

7.1 The Independent Commission Against Corruption

In 1988, the Independent Commission Against Corruption (ICAC) was established with jurisdiction over all "public officials". Public official was defined to include officers in the Parliament, government departments, statutory authorities and local councils, as well as parliamentarians and local councillors, judges and magistrates. Those working in the private sector and general community who are not public officials may be covered if their conduct adversely affects or could adversely affect the honest or impartial exercise of a public official's official functions.

The principal functions of the ICAC are to:

- investigate, expose and prevent corruption involving or affecting public authorities or public officials; and
- educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community.¹

The ICAC does not punish offences nor does it have any prosecutorial role. Its role is to protect the public interest and to prevent breaches of public trust by exposing and minimising corruption. The legislation establishing the Commission has incorporated many amendments since its assent as a result of court challenges and anomalies that have been recognised in the legislation. Of note is the New South Wales Court of Appeal decision in *Greiner and Moore v Independent Commission Against Corruption*.²

This court case concerned an ICAC inquiry into the appointment of a former member of the Liberal Party and Minister of that Government, Dr Metherell, to a senior public service position as an alleged inducement to resign his parliamentary seat. The former Premier (Mr Greiner) and former Minister (Mr Moore) appealed the decision in the Supreme Court of New South Wales and a judgment was brought down that the ICAC's finding was made without, or in excess of jurisdiction, was a nullity, and was wrong in law.

In 1994 the Parliament passed an amendment to the *Independent Commission Against Corruption Act 1988* in response to continued debate following this decision. The ensuing amendment to correct this anomaly expanded the jurisdiction of the Commission in relation to Ministers of the Crown and members of Parliament. This expanded jurisdiction enables the ICAC to investigate an allegation that a Minister or member of Parliament has breached a code of conduct applicable to that Minister or member, if the alleged breach was substantially of a corrupt nature.³

¹ See information on "What is the ICAC?" <http://www.icac.nsw.gov.au/go/the-icac>

² *Greiner v ICAC* (1992) 28 NSWLR 125.

³ Section 122 of the *Independent Commission Against Corruption Act 1988* precludes any action contrary to Article 9 of the Bill of Rights and thus parliamentary privilege. See also section 5.1.2 of Part Two on the application of section 122 to members of Parliament in relation to search warrants executed by the ICAC.

7.2 The Code of Conduct adopted by the Legislative Assembly

The New South Wales Legislative Assembly adopted a Code of Conduct for its members for the first time on 5 May 1998.⁴ The resolution adopting the code of conduct for the current Parliament was passed by the Legislative Assembly on 8 May 2007 with an amendment being made to the Code in June 2007. The Code of Conduct that has been agreed to by both Houses is as follows:

Preamble to the Code of Conduct

The Members of the Legislative Assembly and the Legislative Council have reached agreement on a Code of Conduct which is to apply to all Members of Parliament.

Members of Parliament recognise that they are in a unique position of being responsible to the electorate. The electorate has the right to dismiss them from office at regular elections.

Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.

Members of Parliament acknowledge that their principal responsibility in serving as Member is to the people of New South Wales.

THE CODE

1 Disclosure of conflict of interest

- (a) *Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.*
- (b) *This may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner.*
- (c) *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.*

2 Bribery

- (a) *A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which the Member has received, is receiving or expects to receive.*
- (b) *A Member must not knowingly or improperly promote any matter, vote*

⁴ The same code applies to members of the New South Wales Legislative Council.

on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which any of the following persons has received, is receiving or expects to receive:

- (i) A member of the Member's family;*
 - (ii) A business associate of the Member; or*
 - (iii) Any other person or entity from whom the Member expects to receive a financial benefit.*
- (c) A breach of the prohibition on bribery constitutes a substantial breach of this Code of Conduct.*

3 Gifts

- (a) Members must declare all gifts and benefits received in connection with their official duties, in accordance with the requirements for the disclosure of pecuniary interests.*
- (b) Members must not accept gifts that may pose a conflict of interest or which might give the appearance of an attempt to improperly influence the Member in the exercise of his or her duties.*
- (c) Members may accept political contributions in accordance with part 6 of the Election Funding Act 1981.*

4 Use of public resources

Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.

5 Use of confidential information

Members must not knowingly and improperly use official information which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for the private benefit of themselves or others.

6 Duties as a Member of Parliament

It is recognised that some members are non-aligned and others belong to political parties. Organised parties are a fundamental part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.

