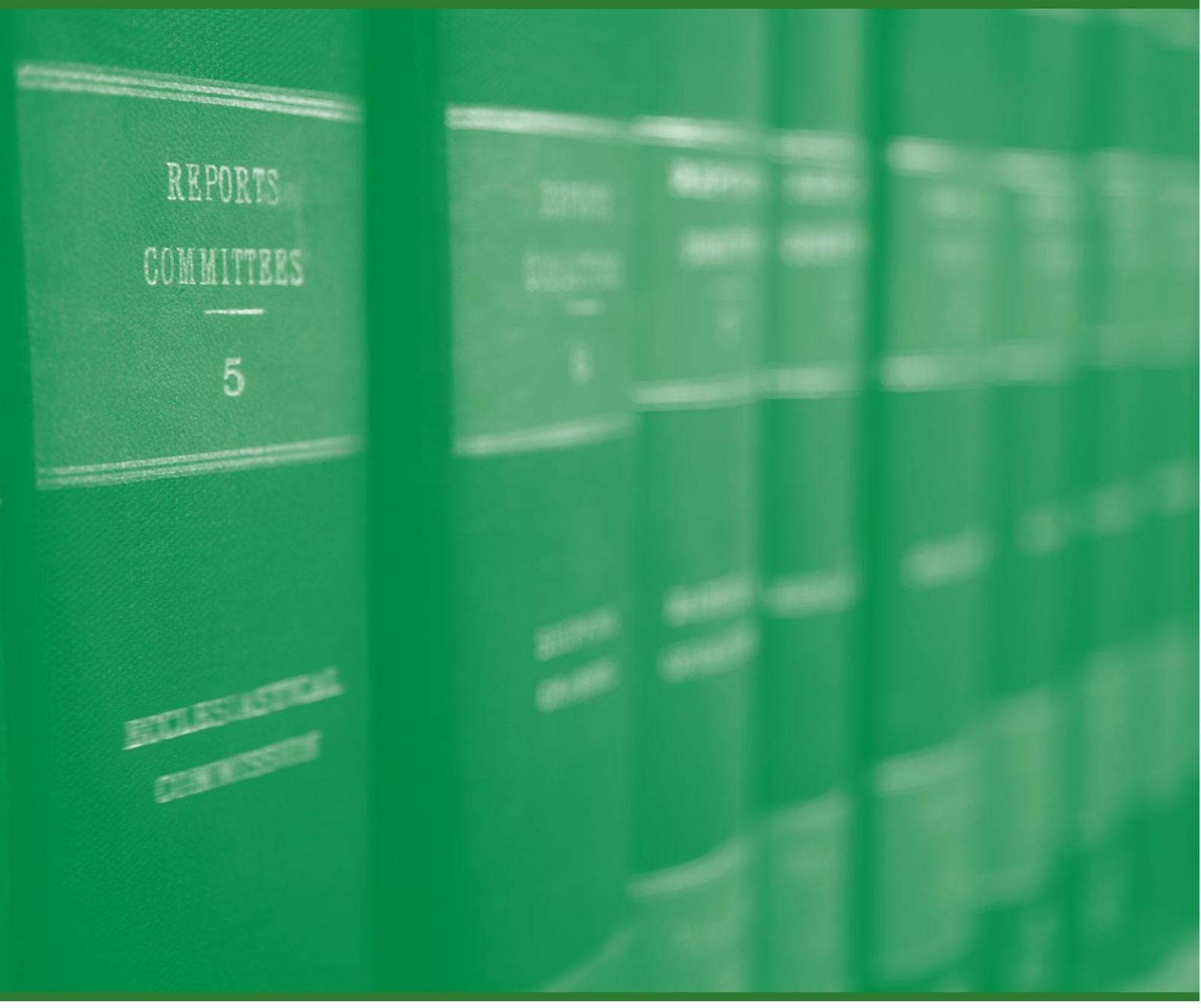




Standing Committee on Parliamentary Privilege and Ethics

REPORT 1/57 – JULY 2021

REVIEW OF THE PROPOSED RESOLUTION FOR THE ESTABLISHMENT OF A PARLIAMENTARY COMPLIANCE OFFICER





Legislative Assembly

Standing Committee on Parliamentary Privilege and
Ethics

Review of the proposed resolution for the
establishment of a Parliamentary Compliance Officer

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The motto of the coat of arms for the state of New South Wales is "Orta recens quam pura nites". It is written in Latin and means "newly risen, how brightly you shine".

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Chair's Foreword

As Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, it has been my pleasure to conduct the Committee's first inquiry for this Parliament, reviewing a proposed resolution for the establishment of a Parliamentary Compliance Officer. This follows a referral from the House on 12 November 2020, amidst concerns about a 'jurisdictional gap' in regulating the conduct of Members of the NSW Parliament.

In reviewing the proposed resolution, the Committee has recommended the establishment of an Independent Complaints Officer to receive and investigate complaints about Members in a number of areas including more minor breaches around Member entitlements and requirements for the disclosure of pecuniary interests; and matters that involve bullying, harassment and inappropriate behaviour.

In doing so, the Committee has highlighted the importance of education for Members and staff about their legal rights and obligations in creating a safe, secure and respectful workplace, and guidance about how to do so. It has also highlighted the importance of independent, confidential, trauma-informed support for complainants, witnesses and people who are the subject of allegations under the Independent Complaints Officer system.

The inquiry also raised important issues surrounding parliamentary privilege and at the time of the report's adoption, the Committee noted the Western Australian Supreme Court judgment handed down in the matter of *The President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]*. This decision is a significant development for the consideration of parliamentary privilege in Australia and most relevant to the other inquiry the Committee has on foot into the adequacy of current procedures to protect parliamentary privilege in circumstances where law enforcement and investigative bodies seek to use coercive, intrusive and covert investigative powers.

To assist in the conduct of its inquiry, the Committee sought and received written feedback from targeted stakeholders – the NSW Independent Commission Against Corruption; the UK Parliamentary Commissioner for Standards; the Chief Executive, NSW Department of Parliamentary Services; Mr John Evans, Parliamentary Ethics Adviser; and the Secondary Compliance Officer, Victorian Independent Remuneration Tribunal. I would like to thank all these stakeholders for taking the time to share their expertise with the Committee.

During the inquiry, there have been a number of concurrent processes underway to examine approaches to misconduct by Members of Parliament. These include the working advisory group to consider the NSW Parliament's approach to bullying, sexual harassment and other misconduct, chaired by the Hon Leslie Williams MP; and Professor Pru Goward's review of policies and procedures for NSW ministerial offices. At the Commonwealth level, the Department of the Prime Minister and Cabinet also conducted a review of procedures surrounding serious incidents that occur during Commonwealth parliamentary employment. These concurrent processes are discussed in the Committee's report and the Committee has taken them into account in developing its own findings and recommendations.

In closing, I would like to thank my fellow Committee Members for their contributions to the conduct of the inquiry. These have been most constructive in developing the recommendations contained in this report. I would also like to thank the Clerk of the

Legislative Assembly, Ms Helen Minnican, and the Committee secretariat for their assistance in the conduct of the inquiry.

I commend the report to the House.

Peter Sidgreaves MP
Chair

Executive Summary

The Committee's inquiry to review a proposed resolution for the establishment of a Parliamentary Compliance Officer follows a referral from the House on 12 November 2020, amidst concerns about a 'jurisdictional gap' in regulating the conduct of Members of the NSW Parliament.

Under the proposed resolution, the Compliance Officer would have jurisdiction to receive and investigate complaints about breaches of the Code of Conduct for Members including misuse of allowances and entitlements; minor breaches of the public interest disclosures scheme; and allegations of bullying, harassment and other types of grievances.

In the course of its inquiry, the Committee observed that a jurisdictional gap does exist with regard to more minor entitlements breaches whereas mechanisms are in place to deal with more significant breaches in this area. In particular, the Independent Commission Against Corruption ('the ICAC') can investigate allegations of 'corrupt conduct' against a Member. However, in doing so, the ICAC must, so far as practicable direct its attention to serious corrupt conduct and systemic corrupt conduct. Similarly, for a breach of the Code of Conduct for Members to fall within the definition of 'corrupt conduct' it must be a substantial breach.

This, and the fact that the NSW parliamentary administration has little, if any, capacity to formally receive a complaint about a Member's use of entitlements, nor to investigate or report on such matters, means that there is little scope to deal with minor entitlements breaches. While the proposed resolution would help address this situation, its implementation would need to take into consideration the over-arching regulatory framework for the allocation and use of Members' entitlements. This involves the determinations of the Parliamentary Remuneration Tribunal, the auditing regime provided by the NSW Auditor-General and the Parliament's internal auditors, and the advice and guidance provided by the Department of Parliamentary Services to assist Members.

Another area in which the Committee has observed a gap in accountability relates to pecuniary interest disclosures. The *Constitution Act 1902* and the *Constitution (Disclosures by Members) Regulation 1983* sets down a scheme for the disclosure by Members of their pecuniary and other interests. Section 14A(2) of the Act provides that either House can declare a Member's seat vacant if he or she wilfully contravenes the Regulation. It is understood that there are no instances of a Member's seat having been declared vacant under these provisions. Further, the legislation does not provide for the examination of breaches that are not wilful, and no sanction applies to a wilful breach other than potential loss of a seat.

In seeking to fill this gap in accountability, it is important to consider that the existing legislative provisions reflect the will of the Parliament. Further, a necessary corollary for the proposed resolution is for the Parliament to consider that the proposal put before it involves implementing a new standard that breaches of the scheme, which are not wilful, are to be captured as matters to be addressed.

Section 14(3) of the *Constitution Act 1902* provides for the process by which the House considers a motion to declare a seat vacant as a consequence of a wilful breach, expresses its opinion and makes such a declaration. Any proposed scheme to regulate non-wilful breaches

and provide greater transparency and accountability around the disclosures made in the register is a change that would need the endorsement of the House as part of the new standard to regulate Member conduct.

In this regard, the Committee notes that it has previously reviewed the operation of the pecuniary interest regime and reported to the House on options to streamline and improve its operation. This earlier work warrants consideration as a matter of some priority if the proposed extension of the regulatory framework to include non-wilful breaches is to be adopted. It is possible that improving the operation of the regime may require amendments to the *Constitution (Disclosures by Members) Regulation 1983*.

A Compliance Officer type role could help to ensure greater transparency and accountability for Member conduct in relation to minor entitlements and pecuniary interest matters. The proposed approach would provide for an independent person to receive and investigate complaints, coupled with a rectification procedure e.g. to require repayment of monies incorrectly claimed, and to require lodgement of a return disclosing an interest where a Member has inadvertently failed to do so. The Committee considers that the recommendations it makes in this report for the establishment of an Independent Complaints Officer, and a rectification process, would be helpful in this regard.

The situation with respect to bullying and inappropriate behaviour by Members, is quite distinct and different with regard to regulating Member conduct. The Committee noted in the course of its inquiry that Members are employers under the *Members of Parliament Staff Act 2013* and would appear to have a number of legislated obligations under the *Anti-Discrimination Act 1977* and the *Work Health and Safety Act 2011*. Further, where an issue is serious enough, the parliamentary administration can currently assist a complainant to access relevant bodies like the Police and Anti-Discrimination Board.

However, there may still be a perceived jurisdictional gap in regulating Member conduct in this area because the parliamentary administration has no power to formally receive complaints about bullying, harassment and inappropriate behaviour by Members nor to investigate them. In addition, remedies may be further limited by the fact that complainants will not always want to have complaints about such matters reported to external authorities.

In short, on the basis of the Committee's enquiries and advice that it has obtained, the gap would appear to be more of a process gap than a jurisdictional one. That is, the relevant legislation would appear to apply to Members but there is a gap in available processes for the handling and investigation of complaints that Members have engaged in bullying, harassment or inappropriate behaviour. The Committee has therefore recommended that the Independent Complaints Officer it proposes in this report should have the power to receive complaints and investigate matters in this area also.

In addition, the Committee has raised concerns that the abovementioned obligations of Members under workplace legislation, and their application to the parliamentary workplace, may not be readily understood, including in respect of the liability of Members. For this reason, other major recommendations of the report are that the parliamentary administration should provide regular, up-to-date information to Members and staff on legislated requirements, and on creating a safe, secure and respectful working environment.

In its report, the Committee also makes a number of findings in relation to important considerations that warrant attention during the implementation of an Independent Complaints Officer system and these are highlighted throughout.

Findings and Recommendations

Recommendation 1 _____ 47

That the Speaker make arrangements for the establishment of the position of Independent Complaints Officer to expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all Members and staff.

Recommendation 2 _____ 47

That the Speaker make arrangements for the establishment of a panel of people with appropriate skills and expertise ('the Panel') to whom the Independent Complaints Officer could direct complaints for investigation, where he or she does not conduct the investigation him or herself.

Recommendation 3 _____ 48

That the Independent Complaints Officer have the functions of receiving and investigating complaints confidentially in relation to alleged breaches of the Code of Conduct for Members by Members of the Legislative Assembly, not related to conduct in proceedings of the Legislative Assembly or its committees, including:

- misuse of allowances and entitlements
- other less serious misconduct matters
- minor breaches of the pecuniary interest disclosures scheme.

Recommendation 4 _____ 48

That the Independent Complaints Officer also have the function of receiving and investigating complaints confidentially in relation to bullying, harassment and inappropriate behaviour by Members of the Legislative Assembly, not related to conduct in proceedings of the Legislative Assembly or its committees, and contrary to their obligations under legislation including the:

- *Members of Parliament Staff Act 2013*
- *Anti-Discrimination Act 1977*
- *Work Health and Safety Act 2011.*

Recommendation 5 _____ 49

That the Independent Complaints Officer also have discretion to refer a complaint to a member of the Panel, who has the requisite skills and expertise, to confidentially investigate rather than investigating the complaint him or herself.

Recommendation 6 _____ 50

That the Independent Complaints Officer monitor the operation of the Code of Conduct for Members, the *Constitution (Disclosures by Members) Regulation 1983* and the Members' entitlements system, and provide advice about reform to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics ('the Assembly Committee') as required,

consistent with Clause 2(b) of the proposed resolution for a Parliamentary Compliance Officer that is before the House ('the proposed resolution').

Recommendation 7 _____ 50

That the Independent Complaints Officer and members of the Panel have a function of assisting the Assembly Committee, the Parliamentary Ethics Adviser and the Clerk of the Legislative Assembly as requested in relation to the education of Members about their obligations under the Code of Conduct for Members and the *Constitution (Disclosures by Members) Regulation 1983*, consistent with Clause 2(c) of the proposed resolution.

Recommendation 8 _____ 51

That the Independent Complaints Officer and members of the Panel be given no function of providing informal advisory services as envisaged by clause 2(d) of the proposed resolution as this function would be incompatible with their investigatory functions.

Finding 1 _____ 51

That, in light of legal advice concerning the application of work, health and safety and anti-discrimination legislation to Members, the case for an amendment to the Code of Conduct for Members does not appear to be fully made out.

Recommendation 9 _____ 52

That the NSW Department of Parliamentary Services and the Clerk of the Legislative Assembly provide regular, up-to-date information and guidance to Members of the Legislative Assembly, as employers of staff under the *Members of Parliament Staff Act 2013* – and to Members' staff and parliamentary staff – on Member and staff rights and obligations under:

- the *Members of Parliament Staff Act 2013*
- the *Anti-Discrimination Act 1977*
- the *Work Health and Safety Act 2011*.

Recommendation 10 _____ 53

That the regular, up-to-date information to be provided to Members, Members' staff and parliamentary staff on their legal rights and obligations also include:

- information on recognising, identifying and responding to bullying, harassment and inappropriate behaviour in the workplace
- guidance on creating a safe, secure and respectful working environment.

Recommendation 11 _____ 53

That the Assembly Committee review the regular, up-to-date information each time before it is distributed to Members and staff, in consultation with relevant bodies, to check its accuracy and suitability and recommend changes if necessary.

Recommendation 12 _____ 54

That the NSW Department of Parliamentary Services review support services currently available to Members, Members' staff and staff of the NSW Parliament under the Employee

Assistance Program and assess where adjustments may be necessary to provide timely, independent, confidential and trauma-informed support for complainants, witnesses and people who are accused in relation to a complaint under the Independent Complaints Officer system, should such a system be established.

Recommendation 13 _____ 55

That the Speaker appoint an Independent Complaints Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of the Parliament and until the mid-term point of the following Parliament; and that the appointment be able to be extended for a period of up to six months to ensure that there is no period during which there is no person holding the position.

Recommendation 14 _____ 55

That the proposed appointment to the role of Independent Complaints Officer be required to have the support of the Assembly Committee.

Recommendation 15 _____ 55

That the appointment of the Independent Complaints Officer be confirmed by the Clerk of the Legislative Assembly entering into a contract of employment with the appointee.

Recommendation 16 _____ 56

That the Speaker also appoint the Panel – a panel of three independent persons – within three months of the mid-term point of each Parliament, or whenever a position becomes vacant, for the remainder of the Parliament and until the mid-term point of the following Parliament and:

- persons on the Panel be able to be retained as needed to investigate complaints delegated to them by the Independent Complaints Officer
- appointments to the Panel be required to have the support of the Assembly Committee.

Recommendation 17 _____ 57

That there be two persons appointed to the Panel who have appropriate skills and experience to investigate complaints about bullying, harassment and inappropriate behaviour by Members; and that there also be a person appointed to the panel who has appropriate skills and experience to investigate complaints about other matters covered by the Independent Complaints Officer system such as breaches relating to Member entitlements and pecuniary interest disclosures.

Recommendation 18 _____ 57

That the appointment of persons to the Panel be confirmed by the Clerk of the Legislative Assembly entering into a contract of employment with the appointees.

Recommendation 19 _____ 58

That the Independent Complaints Officer and members of the Panel only be able to be dismissed by the Clerk of the Legislative Assembly in consultation with the Speaker and the Assembly Committee.

Recommendation 20 _____ 59

That 'members of the parliamentary community' being:

- Members of the Parliament of NSW
- all those who work for Members of the Parliament of NSW in their capacity as Members or Ministers, including contractors and volunteers
- all those who work for, or carry out work for, the Parliament of NSW including contractors and volunteers

have standing to make a complaint to the Independent Complaints Officer.

Recommendation 21 _____ 60

That the House consider whether former members of the parliamentary community should have standing to make a complaint to the Independent Complaints Officer about bullying, harassment or inappropriate behaviour.

Recommendation 22 _____ 60

That former members of the parliamentary community not have standing to make complaints to the Independent Complaints Officer about matters within jurisdiction of the Independent Complaints Officer that do not relate to bullying, harassment or inappropriate behaviour (e.g. breaches around entitlements or disclosures of pecuniary interests).

Recommendation 23 _____ 60

That the House consider whether the Independent Complaints Officer system should have any retrospective remit, that is, whether the Independent Complaints Officer should be able to receive complaints relating to incidents that occurred before the establishment of the Independent Complaints Officer position.

Recommendation 24 _____ 61

That the House consider:

- whether there should be a time limit for reporting misconduct to the Independent Complaints Officer e.g. complaints must be lodged within two years of the conduct in question
- whether such time limits should differ according to the type of case e.g. bullying and inappropriate conduct matters versus other matters.

Recommendation 25 _____ 66

That the Independent Complaints Officer develop the investigations protocol envisaged by Clause 5(a) of the proposed resolution within three months of his or her appointment, to be approved by the Assembly Committee and tabled in the House by the Chair.

Recommendation 26 _____ 67

That under the Independent Complaints Officer system:

- Members of the parliamentary community who are not Members of Parliament and who make complaints be required to maintain confidentiality concerning complaints and investigations.

- There be an expectation that, except in extraordinary circumstances, Members of Parliament will maintain confidentiality about complaints and investigations. However, it should be made clear that nothing about this expectation affects parliamentary privilege and, in particular, freedom of speech.
- Others involved in any complaints investigations e.g. witnesses, are required to maintain confidentiality concerning complaints and investigations.

Recommendation 27 _____ 68

That on receiving complaints, the Independent Complaints Officer be required to assess complaints in a reasonably timely manner having regard to any relevant factors including the complexity of the complaint and available resources.

Recommendation 28 _____ 68

That investigations by the Independent Complaints Officer and members of the Panel be required to be conducted in a reasonably timely manner having regard to any relevant factors including the complexity of the investigation and available resources.

Recommendation 29 _____ 69

That where the Independent Complaints Officer decides to dismiss a complaint and that it is not suitable for investigation, he or she is to:

- Write to the Member in question, and the complainant, advising of the decision.
- Briefly report the decision to the Assembly Committee on a confidential basis. However, in the case of bullying, harassment and inappropriate behaviour complaints, a report to the Committee must only be made with the complainant's consent.

Recommendation 30 _____ 70

That the Independent Complaints Officer and persons retained from the Panel to investigate a matter not have the power to make reports about specific investigations *direct to the House*.

Recommendation 31 _____ 70

That where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a Member has not breached the Code of Conduct for Members or the *Constitution (Disclosures by Members) Regulation 1983*, nor engaged in bullying, harassment or inappropriate conduct, the investigator be required to:

- Write to the Member and complainant advising of his or her findings.
- Briefly report his or her findings on a confidential basis to the Assembly Committee (and to the Independent Complaints Officer if the investigator is a member of the Panel). However, in the case of bullying, harassment and inappropriate behaviour matters, a report to the Committee must only be made with the complainant's consent.

Recommendation 32 _____ 71

That where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a Member has breached the Code of Conduct

for Members or the *Constitution (Disclosures by Members) Regulation 1983*, or has engaged in bullying, harassment or inappropriate behaviour:

- The investigator be required to write to the Member advising of his or her findings and specifying what action is required to rectify the breach. A table listing possible examples of standard rectification actions is at Appendix Four to this report.
- Should the Member take the rectification action, the investigator be required to write to the complainant advising of his or her findings and noting the rectification action taken by the Member.
- The investigator be required to briefly report his or her findings, and the rectification action taken by the Member, on a confidential basis, to the Assembly Committee (and to the Independent Complaints Officer if the investigator is a member of the Panel). However, in the case of bullying, harassment and inappropriate behaviour matters, a report to the Committee must only be made with the complainant's consent.

Recommendation 33 _____ 73

That where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a Member has breached the Code of Conduct for Members or the *Constitution (Disclosures by Members) Regulation 1983*, or has engaged in bullying, harassment or inappropriate behaviour and the Member has failed to undertake the stipulated rectification action or declined to do so pending appeal:

- The investigator report his or her findings and conclusions to the Assembly Committee on a confidential basis (and to the Independent Complaints Officer if the investigator is a member of the Panel), including recommendations as to the sanctions, if any, that should be imposed by the House. However, in the case of bullying, harassment and inappropriate behaviour matters, a report to the Committee must only be made with the complainant's consent.
- The Member in question also have the right to lodge an appeal against the investigator's findings, conclusions and recommendations with the Assembly Committee, where they have been so reported to the Committee.

