly the ICAC 2004 report on “Guidelines for managing conflicts of interest in the public sector”.
15. A conflict of interest is where a public official has private interests that could improperly influence, or be seen to influence, their decisions or actions in the performance of their public duties.
16. Conflicts of interest can arise in a variety of situations and potentially under the draft regulation will require Members to continually disclose conflicts of interest.
17. Conflicts of interest can be actual, potential or perceived.
18. A report of the South Australia Ombudsman in 2011 provides a useful summary of these types of conflict of interest:

“There are three types of conflicts of interest - actual, potential and perceived. There is also the notion of a ‘conflict of duty’, which I describe below.

A person has an actual conflict of interest if they have a specific duty relating to their role as an elected member (ie to vote on a particular matter) and they have a personal or private interest which could reasonably be expected to conflict with their ability to act in the public interest in relation to that specific duty.

A potential conflict of interest exists when the person has an external interest or duty that does not presently conflict with their duties as an elected member but, in view of the types of decisions that an elected member is involved in, could reasonably be expected to give rise to a conflict of interest at some time in the future.

A perceived conflict of interest is one which a fair minded and informed member of the public might perceive as existing. A perceived conflict of interest may not relate to what is in reality a potential or an actual conflict of interest. It may only ever be a ‘perception’ of a conflict of interest. However, as my investigation has highlighted, the management of perceived conflicts of interest is important for the integrity of a council; and it may be impossible to determine whether or not a public officer has in reality acted in their private interest. Perceived conflicts of interest may be a contributor to allegations of bias.

A conflict of duty may arise where there is a conflict between an elected member’s duty to act in the public interest and their duty to act for the benefit of another. For example, elected members may have a fiduciary relationship with another body which conflicts with their duty as an elected member. A fiduciary duty is an equitable duty to act in good faith for the benefit of another. They could also have a common law duty of fidelity to their employer, namely to

act in the employer's best interests. A conflict of duty could also be a perceived or potential conflict of interest."⁴

19. In summary, an actual conflict of interest is one where there is a real conflict between an official's public duties and responsibilities and their private interests.
20. A potential conflict of interest arises where an official has private interests that could conflict with their public duties.
21. A perceived conflict of interest can exist where a third party could form the view that private interests could improperly influence the performance of public duties, now or in the future.
22. From the above discussion there are various situations in which a member may have an actual, potential or perceived conflict of interest.

Conflict of interest register for Members

23. In Operation Whitney the ICAC commenting on the desirability of a conflict of interest register stated "A centralised conflicts of interest register for members of Parliament is an appropriate mechanism to promote accountability and transparency. A centralised register would assist others in determining whether a member of Parliament has disclosed a conflict of interest. Similar to the register established by the Ministerial Code, it ought to capture conflicts of interest that occur on an ad hoc basis; for example, at a meeting with public officials, as these could be registered in writing afterwards." (Page 179)
24. Recommendation 4 of the ICAC noted the option "to limit access to certain information for privacy reasons." (Page 179)
25. I support the proposed requirement for declaration of conflicts of interests by Members, however, as with the Ministerial Register, I believe the register should be a separate confidential register kept by the Clerk of the House.
26. The confidential register should be open for inspection only by:
 - (a) the Presiding Officer of the relevant House
 - (b) the Chair of the Ethics Committee of the relevant House
 - (c) an officer of the Independent Commission Against Corruption
 - (d) the Independent Complaints Officer
 - (e) the Parliamentary Ethics Adviser.

⁴ South Australia Ombudsman- Investigation into the City of Charles Sturt - Final Report, November 2011, p. 70

27. The details of conflicts of interest to be disclosed by members should be similar to the Ministerial Code, that is - the nature and extent of the relevant interest, the matter to which it relates, and the reason why a conflict of interest arises.

28. I would be pleased to meet with your committee to further discuss these issues.

Yours sincerely

John Evans
Parliamentary Ethics Adviser