7 Secondary employment or engagements

Members must take all reasonable steps to disclose at the start of a parliamentary debate:

- (a) *the identity of any person by whom they are employed or engaged or by whom they were employed or engaged in the last two years (but not if it was before the Member was sworn in as a Member);*
- (b) *the identity of any client of any such person or any former client who benefited from a Member's services within the previous two years (but not if it was before the Member was sworn in as a Member); and*
- (c) *the nature of the interest held by the person, client or former client in the parliamentary debate.*

This obligation only applies if the Member is aware, or ought to be aware, that the person, client or former client may have an interest in the parliamentary debate which goes beyond the general interest of the public.

This disclosure obligation does not apply if a Member simply votes on a matter; it will only apply when he or she participates in a debate. If the Member has already disclosed the information in the Member's entry in the pecuniary interest register, he or she is not required to make a further disclosure during the parliamentary debate.

This resolution has continuing effect unless and until amended or rescinded by resolution of the House.

This code forms part of the web of definitional terms of corrupt conduct in sections 8 and 9 of the *Independent Commission Against Corruption Act 1988*.

Section 8 of the Act is an inclusive provision which specifies the kind of acts that might constitute corrupt conduct. This section defines corrupt conduct as the dishonest or partial exercise of official functions, or breach of public trust or the misuse of information or material which was acquired in the exercise of official functions.

Section 9 is an exclusionary provision, establishing the boundaries of corrupt conduct. An act mentioned in section 8 will not constitute corrupt conduct unless it would amount to either:

- (a) a criminal offence;
- (b) a disciplinary offence; or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.
- (d) In the case of conduct of a Minister of the Crown or a member of a House of Parliament – a substantial breach of an applicable code of conduct.

As noted, subsection (d) above was introduced through the 1994 amendments to the ICAC legislation so that an act by a Minister or member could also amount to corrupt conduct if it amounts to a substantial breach of an applicable code of conduct.

An applicable code of conduct is defined in the *Independent Commission Against Corruption Act 1988* as, firstly, in the case of a Minister, a ministerial code of conduct prescribed or adopted for the purposes of section 9 by the regulations, and, secondly, in the case of a member of Parliament (including a Minister of the Crown), a code of conduct adopted for the purposes of the section by resolution of the House concerned.

Under the provisions of the Act, the Legislative Assembly is required to appoint a committee to carry out functions in relation to the Code of Conduct, including reviewing the code at least once every four years.⁵ The code was last reviewed in 2006 by the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.⁶

7.2.1. The link between the Code of Conduct and the Members' Handbook

Under the Code of Conduct "Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources." The preface to the Legislative Assembly *Members' Handbook* explains that the handbook "has legal status as a set of guidelines for the appropriate use of facilities, services and entitlements provided to members of the Legislative Assembly." The handbook sets out guidelines for the conduct of members in regard to such matters as travel entitlements. It explains the relationship between the guidelines, the Code and the *Independent Commission Against Corruption Act 1988* in the following terms:

Failure to use public resources in accordance with the guidelines detailed in the Members' Handbook amounts to a breach of the Members' Code of Conduct which may, in turn, amount to corrupt conduct under the *Independent Commission Against Corruption Act 1988*, even if the conduct is not otherwise illegal.

7.3 Parliamentary Ethics Adviser

On 23 September 1998, on the motion of the Premier, the House agreed to the appointment of a Parliamentary Ethics Adviser for the first time.⁷ The Parliamentary Ethics Adviser has been appointed to assist and advise members of Parliament in resolving ethical issues and problems. The position holder advises members, upon their request, on the use of entitlements and on the interpretation of rules for use of entitlements. The adviser is also an independent point of contact for advice on more difficult questions arising in relation to exercising the role of a member of Parliament, such as whether there is a potential conflict of interest in particular circumstances.

The Adviser bases the advice given on the determinations of the Parliamentary Remuneration Tribunal and the provisions of the Code of Conduct adopted by the Houses. The Adviser does not provide legal advice and gives an opinion rather than a ruling. It is up to members how and whether or not they adopt the advice given.

⁵ Section 72E of the *Independent Commission Against Corruption Act 1988*. The designated committee for purposes of the Act is the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics see VP 04/12/2003, pp. 536-7.

⁶ See the report of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Review of the Proposed Amendments to the Code of Conduct and Draft Constitution (Disclosure by Members) Regulation 2006*, September 2006.

⁷ VP 23/09/1998, pp. 883-4 – Mr Ken Robson (a former Auditor-General for NSW) was appointed.

In June 2006 the functions of the Parliamentary Ethics Adviser were extended to include the provision of advice to Ministers or former members (who held ministerial positions) in relation to post-separation employment.⁸

In establishing the position, the resolution of the House requires the Adviser to keep a record of any advice given in response to a member's request and also the factual information on which the advice was based. These records are to remain confidential unless:

- (1) The member who requested the advice gives permission for the Parliamentary Ethics Adviser to make the advice public; or
- (2) The House calls for the production of the records of the Parliamentary Ethics Adviser if the member to which the records relate has sought to rely on the advice of the adviser or has given permission for the records to be produced to the House.