Recommendation 34 _____ 75

That after receiving:

- an investigatory report from the Independent Complaints Officer or a member of the Panel about a breach for which the Member has failed to take the stipulated rectification action, and/or
- an appeal from the Member in question concerning the investigator's findings, conclusions and recommendations

the Assembly Committee:

- form its own conclusions
- have the power to report its conclusions and recommendations – including as regards appropriate sanctions – to the House

- have the power to decide that a report to the House and/or sanctions are not warranted in a particular case e.g. where the Committee disagrees with the investigator's findings.

Recommendation 35 _____ 78

That the Independent Complaints Officer and persons from the Panel who are retained to investigate a complaint be able to engage the services of persons to assist with or perform services for them in the conduct of an investigation, within budget.

Finding 2 _____ 78

The power of the Independent Complaints Officer or any person from the Panel who is retained to investigate a complaint, to compel the production of documents or other records would be problematic, and would not accord with the Legislative Assembly's approach to such questions. As the Independent Complaints Officer and members of the Panel are to operate pursuant to a resolution of the House, they could only request documents or records and report non-compliance to the Assembly Committee which, if necessary, could report to the House to resolve the matter.

Recommendation 36 _____ 79

That the Independent Complaints Officer and members of the Panel retained to investigate complaints be required to keep confidential records of their assessments and investigations. These records should be regarded as records of the House, and not be made public except for:

- the referral of information between the Independent Complaints Officer, a member of the Panel retained to investigate a complaint, and relevant authorities in accordance with the protocol (to be developed by the Independent Complaints Officer, approved by the Assembly Committee and tabled in the House by the Chair) for the operation of the Independent Complaints Officer system
- where the Member who is the subject of the complaint requests that the records be made public.

Recommendation 37 _____ 80

That the Independent Complaints Officer be required to table in the House quarterly reports that contain general, de-identified information about complaints dealt with under the Independent Complaints Officer system including:

- the number and types of complaints received
- the number of investigations undertaken
- the number of matters found by an investigator to be unsustainable
- the number of matters involving breaches that were dealt with via the rectification procedure, and the rectification action that was taken for these matters (e.g. repayments)
- the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, and that were reported to the Assembly Committee but not to the House

- the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, that were reported to the Assembly Committee and to the House
- the results of matters reported to the House i.e. type of sanctions imposed.

Recommendation 38 _____ 82

That each calendar year the Assembly Committee meet with:

- the Independent Complaints Officer
- any persons retained from the Panel to conduct investigations of complaints in that calendar year.

Finding 3 _____ 83

That on receiving a report from the Assembly Committee, arising from an investigation under the Independent Complaints Officer system, which details Member misconduct, it would be open to the House to impose sanctions on the Member of a self-protective nature including:

- seeking an apology from the Member
- requiring the Member to provide an explanation at the Bar of the House
- admonishing or reprimanding the Member
- suspending the Member from the service of the House, depending on the context.

Finding 4 _____ 84

There may also be some scope for financial penalties in support of the operation of the statutory scheme. For example, it may be possible for amendments to be made to the *Parliamentary Remuneration Act 1989* so that Members who have breached requirements around entitlements – and who have been required by the Independent Complaints Officer or a member of the Panel to repay monies – can be required to pay a small loading e.g. linked to the consumer price index.

Recommendation 39 _____ 84

That the Independent Complaints Officer system be thoroughly costed prior to its establishment.

Recommendation 40 _____ 84

That the Assembly Committee be required to review the Independent Complaints Officer system within 12 months of the establishment of the Independent Complaints Officer position, in consultation with key stakeholders. The review should examine how the system is operating in practice and whether any changes are needed, and in particular:

- the confidentiality provisions applying in respect of complaints and investigations under the system
- the timeliness of complaints assessments and investigations conducted under the system.

Recommendation 41 _____ 85

That the Assembly Committee also be required to review the Independent Complaints Officer system once every parliamentary term, in consultation with key stakeholders, to examine how it is operating in practice and whether any changes are needed.

Finding 5 _____ 86

The resolution for the proposed Compliance Officer raises questions around confidentiality, protection against defamation and parliamentary privilege. Some of these matters necessitate appropriate safeguards within any independent complaint handling mechanism that is established, to provide confidentiality for a complainant, and to provide for the appropriate use of information supplied for specific purposes. For example, conducting investigations into allegations and accounting for complaints officer activities.

The question of how the work of an Independent Complaints Officer and the handling of any records or information held or obtained by him or her, is to be balanced against parliamentary privilege is a matter that will require detailed review during the implementation of any independent complaint handling mechanism.

Consequently, questions concerning parliamentary privilege are matters for the Assembly Committee to examine in light of input from the Independent Complaints Officer and consultation with external bodies on possible protocols and memoranda of understanding, consistent with agreements currently in place with bodies such as the Independent Commission Against Corruption ('the ICAC') and the NSW Police Force.

The Assembly Committee notes that this is an area it currently has under review as part of its Inquiry into the Adequacy of Current Procedures to Protect Parliamentary Privilege in Circumstances where Law Enforcement and Investigative Bodies seek to use Coercive, Intrusive and Covert Investigative Powers.

Finding 6 _____ 88

The Independent Complaints Officer should not provide complaint handling records to the ICAC and the ICAC should not 'take over' complaint investigations that the Independent Complaints Officer has commenced.

Where the Independent Complaints Officer has concerns that a complaint to him or her may potentially involve corrupt conduct, he or she should cease the complaint investigation and invite the complainant to raise the matter with the ICAC.

The Independent Complaints Officer can also determine to draw back from the investigation of a complaint and make a notification to the ICAC but should not hand over papers and records obtained under the Independent Complaints Officer system.

Recommendation 42 _____ 89

That the House consider changes to the composition of the Assembly Committee so that it comprises:

- five Government Members
- two Opposition Members

- one Cross Bench Member.

Chapter One – Background to the Proposal for a Parliamentary Compliance Officer

Background to the inquiry

What are the proposals that are before the Legislative Assembly and Legislative Council?

- 1.1 On 12 November 2020, the Legislative Assembly resolved on the motion of the Hon Mark Speakman SC MP that the Standing Committee on Parliamentary Privilege and Ethics ('the Assembly Committee') review a proposed resolution for the establishment of a Parliamentary Compliance Officer, as brought forward by the Speaker, in the same terms as a proposal brought forward by the President of the Legislative Council. The proposed resolution is at Appendix One. The review of the proposed resolution is the subject of the Assembly Committee's current inquiry.
- 1.2 Similarly, on 17 November 2020, the Legislative Council resolved, on the motion of the Hon Damien Tudehope MLC, that the Legislative Council Privileges Committee ('the Council Committee') review a proposed resolution in the same terms for the establishment of a Parliamentary Compliance Officer. The Council Committee accordingly commenced an inquiry to review the proposed resolution and tabled its report in the Legislative Council on 11 May 2021.

What led to the introduction of the proposals?

- 1.3 The proposed resolutions follow a recommendation in a 2013 report of the Independent Commission Against Corruption ('the ICAC') that the Assembly Committee and the Council Committee consider a parliamentary investigator position. The ICAC raised concerns that there was a jurisdictional gap for regulating the conduct of Members of Parliament in NSW, noting that 'the effectiveness of codes of conduct and statutory pecuniary interest regimes is dependent on timely and impartial enforcement mechanisms'.¹
- 1.4 Both Committees reported in 2014 but did not reach agreement on a proposed model for a parliamentary investigator.²

¹ Independent Commission Against Corruption, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, October 2013, pp43-44, Independent Commission Against Corruption website:

[https://www.parliament.nsw.gov.au/la/papers/DBAssets/tabledpaper/webAttachments/28028/Reducing_the_opportunities_and_incentives_for_corruption_in_the_state%27s_management_of_coal_resources_\(Oct_2013\)%5B1%5D.pdf](https://www.parliament.nsw.gov.au/la/papers/DBAssets/tabledpaper/webAttachments/28028/Reducing_the_opportunities_and_incentives_for_corruption_in_the_state%27s_management_of_coal_resources_(Oct_2013)%5B1%5D.pdf), viewed 30 March 2021.

² See Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into Matters Arising from the ICAC Report Entitled 'Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources'*, July 2014, NSW Parliament website: <https://www.parliament.nsw.gov.au/ladocs/inquiries/2172/Inquiry%20into%20matters%20arising%20from%20the%20ICAC%20Report%20.pdf> viewed 13 July 2021 and Legislative Council Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, June 2014, NSW Parliament website:

- 1.5 Up to this point, the focus had been on the jurisdictional gap in regulating the conduct of Members with regard to less serious breaches in their use of entitlements, and failure to disclose pecuniary and other interests. Matters such as bullying, harassment and sexual harassment by Members was not the focus. It is relevant to note that the Code of Conduct for Members adopted on 5 March 2020, does not cover matters such as bullying, harassment or sexual harassment. A copy of the Code of Conduct can be found at Appendix Two.
- 1.6 However, in August 2020 the focus shifted to include matters such as bullying, harassment and sexual harassment by Members. At this time, 23 Members of the NSW Parliament spanning both Houses wrote to the Clerk of the Legislative Assembly, Ms Helen Minnican; and the Clerk of the Parliaments and Clerk of the Legislative Council, Mr David Blunt. In their letter, the Members raised concerns about a jurisdictional gap where there are allegations that a Member has engaged in workplace bullying or inappropriate behaviour. The Members asked that a mechanism be established to handle complaints in these areas, and to enable these complaints to be independently investigated.³ In the letter, the Members stated:
- In our opinion, a mechanism or process agreed upon by Members of both Houses of the New South Wales Parliament should be established to handle complaints of this nature and investigate them independently. By agreement it could also facilitate mediation.
- This would at least provide some recourse or mechanism to those who wish to make a complaint and have it dealt with privately but nonetheless have it dealt with formally.⁴
- 1.7 As a result, the Presiding Officers directed the Clerk of the Legislative Assembly; the Clerk of the Parliaments and the Clerk of the Legislative Council; and the Chief Executive of the Department of Parliamentary Services (DPS), Mr Mark Webb ('the Department Heads'), to develop a joint proposal to establish a position of 'Compliance Officer'. The Department Heads did so and after amendments were made by the Leaders of the Houses, the resulting proposed resolution was put to both Houses in November 2020 and referred to the Committees, as detailed above, for review.

Concurrent processes

Are there any concurrent processes underway to examine the Parliament's approach to Member misconduct?

- 1.8 In addition to the review of the proposals by the Assembly and Council Committees, a concurrent process is underway to consider the NSW Parliament's approach to Member misconduct. On 22 March 2021, it was decided to establish a working advisory group to consider the Parliament's approach to bullying,

<https://www.parliament.nsw.gov.au/lcdocs/inquiries/1611/Report%20No.%2070%20-%20Recommendations%20of%20the%20ICAC.pdf> viewed 13 July 2021.

³ Letter from 23 Members of the NSW Parliament to the Clerk of the Legislative Assembly and the Clerk of the Parliaments, 6 August 2020.

⁴ Letter from 23 Members of the NSW Parliament to the Clerk of the Legislative Assembly and the Clerk of the Parliaments, 6 August 2020.

sexual harassment and other serious misconduct, comprising Members, Members' staff, parliamentary staff, relevant managers and other representatives and stakeholders. The Presiding Officers appointed the Hon. Leslie Williams MP, Deputy Speaker, as the initial Chair of the working advisory group, and to conduct preliminary discussions and meetings with key people including Members of each House who had expressed interest around these matters.⁵

1.9 Also of relevance, Professor Pru Goward was commissioned by the Premier to conduct a review into policies and procedures for ministerial offices regarding bullying, harassment and sexual misconduct⁶ with a report published on 28 April 2021. While the focus of this review was NSW ministerial offices, Professor Goward noted in her report that there are considerable overlaps between ministerial staff and parliamentary staff in their shared workplace, the Parliament.⁷ Professor Goward also made 13 recommendations including:

- A best practice Respectful Workplace Policy should be developed, including investigative and reporting procedures to address bullying, harassment and sexual misconduct in ministerial offices to enhance the safety and security of staff.
- Complaints of misconduct from ministerial staff should be received by an independent person who has experience and training in conducting investigations about bullying, harassment and sexual misconduct.
- Where a matter raised or investigated may also be a serious criminal offence certain principles should apply including that the complainant should be notified of the requirement to report the offence to the NSW Police Force, and that the complainant's wishes about making the report must be obtained.⁸

1.10 In addition, on the subject of matters investigated that may also be a criminal offence, Professor Goward noted that in NSW under section 316 of the *Crimes Act 1900*, concealing a serious indictable offence (being an offence punishable by at least five years prison) is a crime in certain circumstances. However, under section 316(1A) a person has reasonable excuse for not informing police or other appropriate authorities of an alleged sexual or domestic violence offence if:

- the alleged victim was an adult at the time the information relating to the alleged offence was obtained by the person and

⁵ The Hon. Jonathan O’Dea MP, Speaker, *Legislative Assembly Debates*, 23 March 2021, p5827, NSW Parliament website: <https://www.parliament.nsw.gov.au/hansard/pages/home.aspx?tab=Browse&s=1> viewed 7 July 2021.

⁶ Professor Pru Goward, *Review of policies and procedures for Ministerial offices – bullying, harassment and sexual misconduct*, 19 April 2021, p1, Department of Premier and Cabinet website: https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/1832/Goward-Report-April-2021.pdf?utm_source=miragenews&utm_medium=miragenews&utm_campaign=news viewed 29 April 2021.

⁷ Professor Pru Goward, *Review of policies and procedures for Ministerial offices – bullying, harassment and sexual misconduct*, 19 April 2021, p41.

⁸ Professor Pru Goward, *Review of policies and procedures for Ministerial offices – bullying, harassment and sexual misconduct*, 19 April 2021, pp6-8.

- the person believes on reasonable grounds that the alleged victim does not wish the information to be reported to police or another appropriate authority.

1.11 Professor Goward therefore concluded that:

Where it is apparent either before or during the investigation that the matter may constitute a criminal offence, this must be reported to the NSW Police Force. However, the complainant's wishes are important and where he or she does not want the matter reported to police this may constitute an appropriate reason for not reporting the matter.⁹

1.12 On 28 April 2021, the Premier announced that she would be accepting Professor Goward's recommendations and that the next phase of the process would involve consultation with the NSW Parliament and survivors.¹⁰

1.13 At the Commonwealth level, there has been recent work that focusses on serious incidents. On 16 February 2021, the Prime Minister, the Hon Scott Morrison MP initiated a review to be conducted by Stephanie Foster PSM, Deputy Secretary of the Department of the Prime Minister and Cabinet, into the procedures and processes involved in identifying, reporting and responding to serious incidents that occur during Commonwealth parliamentary employment. This was in response to reports of an alleged sexual assault by a ministerial staffer, which had been made public the previous day.¹¹

1.14 The review's report was published on 4 June 2021 and found that current procedures cannot respond appropriately to serious incidents in the parliamentary workplace, particularly sexual assault. It further found:

- an absence of readily accessible, timely, independent, trauma-informed response mechanisms, now partially remedied with the introduction of a dedicated 24/7 support line
- the need for a trusted, independent complaints mechanism able to deliver proportionate consequences for misconduct
- the need for tailored, face to face education and support for parliamentarians and their staff in preventing, identifying and responding to serious incidents in the workplace
- the need for a clearly articulated leadership commitment and actions to promote a safe and respectful workplace

⁹ Professor Pru Goward, *Review of policies and procedures for Ministerial offices – bullying, harassment and sexual misconduct*, 19 April 2021, p37.

¹⁰ Premier Gladys Berejiklian, 'New bullying and harassment protections' 28 April 2021, NSW Government website: https://www.nsw.gov.au/media-releases/new-bullying-and-harassment-protections?utm_source=miragenews&utm_medium=miragenews&utm_campaign=news viewed 29 April 2021.

¹¹ Department of the Prime Minister and Cabinet, *Review of the Parliamentary Workplace: Responding to Serious Incidents*, 4 June 2021, p5, Department of the Prime Minister and Cabinet website: <https://pmc.gov.au/resource-centre/pmc/review-parliamentary-workplace-responding-serious-incidents> viewed 11 June 2021.

and these findings underpinned the review's recommendations.¹²

- 1.15 On the subject of complaints at the Parliament that may relate to criminal conduct, the report also highlighted the agency of the impacted person in decisions about whether to refer a matter to the police. It stated:

Best practice approaches facilitate and encourage referral of criminal matters to police but, unless a mandatory disclosure obligation exists, emphasise the impacted person's control and autonomy at every stage of the process. A system that requires referral to police may result in fewer people accessing support, as a forced referral may be re-traumatising and detract from safety and confidence in the process.¹³

Mechanisms to regulate Member conduct and the jurisdictional gap

What mechanisms are currently in place to regulate the conduct of Members, and where could there be said to be a jurisdictional gap?

- 1.16 The conduct of Members of the NSW Parliament is currently regulated in a number of ways, outlined below. However, as noted previously there have been said to be gaps in the current arrangements. These gaps are discussed further below.¹⁴

General mechanisms to regulate Members' conduct

- 1.17 The conduct of Members in the Chambers is governed by the Standing Orders of each House. These are the written rules of procedure and govern matters including the rules of debate and the maintenance of order.
- 1.18 In addition, the Legislative Assembly and Legislative Council adopted an identical Code of Conduct for Members on 5 March 2020. The Code covers the proper exercise of power; use of public resources; use of confidential information; disclosure of interests; avoidance, resolution or disclosure of conflicts of interest; and gifts.
- 1.19 The Parliament has also appointed a Parliamentary Ethics Adviser to advise Members, at their request, on ethical issues concerning the exercise of their role including the use of entitlements and potential conflicts of interest. Since 2006 the role of the Ethics Adviser has also included the provision of advice, as required by the NSW Ministerial Code of Conduct, to Ministers and former Ministers on post separation employment.¹⁵ The current Ethics Adviser, Mr John

¹² Department of the Prime Minister and Cabinet, *Review of the Parliamentary Workplace: Responding to Serious Incidents*, 4 June 2021, p5.

¹³ Department of the Prime Minister and Cabinet, *Review of the Parliamentary Workplace: Responding to Serious Incidents*, 4 June 2021, p43.

¹⁴ The Assembly Committee acknowledges the discussion in Legislative Council Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, June 2014 pp45-48 which provided helpful background about current arrangements to regulate the conduct of Members in NSW, and the limitations surrounding these arrangements.

¹⁵ Parliamentary Ethics Adviser, *Annual Report 2019-2020*, pp1-2, NSW Parliament website: <https://www.parliament.nsw.gov.au/tp/files/78316/Report%20of%20the%20Parliamentary%20Ethics%20Adviser%20for%20the%20year%20ended%2030%20June%202020.pdf> viewed 13 July 2021. See also Part 5, Schedule, NSW Ministerial Code of Conduct. Clause 23 provides that if a Minister wishes to consider accepting an offer of post-separation employment that relates to any of his or her current portfolio responsibilities, or those held within the

Evans, commenced his role on 1 July 2014.¹⁶ However, the Assembly Committee notes that the Ethics Adviser performs an advisory function and does not possess investigatory powers.

- 1.20 In addition, the Assembly Committee and the Council Committee have functions to review the Code of Conduct for Members; undertake educative work around ethical standards applying to Members of Parliament; and consider and report on any matters relating to privilege referred to them by the House.¹⁷
- 1.21 Finally, like all people in NSW, Members are subject to the criminal law and allegations of Member misconduct that meet the criminal standard e.g. fraud, misconduct in public office, sexual assault, or assault are a matter for the Police.

Pecuniary interests

- 1.22 Regarding pecuniary interests, the *Constitution Act 1902* and the *Constitution (Disclosures by Members) Regulation 1983* sets down a scheme for the disclosure by Members of their pecuniary and other interests. Section 14A(2) of the Act provides that either House can declare a Member's seat vacant if he or she wilfully contravenes the Regulation. However, as the ICAC noted in its 2013 report, there are no instances of a Member's seat having been declared vacant under these provisions.¹⁸ The Assembly Committee also notes that there is no potential to examine breaches that are not wilful and no lesser sanction that could apply to a breach other than potential loss of a seat.

Corrupt conduct

- 1.23 The ICAC can investigate allegations of 'corrupt conduct' against a Member as per the definition of 'corrupt conduct' in Part 3 of the *Independent Commission Against Corruption Act 1988* ('ICAC Act'). However, the ICAC is required by section 12A of the ICAC Act to, as far as practicable, direct its attention to serious corrupt conduct and systemic corrupt conduct. Further, for a breach of the Code of Conduct for Members to fall within the definition of 'corrupt conduct' it must be a 'substantial breach' (see section 9 of the ICAC Act). As the ICAC observed in its 2013 report, this means that allegations of more minor misconduct by Members may go unchecked.¹⁹
- 1.24 In the 2013 report, the ICAC did not provide any indication of the number of such matters that may be going unchecked but stated that 'The creation of a

previous two years, he or she must first obtain the advice of the Parliamentary Ethics Adviser, NSW legislation website: <https://legislation.nsw.gov.au/view/html/inforce/current/sl-2017-0479#sch> viewed 13 July 2021.

¹⁶ Legislative Assembly, *Votes and Proceedings No 206*, item 17, 17 June 2014, NSW Parliament website: <https://www.parliament.nsw.gov.au/hp/housepaper/660/206-VAP.pdf> viewed 13 July 2021; and Legislative Council, *Minutes of Proceedings No 205*, item 25, 18 June 2014, NSW Parliament website: <https://www.parliament.nsw.gov.au/hp/housepaper/7525/Min-20140618-Cor.pdf> viewed 13 July 2021.

¹⁷ See establishing resolutions: Legislative Assembly, *Votes and Proceedings No 10*, item 13, 18 June 2019, NSW Parliament website: <https://www.parliament.nsw.gov.au/hp/housepaper/269/10-VAP-Corrected.pdf> viewed 13 July 2021; and Legislative Council, *Minutes of Proceedings No 2*, item 124, 8 May 2019, NSW Parliament website: <https://www.parliament.nsw.gov.au/hp/housepaper/3391/Min-20190508-Cor.pdf> viewed 13 July 2021.

¹⁸ Independent Commission Against Corruption, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, October 2013, p44.