The current resolution sets out the functions and provisions related to the role of the Ethics Adviser:

The Parliamentary Ethics Adviser shall have the following functions.

Advice to Members of Parliament

- (1)(a) The Parliamentary Ethics Adviser is to advise any member of Parliament, when asked to do so by that member, on ethical issues concerning the exercise of his or her role as a member of Parliament (including the use of entitlements and potential conflicts of interest).
- (b) The Parliamentary Ethics Adviser is to be guided in giving this advice by any Code of Conduct or other guidelines adopted by the House (whether pursuant to the Independent Commission Against Corruption Act or otherwise).
- (c) The Parliamentary Ethics Adviser's role does not include the giving of legal advice.

Advice to Ministers on post-separation employment

- (2) The Parliamentary Ethics Adviser must on request by a Minister provide written advice to the Minister as to whether or not the Adviser is of the opinion that the Minister's:
 - (a) acceptance of an offer of post-separation employment or engagement which relates to the Minister's portfolio responsibilities (including portfolio responsibilities held during the previous two years of ministerial office); or
 - (b) decision to proceed, after the Minister leaves office, with a proposal to provide services to third parties (including a proposal to establish a business to provide such services) which relates to the Minister's

⁸ VP 07/6/2006, pp. 97-8.

portfolio responsibilities (including portfolio responsibilities held during the previous two years of ministerial office),

would give rise to a reasonable concern that:

- (c) the Minister's conduct while in office was influenced by the prospect of the employment or engagement or the proposal to provide services; or
 - (d) the Minister might make improper use of confidential information to which he or she has access while in office.
- (3) The Adviser must on request by a person who has ceased to hold ministerial office within the previous 12 months ("the former Minister") provide written advice to the former Minister as to whether or not the Adviser is of the opinion that the former Minister's:
- (a) acceptance of an offer of employment or engagement which relates to the former Minister's former portfolio responsibilities during the last two years in which the Minister held ministerial office; or
 - (b) decision to proceed with a proposal to provide services to third parties (including a proposal to establish a business to provide such services) which relate to the former Minister's former portfolio responsibilities during the last two years in which the Minister held ministerial office,

would give rise to a reasonable concern that:

- (c) the former Minister's conduct while in office was influenced by the prospect of the employment or engagement or the proposal to provide services; or
 - (d) the former Minister might make improper use of confidential information to which he or she had access while in office.
- (4) If the Adviser is of the opinion that accepting the proposed employment or engagement or proceeding with the proposal to provide services might give rise to such a reasonable concern, but the concern would not arise if the employment or engagement or the provision of services were subject to certain conditions, then he or she must so advise and specify the necessary conditions.
- (5) The Adviser's advice must include:
- (a) a general description of the position offered, including a description of the duties to be undertaken, or the services to be provided, based on material provided by the Minister or former Minister but excluding any information that the Minister or former Minister indicates is confidential; and

- (b) the Adviser's opinion as to whether or not the position may be accepted, or the services may be provided, either with or without conditions.
- (6) Where the Adviser becomes aware that a Minister or former Minister has accepted a position, or has commenced to provide services, in respect of which the Adviser has provided advice, the Adviser must provide a copy of that advice to the Presiding Officer of the House to which the Minister belongs or to which the former Minister belonged.

Keeping of records

- (7) The Parliamentary Ethics Adviser shall be required to keep records of advice given and the factual information upon which it is based.
- (8) Subject to clause 6, the Parliamentary Ethics Adviser shall be under a duty to maintain the confidentiality of information provided to him in exercising his function and any advice given, but the Parliamentary Ethics Adviser may make advice public if the person who requested the advice gives permission for it to be made public.
- (9) This House shall only call for the production of records of the Parliamentary Ethics Adviser if the person to which the records relate has: in the case of advice given under clause 1(a), sought to rely on the advice of the Parliamentary Ethics Adviser; or given permission for the records to be produced to the House.

Annual meeting with committees

- (10) The Parliamentary Ethics Adviser is to meet annually with the Standing Committee of each House designated for the purposes of Part 7A of the Independent Commission Against Corruption Act.

Report to Parliament

- (11)(a) The Parliamentary Ethics Adviser shall be required to report to the Parliament prior to the end of his annual term on the number of ethical matters raised with him, the number of members who sought his advice, the amount of time spent in the course of his duties and the number of times advice was given.
- (b) The Parliamentary Ethics Adviser may report to the Parliament from time to time on any problems arising from the determinations of the Parliamentary Remuneration Tribunal that have given rise to requests for ethics advice and proposals to address these problems.⁹

⁹ VP 27/06/2007, pp. 196-8.