¹⁹ Independent Commission Against Corruption, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, October 2013, pp43-44.

parliamentary investigator to examine minor allegations about members...may...provide for a 'graded' approach to non-compliance rather than the 'all or nothing' response of the current system'.²⁰

Audits and Member entitlements and allowances

- 1.25 The NSW Auditor-General also plays a role in regulating Member conduct. First, the Auditor-General has power under *the Public Interest Disclosures Act 1994* to investigate public interest disclosures made by a public official about serious and substantial waste of public money by a NSW Government agency. A serious and substantial waste of public money is any uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in a serious and substantial loss of public funds or resources.²¹ The conduct of Members and their staff, come within the remit of this public interest disclosures regime.
- 1.26 Such investigations can result in reports by the Auditor-General to Ministers, the Premier and the Houses of the NSW Parliament.²² However, this regime involves meeting a 'serious and substantial' threshold and the Auditor-General's focus does not concern more minor matters.
- 1.27 Under the *Public Finance and Audit Act 1983* the Auditor-General can conduct financial statement audits and performance audits of public sector agencies. In relation to Members' entitlements, the Auditor-General conducts an annual external audit as prescribed by the Parliamentary Remuneration Tribunal. This audit helps to ensure that additional entitlements paid to Members comply with the Parliamentary Remuneration Tribunal Determination. The audits can examine the validity of claims made and whether there have been any breaches of administrative requirements.²³ The Auditor-General's report is tabled in Parliament but it does not identify Members.
- 1.28 DPS also administers the use of the additional entitlements determined by the Parliamentary Remuneration Tribunal. However, in a March 2021 letter to the Assembly Committee, the Chief Executive of DPS explained that DPS has almost no capacity to formally receive a complaint about a Member's use of entitlements, investigate a complaint, compel cooperation in any inquiries into a complaint, report on, or sanction a Member. However, the Chief Executive

²⁰ Independent Commission Against Corruption, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, October 2013, p44.

²¹ Audit Office of New South Wales website: <https://www.audit.nsw.gov.au/make-a-public-interest-disclosure> viewed 30 March 2021.

²² See *Public Finance and Audit Act 1983*, Part 3, Division 7.

²³ See *Parliamentary Remuneration Act 1989*; Parliamentary Remuneration Tribunal, *Annual Report and Determination*, July 2020, NSW Remuneration Tribunals website:

https://www.remtribunals.nsw.gov.au/sites/default/files/2020-12/2020_annual_determination-prt.pdf viewed 30 March 2021; and NSW Auditor General, *Special Report, Members' additional entitlements 2020*, 15 December 2020, NSW Parliament website:

<https://www.parliament.nsw.gov.au/tp/files/78879/Auditor-General%20-%20Members%20additional%20entitlements%202020.pdf> viewed 30 March 2021.

further explained that DPS does implement preventative measures including advisory services.²⁴

- 1.29 In particular, the Chief Executive stated that while DPS provides advice to Members about the validity of their entitlements claims or use of allowances, there is no forensic examination and accountability remains with the Member:

DPS does not undertake a forensic examination of Members' claims as the accountability always rests with the Member to substantiate the claim is in connection with their parliamentary or electorate duties. The services provided to Members and staff are predominantly advisory in nature and are intended to help them self-assess the validity of a potential claim or use of an allowance. The guidance and advice is further supported by a range of resources including the Members' Entitlements Handbook, Parliament's administrative guidelines, circulars and other information.²⁵

- 1.30 The Chief Executive provided an example of the DPS advisory role as it relates to Members' Communications Allowance:

...the communications appraisal service expresses an opinion as to whether or not the communication to be funded from the Communications Allowance is consistent with the PRT [Parliamentary Remuneration Tribunal] determination and Parliament's administrative guidelines. It is not intended to approve the communication but rather support Members in making an informed decision on whether to proceed with the communication to be funded from the entitlement.²⁶

- 1.31 The Chief Executive also illustrated how the final decision on entitlements claims is left to Members where there is uncertainty around the validity of the claim:

Where a claim is clearly within guidelines and consistent with the purpose for which it has been provided, a claim from a Member will be supported. Where a claim is clearly outside the guidelines for use of the allowance, it will be discussed with the Member or their staff before being returned. If there is an argument for either side, and the decision could go either way, the final decision to proceed with the claim will be left to the Member.²⁷

- 1.32 In addition, DPS facilitates audits of entitlements claims made by Members to identify any non-compliance. The Chief Executive explained that all Members must retain records for at least two years to substantiate claims made to Parliament, and all Members will be audited at least once in a parliamentary term.²⁸

²⁴ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, p1.

²⁵ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, p2.

²⁶ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, p3.

²⁷ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, p3.

²⁸ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, p3.

1.33 The Chief Executive also explained that DPS retains independent auditors to undertake an internal audit of a sample of claims for all allowances in a given financial year. These audits, and data analytics, are used to identify patterns in entitlements use and non-compliant claims, and improve the Parliament's administrative guidelines and processes. The findings of the internal audit are also made available to the Auditor-General for his or her abovementioned annual audit around Members' entitlements.²⁹

1.34 Importantly, where irregularities are identified as a result of an audit or otherwise raised, DPS has limited powers. As touched upon above, it cannot investigate nor impose sanctions on a Member and while DPS can conduct an administrative review it cannot compel cooperation with any such review. The following advice from the Chief Executive also illustrates that where more minor entitlements breaches are detected, the available remedies are very limited because it is only more serious matters that could be referred to external bodies like the ICAC or the Auditor General:

Where irregularities are raised or identified, an *administrative* review can be undertaken to determine the appropriate course of action. DPS will review and scrutinise the relevant expense claims and determine if the concerns raised are credible and warrant further investigation. This may involve requests for additional information from relevant Members or their staff, a review of any advice or correspondence between DPS and the Member or their staff and a review of the primary purpose for which the expense has been incurred in relation to the parliamentary duties of a Member. Note that DPS cannot compel cooperation with such an administrative review...

Appropriate action may include administrative remedial action for minor matters such as requesting the repayment of any expense claims submitted. More serious matters including substantial possible misuse of entitlements may be referred to Parliament's internal auditors, the Office of the Auditor General or the Independent Commission Against Corruption (ICAC) for further review.³⁰

Bullying, harassment and sexual harassment

1.35 As noted already, in August 2020, 23 Members of the NSW Parliament raised concerns with the Clerks about a jurisdictional gap where there are allegations that a Member has engaged in workplace bullying or inappropriate behaviour. In particular, the Members noted that the parliamentary administration has no jurisdiction to inquire into Member conduct and called for a mechanism so that complaints about such bullying and inappropriate behaviour can be independently investigated:

We note that Members are not employees of the Parliament and that the Department of Parliamentary Services has no power to inquire into Member conduct. We further note that the Clerks of the respective Houses are not empowered in this way.

²⁹ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, p3.

³⁰ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, pp3-4 (emphasis in original).

This means that only an action or a resolution of the House can be used to investigate complaints or uphold findings of this nature.

In our view, this sets a very high and very political threshold for action to investigate complaints about Member conduct. We also make the observation that this threshold is only available in a practical sense to complainants who are themselves Members...

In our opinion, a mechanism or process agreed upon by Members of both Houses of the New South Wales Parliament should be established to handle complaints of this nature and investigate them independently.³¹

- 1.36 In short, the gap that exists in regulating Member conduct as regards bullying, harassment and inappropriate behaviour appears to be more of a process gap than a jurisdictional gap. Legal advice received by the Clerk of the Legislative Assembly, and discussed further below, confirms that Members are covered by legislation relevant to bullying, harassment and inappropriate behaviour – the *Anti-Discrimination Act 1977* and the *Work Health and Safety Act 2011* (WHS Act).³² However, notwithstanding this, the parliamentary administration appears to have very limited capacity to intervene where complaints are made against Members about bullying, harassment and inappropriate behaviour.
- 1.37 In particular, in his letter to the Assembly Committee, the Chief Executive of DPS noted that, as with entitlements matters, his Department has no power to formally receive complaints about bullying, harassment or inappropriate behaviour by Members, nor to investigate them, nor compel cooperation in any inquiries in relation to them, nor report on, or sanction a Member in relation to such behaviour.³³
- 1.38 The Chief Executive did note that where an issue is serious enough, DPS can assist a complainant to access Police in the case of criminal matters and the Anti-Discrimination Board in the case of sexual harassment.³⁴ However, the Assembly Committee identifies that even here remedies may be limited because complainants may not want complaints about such matters reported to external authorities. As noted earlier, in NSW where a complaint may include information about a serious indictable offence, this must generally be reported to the police or other relevant authorities.³⁵ However, in certain cases, such as those involving allegations of domestic violence or sexual offences, and where the adult complainant does not want the matter reported, this may be an appropriate reason at law for not reporting it.³⁶

³¹ *Letter from 23 Members of the NSW Parliament to the Clerk of the Legislative Assembly and the Clerk of the Parliaments*, 6 August 2020.

³² NSW Crown Solicitor, Advice to the Clerk of the Legislative Assembly dated 1 March 2021.

³³ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, pp1-2.

³⁴ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, p1.

³⁵ *Crimes Act 1900*, s316.

³⁶ *Crimes Act 1900*, s316(1A). See also Professor Pru Goward, *Review of policies and procedures for Ministerial offices – bullying, harassment and sexual misconduct*, 19 April 2021, p37.

1.39 In discussing these matters, it is necessary to define certain terms, including 'bullying', 'workplace bullying', 'harassment' and 'sexual harassment'. The Parliament of NSW Anti-Bullying Policy, which applies to 'all staff of the Parliament of New South Wales' but not to Members, defines bullying as 'repeated, unreasonable behaviour directed to an employee or group of employees that creates a risk to health and safety'.³⁷ Further, it defines workplace bullying as 'repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to their health and safety. It may be one-one-one or 'mobbing' by a group; carried out openly or subtly; privately or in front of others'.³⁸

1.40 The Anti-Bullying Policy also provides examples of behaviour that may be considered workplace bullying including:

- abusive, insulting or offensive language
- displaying offensive material
- unjustified criticism or complaints
- spreading misinformation or malicious rumours
- behaviour or language that frightens, humiliates, belittles or degrades, including criticism that is delivered with yelling or screaming
- inappropriate comments about a person's lifestyle, appearance, or their family
- teasing or regularly making someone the target of pranks or jokes
- impeding a person's capacity to fulfil their duties by unreasonably overloading them with work, not providing enough work or appropriate work, or deliberately withholding access to information
- setting unreasonable deadlines and other demands
- interfering with someone's personal effects or work equipment
- harmful or offensive initiation practices
- deliberately excluding or isolating a person from normal work activities
- threatening the security of a staff member's job
- applying harmful and punitive administrative sanctions such as delays in processing a person's work or applications for training
- creating unexplained job changes, setting meaningless tasks or tasks well beyond a person's normal range of duties

³⁷ *Parliament of NSW Anti-Bullying Policy*, March 2018, pp1&3.

³⁸ *Parliament of NSW Anti-Bullying Policy*, March 2018, p4.

- sending abusive or offensive emails or text messages or using digital and online social networks to make inappropriate comments which humiliate, slander, intimidate or degrade a person
- unfair treatment relating to rosters, leave, training and other entitlements.³⁹

1.41 The Anti-Bullying Policy also makes it clear that 'workplace violence' occurs when a person is abused, threatened or assaulted in circumstances relating to their work and that any instances of violence in the workplace are criminal matters that should be reported to the relevant Department Head and Presiding Officer/s and referred to the Police.⁴⁰

1.42 Harassment and discrimination are considered separately from bullying because the target of the inappropriate behaviour is treated poorly because of a personal characteristic such as their race, gender, disability or religion.⁴¹ The Parliament has a separate policy to cover harassment, i.e. the Parliament of NSW Harassment Free Workplace Policy, which applies 'to Members' staff and staff of the three Parliamentary departments' but not to Members. This policy defines 'harassment' as:

...any behaviour that is unwanted, offensive, humiliating or intimidating, regardless of how the behaviour is perceived by anyone else. Harassment can be an ongoing pattern of behaviour or, in the case of sexual harassment, a one-off incident. It can be verbal, non-verbal, physical, visual, deliberate, accidental, subtle or obvious. Harassment can be perceived differently – what one person considers harassment, another person may consider as acceptable behaviour.⁴²

1.43 The Harassment Free Workplace Policy also provides that, if unwelcome or unreciprocated, the following behaviour could be examples of harassment:

- unnecessary physical contact or requests for sexual favours
- persistent following (stalking)
- suggestive looks implying a sexual interest
- offensive gestures, mimicry or wolf whistles
- persistent verbal abuse or threats, or ridicule
- asking intrusive questions about someone's personal life
- persistently disrupting an individual's work, work space, equipment or interfering with their personal property
- jokes, derogatory or dismissive comments

³⁹ *Parliament of New South Wales Anti-Bullying Policy*, March 2018, pp1-3.

⁴⁰ *Parliament of New South Wales Anti-Bullying Policy*, March 2018, p6.

⁴¹ *Parliament of New South Wales Anti-Bullying Policy*, March 2018, pp5-6.

⁴² *Parliament of New South Wales Harassment Free Workplace Policy*, February 2021, p3.

- circulating or displaying material that is offensive or belittling
- deliberate exclusion of colleagues from activities organised within the workplace.⁴³

1.44 In addition, the Harassment Free Workplace Policy provides that 'sexual harassment' is 'any unwelcome sexual behaviour that under the circumstances could reasonably be perceived as offensive, humiliating or intimidating'. The Policy also notes that such behaviour may be an offence under the *Anti-Discrimination Act 1977* or a criminal offence. It further states that certain 'types of harassment such as sexual assault, stalking and harassing phone calls are also criminal offences'.⁴⁴ However, while sexual assault, stalking and harassing phone calls constitute criminal offences, harassment under the *Anti-Discrimination Act 1977* is unlawful and not criminal. Hence, it would be more correct for the policy to refer to unlawful conduct under the *Anti-Discrimination Act 1977* rather than to offences. Legal advice confirms that the majority of remedies available under the *Anti-Discrimination Act 1977* are in the nature of civil remedies while contraventions of the WHS Act are, in general, criminal offences. For example, harassment such as to constitute a failure to ensure the health and safety of workers could constitute a contravention of the WHS Act.

1.45 As identified above, legal advice confirms that Members have obligations under certain legislation that are relevant to how any complaints that a Member has engaged in sexual harassment, harassment or bullying would be dealt with – including where such complaints would be directed, and the parties who may be held liable in respect of these complaints.

1.46 First, section 22B(7) of the *Anti-Discrimination Act 1977* provides that it is unlawful for a Member of either House of Parliament to sexually harass:

- a workplace participant at a place that is a workplace of both the Member and the workplace participant, or
- another Member of Parliament at a place that is a workplace of both Members.

(Likewise, section 22B(8) of the *Anti-Discrimination Act 1977* provides that it is unlawful for a workplace participant to sexually harass a Member of either House of Parliament at a place that is the workplace of both the Member and the workplace participant).

1.47 For the purposes of the unlawful conduct under the *Anti-Discrimination Act 1977*, sexual harassment is defined to have occurred if:

- the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours to the other person, or

⁴³ *Parliament of New South Wales Harassment Free Workplace Policy*, February 2021, pp3-4.

⁴⁴ *Parliament of New South Wales Harassment Free Workplace Policy*, February 2021, p4.

- the person engages in other unwelcome conduct of a sexual nature in relation to the other person

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.⁴⁵

1.48 Further, 'workplace participant' is defined to mean any of the following:

- an employer or employee
- a commission agent or contract worker
- a partner in a partnership
- a person who is self-employed
- a volunteer or unpaid trainee.⁴⁶

1.49 In addition, without limiting the definition of 'workplace' the workplace of a Member of either House of Parliament is taken to include:

- the whole of Parliament House
- any ministerial office or electoral office of the Member
- any other place that the Member otherwise attends in connection with his or her ministerial, parliamentary or electoral duties.⁴⁷

1.50 The *Anti-Discrimination Act 1977* also places obligations on 'employers' on other grounds such as religion, race or gender. For example, section 8(2) provides that it is unlawful for an employer to discriminate against an employee on the ground of race:

- in the terms or conditions of employment which the employer affords the employee
- by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, or
- by dismissing the employee or subjecting the employee to any other detriment.

1.51 And relevantly, Part 3 of the *Members of Parliament Staff Act 2013* (MOPS Act) clarifies that Members are 'employers' of their staff. Specifically, section 14(1) of the MOPS Act provides that a Member of Parliament may, on behalf of the State,

⁴⁵ *Anti-Discrimination Act 1977*, s22A.

⁴⁶ *Anti-Discrimination Act 1977*, s22B(9).

⁴⁷ *Anti-Discrimination Act 1977*, s22B(10).

employ a person under written agreement to assist the Member in exercising his or her functions as a Member of Parliament.

- 1.52 Further, sections 24 and 25 of the MOPS Act deal with the liability of a Member of Parliament in his or her capacity as an 'employer' under the MOPS Act:
- Section 24 applies to a tort that is committed by a Member of Parliament in relation to a person employed by the Member under Part 3, and in the course of or incidental to exercising the Member's functions as a Member of Parliament. It provides that the office of the relevant Presiding Officer is vicariously liable for such torts.
 - Section 25(1) provides that any liability incurred under any Act or law by a Member of Parliament in his or her capacity as the 'employer' is taken to be the liability of the office of the relevant Presiding Officer. However, section 25(2) provides that this vicarious liability provision does not affect the liability of a Member for any act or omission for which the Member would be liable if the Member were not an employer of persons under Part 3.
- 1.53 In relation to how complaints are handled under the *Anti-Discrimination Act 1977*, where it is alleged that a person has contravened a provision of the Act, complaints are made by being lodged with the President of the Anti-Discrimination Board, who makes an initial determination of whether or not the complaint is to be accepted or declined, in whole or in part (section 89B(1)).
- 1.54 The President is obliged to investigate each complaint that has been accepted (section 90 (1)) and the President is able to decline the complaint at any stage during the investigation (section 92).
- 1.55 If the President declines a complaint during the investigation, the complainant may write to the President and require the President to refer the complaint to the NSW Civil and Administrative Tribunal (the NCAT) (section 93A).
- 1.56 At any stage after the complaint has been accepted, the President can seek to resolve the complaint by conciliation (section 91A).
- 1.57 The President is also able to refer complaints to the NCAT if he or she considers that the complaint cannot be resolved by conciliation, if conciliation has been unsuccessful, if he or she is of the view it should be referred to the NCAT, or if all parties wish for it to be referred (section 93C).
- 1.58 The NCAT may dismiss the complaint, or find it substantiated in whole or in part. If it is found to be substantiated, it may order the respondent to pay damages, undertake other redress action, or decline to take further action (section 108).
- 1.59 Legal advice notes that the vicarious liability protection of section 24 of the MOPS Act is relevant *only in respect of torts* committed by a Member of Parliament. As unlawful conduct prohibited by the *Anti-Discrimination Act 1977* is not a tort, the advice indicates that the protection would not be applicable. Therefore, should a complaint under the *Anti-Discrimination Act 1977* be referred to the NCAT, it would probably be open for the State (as 'employer' for the purposes of the *Anti-*

Discrimination Act 1977), the Member (as the State's agent), and the relevant Presiding Officer to be named as respondents. However, no proceedings of this nature have taken place to date.

- 1.60 Further, the legal advice indicates that, with respect to the operation of section 25 of the MOPS Act, if a complaint were made against a Member under section 22B(7) of the *Anti-Discrimination Act 1977* for sexual harassment the relevant Presiding Officer could *not* be deemed liable and any liability would rest with the individual Member. This is because such liability would not be incurred under the *Anti-Discrimination Act 1977* by the Member in his or her capacity as an 'employer' within the meaning of section 25(1) of the MOPS Act. As above, section 25(2) makes it clear that section 25(1) does not affect the liability of a Member for any act or omission for which he or she would be liable were the Member not an 'employer' under Part 3 of the MOPS Act. However, again, no proceedings of this nature have taken place to date.
- 1.61 As noted, the WHS Act also contains provisions relevant to bullying and inappropriate behaviour by Members. This Act provides for a primary duty of care to be exercised by a 'person conducting a business or undertaking' (PCBU) who must ensure 'so far as reasonably practicable' the health and safety of the workers they engage or workers whose activities are influenced or directed by the PCBU while in the workplace (section 19). An 'officer' of a PCBU also has a duty to exercise due diligence to ensure that a PCBU complies with its duties and obligations under the WHS Act (section 27).
- 1.62 The legal advice indicates that the Crown would be the relevant PCBU under the WHS Act in relation to work carried out for a Member by staff employed under the MOPS Act. Further, the relevant Presiding Officer and Member would probably also have the duties of an 'officer' in respect of an undertaking carried on by the staff of a Member's office for the purposes of the WHS Act.
- 1.63 The legal advice also indicates that the MOPS Act does not operate to deem any liability of a Member – nor the Crown as PCBU – under the WHS Act, to be the liability of the office of the relevant Presiding Officer:
- As noted above, section 24 of the MOPS Act makes the office of the relevant Presiding Officer vicariously liable for certain torts committed by Members of Parliament. However, the legal advice notes that liabilities incurred under the WHS Act are not tortious but are, in general, criminal offences.
 - As noted above section 25(1) of the MOPS Act provides that any liability incurred under any Act or law by a Member of Parliament in his or her capacity as the 'employer' is taken to be the liability of the office of the relevant Presiding Officer. However, the legal advice notes that none of the duties imposed in the WHS Act are imposed on 'employers'. It further raises doubt that 'any liability' in section 25 of the MOPS Act extends to criminal liability and notes that contraventions of the WHS Act are, in general, criminal offences.

- 1.64 In short, noting that bullying and harassment raise work health and safety implications, the legal advice indicates that Members of Parliament can be liable under the WHS Act for such conduct. If the MOPS Act does not operate to deem any liability of a Member under the WHS Act to be the liability of the office of the relevant Presiding Officer, the Member of Parliament would be liable in such circumstances. However, no proceedings of this nature have yet taken place to test these assumptions.
- 1.65 In conclusion, the legal advice indicates that there is capacity for Members to be held liable for unlawful conduct under the *Anti-Discrimination Act 1977* and potentially criminally liable under the provisions of the WHS Act.
- 1.66 While DPS can assist a complainant to access outside bodies such as the Police and the Anti-Discrimination Board in such cases, DPS itself has very little capacity to intervene in matters of bullying, harassment and inappropriate behaviour. The Parliament's Anti-Bullying and Harassment-Free Workplace and Grievance Policies do not apply to Member behaviour and DPS cannot formally receive or investigate complaints about Member behaviour, compel cooperation in any inquiries in relation to them, nor report on, or sanction a Member in relation to them.⁴⁸
- 1.67 In his letter to the Assembly Committee, the Chief Executive of DPS explained that the role of his Department in such cases is limited to informally mediating issues between Members and staff, and this can only be done with the agreement of all parties.⁴⁹ Further, DPS provides training and assistance for Members including:
- a new Member mandatory induction which provides information on workplace health and safety matters
 - a large suite of optional e-learning modules
 - a Human Services team that is available for confidential advice assistance
 - the option for consulting an external professional such as an organisational psychologist
 - access to a 'Manager Assist' direct service through the Parliament's Employee Assistance Program Provider.⁵⁰
- 1.68 The Assembly Committee is concerned that the statutory provisions discussed above and their application to the parliamentary workplace is not readily understood, including in respect of the liability of Members. The Assembly Committee is also concerned about the extent of support and guidance given to

⁴⁸ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, pp1-2.

⁴⁹ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, p2.

⁵⁰ Mr Mark Webb, Chief Executive, Department of Parliamentary Services, *Letter to Assembly Committee Chair*, 24 March 2021, pp1-2.

Members in the application of the legislation and the management of employees in their offices.

- 1.69 For this reason, the Assembly Committee has made recommendations later in the report for DPS and the Clerk of the Legislative Assembly to provide recurring, up-to-date information to Members and staff on legislative requirements, and creating a safe, secure and respectful working environment.

Chapter Two – Stakeholder Comment on the Proposal for a Parliamentary Compliance Officer

- 2.1 During its inquiry to review the proposed resolution for the establishment of a Parliamentary Compliance Officer, the Assembly Committee resolved to seek comment from targeted stakeholders. These stakeholders included the United Kingdom House of Commons Parliamentary Commissioner for Standards ('the UK Commissioner'); the ICAC; the NSW Parliamentary Ethics Adviser ('the Ethics Adviser'); the Secondary Compliance Officer – Victorian Independent Remuneration Tribunal; and the Chief Executive of DPS. The Assembly Committee considered that this approach was the most efficient way to evaluate comparable schemes to the proposed Compliance Officer and inform the consultations and debate that would follow the tabling of the report in the Legislative Assembly.
- 2.2 The feedback of the Chief Executive of DPS, which related predominantly to the existing system, is discussed in the previous Chapter, while feedback from the other stakeholders is discussed in this Chapter. For ease of reference, the feedback is grouped as it relates to each clause of the proposed Compliance Officer resolution, or thematically if it relates to a matter not covered by the proposed resolution.

Feedback regarding the jurisdictional gap

- 2.3 Consistent with its 2013 report recommending that the Assembly Committee and the Council Committee consider a parliamentary investigator position, the ICAC has confirmed its view that the jurisdictional gap for regulating Members' conduct (see Chapter One), remains.
- 2.4 The ICAC noted that 'the effectiveness of codes of conduct as well as pecuniary interest regimes depend on timely and impartial enforcement mechanisms'. The ICAC further noted that while in 2014 the Assembly Committee had recommended the establishment of an Ethics Commissioner, and the Council Committee had recommended the establishment of a Commissioner for Standards, neither of these recommendations had been implemented by the NSW Parliament.⁵¹
- 2.5 The ICAC also highlighted the limits to its own ability to regulate Members' conduct, especially less serious conduct, touched upon in Chapter One:

Of all the matters received by the Commission each year, only a small number (around 1%) become the subject of an investigation by Commission. As outlined in section 12A of the *Independent Commission Against Corruption Act 1988* ("ICAC Act"), the Commission ought to direct its attention to serious or systemic corrupt

⁵¹ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p2.

conduct and take into account the responsibility and role of other public authorities and officials in preventing corrupt conduct.

Furthermore, the Commission's ability to make findings of corrupt conduct is limited by s 9 of the ICAC Act. A potential breach of a code of conduct adopted for the purposes of this section by a member...must amount to a substantial breach. This means that allegations that would amount to a minor breach of an applicable code of conduct are unlikely to become the subject of an investigation by this Commission.⁵²

2.6 The ICAC also noted the comments in its 2013 report that the creation of a parliamentary investigator position could allow a 'graded' approach for allegations of minor misconduct, and stated that it could reduce the need for the ICAC to investigate, and provide a viable alternative so that less serious matters could be addressed.⁵³

2.7 In addition, the ICAC stressed that it is not a regulator, and that this has implications for enforcement of requirements around Member entitlements and pecuniary interests:

...the Commission is not a regulator. The Commission can make findings of serious corrupt conduct, express opinions and make recommendations. Any such findings, opinions or recommendations, including regarding applicable codes of conduct or the pecuniary interest regime ultimately rely on enforcement by other agencies.⁵⁴

2.8 With regard to pecuniary interests, as in its 2013 report, the ICAC again alluded to the fact that while section 14A(2) of the *Constitution Act 1902* provides that either House can declare a Member's seat vacant if he or she wilfully contravenes disclosure requirements, a Member's seat has never been declared vacant under these provisions. The ICAC also stressed that better monitoring and enforcement mechanisms are needed both in the area of pecuniary interests and Members' entitlements:

In respect to the proposed monitoring role of the Code of Conduct for Members, the *Constitution (Disclosures by Members) Regulation 1983* ("the regulation") and the members' entitlement system, the Commission proposes that the Committee considers the limitations of the existing system, which essentially relies on self-regulation. Compliance and deterrence depend on effective enforcement mechanisms being in place. The Commission proposes that an effective regime requires monitoring and enforcement powers. This may necessitate amendments to the existing regulation.⁵⁵

⁵² Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p2.

⁵³ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, pp2-3.

⁵⁴ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p3.

⁵⁵ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p3.

Feedback regarding Clause 2: Functions of the position

2.9 Clause (2) of the proposed resolution sets out the functions of the Compliance Officer. It states:

(2) Functions of position

The Compliance Officer shall have the following functions:

(a) Receive and investigate complaints

The Compliance Officer may receive and investigate complaints confidentially in relation to alleged breaches of the Code of Conduct for Members, not related to conduct in proceedings of the Legislative Assembly or Legislative Council or their committees, including:

- (i) misuse of allowances and entitlements,
- (ii) other less serious misconduct matters falling short of corrupt conduct,
- (iii) allegations of bullying, harassment and other types of grievances,
- (iv) minor breaches of the pecuniary interests disclosure scheme.

(b) Monitoring Code of Conduct for Members

The Compliance Officer shall monitor the operation of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation 1983 and the members' entitlements system, and provide advice about reform to the Committee on Parliamentary Privilege and Ethics as required.

(c) Educational presentations

The Compliance Officer shall assist the Committee on Parliamentary Privilege and Ethics, Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of members about their obligations under the Code of Conduct for Members and the Constitution (Disclosures by Members) Regulation 1983.

(d) Informal advisory services

A member or the parliamentary administration may seek confidential advice on a matter of interpretation of the Members' Entitlements scheme, for the purposes of resolving any disagreements.

Comment on Clause 2 generally – functions of the position

2.10 In noting the proposed functions of the Compliance Officer, the ICAC commented on the skills the appointee would need:

In the Commission's view, a Compliance Officer would require both legal and investigative qualifications to perform his/her functions, as well as a sophisticated understanding of parliamentary conventions. If the role is to encompass the investigation of potential bullying and harassment, a detailed position description

should reflect this, which would help shape the pool of suitable candidates for such a position.⁵⁶

- 2.11 The Ethics Adviser also commented on the skills required to carry out the Compliance Officer's functions as per the proposed resolution. The Ethics Adviser raised concerns about the ability of a person appointed to deal with complaints about the Members' Code of Conduct, entitlements and pecuniary interests, to also deal with bullying, harassment and sexual harassment. The Ethics Adviser stated:

I do not consider that the Compliance Officer role is an appropriate mechanism to deal with bullying and harassment and sexual harassment...[S]uch a role should be performed by independent trained experts, similar to the UK Parliament model. For example, a person on secondment from the Anti-Discrimination Board. The Compliance Officer would have an oversight role in such matters and report to the oversight Committee in appropriate cases.⁵⁷

- 2.12 The Ethics Adviser explained that the UK Parliament has an Independent Complaints and Grievance Scheme (ICGS) to deal with bullying, harassment and sexual harassment, and that complaints under the ICGS scheme are allocated to an independent, external investigator who assesses them to decide whether they involve bullying and harassment or sexual misconduct. The Ethics Adviser further stated:

Where a formal complaint is made against a Member, an independent specialist investigator is appointed to undertake an assessment, gather evidence and report to the Commissioner for Standards, who has oversight of the investigation and reports to the Committee.⁵⁸

Comment on Clause 2(a) – receive and investigate complaints

- 2.13 As noted, clause 2(a) of the proposed resolution provides that the Compliance Officer may receive and investigate complaints confidentially in relation to alleged breaches of the Code of Conduct for Members, not related to conduct in proceedings of the Houses or their committees, including 'other less serious misconduct matters falling short of corrupt conduct'.
- 2.14 However, in its comment regarding the proposed resolution, the ICAC noted that it is often hard at the start of an investigation to determine whether the alleged conduct could meet the definition of corrupt conduct. The ICAC therefore recommended 'that the remit of the proposed Compliance Officer be extended to potentially include matters that could amount to corrupt conduct'. However, the ICAC also noted that 'this suggestion is contingent on establishing satisfactory liaison arrangements with the Commission via a proposed protocol'.⁵⁹

⁵⁶ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p5.

⁵⁷ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p13.

⁵⁸ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p10.

⁵⁹ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p3.

- 2.15 In addition, the ICAC stated that clarification is needed regarding who can make complaints to the Compliance Officer – for example, Members’ staff, members of the public etc – and whether complaints would need to comply with any specific formality.⁶⁰

Comment on Clause 2(d) – informal advisory services

- 2.16 In relation to clause 2(d) – which provides that one of the Compliance Officer's functions would be to give advice to Members and the parliamentary administration on a matter of interpretation of the Members' Entitlements scheme to resolve any disagreement, a question that arises is the extent to which this advisory role is consistent with the Compliance Officer's investigatory functions.

- 2.17 The UK Commissioner raised concerns about blurring this advisory role with the Compliance Officer's investigatory functions. The UK Commissioner stated:

Care should also be taken not to blur the responsibilities of advice and investigation. The Assembly will need to consider carefully the standing of any such advice provided by a Compliance Officer and whether it is an appropriate function for the Officer to perform given that a later investigation might hinge on, or challenge the, interpretation of earlier advice provided by the Officer.⁶¹

- 2.18 The UK Commissioner also noted that detailed published guidance may provide an alternative to case-by-case advice:

The Assembly should also be mindful that many regulatory systems do not provide advice on a case-by-case basis but instead make use of detailed published guidance, comprehensive frequently asked questions, and educational tools informed by earlier investigative decisions, as a means to address issues of interpretation.⁶²

- 2.19 In a similar vein, the Ethics Adviser stated that he did not support the Compliance Officer having the advisory role set down in Clause 2(d), indicating that it would not be compatible with the Compliance Officer's investigatory role:

I do not believe the Compliance Officer should perform both roles as it would amount to a conflict of interest. The role of the Compliance Officer should be limited to investigating complaints on the misuse of entitlements and appropriate remediation.⁶³

Feedback regarding Clause 3 – Amendment of the Code of Conduct for Members

- 2.20 As noted in Chapter One, in August 2020, 23 Members of the NSW Parliament raised concerns with the Clerks about a jurisdictional gap where there are

⁶⁰ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p5.

⁶¹ Ms Kathryn Stone OBE, Parliamentary Commissioner for Standards, UK House of Commons, *Letter to Assembly Committee Chair*, 19 March 2021, p1.

⁶² Ms Kathryn Stone OBE, Parliamentary Commissioner for Standards, UK House of Commons, *Letter to Assembly Committee Chair*, 19 March 2021, p1.

⁶³ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p14.

allegations that a Member has engaged in workplace bullying or inappropriate behaviour – and the Code of Conduct for Members does not currently cover matters such as bullying, harassment or sexual harassment.

- 2.21 Therefore, when the Presiding Officers responded by directing the Department Heads to develop a joint proposal to establish a position of Compliance Officer, the joint proposal included:
- the abovementioned provision (Clause 2(a)) – that the Compliance Officer could receive and investigate complaints about alleged breaches of the Code of Conduct for Members *including allegations of bullying, harassment and other types of grievances*; and
 - a proposed amendment to the Code of Conduct which would require Members to treat 'staff, each other and all those visiting or working for or with Parliament with dignity, courtesy and respect' – this was to reflect a commitment to appropriate standards of behaviour (as in the UK House of Commons' Code) and to make it clear that the Compliance Officer had jurisdiction to investigate such matters.

- 2.22 In conducting a review of the proposed resolution before it was put before both Houses, the Leaders of the House changed the wording of Clause 3 so that it now reads:

(3) Amendment of the Code of Conduct for Members

The Code of Conduct for Members is amended by the addition of the following paragraph:

'Clause 10

Members must treat their staff and each other and all those working for Parliament in a manner compatible with a safe workplace, free from harassment.

Commentary

Section 22(b) of the Anti-Discrimination Act 1977 makes it an offence for a member to sexually harass a workplace participant or another member in the workplace, or for a workplace participant to sexually harass a member.'

- 2.23 In its comments on the proposed resolution, the ICAC confirmed that it supports the expansion of the Code of Conduct for Members so that it specifically prohibits bullying and harassment. However, the ICAC noted that the current wording of the proposed amendment to the Code of Conduct, in Clause 3, does not specifically mention the word 'bullying'.⁶⁴
- 2.24 In commenting on why it supports an amendment to prohibit bullying and harassment, the ICAC noted that bullying and harassment could amount to 'corrupt conduct' within the meaning of the ICAC Act:

⁶⁴ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p4.

...bullying and harassment could amount to corrupt conduct if several elements are met, for example, if the intended purpose of the bullying and harassment was to affect the honest or impartial exercise of the official functions of a public official (section 8(1)(a)). The alleged conduct must also be sufficiently serious to amount to at least a disciplinary offence, give ground for dismissal, or, relevantly for members and ministers, amount to a substantial breach of an applicable code of conduct (section 9(1) ICAC Act.⁶⁵

- 2.25 The ICAC also identified further links between bullying and harassment and corrupt conduct:

In the Commission's experience, a culture that tolerates bullying and harassment may also be linked to corrupt conduct if it entails reprisal actions. Such a culture does not engender the reporting of potential misconduct...In addition, the misuse of information acquired by a public official during the exercise of his or her official functions, which can be corrupt conduct, may be for the purpose of bullying and harassment.⁶⁶

- 2.26 The ICAC noted that in the context of the NSW Parliament, staff can be in a 'difficult and vulnerable position' where their employment is at the discretion of an individual member and that '[t]his situation makes it imperative that there are independent and supportive complaints mechanisms for staff to raise concerns'.⁶⁷

- 2.27 The Ethics Adviser also commented on Clause 3, questioning what is meant by 'in a manner compatible with a safe workplace, free from harassment' and whether it is intended to cover bullying, harassment and sexual harassment. The Ethics Adviser stated:

If under proposed clause (2)(a)(iii) the Compliance Officer may investigate "allegations of bullying, harassment and other types of grievances", then any amendment to the Members' Code should include bullying.⁶⁸

- 2.28 The Ethics Adviser suggested the following alternative wording for Clause 3:

10 Behaviour of Members

A Member must treat all those with whom they come into contact in the course of their parliamentary duties and activities (including parliamentary proceedings) with dignity, courtesy and respect, and free from any behaviour that amounts to bullying, harassment or sexual harassment.⁶⁹

⁶⁵ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p4.

⁶⁶ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p4.

⁶⁷ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p5.

⁶⁸ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p8.

⁶⁹ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p8.

Feedback regarding Clause 4: Term of Appointment – Appointment and Dismissal Provisions

2.29 Clause 4 of the proposed resolution, entitled 'Term of appointment' makes provision for the appointment and dismissal of the Parliamentary Compliance Officer. It states:

(4) Term of appointment

(a) Appointment by Presiding Officers

The Presiding Officers shall appoint a Compliance Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of that Parliament and until the mid-term point of the following Parliament. The proposed appointment must have the support of the Privileges Committee in each House. An appointment may be extended for a period of up to six months so as to ensure there is no period in which there is no person holding the position.

(b) Dismissal

The Compliance Officer may only be dismissed by the Chief Executive Officer of the Department of Parliamentary Services with the consent of the Speaker and the President.

2.30 In commenting on the appointment provisions in Clause 4(a), the Ethics Adviser stated that appointment of the Compliance Officer should run for a fixed term until September in the year prior to the expiry of each Parliament (i.e. six months before each expiry), with special provision for the initial appointment, which should be for a single term only:

...the initial appointment of the first Compliance Officer, when made, should continue for a fixed term until September in the year prior to the expiry of the Parliament in March 2027 – that is September 2026. Thereafter a Compliance Officer should be appointed six months before the commencement of the Parliament in March each four years that is by the previous September, and be eligible for re-appointment for one more term.⁷⁰

2.31 The Ethics Adviser noted that, in this way, a Compliance Officer would be in place six months prior to the start of each Parliament, and well before any induction seminars occur in the new Parliament.⁷¹

2.32 In addition, the Ethics Adviser stated that the term of appointment and dismissal provisions for the Compliance Officer should be included in the contract of employment for him or her, not the proposed resolution. With regard to the dismissal procedures set down in Clause 4(b) of the proposed resolution, the Ethics Adviser also stated that: 'Since the Compliance Officer is appointed by the Presiding Officers any scheme for dismissal should be on the recommendation of the Joint Clerks, rather than the Chief Executive of the Department of Parliamentary Services as proposed' and that he imagined that any proposal for

⁷⁰ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, pp11-12.

⁷¹ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p11.

dismissal would involve consultation with the Chair of the oversight Committees before a recommendation is made to the Presiding Officers.⁷²

2.33 The Secondary Compliance Officer – Victorian Independent Remuneration Tribunal also commented on appointment and dismissal provisions. In Victoria, there are two Compliance Officers, the Primary Compliance Officer and the Secondary Compliance Officer. Their functions are set down in the Part 4 of the *Victorian Independent Remuneration Tribunal and Improving Parliamentary Standards Act 2019 (Vic)* and they are 'responsible for hearing and determining appeals from Members of Parliament in relation to the use of the Electorate Office and Communications Budget, certain parliamentary allowances and the separation payment'.⁷³ It is noted that the functions of the Victorian Compliance Officers are quite different from those set down for the Compliance Officer in the proposed resolution and, in particular, that the Victorian Compliance Officers have no jurisdiction over complaints about bullying or inappropriate behaviour by Members.⁷⁴

2.34 In relation to appointments, The Secondary Compliance Officer told the Assembly Committee that the Victorian Compliance Officers are appointed by the Governor in Council on the recommendation of the Minister for Government Services under section 29(2) of the *Victorian Independent Tribunal and Improving Parliamentary Standards Act 2019 (Vic)* ('the VIRTIPS Act'). The Secondary Compliance Officer also stated:

Before the Minister recommended the appointment of the initial primary and secondary Compliance Officer, the Premier was required to consult in relation to the proposed recommendation with the Leader of the Opposition (s30(4) of the VIRTIPS Act). For all subsequent appointments the Minister is required to submit details of the proposed recommendation to the Integrity and Oversight Committee of the Parliament of Victoria, which may veto the proposed recommendation (s30(4) of the VIRTIPS Act).⁷⁵

2.35 In addition, the Secondary Compliance Officer stated that a person is eligible to be appointed as a Compliance Officer if:

- They are or have been qualified for appointment as a judge of the High Court, the Federal Court or the Supreme Court of Victoria or another State or Territory of the Commonwealth, or
- They have extensive or specialist knowledge, expertise or experience in at least one of the following:
 - Government, law or public administration

⁷² Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p12.

⁷³ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p1.

⁷⁴ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p5.

⁷⁵ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p3.

- Any other field that the Minister considers is relevant to the performance of the function of the Compliance Officer (s29(3) of the VIRTIPS Act).⁷⁶
- 2.36 Further, a Victorian Compliance Officer is appointed on a sessional basis for a period not exceeding five years and cannot be reappointed (s31 of the VIRTIPS Act).⁷⁷
- 2.37 Regarding dismissals, the Secondary Compliance Officer stated that in Victoria a Compliance Officer can be dismissed on certain grounds:
- misconduct
 - neglect of duty
 - inability to perform the duties of the office, or
 - any other ground on which the Governor in Council is satisfied that the Compliance Officer is unfit to hold office (s32(2) of the VIRTIPS Act).⁷⁸
- 2.38 In addition, in Victoria a Compliance Officer ceases to hold office if they:
- resign in writing to the Governor in Council
 - become insolvent under administration
 - are convicted, or found guilty, of an indictable offence or an offence that, if committed in Victoria, would be an indictable offence
 - nominate for election as a Member of Parliament or otherwise become a Member of Parliament
 - become a represented person within the meaning of the *guardianship and Administration Act 1986* (Vic)
 - die (s32(1) of the VIRTIPS Act).⁷⁹

Feedback regarding Clause 5(a): Complaints investigations – protocol

- 2.39 Clause 5(a) of the proposed resolution provides for the development of a protocol for the Compliance Officer’s complaints investigations. It states:

(5) Complaints investigations

(a) Protocol

⁷⁶ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p3.

⁷⁷ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p4.

⁷⁸ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p4.

⁷⁹ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p4.

The Compliance Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Committee on Parliamentary Privilege and Ethics and tabled in the House by the Speaker, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Compliance Officer and the Independent Commission Against Corruption and other relevant bodies, subject to relevant legislation (including section 122 of the Independent Commission Against Corruption Act).

2.40 In commenting on what should be included in the proposed protocol, as above, the ICAC noted that it is often hard at the start of an investigation to determine whether the alleged conduct could meet the definition of ‘corrupt conduct’ in the ICAC Act (and, therefore, be a matter for the ICAC). Consequently, the ICAC stressed that there must be a robust process in place to inform the ICAC of complaints to the Compliance Officer:

The Commission’s support for the proposal to establish a parliamentary Compliance Officer is contingent on a robust and sound process being in place which ensures that the Commission is apprised of complaints to the Compliance Officer. There should be an explicit provision in any protocol or Memorandum of Understanding between the Commission and the Compliance Officer by which the Commission can, in appropriate circumstances, assume the investigation of a complaint.⁸⁰

2.41 The ICAC also stated that the proposed protocol should include arrangements for liaison between the Compliance Officer, Presiding Officers, and senior staff of the Parliament and ICAC, and could entail a memorandum of understanding covering:

- prompt reporting of matters to the ICAC
- dealing with matters referred by the ICAC
- other information sharing, liaison and mutual assistance
- arrangements that are in the public interest
- cooperation in relation to educational and corruption prevention issues.⁸¹

2.42 In commenting on the proposed protocol, the ICAC also discussed the requirements of section 11 of the ICAC Act. Under this section, certain persons including the principal officer of a public authority; an officer who constitutes a public authority; the Ombudsman; the Commissioner of Police; and a Minister of the Crown must report to the ICAC any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct.

2.43 The ICAC recommended that the Compliance Officer be added to the list of persons who have a duty to report reasonable suspicions of corrupt conduct to it

⁸⁰ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p8.

⁸¹ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p8.

under section 11. In so recommending, the ICAC stressed that section 11 reporting requirements do not differentiate between the serious corrupt conduct and systemic corrupt conduct that the ICAC is required to direct its attention to, as far as practicable; and that 'As a general rule, the Commission encourages the reporting of matters that could involve corrupt conduct and erring on the side of caution'.⁸² It is then up to the ICAC to determine whether a matter could involve serious or systemic corrupt conduct.⁸³

2.44 Hence, if the Compliance Officer were under such an obligation, he or she would have to report any matter he or she reasonably thought might involve corrupt conduct, regardless of whether he or she thought it was minor, serious or otherwise.

2.45 In addition, and still in relation to section 11 of the ICAC Act, the ICAC raised concerns that 'there is an ambiguity regarding a duty of relevant officers of the NSW Parliament to notify the Commission of possible corrupt conduct pursuant to section 11 of the ICAC Act'.⁸⁴ The ICAC referred to a 2013 paper of the Clerk of the Parliaments which stated:

There is one further flaw, or at least ambiguity, in the current regime for the scrutiny of the conduct of Members of Parliament that is worthy of comment...The Parliament has legal advice from the Crown Solicitor indicating that neither the Clerks nor the Executive Manager, Parliamentary Services, are covered by the scope of section 11 [of the ICAC Act]. It is unknown whether the absence of such an obligation was inadvertent or the intention of the framers of the ICAC Act in 1988. However, it leaves a gap in the regime for the reporting of suspected corrupt conduct...⁸⁵

2.46 The ICAC stated that if such a gap does exist it must be addressed so that relevant matters can be reported to the ICAC, and/or referred back by the ICAC.⁸⁶ The Assembly Committee notes that there is no impediment to any of the officers referred to by the ICAC making a voluntary disclosure of possible corrupt conduct to the ICAC, or any other type of conduct as a public interest disclosure under that legislative scheme. This would apply to the Clerk whilst also recognising his or her role as a permanent officer and servant of the House. It is also relevant to consider the political context – allegations that may have no reasonable basis may be made – e.g. during parliamentary debate.

⁸² Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p9.

⁸³ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p7.

⁸⁴ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p4.

⁸⁵ Mr David Blunt, Clerk of the Parliaments, 'A Parliamentary Commissioner for Standards for New South Wales?' 2013, p9, NSW Parliament website: <https://www.parliament.nsw.gov.au/lc/articles/Documents/a-parliamentary-commissioner-for-standards-for-n/Paper%20-%20By%20David%20Blunt%20-%20A%20Parliamentary%20Commissioner%20for%20Standards%20for%20New%20South%20Wales.pdf> viewed 7 April 2021.

⁸⁶ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p4.

- 2.47 Finally, in its comments regarding the proposed protocol, the ICAC raised the issue of public interest disclosures. In NSW, the *Public Interest Disclosures Act 1994* ('PID Act'), sets a system in place to encourage public officials, in the public interest, to report serious wrongdoing in the public sector including corrupt conduct, maladministration and serious and substantial waste.
- 2.48 In particular, the PID Act seeks to protect public officials from reprisals to which they may otherwise be subject because of those disclosures. For example, section 20(1) of the PID Act provides that a person who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is guilty of an offence punishable by an \$11,000 fine, or imprisonment for two years, or both.
- 2.49 In its comments, the ICAC noted section 8(1)(c1) of the PID Act which provides that to be protected by the Act, a public official who makes a disclosure about the conduct of a Member of Parliament must make that disclosure to 'the principal officer of the Department of Parliamentary Services, the Department of the Legislative Assembly, or the Department of the Legislative Council'.
- 2.50 With the proposed establishment of a Compliance Officer position, there may be an argument for allowing this Officer to receive public interest disclosures about Members. In keeping with this, the ICAC noted:
- Section 8(1)(c1) of the *Public Interest Disclosures Act 1994* describes how disclosures about the conduct of members of parliament should be made. Subject to any advice available to the Committee, it may be necessary for the protocol to allow the proposed Compliance Officer to receive and manage public interest disclosures.⁸⁷
- 2.51 In his comments on the proposed protocol, the Ethics Adviser stated that in the development of any such protocol he would envisage that the Presiding Officers, the Leaders of the Houses, the Department Heads, and the Parliamentary Ethics Adviser would be consulted.⁸⁸
- 2.52 Finally, given the proposed protocol will deal in part with arrangements for receiving complaints, the Secondary Compliance Officer – Victorian Independent Remuneration Tribunal noted the arrangements for receiving matters under the Victorian scheme. The Secondary Compliance Officer stated that an appeal to a Compliance Officer must be made in writing using the forms approved by the Compliance Officer and available on the website for that scheme, and that it must contain the information specified in the form (regulations 13 and 18 of the *Parliamentary Salaries, Allowances and Superannuation Regulations 2019 (Vic)*).⁸⁹

Committee comment:

- 2.53 The proposals put forward by the ICAC raise a number of issues warranting detailed examination by the Assembly Committee, including as part of its current

⁸⁷ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p5.

⁸⁸ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p15.

⁸⁹ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p5.

Inquiry into the Adequacy of Current Procedures to Protect Parliamentary Privilege in Circumstances where Law Enforcement and Investigative Bodies seek to use Coercive, Intrusive and Covert Investigative Powers. As part of this inquiry the Assembly Committee will review the current memorandum of understanding with the ICAC in relation to the use of its powers under the ICAC Act.

- 2.54 The Assembly Committee would be concerned that should the Independent Complaints Officer that it proposes in Chapter Three – which is designed to fill the jurisdictional gap around relatively minor entitlements issues and certain pecuniary interest matters, and to provide a confidential complaint handling mechanism for allegations of bullying, harassment and other inappropriate behaviour – be drawn on by the ICAC as a source of information for investigations, a number of issues need to be addressed.
- 2.55 Significantly, the ICAC as an investigative commission with the capacity to exercise covert and coercive powers, operates within a very different framework from a complaints-handling mechanism such as that of the proposed Independent Complaints Officer. The latter, in contrast to the ICAC, would operate under a scheme that relies upon voluntary cooperation of individuals. Any failure in cooperation would result in a report by the Independent Complaints Officer to the Assembly Committee and, if necessary, for report to the House to resolve the matter.
- 2.56 In these circumstances, the provision to the ICAC of information voluntarily provided by complainants on a confidential basis and the willingness of individuals to participate in the complaints scheme may be significantly impacted if this aspect of any memorandum of understanding or protocol between the Independent Complaints Officer and the ICAC is not carefully managed and appropriate balances struck. This matter will require careful consideration by the Assembly Committee, in consultation with the ICAC, Complaints Officer and other relevant stakeholders. As noted, it also relates closely to the current detailed review being undertaken by the Assembly Committee into the use of intrusive powers.
- 2.57 The Assembly Committee notes that a complaints scheme will require the application of procedural fairness and, to some extent, informal complaints resolution techniques. Particular questions may arise in relation to any subsequent use by a body such as the ICAC, of information gathered under the scheme, given that the ICAC relies on inquisitorial processes. In Chapter Three the Assembly Committee makes a Finding (Finding 6) in relation to these matters.

Feedback regarding Clause 5(b)-(d) and Clause 7: Complaints Investigations and Keeping of Records – Publication

- 2.58 Clauses 5(b) to (d) of the proposed resolution deal with complaints investigations by the Compliance Officer including the circumstances under which he or she would report to the House; while Clause 7 deals with keeping of records by the Compliance Officer. These clauses have implications for the extent to which investigation outcomes and the information on which they are based are published. Particular questions that arise are whether investigation outcomes

should be published in the case of minor and/or inadvertent breaches; or in the case of unsustainable matters. Clauses 5(b)-(d) state:

(5) Complaints investigations

...

(b) Investigatory report to the House

Where the Compliance Officer considers that there has been a misuse of an allowance or entitlement, the Compliance Officer may order repayment of funds misused. Where the Compliance Officer considers that a member has otherwise breached the Code of Conduct for Members, the Compliance Officer may recommend corrective action.

Subject to (c) below, the Compliance Officer will make a report to the House if and only if the member does not comply with the order or accept the recommendation as the case may be, and the complainant consents to the making of a report.

(c) Minor breach

The Compliance Officer on investigating a matter and finding that a member has breached the Code or Regulations, but in his or her opinion considers the breach to have been minor or inadvertent and the member concerned has taken such action to rectify the breach, including the making of appropriate financial reimbursement, the Compliance Officer shall advise in writing the member and the complainant of the finding and the action taken by the member. No report to a House is required in this circumstance.

(d) Declines to investigate

If the Compliance Officer receives a complaint but upon assessment declines to investigate the matter, or upon investigation finds no evidence or insufficient evidence to substantiate a breach of the Code of Conduct for Members or the Constitution (Disclosures by Members) Regulation, the Compliance Officer shall advise in writing the member and the complainant of the decision. No report to a House is required in this circumstance.

2.59 Clause 7 of the proposed resolution states:

(7) Keeping of records

The Compliance Officer shall be required to keep records of advice given and the factual information upon which it is based, complaints received and investigations. The records of the Compliance officer are to be regarded as records of the House and are not to be made public without the prior approval of the Compliance Officer and resolution of the House, except for the referral of information between the Compliance Officer and other relevant authorities in accordance with paragraph 12 of the protocol or where the member requests that the records be made public.⁹⁰

⁹⁰ The Assembly Committee notes that the reference in Clause 7 to 'paragraph 12 of the protocol' is a drafting error and refers to a draft version of a protocol that has not been published. As per Clause 5(a) of the proposed resolution a protocol for complaints investigations was instead to be developed by the Compliance Officer within three months of his or her appointment.

- 2.60 Commenting on the extent to which investigation outcomes or accompanying evidence should be published, the UK Commissioner cautioned that it is necessary to consider the competing interests:

Publication of investigations, and the accompanying evidence, is difficult to comment on in the abstract but the Assembly will need to consider carefully the competing interests that might be involved when publishing materials that could rightly be viewed as confidential. However, the over-arching public interest in transparency of decision making and maintaining confidence in the Assembly, and the actions of its Members, should be at the heart of any publication scheme.⁹¹

- 2.61 The UK Commissioner also noted arguments for publishing investigation outcomes in the case of unsustainable matters or where the breaches in question are minor:

The Assembly should also bear in mind that publication of investigation outcomes, including "not upheld" outcomes, can have a powerful impact on changing culture, affecting the behaviour of other Members, and can in some instances of minor breaches act as a sanction in [and] of itself.⁹²

- 2.62 In commenting on the publication of investigative outcomes, the ICAC noted that Clause 7 provides that the Compliance Officer's records are not to be published except in the circumstances specified therein, and stated that it does not agree with this provision if it encompasses completed investigation reports.

There is a need for finalised investigation reports to be made public in certain circumstances...The function performed by the proposed Compliance Officer relies on his or her findings and/or recommendations having a meaningful deterrent effect and a system that promotes both transparency as well as accountability...In any case, it is preferable that the decision to publish reports not be based on a political process.⁹³

- 2.63 The ICAC also stated that the proposed arrangements for reporting on investigative outcomes in Clauses 5(b)-(d) are not appropriate because of the need for finalised investigation reports to be made public in certain circumstances. Whilst stating that it had not formed a final view on the question, the ICAC provided the following preliminary view:

The Commission's preliminary view is that, as a general rule, investigative outcomes of breaches of the codes of conduct and the [Constitution (Disclosures by Members)] Regulation ought to be made public. Allegations that are not sustained would not usually become public. Investigative outcomes of minor or inadvertent breaches of the codes of conduct, including any rectification steps taken, could also benefit from being made public, as these could still provide an important educative function.⁹⁴

⁹¹ Ms Kathryn Stone OBE, Parliamentary Commissioner for Standards, UK House of Commons, *Letter to Assembly Committee Chair*, 19 March 2021, p2.

⁹² Ms Kathryn Stone OBE, Parliamentary Commissioner for Standards, UK House of Commons, *Letter to Assembly Committee Chair*, 19 March 2021, p2.

⁹³ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p6.

⁹⁴ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, pp7-8.

2.64 In addition, the ICAC noted:

- That certain findings and reports of substantiated inquiries by the UK Commissioner and the UK Committee on Standards (the House of Commons Committee that oversees the work of the UK Commissioner⁹⁵) are published online.
- That the UK Commissioner publicly reports on matters reported to the UK Committee on Standards, on allegations the Commissioner has not upheld, and on allegations the Commissioner has rectified.
- A submission by the UK Commissioner to the Council Committee's inquiry into the proposed resolution for a Compliance Officer stated that there is an intermediate step – and thus safeguard – before the UK Commissioner's findings are made public. Before they go to the House, these findings go to the Committee on Standards or an Independent Expert Panel.⁹⁶

2.65 In his consideration of Clauses 5(b) to (d) of the proposed resolution, the Ethics Adviser stated that he did not think that the Compliance Officer should be able to report direct to the House at all. Rather, the Ethics Adviser considered that the Compliance Officer should report to:

- The Assembly Committee with regard to 'breaches of the Code of Conduct and pecuniary interests regime'.
- The Speaker with regard to matters involving Parliamentary Remuneration Tribunal additional entitlements. The Speaker would then refer matters to the Assembly Committee as appropriate.
- The Speaker with regard to 'issues of bullying, harassment, sexual harassment and other grievances'. The Speaker would then bring matters to the attention of the Assembly Committee or the House as appropriate.⁹⁷

2.66 The Ethics Adviser indicated his view that such a system would result in better recommendations to the House:

I posit this view on the basis of my previous experience that parliamentary law and practice requires a unique knowledge, experience and practical understanding. Members of the Privileges Committee with the expert advice of senior officials of the House, such as the Clerk and Deputy Clerk, are best placed to formulate recommendations to the House, while having regard to the nuances of parliamentary practice.⁹⁸

⁹⁵ See UK Parliament Committee on Standards website:

<https://committees.parliament.uk/committee/290/committee-on-standards/role/> viewed 7 April 2021.

⁹⁶ Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, pp6&8.

⁹⁷ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, pp15-16.

⁹⁸ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p15.

2.67 The Ethics Adviser also provided further detail about how he envisaged such a system would work, noting it would also provide an appeals mechanism from the Compliance Officer's findings:

The Privilege and Ethics Committee would consider any report to it from the Compliance Officer and report its conclusions and recommendations to the House. This process would allow an appeal mechanism from the findings of the Compliance Officer by the Member concerned, before the Committee reports to the House...The House may then impose a sanction on the Member where necessary.⁹⁹

2.68 In addition, the Ethics Adviser stated that to alleviate concerns about the suitability of Members hearing allegations and appeals about alleged bullying, harassment or sexual misconduct by another Member 'consideration should be given to the appointment of say three lay members to the Privilege and Ethics Committee to allow them to participate in decisions and voting on motions in these matters'.¹⁰⁰

2.69 Regarding minor or inadvertent breaches by Members, or unsubstantiated matters, the Ethics Adviser also supported a system that did not involve the Compliance Officer publishing investigative outcomes or reporting direct to the House:

In many instances involving minor or inadvertent breaches, I would envisage such issues would be dealt with by the Compliance Officer negotiating an outcome with the Member concerned and the complainant. For example, a minor breach of use of Members entitlements might require the Member to make any repayment or other relevant rectification...

...the Compliance Officer should report briefly to the Committee details of unsubstantiated allegations, and all formal complaints and allegations, and successful outcomes of investigations to the relevant Committee or Presiding Officer.¹⁰¹

2.70 The Assembly Committee notes in this regard that in August 2020, when the 23 Members of the NSW Parliament wrote to the Clerks raising concerns about a jurisdictional gap where there are allegations that a Member has engaged in workplace bullying or inappropriate behaviour, they specifically noted the need for complainants to be able to have their matter dealt with privately.¹⁰²

2.71 Commenting on Clause 7 of the proposed resolution the Ethics Adviser also stated that he supported the proposal that the Compliance Officer's records are to be regarded as records of the House and not to be made public except by resolution of the House (or where there is referral of information between the Compliance Officer and other relevant authorities like the ICAC). However, he

⁹⁹ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, pp15-16.

¹⁰⁰ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p21.

¹⁰¹ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, pp16-17.

¹⁰² *Letter from 23 Members of the NSW Parliament to the Clerk of the Legislative Assembly and the Clerk of the Parliaments*, 6 August 2020.

queried the exception to this in Clause 7 'or where the Member requests they be made public' asking how this would occur.¹⁰³

- 2.72 Also relevant to Clause 7, the Ethics Adviser stated that he does not believe that the records of the Parliamentary Ethics Adviser are subject to the *Government Information (Public Access) Act 2009* since his appointment is by resolution of the Houses. In particular, the Ethics Adviser noted that the resolution of the House governing his role states '...the Parliamentary Ethics Adviser shall be under a duty to maintain the confidentiality of information provided to him in exercising his functions and any advice given'.¹⁰⁴
- 2.73 In short, the system espoused by the Ethics Adviser would ensure that the outcomes of the Compliance Officer's investigations are not published except on the recommendation of the Assembly Committee and by resolution of the House – except for referral of information between the Compliance Officer and other relevant authorities e.g. the ICAC, a matter that would itself require further consideration.
- 2.74 Finally, the Secondary Compliance Officer – Victorian Independent Remuneration Tribunal commented on the publication of investigation outcomes and the evidence on which they are based. The Secondary Compliance Officer noted that in Victoria a Compliance Officer has discretion to publish a statement of findings and any required actions in relation to an appeal.¹⁰⁵ As above, these are appeals from Members and they relate to the use of the Electorate Office and Communications Budget, certain parliamentary allowances and the separation payment.¹⁰⁶ The Secondary Compliance Officer further clarified: 'The statement of findings are generally condensed summaries of the logic behind a decision'.¹⁰⁷
- 2.75 The Assembly Committee also notes that in the case of Victoria, discretion to publish is exercised against certain criteria. The Secondary Compliance Officer stated that before choosing to publish a statement of findings, a Compliance Officer in Victoria considers a range of factors including whether:
- there would be benefit to other Members in having access to the decision to promote a better understanding of, and compliance with, the regulatory framework
 - there would be public interest in releasing the decision, such as providing transparency about how public funds may be used by Members

¹⁰³ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p17.

¹⁰⁴ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p19.

¹⁰⁵ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p6.

¹⁰⁶ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p1.

¹⁰⁷ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, pp6-7.

- there are personal or commercial details that would be inappropriate to disclose.¹⁰⁸

2.76 The Secondary Compliance Officer also told the Assembly Committee that if the Compliance Officer does propose to publish a statement of findings, he or she will first provide a copy to the Member or former Member in question for review and to allow any privacy concerns to be raised.¹⁰⁹

Feedback regarding Clause 8: Annual reports to Parliament

2.77 Clause 8 of the proposed resolution sets down provisions for the Compliance Officer's annual reports to Parliament. It states:

(8) Reports to Parliament

In addition to reports on investigations, the Compliance Officer shall be required to report to the Parliament annually on the performance of his or her functions including the number of members who sought his or her advice, the number and types of complaints received and the number of investigations undertaken and the findings of those investigations. All reports from the Compliance Officer are to be tabled by the Speaker on the next sitting day after receipt.

2.78 In keeping with his abovementioned views regarding investigation reports, the Ethics Adviser commented that the only way in which the Compliance Officer should report direct to the House, through the Presiding Officers, is in such an annual report. The Ethics Adviser also indicated that the information included in these reports should be quite general (i.e. not detailing specific investigations):

The Compliance Officer should only report directly to the House, through the Presiding Officers, in an annual report. Apart from general discussion of the nature of complaints investigated in the various categories, details in the annual report should be limited to statistical information on the number of allegations received, the number of complaints unsubstantiated, the number of complaints investigated, the number of inquiries initiated on own initiative, the number of inquiries resolved, referred to the oversight Committee, not upheld, and resolved through rectification.¹¹⁰

Feedback regarding Clause 6: Powers of the Compliance Officer

2.79 Clause 6 of the proposed resolution sets out the powers of the Compliance Officer, including that the Compliance Officer would have the power to call for the production of relevant documents and other records from Members and officers of the Parliament. Questions arise as to whether this is an appropriate power for the Compliance Officer.

2.80 The proposed scheme for a Compliance Officer would operate pursuant to a resolution of the House and not under a statutory framework. Consequently, the

¹⁰⁸ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p6.

¹⁰⁹ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p6.

¹¹⁰ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p17.

Compliance Officer's powers would be limited to those conferred by the House. The role normally assigned to such an appointee, as in the case of the Ethics Adviser is in the nature of an advisory rather than an investigatory role; and any ability of the Compliance Officer to compel the production of documents does not accord with the Legislative Assembly's approach to such questions.

2.81 Currently, in the Legislative Assembly a House resolution is required to order a Minister to produce papers – under Legislative Assembly Standing Order 269, the House may order Ministers to table papers. It is also the practice of committees administered by the Legislative Assembly – in accordance with the Standing Orders – to seek a resolution of the House to require a Member or an officer of the House to produce documents or appear as a witness for the purposes of a committee inquiry.

2.82 With the exception of those committees administered by the Legislative Assembly that have a statutory basis for their powers, the Legislative Assembly Standing Orders provide committees with the power to send for persons, papers, records, exhibits and things.¹¹¹ The interpretation given to this Standing Order and the practice in the Legislative Assembly is that this is a delegated power from the House and where a committee's request is not met, the matter may be reported to the House and it is for the House to consider whether to exercise its powers to order the production of papers. In addition, the *Parliamentary Evidence Act 1901* affords certain authority and powers to parliamentary committees, e.g. to summons individuals. However, the Assembly has rarely issued a summons, certainly not in recent times.

2.83 Clause 6 of the proposed resolution states:

(6) Powers of the Compliance Officer

The Compliance Officer shall have power to call for the production of relevant documents and other records from members and officers of the Parliament.

Members, their staff and parliamentary officers are required to reasonably cooperate at all stages with the Compliance Officer's inquiries including giving a full, truthful and prompt account of the matters giving rise to a complaint.

The Compliance Officer may report any failure to comply with these provisions to the Speaker, for determination of the matter by the House.

2.84 Commenting on the powers to be given to the Compliance Officer, the UK Commissioner stressed that the Compliance Officer would need appropriate powers to make a proper impact:

It seems critical to me that if the proposed role of Compliance Officer is to succeed, is to enjoy the respect and support of the Assembly and its Members, and is to make a meaningful contribution to the culture and standards of the Assembly, the role needs to be appropriately empowered. This, in my view, must include the powers to compel cooperation with his or her investigations, the power to require the

¹¹¹ Legislative Assembly Standing Order 288.

production of documentation, and the power to censure those who fail to cooperate.¹¹²

- 2.85 The UK Commissioner also stressed that the Compliance Officer would need to be able to exercise these powers independently:

Part of this empowerment must also include the ability to exercise these powers independently, free from interference, or the perception of interference, by Assembly Members or other stakeholders. This does not mean that checks and balances are not needed for these powers, such as the right of appeal, but it does mean that these powers should be operated independently on a day-to-day basis by the Officer using their unfettered discretion. In my view, this would go a large way to building public confidence in the rigour, independence, and impartiality of the overall regulatory scheme.¹¹³

- 2.86 In his comments on these matters, the Ethics Adviser stated that it would be ‘appropriate for the Compliance Officer to have the power to compel the production of documents *under a resolution of the House*, in a similar manner to Committees’.¹¹⁴ Further, the Ethics Adviser stated that such an order for documents should only be made after consultation with the relevant Presiding Officer or Clerk of the House and Chief Executive DPS, as appropriate. The Ethics Adviser explained this would help to prevent the production of documents subject to parliamentary privilege:

Such a procedure would ensure that an order of the Compliance Officer was appropriate and did not involve documents amounting to “proceedings in Parliament”. Consultation with the Presiding Officer should involve the purpose of the order and the reason why the order for production is needed.¹¹⁵

- 2.87 The Ethics Adviser also advised against the alternative of enacting legislation setting out the Compliance Officer’s powers as this would ‘subject the powers and authorities of the Parliament and Compliance Officer to interpretation by the Courts’.¹¹⁶

Parliamentary Privilege: Feedback Regarding the Extent to which the records and proceedings of the Compliance Officer would be protected by parliamentary privilege

- 2.88 Another question that arises in reviewing the proposed resolution is the extent to which the records and proceedings of the Compliance Officer would be protected by parliamentary privilege. Parliamentary privilege refers to certain rights, powers and immunities from the law conferred on individual Members of Parliament so they can fulfil their duties and so that the Parliament can

¹¹² Ms Kathryn Stone OBE, Parliamentary Commissioner for Standards, UK House of Commons, *Letter to Assembly Committee Chair*, 19 March 2021, p2.

¹¹³ Ms Kathryn Stone OBE, Parliamentary Commissioner for Standards, UK House of Commons, *Letter to Assembly Committee Chair*, 19 March 2021, p2.

¹¹⁴ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p19, emphasis added.

¹¹⁵ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, pp19-20.

¹¹⁶ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p20.

collectively perform its constitutional role.¹¹⁷ *May's Parliamentary Practice* describes parliamentary privilege as:

The sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.¹¹⁸

2.89 Further, *NSW Legislative Assembly Practice, Procedure and Privilege* notes:

The most fundamental parliamentary privilege is the privilege of freedom of speech. In Australia, there is no restriction on what may be said by elected representatives speaking in Parliament. Freedom of political speech is considered essential to ensure that Parliament can carry out its role scrutinising the operation of the Government of the day, and inquiring into matters of public concern. The statutory recognition of this privilege is founded in Article 9 of the *Bill of Rights 1688*...¹¹⁹

2.90 Article 9 of the *Bill of Rights 1688* provides: 'The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court of place out of Parliament' and is in force in NSW by operation of the *Imperial Acts Application Act 1969*.¹²⁰

2.91 In providing protection for speeches, debates and proceedings of Parliament, questions arise as to what constitutes 'proceedings in Parliament'. In NSW, in the absence of legislation, determining the scope of what constitutes 'proceedings in Parliament' lies with the courts.¹²¹ Carney argues that proceedings in Parliament covers:

...the speeches and debates as well as the passage of legislation. Also included are the tabling of motions and amendments to motions or bills and the tabling, asking and answering or questions to Ministers and other members. A register of members' pecuniary interests might also attract privilege. The proceedings of parliamentary committees including the evidence given by any person to those committees are also covered as are those who present petitions to Parliament.¹²²

2.92 An illustration of how these protections operate in practice in NSW is provided by the ICAC Act. Section 122 confirms that the ICAC cannot use material covered by parliamentary privilege for the purposes of its investigations. Section 122(1) states: 'Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament'.

¹¹⁷ *NSW Legislative Assembly Practice, Procedure and Privilege*, Part Two, Chapter 1, p1, NSW Parliament website: <https://www.parliament.nsw.gov.au/la/proceduralpublications/Pages/wppbook.aspx>, viewed 7 July 2021.

¹¹⁸ May, Thomas Erskine, Sir, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd Edition, edited by Sir William McKay, KCB, p75 as quoted in *NSW Legislative Assembly Practice, Procedure and Privilege*, Part Two, Chapter 1, p1.

¹¹⁹ *NSW Legislative Assembly Practice, Procedure and Privilege*, Part Two, Chapter 3, p1.

¹²⁰ See *Imperial Acts Application Act 1969*, second schedule, part 1, s6.

¹²¹ *NSW Legislative Assembly Practice, Procedure and Privilege*, Part Two, Chapter 3, pp2-3.

¹²² Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp210-11 as quoted in *NSW Legislative Assembly Practice, Procedure and Privilege*, Part Two, Chapter 3, p3, which also notes section 14A(7) of the *Constitution Act 1902* expressly confers parliamentary privilege on the Register of Pecuniary Interests.

2.93 However, there is an exception. As noted in Chapter One, the *Constitution Act 1902* and the *Constitution (Disclosures by Members) Regulation 1983* sets down a scheme for the disclosure by Members of their pecuniary and other interests. Section 122(2) and (4) of the ICAC Act provide that the ICAC can use a register of pecuniary interests or other matters that is required to be compiled and maintained pursuant to the *Constitution (Disclosures by Members) Regulation 1983*:

- for the purpose of any investigation into whether or not a Member publicly disclosed a matter or as to the nature of any matter disclosed and
- for the purpose of any finding, opinion or recommendation concerning the disclosure or non-disclosure

and for that purpose, Parliament is taken to have waived any parliamentary privilege that may apply to the register.

2.94 With regard to the Compliance Officer, the extent to which his or her proceedings and records would fall within 'proceedings in Parliament' and thus attract parliamentary privilege is unclear. The Assembly Committee notes that to date, the Australian Senate's three step test has been used to assess whether or not there is a potential claim of parliamentary privilege where documents are sought by investigative commissions and law enforcement bodies.¹²³ In his comments to the Assembly Committee, the Ethics Adviser stated that: 'The extent to which records of the Parliamentary Ethics Adviser are protected by absolute privilege is limited to those which are tabled in the House, or in response to a request from a Committee'.¹²⁴

2.95 The Ethics Adviser had two suggestions in this area. First, he suggested that 'to somewhat mitigate any doubt as to the application of parliamentary privilege to the proceedings of the Compliance Officer' a resolution of the House should be considered in the following terms:

For the avoidance of doubt, the provisions of Article 9 of the Bill of Rights 1688, applies in relation to the proceedings of the Compliance Officer for the purpose of "proceedings in Parliament" and the test of necessity of the proper functions the House is intended to execute.¹²⁵

2.96 Secondly, the Ethics Adviser suggested that to complement the above suggestion, the appointment of the Compliance Officer as an independent officer of the House should be included in the Standing Orders as follows:

Compliance Officer

¹²³ An account of the test can be found in Legislative Council Privileges Committee, Report 81 – *Execution of Search Warrants by the Australian Federal Police No. 2*, 18 November 2020, p7, NSW Parliament website: <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2625/Final%20Report%20No.%2081%20-%20Execution%20of%20search%20warrants%20by%20the%20Australian%20Federal%20Police%20No.%202.pdf> viewed 13 July 2021.

¹²⁴ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p18.

¹²⁵ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p18.

(1) An Officer of the House, called the Compliance Officer, is to be appointed by the Speaker.

(2) The Compliance Officer has and may exercise the functions authorised by resolution of the House, but not in relation to any proceedings in the House or a Committee of the House.¹²⁶

2.97 In addition, the Ethics Adviser noted section 27 of the *Defamation Act 2005* of which subsection 1 provides that it is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege. Further, subsection (2) provides that, without limiting subsection (1), matter is published on an occasion of absolute privilege if:

- The matter is published in the course of the proceedings of a parliamentary body, including (but not limited to) –
 - the publication of a document by order, or under the authority, of the body, and
 - the publication of the debates and proceedings of the body by or under the authority of the body or any law, and
 - the publication of matter while giving evidence before the body, and
 - the publication of matter while presenting or submitting a document to the body.

2.98 The Ethics Adviser stated that for absolute privilege to apply to the proceedings of the Compliance Officer, the *Defamation Act 2005* would have to be amended.¹²⁷

2.99 In addition, commenting on privilege issues, the Secondary Compliance Officer – Victorian Remuneration Tribunal commented that if a Compliance Officer publishes a statement of findings and any required actions on the website for the scheme, the publication is absolutely privileged (section 35 VIRTIPS Act).¹²⁸

Parliamentary Privilege: Feedback regarding Sanctions

2.100 Another important parliamentary privilege is the power of the House to regulate and discipline Members.¹²⁹ However, the proposed resolution does not contain any reference to sanctions except in Clause 5(b) – see above – which provides that the Compliance Officer may order repayment of funds where a Member has misused an allowance or entitlement.

¹²⁶ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p18.

¹²⁷ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, pp18-19.

¹²⁸ Ms Jane Brockington, Secondary Compliance Officer, Victorian Independent Remuneration Tribunal, *Letter to Assembly Committee Chair*, 30 April 2021, p7.

¹²⁹ See *NSW Legislative Assembly Practice, Procedure and Privilege*, Part Two, Chapter 1, p1.

2.101 This contrasts with the position in the United Kingdom (UK). Under the House of Commons Commissioner for Standards model, which is established under Standing Order 150, for more serious breaches the Commissioner will normally report the facts and his or her conclusions to the relevant oversight committee in a memorandum. The Committee will then publish the memorandum alongside its own report setting out its conclusions on the matter, and any recommendations to the House on any sanctions, including punitive options like suspension from the house where the Member receives no salary.¹³⁰

2.102 In commenting on sanctions, the UK Commissioner stated that to promote public confidence, powers of sanction should be reserved to the Compliance Officer, subject to an appeals process; and a structured, documented sanctions regime should be considered:

...to ensure public confidence in the role of Compliance Officer, I would recommend reserving most, if not all, powers of sanction, subject to a structured appeal mechanism, to the Officer. To ensure these powers are exercised fairly and consistently, the Assembly should consider whether a documented and structured sanctions regime needs to be designed and endorsed by the Assembly before an Officer is appointed. I do not think that a structured sanctions regime would limit the use of the Officer's own discretion, but instead would operate as an important check and balance to ensure that their discretion is used fairly and consistently.¹³¹

2.103 In its comments, the ICAC also stressed the importance of sanctions to respond to misconduct identified by the Compliance Officer, noting that compliance and deterrence depend in part on effective enforcement:

The Commission accepts that it is difficult for the Parliament to devise practical ways to discipline misconduct by its members. Options that are typically used to discipline employees, such as dismissal, demotion or even suspension, are not viable for members. However, because compliance and deterrence depend in part on the presence of effective enforcement mechanisms, the Commission encourages the Committee to put forward realistic options for disciplining any misconduct identified by the Compliance Officer. The Commission notes that the 2014 report by the [Assembly Committee]...proposed that sanctions are to include ordering an apology, ordering rectification or reimbursement.¹³²

2.104 In his comments on sanctions, the Ethics Commissioner referred to his views discussed above that the Compliance Officer should not be able to report direct to the House but to the Assembly Committee which would be able to report its conclusions and recommendations – including as regards sanctions – to the House. Under this model, the Compliance Officer could recommend sanctions to the Committee.¹³³

¹³⁰ UK Parliament website: <https://publications.parliament.uk/pa/cm201719/cmcode/1882/188207.htm> viewed 13 July 2021.

¹³¹ Ms Kathryn Stone OBE, Parliamentary Commissioner for Standards, UK House of Commons, *Letter to Assembly Committee Chair*, 19 March 2021, p2.

¹³² Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, *Letter to Assembly Committee Chair*, 25 March 2021, p3.

¹³³ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, pp15&20.

2.105 The Ethics Adviser acknowledged that it is well settled by legal cases that the Houses in NSW have self-protective but not punitive powers against Members and hence 'the powers of the Parliament do not extend to the imposition of fines'. However, the Ethics Adviser outlined sanctions that could apply:

...the Houses do have power to impose sanctions on a Member such [as] a submission of an apology, reprimand and admonishment, and suspension from the service of the House. Further, in extreme cases involving conduct unworthy of a Member, the Houses have power to expel a Member as a measure of self-protection.¹³⁴

¹³⁴ Mr John Evans, NSW Parliamentary Ethics Adviser, *Letter to Assembly Committee Chair*, 11 April 2021, p20.

Chapter Three – The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

- 3.1 In this Chapter, the Assembly Committee sets out its views on the proposed resolution for the establishment of a Parliamentary Compliance Officer. The Assembly Committee has elected to do this in table format, as follows.

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
<p>Clause 1 – Establishment of position</p> <p>That this House directs the Speaker to join with the President to make arrangements for the establishment of the position of Compliance Officer to expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all members and staff.</p>	<p>Recommendation 1</p> <p>That the Speaker make arrangements for the establishment of the position of Independent Complaints Officer to expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all Members and staff.</p> <p>Recommendation 2</p> <p>That the Speaker make arrangements for the establishment of a panel of people with appropriate skills and expertise ('the Panel') to whom the Independent Complaints Officer could direct complaints for investigation, where he or she does not conduct the investigation him or herself.</p>	<p>Clause 1 – Establishment of positions</p> <p>That this House directs the Speaker to make arrangements for the establishment of the position of Independent Complaints Officer to expeditiously deal with low level, minor misconduct matters so as to protect the institution of Parliament, all Members and staff.</p> <p>That this House also directs the Speaker to make arrangements for the establishment of a panel of people with appropriate skills and expertise ('the Panel') to whom the Independent Complaints Officer can direct complaints for investigation, where he or she does not conduct the investigation him or herself.</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
<p>Clause 2 – Functions of the Position</p> <p>The Compliance Officer shall have the following functions:</p> <p>(a) <u>Receive and investigate complaints</u></p> <p>The Compliance Officer may receive and investigate complaints confidentially in relation to alleged breaches of the Code of Conduct for Members, not related to conduct in proceedings of the Legislative Assembly or Legislative Council or their committees, including:</p> <p>(i) misuse of allowances and entitlements, (ii) other less serious misconduct matters falling short of corrupt conduct, (iii) allegations of bullying, harassment and other types of grievances, (iv) minor breaches of the pecuniary interests disclosure scheme.</p> <p>(b) <u>Monitoring Code of Conduct for Members</u></p>	<p>Recommendation 3</p> <p>That the Independent Complaints Officer have the functions of receiving and investigating complaints confidentially in relation to alleged breaches of the Code of Conduct for Members by Members of the Legislative Assembly, not related to conduct in proceedings of the Legislative Assembly or its committees, including:</p> <ul style="list-style-type: none"> • misuse of allowances and entitlements • other less serious misconduct matters • minor breaches of the pecuniary interest disclosures scheme. <p>Recommendation 4</p> <p>That the Independent Complaints Officer also have the function of receiving and investigating complaints confidentially in</p>	<p>Clause 2 – Functions of Independent Complaints Officer and members of the Panel</p> <p>(a) <u>Receive, investigate and refer complaints</u></p> <p>The Independent Complaints Officer may receive and investigate complaints confidentially in relation to alleged breaches of the Code of conduct for Members by Members of the Legislative Assembly, not related to conduct in proceedings of the Legislative Assembly or its committees, including:</p> <p>(i) misuse of allowances and entitlements (ii) other less serious misconduct matters, (iii) minor breaches of the pecuniary interests disclosure scheme.</p> <p>The Independent Complaints Officer shall also have the function of receiving and investigating complaints confidentially in relation to bullying, harassment and inappropriate behaviour by Members, not related to conduct in proceedings of the Legislative Assembly or its committees, and contrary to their obligations under legislation including the:</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
<p>The Compliance Officer shall monitor the operation of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation 1983 and the members’ entitlements system, and provide advice about reform to the Committee on Parliamentary Privilege and Ethics as required.</p> <p>(c) <u>Educational presentations</u></p> <p>The Compliance Officer shall assist the Committee on Parliamentary Privilege and Ethics, Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of members about their obligations under the Code of Conduct for Members and the Constitution (Disclosures by Members) Regulation 1983.</p> <p>(d) <u>Informal advisory services</u></p> <p>A member or the parliamentary administration may seek confidential advice on a matter of interpretation of the Members’ Entitlements scheme,</p>	<p>relation to bullying, harassment and inappropriate behaviour by Members of the Legislative Assembly, not related to conduct in proceedings of the Legislative Assembly or its committees, and contrary to their obligations under legislation including the:</p> <ul style="list-style-type: none"> • <i>Members of Parliament Staff Act 2013</i> • <i>Anti-Discrimination Act 1977</i> • <i>Work Health and Safety Act 2011.</i> <p>Recommendation 5</p> <p>That the Independent Complaints Officer also have discretion to refer a complaint to a member of the Panel, who has the requisite skills and expertise, to confidentially investigate rather than investigating the complaint him or herself.</p>	<ul style="list-style-type: none"> • <i>Members of Parliament Staff Act 2013;</i> • <i>Anti-Discrimination Act 1977;</i> and • <i>Work Health and Safety Act 2011.</i> <p>In addition, the Independent Complaints Officer shall have discretion to refer a complaint to a member of the Panel, who has the requisite skills and expertise, to investigate rather than investigating the complaint him or herself.</p> <p>(b) <u>Monitoring Code of Conduct for Members</u></p> <p>The Independent Complaints Officer shall monitor the operation of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation 1983 and the Members' entitlements system, and provide advice about reform to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics ('the Assembly Committee'), as required.</p> <p>(c) <u>Educational presentations</u></p> <p>The Independent Complaints Officer and members of the Panel shall assist the Assembly Committee, the Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of Members about their obligations under the Code of Conduct for Members and the</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
<p>for the purposes of resolving any disagreements.</p>	<p>Recommendation 6</p> <p>That the Independent Complaints Officer monitor the operation of the Code of Conduct for Members, the <i>Constitution (Disclosures by Members) Regulation 1983</i> and the Members' entitlements system, and provide advice about reform to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics ('the Assembly Committee') as required, consistent with Clause 2(b) of the proposed resolution for a Parliamentary Compliance Officer that is before the House ('the proposed resolution').</p> <p>Recommendation 7</p> <p>That the Independent Complaints Officer and members of the Panel have a function of assisting the Assembly Committee, the Parliamentary Ethics Adviser and the Clerk of the Legislative Assembly as requested in relation to the education of Members</p>	<p><i>Constitution (Disclosures by Members) Regulation 1983.</i></p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>about their obligations under the Code of Conduct for Members and the <i>Constitution (Disclosures by Members) Regulation 1983</i>, consistent with Clause 2(c) of the proposed resolution.</p> <p>Recommendation 8</p> <p>That the Independent Complaints Officer and members of the Panel be given no function of providing informal advisory services as envisaged by clause 2(d) of the proposed resolution as this function would be incompatible with their investigatory functions.</p>	
<p>Clause 3 – Amendment of Code of Conduct for Members</p> <p>The Code of Conduct for Members is amended by the addition of the following paragraph:</p> <p>'Clause 10 Members must treat their staff and each other and all those working for Parliament in a manner compatible with a safe workplace, free from harassment.</p>	<p>Finding 1</p> <p>That, in light of legal advice concerning the application of work, health and safety and anti-discrimination legislation to Members, the case for an amendment to the Code of Conduct for Members does not appear to be fully made out.</p>	<p>Not applicable – the Assembly Committee is not recommending an amendment to the Code of Conduct for Members.</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
<p><i>Commentary</i> Section 22(b) of the Anti-Discrimination Act 1977 makes it an offence for a member to sexually harass a workplace participant or another member in the workplace, or for a workplace participant to sexually harass a member.'</p>		
<p>Topic not covered in the proposed resolution: The need for the regular provision of information on Members' obligations under the <i>Members of Parliament Staff Act 2013</i>; the <i>Anti-Discrimination Act 1977</i> and the <i>Work Health and Safety Act 2011</i></p>	<p>Recommendation 9</p> <p>That the NSW Department of Parliamentary Services and the Clerk of the Legislative Assembly provide regular, up-to-date information and guidance to Members of the Legislative Assembly, as employers of staff under the <i>Members of Parliament Staff Act 2013</i> – and to Members' staff and parliamentary staff – on Member and staff rights and obligations under:</p> <ul style="list-style-type: none"> • the <i>Members of Parliament Staff Act 2013</i> • the <i>Anti-Discrimination Act 1977</i> 	<p>Not applicable. While this matter is not covered in the proposed resolution, the Assembly Committee considers that there is a need for increased awareness and understanding of applicable legislation.</p> <p>In this regard, the Assembly Committee also notes that the Department of the Prime Minister and Cabinet <i>Review of the Parliamentary Workplace: Responding to Serious Incidents</i> highlighted the need for a tailored education program so that Members and staff understand their rights and responsibilities in the workplace; can recognise unacceptable behaviour; and can respond to serious incidents when they occur – see in particular Recommendation 5 and pp78-79: https://pmc.gov.au/resource-centre/pmc/review-parliamentary-workplace-</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<ul style="list-style-type: none"> • the <i>Work Health and Safety Act 2011</i>. <p>Recommendation 10</p> <p>That the regular, up-to-date information to be provided to Members, Members' staff and parliamentary staff on their legal rights and obligations also include:</p> <ul style="list-style-type: none"> • information on recognising, identifying and responding to bullying, harassment and inappropriate behaviour in the workplace • guidance on creating a safe, secure and respectful working environment. <p>Recommendation 11</p> <p>That the Assembly Committee review the regular, up-to-date information each time before it is distributed to Members and staff,</p>	<p>responding-serious-incidents, viewed 15 June 2021.</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>in consultation with relevant bodies, to check its accuracy and suitability and recommend changes if necessary.</p>	
<p>Topic not covered in the proposed resolution: The need for trauma-informed support services for complainants, witnesses and accused persons</p>	<p>Recommendation 12</p> <p>That the NSW Department of Parliamentary Services review support services currently available to Members, Members' staff and staff of the NSW Parliament under the Employee Assistance Program and assess where adjustments may be necessary to provide timely, independent, confidential and trauma-informed support for complainants, witnesses and people who are accused in relation to a complaint under the Independent Complaints Officer system, should such a system be established.</p>	<p>Not applicable.</p> <p>The Assembly Committee notes that the Department of the Prime Minister and Cabinet <i>Review of the Parliamentary Workplace: Responding to Serious Incidents</i> highlighted the need for 'Trauma-informed support provided by appropriately trained staff and accessible at all stages of a response [to]...a serious incident'. The report noted that a new framework for reporting and responding to serious incidents would need to involve three elements: trauma-informed support services; an independent, confidential complaints mechanism; and tailored education and support for all staff – see in particular Recommendations 2 and 3 and p29: https://pmc.gov.au/resource-centre/pmc/review-parliamentary-workplace-responding-serious-incidents, viewed 15 June 2021.</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
<p>Clause 4 – Term of Appointment [Appointment and Dismissal Provisions]</p> <p>(a) <u>Appointment by Presiding Officers</u></p> <p>The Presiding Officers shall appoint a Compliance Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of that Parliament and until the mid-term point of the following Parliament. The proposed appointment must have the support of the Privileges Committee in each House. An appointment may be extended for a period of up to six months so as to ensure there is no period in which there is no person holding the position.</p> <p>(b) <u>Dismissal</u></p> <p>The Compliance Officer may only be dismissed by the Chief Executive Officer of the Department of Parliamentary Services with the consent of the Speaker and the President.</p>	<p>Recommendation 13</p> <p>That the Speaker appoint an Independent Complaints Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of the Parliament and until the mid-term point of the following Parliament; and that the appointment be able to be extended for a period of up to six months to ensure that there is no period during which there is no person holding the position.</p> <p>Recommendation 14</p> <p>That the proposed appointment to the role of Independent Complaints Officer be required to have the support of the Assembly Committee.</p> <p>Recommendation 15</p> <p>That the appointment of the Independent Complaints Officer be confirmed by the Clerk of the</p>	<p>Clause 3 – Appointment and Dismissal</p> <p>(a) <u>Appointment by Speaker – Independent Complaints Officer</u></p> <p>The Speaker is to appoint an Independent Complaints Officer within three months of the mid-term point of each Parliament – or whenever a position becomes vacant – for the remainder of the Parliament and until the mid-term point of the following Parliament.</p> <p>The proposed appointment must have the support of the Assembly Committee. An appointment may be extended for a period of up to six months to ensure that there is no period during which there is no person holding the position.</p> <p>(b) <u>Appointment by Speaker – the Panel</u></p> <p>The Speaker is to appoint a panel of three independent persons – the Panel – within three months of the mid-term point of each Parliament – or whenever a position becomes vacant – for the remainder of that Parliament and until the mid-term point of the following Parliament who can be retained as needed to investigate complaints referred to them by the Independent</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>Legislative Assembly entering into a contract of employment with the appointee.</p> <p>Recommendation 16</p> <p>That the Speaker also appoint the Panel – a panel of three independent persons – within three months of the mid-term point of each Parliament, or whenever a position becomes vacant, for the remainder of the Parliament and until the mid-term point of the following Parliament and:</p> <ul style="list-style-type: none"> • persons on the Panel be able to be retained as needed to investigate complaints delegated to them by the Independent Complaints Officer • appointments to the Panel be required to have the support of the Assembly Committee. 	<p>Complaints Officer. Proposed appointments to the Panel must have the support of the Assembly Committee.</p> <p>The Panel must include two persons who have appropriate skills and experience to investigate complaints about bullying, harassment and inappropriate behaviour by Members. The Panel must also include a person who has appropriate skills and experience to investigate complaints about other matters covered by the Independent Complaints Officer system such as breaches relating to Member entitlements and pecuniary interest disclosures.</p> <p>(c) <u>Contract with Clerk of the Legislative Assembly – Independent Complaints Officer</u></p> <p>The appointment of the Independent Complaints Officer is to be confirmed by the Clerk of the Legislative Assembly entering into a contract of employment with the appointee.</p> <p>(d) <u>Contract with Clerk of the Legislative Assembly – the Panel</u></p> <p>The appointment of persons to the Panel is to be confirmed by the Clerk of the Legislative</p>

	<p>Recommendation 17</p> <p>That there be two persons appointed to the Panel who have appropriate skills and experience to investigate complaints about bullying, harassment and inappropriate behaviour by Members; and that there also be a person appointed to the panel who has appropriate skills and experience to investigate complaints about other matters covered by the Independent Complaints Officer system such as breaches relating to Member entitlements and pecuniary interest disclosures.</p> <p>Recommendation 18</p> <p>That the appointment of persons to the Panel be confirmed by the Clerk of the Legislative Assembly entering into a contract of employment with the appointees.</p> <p>The Assembly Committee notes that these recommendations (providing that it is for the Speaker to <u>appoint</u> and for the Clerk to <u>retain</u> the Independent Complaints Officer and members of the Panel) are based on 1998</p>	<p>Assembly entering into a contract of employment with the appointees.</p> <p>(e) <u>Dismissal</u></p> <p>The Independent Complaints Officer and members of the Panel can only be dismissed by the Clerk of the Legislative Assembly in consultation with the Speaker and the Assembly Committee.</p>
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The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>Crown Solicitor’s advice in relation to the employment contract for the Parliamentary Ethics Adviser.</p> <p>This advice indicated that there is doubt over whether the Presiding Officers can engage persons by way of contract to perform services for the Parliament.</p> <p>The legal advice recommended that the Clerks enter into the contract with the Ethics Adviser ‘for and on behalf of the State of New South Wales’ (the Crown) and though the contract would be a contract with the Crown, it could provide that the Ethics Adviser would be subject to directions from the Presiding Officers and required to comply with requests from the Parliament.¹³⁵</p> <p style="text-align: center;">Recommendation 19</p> <p style="text-align: center;">That the Independent Complaints Officer and members of the Panel only be able to be dismissed by the Clerk of the Legislative Assembly in consultation with the</p>	

¹³⁵ NSW Crown Solicitor, Advice to the Clerk of the Parliaments and Clerk of the Legislative Assembly dated 11 December 1998.

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>Speaker and the Assembly Committee.</p>	
<p>Clause 5 – Complaints Investigations – standing</p> <p>Clause 5 of the proposed resolution deals with complaints investigations. However, the proposed resolution is silent on the persons who are to have standing to make complaints to the Compliance Officer.</p>	<p style="text-align: center;">Recommendation 20</p> <p style="text-align: center;">That 'members of the parliamentary community' being:</p> <ul style="list-style-type: none"> • Members of the Parliament of NSW • all those who work for Members of the Parliament of NSW in their capacity as Members or Ministers, including contractors and volunteers • all those who work for, or carry out work for, the Parliament of NSW including contractors and volunteers <p style="text-align: center;">have standing to make a complaint to the Independent Complaints Officer.</p>	<p>Clause 4 – Complaints Investigations</p> <p>(a) <u>Standing to make a complaint</u> 'Members of the parliamentary community' being:</p> <ul style="list-style-type: none"> • Members of the Parliament of NSW; • all those who work for Members of the Parliament of NSW in their capacity as Members or Ministers, including contractors and volunteers; • all those who work for, or carry out work for, the Parliament of NSW including contractors and volunteers; <p>have standing to make a complaint to the Independent Complaints Officer.</p> <p><u>Further possible additional clauses for the House to consider include: former members of the parliamentary community having standing to make a complaint; retrospective remit of the Independent Complaints Officer system; and time limits for lodging complaints.</u></p>

	<p>Recommendation 21</p> <p>That the House consider whether former members of the parliamentary community should have standing to make a complaint to the Independent Complaints Officer about bullying, harassment or inappropriate behaviour.</p> <p>Recommendation 22</p> <p>That former members of the parliamentary community not have standing to make complaints to the Independent Complaints Officer about matters within jurisdiction of the Independent Complaints Officer that do not relate to bullying, harassment or inappropriate behaviour (e.g. breaches around entitlements or disclosures of pecuniary interests).</p> <p>Recommendation 23</p> <p>That the House consider whether the Independent Complaints Officer system should have any retrospective remit, that is, whether the Independent</p>	
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Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>Complaints Officer should be able to receive complaints relating to incidents that occurred before the establishment of the Independent Complaints Officer position.</p> <p>Recommendation 24</p> <p>That the House consider:</p> <ul style="list-style-type: none"> • whether there should be a time limit for reporting misconduct to the Independent Complaints Officer e.g. complaints must be lodged within two years of the conduct in question • whether such time limits should differ according to the type of case e.g. bullying and inappropriate conduct matters versus other matters. <p><u>Time limits in legislation:</u> The Assembly Committee notes that ‘yardsticks’ under NSW legislation may assist in deciding on time limits,</p>	

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	<p>if any, for lodging complaints with the Independent Complaints Officer.</p> <p>Under the <i>Anti-Discrimination Act 1977</i>, there are no absolute time limits for lodging a discrimination complaint with the President of the Anti-Discrimination Board. However, the President can decline the complaint if the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint (section 89B).</p> <p>Similarly, proceedings for an offence against the <i>Work Health and Safety Act 2011</i> must generally be brought within two years after the offence first comes to the notice of the regulator (see section 232).</p> <p><u>Professor Pru Goward’s report, <i>Review of policies and procedures for Ministerial offices – bullying, harassment and sexual misconduct</i></u>: Does not specifically deal with retrospectivity or time limits for making complaints. Recommendation 6 of the report does however recommend that complaints should be able to be made by current <i>and former</i> ministerial staff, p34: https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/1832/Goward-Report-April-2021.pdf, viewed 15 June 2021.</p>	

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	<p><u>The Legislative Council Privileges Committee Report, Proposal for a Compliance Officer for NSW Parliament:</u> does make general comment, but no recommendations, on whether the Compliance Officer should be able to investigate non-recent cases relating to incidents before the Compliance Officer’s establishment. The Council Committee concluded that this is a matter for the Compliance Officer to decide on in developing an investigations Protocol.</p> <p>The Council Committee noted that ‘...the question is whether the Compliance Officer can investigate so-called legacy issues. The current resolution is silent on the issue’. In stating that it considered that this is a matter for the Compliance Officer to decide on in developing the investigations Protocol, the Council Committee also stated that: ‘Any complaint lodged should refer to a current serving member (at the time of the complaint being made) and relate to a time that they were a member. The decision should not be made on the basis of need, nor the resources available; such resources may need to be supplemented if the officer considered it appropriate to investigate earlier matters’ p20: https://www.parliament.nsw.gov.au/lcdocs/inq</p>	

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	<p>uiries/2642/Final%20Report%20-%20Compliance%20Officer%20.pdf, viewed 15 June 2021.</p> <p><u>United Kingdom House of Commons</u>: It is noted that for the UK House of Commons, complaints about bullying, harassment and sexual misconduct that pre-date the establishment of the Independent Complaints and Grievance Scheme (ICGS) can be considered under the scheme.¹³⁶</p> <p>However, a February 2021 review of the ICGS recommended that for <u>bullying and harassment cases</u> there be a time limit on non-recent cases of <u>two years</u> from the date of the incident(s) or behaviour complained of¹³⁷ and that there continue to be <u>no time limit</u> imposed in respect of complaints to the ICGS of <u>sexual misconduct</u>, pending re-consideration in three years.¹³⁸</p> <p>With regard to complaints to the UK Standards Commissioner that the rules in the House of Commons Code of Conduct about matters more</p>	

¹³⁶ Richard Kelly, *Research Briefing 08369: Independent Complaints and Grievance Scheme*, 27 April 2021, pp5-6, UK Parliament website: <https://researchbriefings.files.parliament.uk/documents/CBP-8369/CBP-8369.pdf> viewed 12 July 2021.

¹³⁷ Alison Stanley CBE FCIP, *Independent Complaints and Grievance Scheme Independent 18-Month Review*, 22 February 2021, pp73-74, UK Parliament website: https://www.parliament.uk/contentassets/e3ed0297d92a400bb249c887a30aa59b/icgs-18-month-review_final.pdf, viewed 22 April 2021.

¹³⁸ Alison Stanley CBE FCIP, *Independent Complaints and Grievance Scheme Independent 18-Month Review*, 22 February 2021, pp73-74.

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	<p>broadly (including matters around entitlements and registration of financial interests) have been broken, the Office of the Commissioner has also confirmed that <u>since 2018 there have been no time restrictions for alleging a breach of the Rules of Conduct.</u>¹³⁹</p> <p><u>At Commonwealth level, the Department of the Prime Minister and Cabinet’s <i>Review of the Parliamentary Workplace: Responding to Serious Incidents</i></u>: recommended an independent complaints mechanism be established under the <i>Parliamentary Service Act 1999</i> (Cth) and that it have some retrospective impact but only for current employees – it would (at least initially) only cover complaints that relate to the current term of Parliament (that is, since the 2019 election, including periods when either House is dissolved) where the parties remain in Parliament or employment under the <i>Members of Parliament (Staff) Act 1984</i> (Cth), see recommendation 4, and pp55&57: https://pmc.gov.au/resource-centre/pmc/review-parliamentary-workplace-responding-serious-incidents, viewed 15 June</p>	

¹³⁹ Office of the Parliamentary Commissioner for Standards, UK House of Commons, Email to Committee Secretariat dated 4 June 2021.

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	<p>2021. The review noted that this initial focus on incidents in the current Parliament where a link to the workplace remains would allow the new complaints mechanism to be tested and to respond to issues ‘without having to manage the complexity associated with historical reports that will likely relate to offices that no longer exist’ (p55).</p>	
<p>Clause 5(a) – Complaints Investigations [Protocol]</p> <p>(5) <u>Complaints investigations</u></p> <p>(a) <u>Protocol</u></p> <p>The Compliance Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Committee on Parliamentary Privilege and Ethics and tabled in the House by the Speaker, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Compliance Officer and the Independent Commission Against Corruption and other relevant bodies, subject to relevant legislation (including</p>	<p>Recommendation 25</p> <p>That the Independent Complaints Officer develop the investigations protocol envisaged by Clause 5(a) of the proposed resolution within three months of his or her appointment, to be approved by the Assembly Committee and tabled in the House by the Chair.</p>	<p>Clause 4 – Complaints Investigations [continued]</p> <p>(b) <u>Protocol</u></p> <p>The Independent Complaints Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Assembly Committee and tabled in the House by the Chair, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Independent Complaints Officer system and the Independent Commission Against Corruption and other relevant bodies, subject to relevant legislation (including section 122 of the <i>Independent Commission Against Corruption Act 1988</i>).</p>

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<p>section 122 of the Independent Commission Against Corruption Act).</p>		
<p>Clause 5(b)-(d)– Complaints investigations [confidentiality and reporting] – and timeliness.</p> <p>As noted, clause 5 of the proposed resolution deals with complaints investigations. However, the proposed resolution is silent on timeframes for such investigations.</p> <p>Clauses 5(b)-(d) of the proposed resolution states:</p> <p>(5) <u>Complaints investigations</u></p> <p>...</p> <p>(b) <u>Investigatory report to the House</u></p> <p>Where the Compliance Officer considers that there has been a misuse of an allowance or entitlement, the Compliance Officer may order repayment of funds misused. Where the Compliance</p>	<p><u>Confidentiality:</u></p> <p>Recommendation 26</p> <p>That under the Independent Complaints Officer system:</p> <ul style="list-style-type: none"> • Members of the parliamentary community who are not Members of Parliament and who make complaints be required to maintain confidentiality concerning complaints and investigations. • There be an expectation that, except in extraordinary circumstances, Members of Parliament will maintain confidentiality about complaints and investigations. However, it should be made clear that nothing about this 	<p>Clause 4 – Complaints Investigations [continued]</p> <p>(c) <u>Confidentiality of complaints investigations</u></p> <p>Under the Independent Compliance Officer system:</p> <ul style="list-style-type: none"> • Members of the parliamentary community who are not Members of Parliament and who make complaints shall be required to maintain confidentiality concerning complaints and investigations. • There shall be an expectation that, except in extraordinary circumstances, Members of Parliament will maintain confidentiality about complaints and investigations. However, nothing about this expectation affects parliamentary privilege and, in particular, the parliamentary privilege of freedom of speech.

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<p>Officer considers that a member has otherwise breached the Code of Conduct for Members, the Compliance Officer may recommend corrective action.</p> <p>Subject to (c) below, the Compliance Officer will make a report to the House if and only if the member does not comply with the order or accept the recommendation as the case may be, and the complainant consents to the making of a report.</p> <p>(c) <u>Minor breach</u></p> <p>The Compliance Officer on investigating a matter and finding that a member has breached the Code or Regulations, but in his or her opinion considers the breach to have been minor or inadvertent and the member concerned has taken such action to rectify the breach, including the making of appropriate financial reimbursement, the Compliance Officer shall advise in writing the member and the complainant of the finding and the action taken by the</p>	<p>expectation affects parliamentary privilege and, in particular, freedom of speech.</p> <ul style="list-style-type: none"> Others involved in any complaints investigations e.g. witnesses, are required to maintain confidentiality concerning complaints and investigations. <p><u>Timeliness:</u></p> <p>Recommendation 27</p> <p>That on receiving complaints, the Independent Complaints Officer be required to assess complaints in a reasonably timely manner having regard to any relevant factors including the complexity of the complaint and available resources.</p> <p>Recommendation 28</p> <p>That investigations by the Independent Complaints Officer and members of the Panel be</p>	<ul style="list-style-type: none"> Others involved in any complaints investigations, for example witnesses shall be required to maintain confidentiality concerning complaints and investigations. <p>(d) <u>Timeliness of complaints assessments and investigations</u></p> <p>On receiving complaints the Independent Complaints Officer must assess complaints in a reasonably timely manner having regard to any relevant factors including the complexity of the complaint and available resources.</p> <p>Investigations by the Independent Complaints Officer and members of the Panel must be conducted in a reasonably timely manner having regard to any relevant factors including the complexity of the complaint and available resources.</p>

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<p>member. No report to a House is required in this circumstance.</p> <p>(d) <u>Declines to investigate</u></p> <p>If the Compliance Officer receives a complaint but upon assessment declines to investigate the matter, or upon investigation finds no evidence or insufficient evidence to substantiate a breach of the Code of Conduct for Members or the Constitution (Disclosures by Members) Regulation, the Compliance Officer shall advise in writing the member and the complainant of the decision. No report to a House is required in this circumstance.</p>	<p>required to be conducted in a reasonably timely manner having regard to any relevant factors including the complexity of the investigation and available resources.</p> <p><u>Reporting</u></p> <p>Recommendation 29</p> <p>That where the Independent Complaints Officer decides to dismiss a complaint and that it is not suitable for investigation, he or she is to:</p> <ul style="list-style-type: none"> • Write to the Member in question, and the complainant, advising of the decision. • Briefly report the decision to the Assembly Committee on a confidential basis. However, in the case of bullying, harassment and inappropriate behaviour complaints, a report to 	<p>(e) <u>Unsubstantiated matters</u></p> <p>Where the Independent Complaints Officer decides to dismiss a complaint, and that it is not suitable for investigation, the Independent Complaints Officer shall write to the Member who is the subject of the complaint, and to the complainant, advising of the decision.</p> <p>The Independent Complaints Officer shall also briefly report the decision to the Assembly Committee on a confidential basis. However, if the complaint relates to bullying, harassment or inappropriate behaviour, the decision must only be reported to the Assembly Committee with the complainant's consent.</p> <p>(f) <u>Unsustained matters</u></p> <p>Where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a</p>

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	<p style="text-align: center;">the Committee must only be made with the complainant’s consent.</p> <p>Recommendation 30</p> <p>That the Independent Complaints Officer and persons retained from the Panel to investigate a matter <u>not</u> have the power to make reports about specific investigations <i>direct to the House</i>.</p> <p>Recommendation 31</p> <p>That where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a Member has not breached the Code of Conduct for Members or the <i>Constitution (Disclosures by Members) Regulation 1983</i>, nor engaged in bullying, harassment or inappropriate conduct, the investigator be required to:</p>	<p>Member has not breached the Code of Conduct for Members or the <i>Constitution (Disclosures by Members) Regulation 1983</i>, nor engaged in bullying, harassment or inappropriate behaviour the investigator shall:</p> <ul style="list-style-type: none"> • write to the Member and complainant advising of his or her findings; • briefly report his or her findings on a confidential basis to the Assembly Committee (and to the Independent Complaints Officer if the investigator is a member of the Panel). However, if the matter relates to bullying, harassment or inappropriate behaviour, the findings must only be reported to the Assembly Committee with the complainant’s consent. <p>(g) <u>Breaches and rectification</u></p> <p>Where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a Member has breached the Code of Conduct for Members or the <i>Constitution (Disclosures by Members) Regulation 1983</i>, or has engaged in bullying, harassment or inappropriate behaviour:</p>

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	<ul style="list-style-type: none"> • Write to the Member and complainant advising of his or her findings. • Briefly report his or her findings on a confidential basis to the Assembly Committee (and to the Independent Complaints Officer if the investigator is a member of the Panel). However, in the case of bullying, harassment and inappropriate behaviour matters, a report to the Committee must only be made with the complainant’s consent. <p style="text-align: center;">Recommendation 32</p> <p>That where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a Member has breached the Code of Conduct for Members or the Constitution (<i>Disclosures by Members</i>) Regulation 1983, or</p>	<ul style="list-style-type: none"> • The investigator shall write to the Member advising of his or her findings and specifying what action is required to rectify the breach. • Should the Member take the rectification action, the investigator shall write to the complainant advising of his/her findings and noting the rectification action taken by the Member. • The investigator shall briefly report his or her findings, and the rectification action taken by the Member, on a confidential basis, to the Assembly Committee (and to the Independent Complaints Officer if the investigator is a member of the Panel). However, if the matter relates to bullying, harassment or inappropriate behaviour, the report must only be made to the Assembly Committee with the complainant’s consent. <p>(h) <u>Breaches where the Member has failed or declined to take rectification action – reports and appeal rights</u></p> <p>Where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a</p>

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	<p>has engaged in bullying, harassment or inappropriate behaviour:</p> <ul style="list-style-type: none"> • The investigator be required to write to the Member advising of his or her findings and specifying what action is required to rectify the breach. A table listing possible examples of standard rectification actions is at Appendix Four to this report. • Should the Member take the rectification action, the investigator be required to write to the complainant advising of his or her findings and noting the rectification action taken by the Member. • The investigator be required to briefly report his or her findings, and 	<p>Member has breached the Code of Conduct for Members or the <i>Constitution (Disclosures by Members) Regulation 1983</i>, or has engaged in bullying, harassment or inappropriate behaviour and the Member has failed to undertake the stipulated rectification action or declined to do so pending appeal:</p> <ul style="list-style-type: none"> • the investigator shall report his or her findings and conclusions to the Assembly Committee on a confidential basis (and to the Independent Complaints Officer if the investigator is a member of the Panel), including recommendations as to the sanctions, if any, that should be imposed by the House. However, if the matter relates to bullying, harassment or inappropriate behaviour, the report to the Committee must only be made with the complainant's consent. • the Member in question shall also have the right to lodge an appeal against the investigator's findings, conclusions and recommendations with the Assembly Committee where they have been so reported to the Committee.

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	<p>the rectification action taken by the Member, on a confidential basis, to the Assembly Committee (and to the Independent Complaints Officer if the investigator is a member of the Panel). However, in the case of bullying, harassment and inappropriate behaviour matters, a report to the Committee must only be made with the complainant’s consent.</p> <p>Recommendation 33</p> <p>That where, after investigating a complaint, the Independent Complaints Officer or a person retained from the Panel to investigate finds that a Member has breached the Code of Conduct for Members or the Constitution (<i>Disclosures by Members</i>) Regulation 1983, or has engaged in bullying, harassment or inappropriate behaviour and the Member has</p>	<p>Further, after receiving:</p> <ul style="list-style-type: none"> • an investigatory report from the Independent Complaints Officer or a member of the Panel about a breach for which the Member has failed to take the stipulated rectification action, and/or; • an appeal from the Member in question concerning the investigator’s findings, conclusions and recommendations; <p>the Assembly Committee shall:</p> <ul style="list-style-type: none"> • form its own conclusions • have the power to report its conclusions and recommendations – including as regards appropriate sanctions – to the House • have the power to decide that a report to the House and/or sanctions are not warranted in a particular case e.g. where the Committee disagrees with the investigator’s findings.

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	<p>failed to undertake the stipulated rectification action or declined to do so pending appeal:</p> <ul style="list-style-type: none"> • The investigator report his or her findings and conclusions to the Assembly Committee on a confidential basis (and to the Independent Complaints Officer if the investigator is a member of the Panel), including recommendations as to the sanctions, if any, that should be imposed by the House. However, in the case of bullying, harassment and inappropriate behaviour matters, a report to the Committee must only be made with the complainant’s consent. • The Member in question also have the right to lodge an appeal against the investigator’s 	

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	<p>findings, conclusions and recommendations with the Assembly Committee, where they have been so reported to the Committee.</p> <p>Recommendation 34</p> <p>That after receiving:</p> <ul style="list-style-type: none"> • an investigatory report from the Independent Complaints Officer or a member of the Panel about a breach for which the Member has failed to take the stipulated rectification action, and/or • an appeal from the Member in question concerning the investigator’s findings, conclusions and recommendations <p>the Assembly Committee:</p>	

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	<ul style="list-style-type: none"> • form its own conclusions • have the power to report its conclusions and recommendations – including as regards appropriate sanctions – to the House • have the power to decide that a report to the House and/or sanctions are not warranted in a particular case e.g. where the Committee disagrees with the investigator's findings. <p><i>There are unresolved questions concerning the handling of complaints in the political context as it is unclear how to address complaints that are politically motivated and lack substance. Clause 5(b) of the proposed resolution provides that a complainant must consent before the Compliance Officer makes a report to the House, which may raise concerns if a complaints process is being weaponised in a particular case. Nevertheless, the Assembly Committee appreciates that, particularly in a</i></p>	

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	<p><i>bullying/harassment matter, a complainant may not want his or her complaint publicised.</i></p> <p><i>The Assembly Committee considers that a public interest test should apply in relation to the publication of reports on complaint matters. However, it notes that the Department of the Prime Minister and Cabinet report Review of the Parliamentary Workplace: Responding to Serious Incidents indicated ‘Best practice approaches facilitate and encourage referral of criminal matters to police but...emphasise the impacted person’s control and autonomy over every stage of the process’ p.43:</i></p> <p>https://pmc.gov.au/resource-centre/pmc/review-parliamentary-workplace-responding-serious-incidents, viewed 15 June 2021.</p> <p><i>Allowing discretion for the Independent Complaints Officer to make a report to the Assembly Committee, or to table a report in the House, against the complainant’s wishes would appear to run counter to the impacted person’s autonomy at every stage of the process. Therefore, the Assembly Committee has recommended the complainant’s wishes be paramount in this area in harassment, bullying and inappropriate behaviour matters.</i></p>	

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<p>Clause 5(e) – Complaints investigations [expert assistance]</p> <p>(e) <u>Expert Assistance</u></p> <p>The Compliance Officer may engage the services of persons to assist with or perform services for the Compliance Officer, including the conduct of an investigation, within budget.</p>	<p>Recommendation 35</p> <p>That the Independent Complaints Officer and persons from the Panel who are retained to investigate a complaint be able to engage the services of persons to assist with or perform services for them in the conduct of an investigation, within budget.</p>	<p>Clause 4 – Complaints Investigations [continued]</p> <p>(i) <u>Expert assistance</u></p> <p>The Independent Complaints Officer and persons from the Panel retained to investigate a complaint shall be able to engage the services of persons to assist with or perform services for them in the conduct of investigations, within budget.</p>
<p>Clause 6 – Powers of the Compliance Officer</p> <p>The Compliance Officer shall have power to call for the production of relevant documents and other records from members and officers of the Parliament.</p> <p>Members, their staff and parliamentary officers are required to reasonably cooperate at all stages with the Compliance Officer's inquiries including giving a full, truthful and prompt account of the matters giving rise to a complaint.</p> <p>The Compliance Officer may report any failure to comply with these provisions to the Speaker, for determination of the matter by the House.</p>	<p>Finding 2</p> <p>The power of the Independent Complaints Officer or any person from the Panel who is retained to investigate a complaint, to <u>compel</u> the production of documents or other records would be problematic, and would not accord with the Legislative Assembly's approach to such questions. As the Independent Complaints Officer and members of the Panel are to operate pursuant to a resolution of the House, they could only request documents or records and report non-compliance to the Assembly</p>	<p>Clause 5 – Powers of the Compliance Officer</p> <p>The Independent Complaints Officer and members of the Panel who are retained to investigate a complaint shall have power to request the production of relevant documents and other records from Members and officers of the Parliament.</p> <p>Members, their staff and parliamentary officers are required to reasonably cooperate at all stages with the inquiries of the Independent Complaints Officer and members of the Panel who are retained to investigate a complaint, including giving a full, truthful and prompt account of the matters giving rise to a complaint.</p>

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	<p>Committee which, if necessary, could report to the House to resolve the matter.</p>	<p>The Independent Complaints Officer and persons from the Panel who have been retained to investigate a complaint may report any failure to comply with these provisions to the Assembly Committee which, if necessary, can report to the House to resolve the matter.</p>
<p>Clause 7 – Keeping of records</p> <p>The Compliance Officer shall be required to keep records of advice given and the factual information upon which it is based, complaints received and investigations. The records of the Compliance Officer are to be regarded as records of the House and are not to be made public without the prior approval of the Compliance Officer and resolution of the House, except for the referral of information between the Compliance Officer and other relevant authorities in accordance with paragraph 12 of the protocol or where the member requests that the records be made public.¹⁴⁰</p>	<p>Recommendation 36</p> <p>That the Independent Complaints Officer and members of the Panel retained to investigate complaints be required to keep confidential records of their assessments and investigations. These records should be regarded as records of the House, and not be made public except for:</p> <ul style="list-style-type: none"> the referral of information between the Independent Complaints Officer, a member of the Panel retained to investigate a complaint, and relevant authorities in accordance with the 	<p>Clause 6 – Keeping of records</p> <p>The Independent Complaints Officer and members of the Panel retained to investigate complaints shall be required to keep confidential records of their assessments and investigations.</p> <p>These records shall be regarded as records of the House, and shall not be made public except for the referral of information between the Independent Complaints Officer, a member of the Panel retained to investigate a complaint, and relevant authorities in accordance with the protocol to be developed for the operation of the Independent Complaints Officer system; or where the Member who is the subject of the complaint requests that the records be made public.</p>

¹⁴⁰ As noted earlier, the reference in Clause 7 to 'paragraph 12 of the protocol' is a drafting error and refers to a draft version of a protocol that has not been published. As per Clause 5(a) of the proposed resolution a protocol for complaints investigations was instead to be developed by the Compliance Officer within three months of his or her appointment.

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>protocol (to be developed by the Independent Complaints Officer, approved by the Assembly Committee and tabled in the House by the Chair) for the operation of the Independent Complaints Officer system</p> <ul style="list-style-type: none"> • where the Member who is the subject of the complaint requests that the records be made public. 	
<p>Clause 8 – [Annual] Reports to Parliament</p> <p>In addition to reports on investigations, the Compliance Officer shall be required to report to the Parliament annually on the performance of his or her functions including the number of members who sought his or her advice, the number and types of complaints received and the number of investigations undertaken and the findings of those investigations. All reports from the</p>	<p>Recommendation 37</p> <p>That the Independent Complaints Officer be required to table in the House quarterly reports that contain general, de-identified information about complaints dealt with under the Independent Complaints Officer system including:</p>	<p>Clause 7 – Quarterly Reports to Parliament</p> <p>The Independent Complaints Officer shall table in the House quarterly reports that contain general, de-identified information about matters dealt with under the Independent Compliance Officer system including:</p> <ul style="list-style-type: none"> • the number and types of complaints received • the number of investigations undertaken

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
<p>Compliance Officer are to be tabled by the Speaker on the next sitting day after receipt.</p>	<ul style="list-style-type: none"> • the number and types of complaints received • the number of investigations undertaken • the number of matters found by an investigator to be unsustainable • the number of matters involving breaches that were dealt with via the rectification procedure, and the rectification action that was taken for these matters (e.g. repayments) • the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, and that were reported to the Assembly Committee but not to the House 	<ul style="list-style-type: none"> • the number of matters found by an investigator to be unsustainable • the number of matters involving breaches that were dealt with via the rectification procedure, and the rectification action that was taken for these matters (e.g. repayments) • the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, that were reported to the Assembly Committee but not to the House • the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, that were reported to the Assembly Committee and to the House • the results of matters reported to the House i.e. type of sanctions imposed.

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<ul style="list-style-type: none"> • the number of matters an investigator found to involve breaches for which a Member failed to undertake the required rectification action, that were reported to the Assembly Committee and to the House • the results of matters reported to the House i.e. type of sanctions imposed. 	
<p>Clause 9 – Annual meeting with relevant committees</p> <p>The Compliance Officer is to meet annually with the Legislative Assembly's Committee on Parliamentary Privilege and Ethics.</p>	<p>Recommendation 38</p> <p>That each calendar year the Assembly Committee meet with:</p> <ul style="list-style-type: none"> • the Independent Complaints Officer • any persons retained from the Panel to conduct investigations of complaints in that calendar year. 	<p>Clause 8 – Annual meeting with relevant committee</p> <p>Each calendar year, the Assembly Committee is to meet with the Independent Complaints Officer and any persons retained from the Panel to conduct investigations of complaints in that calendar year.</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
<p>Topic not covered in the proposed resolution: Sanctions</p> <p>(N.B. There is very little in the proposed resolution concerning sanctions apart from a reference to repayment/reimbursement)</p>	<p>Finding 3</p> <p>That on receiving a report from the Assembly Committee, arising from an investigation under the Independent Complaints Officer system, which details Member misconduct, it would be open to the House to impose sanctions on the Member of a self-protective nature including:</p> <ul style="list-style-type: none"> • seeking an apology from the Member • requiring the Member to provide an explanation at the Bar of the House • admonishing or reprimanding the Member • suspending the Member from the service of the House, depending on the context. 	<p>Not applicable.</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>Finding 4</p> <p>There may also be some scope for financial penalties in support of the operation of the statutory scheme. For example, it may be possible for amendments to be made to the <i>Parliamentary Remuneration Act 1989</i> so that Members who have breached requirements around entitlements – and who have been required by the Independent Complaints Officer or a member of the Panel to repay monies – can be required to pay a small loading e.g. linked to the consumer price index.</p>	
<p>Topic not covered in the proposed resolution: Costing of the Independent Complaints Officer System</p>	<p>Recommendation 39</p> <p>That the Independent Complaints Officer system be thoroughly costed prior to its establishment.</p>	<p>Not applicable.</p>
<p>Topic not covered in the proposed resolution: Review of the Independent Complaints Officer System</p>	<p>Recommendation 40</p> <p>That the Assembly Committee be required to review the Independent Complaints Officer</p>	<p>Clause 9 – Review of the Independent Complaints Officer System</p> <p>The Assembly Committee is required to review the Independent Complaints Officer system</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>system within 12 months of the establishment of the Independent Complaints Officer position, in consultation with key stakeholders. The review should examine how the system is operating in practice and whether any changes are needed, and in particular:</p> <ul style="list-style-type: none"> • the confidentiality provisions applying in respect of complaints and investigations under the system • the timeliness of complaints assessments and investigations conducted under the system. <p>Recommendation 41</p> <p>That the Assembly Committee also be required to review the Independent Complaints Officer system once every parliamentary term, in consultation with key stakeholders, to examine how it is</p>	<p>within 12 months of the establishment of the Independent Complaints Officer position, in consultation with key stakeholders. The Assembly Committee must examine how the system is operating in practice and whether any changes are needed and in particular:</p> <ul style="list-style-type: none"> • the confidentiality provisions applying in respect of complaints and investigations under the system, and • the timeliness of complaints assessments and investigations conducted under the system. <p>The Assembly Committee is also required to review the Independent Complaints Officer system once every parliamentary term, in consultation with key stakeholders, to examine how it is operating in practice and whether any changes are needed.</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>operating in practice and whether any changes are needed.</p>	
<p>Topic not covered in the proposed resolution: Parliamentary privilege</p>	<p>Finding 5</p> <p>The resolution for the proposed Compliance Officer raises questions around confidentiality, protection against defamation and parliamentary privilege. Some of these matters necessitate appropriate safeguards within any independent complaint handling mechanism that is established, to provide confidentiality for a complainant, and to provide for the appropriate use of information supplied for specific purposes. For example, conducting investigations into allegations and accounting for complaints officer activities.</p> <p>The question of how the work of an Independent Complaints Officer and the handling of any records or information held or obtained by him or her, is to be</p>	<p>Not applicable.</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>balanced against parliamentary privilege is a matter that will require detailed review during the implementation of any independent complaint handling mechanism.</p> <p>Consequently, questions concerning parliamentary privilege are matters for the Assembly Committee to examine in light of input from the Independent Complaints Officer and consultation with external bodies on possible protocols and memoranda of understanding, consistent with agreements currently in place with bodies such as the Independent Commission Against Corruption ('the ICAC') and the NSW Police Force.</p> <p>The Assembly Committee notes that this is an area it currently has under review as part of its Inquiry into the Adequacy of Current Procedures to Protect Parliamentary Privilege in</p>	

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>Circumstances where Law Enforcement and Investigative Bodies seek to use Coercive, Intrusive and Covert Investigative Powers.</p>	
<p>Topic not specifically covered by the proposed resolution: Interaction between the Independent Complaint Officer system and the ICAC</p>	<p>Finding 6</p> <p>The Independent Complaints Officer should not provide complaint handling records to the ICAC and the ICAC should not ‘take over’ complaint investigations that the Independent Complaints Officer has commenced.</p> <p>Where the Independent Complaints Officer has concerns that a complaint to him or her may potentially involve corrupt conduct, he or she should cease the complaint investigation and invite the complainant to raise the matter with the ICAC.</p> <p>The Independent Complaints Officer can also determine to draw back from the investigation of a complaint and make a</p>	

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p>notification to the ICAC but should not hand over papers and records obtained under the Independent Complaints Officer system.</p>	
<p>Topic not covered by the proposed resolution: Membership of the Assembly Committee</p>	<p>Recommendation 42</p> <p>That the House consider changes to the composition of the Assembly Committee so that it comprises:</p> <ul style="list-style-type: none"> • five Government Members • two Opposition Members • one Cross Bench Member. <p><i>Having regard to the role that is proposed in this report for the Assembly Committee under the Independent Compliance Officer system (including hearing appeals from Members against investigation findings, and recommending sanctions to the House in relevant cases) it is important that there be an appropriate diversity of membership on the Committee.</i></p>	<p>Not applicable.</p>

The Assembly Committee's Views on the Proposed Resolution for the Establishment of a Parliamentary Compliance Officer

Clause/s of Proposed Resolution that is currently before the House and/or Topic	Recommendations/Findings – Assembly Committee	What a revised resolution should provide instead
	<p><i>The Assembly Committee is currently comprised of six Members – five Government Members and one Opposition Member. In the circumstances, the Assembly Committee considers the membership should increase to eight – five Government, two Opposition and one Cross-Bench.</i></p>	

Appendix One – Terms of Reference

EXTRACT FROM LEGISLATIVE ASSEMBLY VOTES AND PROCEEDINGS NO. 77, THURSDAY 12 NOVEMBER 2020, ENTRY NO. 13

13 STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

Mr Mark Speakman moved, by leave, That:

(1) The Standing Committee on Parliamentary Privilege and Ethics review the following proposed resolution for the establishment of a Parliamentary Compliance Officer, as brought forward by the Speaker, in the same terms as the proposal brought forward by the President in the Legislative Council:

Proposed resolution to establish a position of Compliance Officer

(1) Establishment of position

That this House directs the Speaker to join with the President to make arrangements for the establishment of the position of Compliance Officer, to expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all members and staff.

(2) Functions of position

The Compliance Officer shall have the following functions:

(a) Receive and investigate complaints

The Compliance Officer may receive and investigate complaints confidentially in relation to alleged breaches of the Code of Conduct for Members, not related to conduct in proceedings of the Legislative Assembly or Legislative Council or their committees, including:

- (i) misuse of allowances and entitlements,
- (ii) other less serious misconduct matters falling short of corrupt conduct,
- (iii) allegations of bullying, harassment and other types of grievances,
- (iv) minor breaches of the pecuniary interests disclosure scheme.

(b) Monitoring Code of Conduct for Members

The Compliance Officer shall monitor the operation of the Code of Conduct for Members, the *Constitution (Disclosures by Members) Regulation 1983* and the members' entitlements system, and provide advice about reform to the Committee on Parliamentary Privilege and Ethics as required.

(c) Educational presentations

The Compliance Officer shall assist the Committee on Parliamentary Privilege and Ethics, Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of members about their obligations under the Code of Conduct for Members and the *Constitution (Disclosures by Members) Regulation 1983*.

(d) Informal advisory services

A member or the parliamentary administration may seek confidential advice on a matter of interpretation of the Members' Entitlements scheme, for the purposes of resolving any disagreements.

(3) Amendment of the Code of Conduct for Members

The Code of Conduct for Members is amended by the addition of the following paragraph:

'Clause 10

Members must treat their staff and each other and all those working for Parliament in a manner compatible with a safe workplace, free from harassment.

Commentary

Section 22(b) of the Anti-Discrimination Act 1977 makes it an offence for a member to sexually harass a workplace participant or another member in the workplace, or for a workplace participant to sexually harass a member.'

(4) Term of appointment

(a) Appointment by Presiding Officers

The Presiding Officers shall appoint a Compliance Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of that Parliament and until the mid-term point of the following Parliament. The proposed appointment must have the support of the Privileges Committee in each House. An appointment may be extended for a period of up to six months so as to ensure there is no period in which there is no person holding the position.

(b) Dismissal

The Compliance Officer may only be dismissed by the Chief Executive Officer of the Department of Parliamentary Services with the consent of the Speaker and the President.

(5) Complaints investigations

(a) Protocol

The Compliance Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Committee on Parliamentary Privilege and Ethics and tabled in the House by the Speaker, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Compliance Officer and the Independent Commission Against Corruption and other relevant bodies, subject to relevant legislation (including section 122 of the *Independent Commission Against Corruption Act*).

(b) Investigatory report to the House

Where the Compliance Officer considers that there has been a misuse of an allowance or entitlement, the Compliance Officer may order repayment of

funds misused. Where the Compliance Officer considers that a member has otherwise breached the Code of Conduct for Members, the Compliance Officer may recommend corrective action.

Subject to (c) below, the Compliance Officer will make a report to the House if and only if the member does not comply with the order or accept the recommendation as the case may be, and the complainant consents to the making of a report.

(c) Minor breach

The Compliance Officer on investigating a matter and finding that a member has breached the Code or Regulations, but in his or her opinion considers the breach to have been minor or inadvertent and the member concerned has taken such action to rectify the breach, including the making of appropriate financial reimbursement, the Compliance Officer shall advise in writing the member and the complainant of the finding and the action taken by the member. No report to a House is required in this circumstance.

(d) Declines to investigate

If the Compliance Officer receives a complaint but upon assessment declines to investigate the matter, or upon investigation finds no evidence or insufficient evidence to substantiate a breach of the Code of Conduct for Members or the *Constitution (Disclosures by Members) Regulation*, the Compliance Officer shall advise in writing the member and the complainant of the decision. No report to a House is required in this circumstance.

(e) Expert assistance

The Compliance Officer may engage the services of persons to assist with or perform services for the Compliance Officer, including in the conduct of an investigation, within budget.

(6) Powers of the Compliance Officer

The Compliance Officer shall have power to call for the production of relevant documents and other records from members and officers of the Parliament.

Members, their staff and parliamentary officers are required to reasonably cooperate at all stages with the Compliance Officer's inquiries including giving a full, truthful and prompt account of the matters giving rise to a complaint.

The Compliance Officer may report any failure to comply with these provisions to the Speaker, for determination of the matter by the House.

(7) Keeping of records

The Compliance Officer shall be required to keep records of advice given and the factual information upon which it is based, complaints received and investigations. The records of the Compliance Officer are to be regarded as records of the House and are not to be made public without the prior approval of the Compliance Officer and resolution of the House, except for referral of information between the Compliance Officer and other relevant authorities in accordance with paragraph 12 of the protocol or where the member requests that the records be made public.

(8) Reports to Parliament

In addition to reports on investigations, the Compliance Officer shall be required to report to the Parliament annually on the performance of his or her functions including the number of members who sought his or her advice, the number and types of complaints received and the number of investigations undertaken and the findings of those investigations. All reports from the Compliance Officer are to be tabled by the Speaker on the next sitting day after receipt.

(9) Annual meeting with relevant committees

The Compliance Officer is to meet annually with the Legislative Assembly's Committee on Parliamentary Privilege and Ethics.

(2) A message be sent informing the Legislative Council accordingly.

Question put and passed.

Appendix Two – Code of Conduct for Members

CODE OF CONDUCT FOR MEMBERS

(adopted 5 March 2020)

That this House adopt, for the purposes of section 9 of the *Independent Commission Against Corruption Act 1988*, the following Code of Conduct–

PREAMBLE

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 and conventions of Parliament, and using their influence to advance the common good of the people of New South Wales.

THE CODE

1 Purpose of the Code

The purpose of this Code of Conduct is to assist all Members in the discharge of their parliamentary duties and obligations to the House, their electorates and the people of NSW.

The Code applies to Members in all aspects of their public life.

In complying with this Code, 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 does not apply to Members in their purely private and personal lives.

Members will not act dishonestly for their own personal gain, or that of another person.

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

PROPER EXERCISE OF POWER

2 Improper influence

- a. No member shall act as a paid advocate in any proceeding of the House or its committees.
- b. A Member must not knowingly and 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 any of the following persons has received, is receiving or expects to receive as a consequence:
 - i. The Member;
 - ii. A member of the Member's family;

- iii. A business associate of the Member; or
 - iv. Any other person or entity from whom the Member expects to receive a financial benefit.
- c. A Member must not knowingly and improperly use his or her influence as a Member to seek to affect a decision by a public official including a Minister, public sector employee, statutory officer or officer of a public body, to further, directly or indirectly, the private interests of the Member, a member of the Member's family, or a business associate of the Member.

3 Use of public resources

The use of public resources should not knowingly confer any undue private benefit on the Member or, on any other person, or entity.

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

Commentary

There is a range of information available to Members to assist them in determining the accurate and appropriate use of resources including:

- *The Legislative Assembly Members' Guide;*
- *The Legislative Council Members' Guide;*
- *The Department of Parliamentary Services Members' Entitlements Handbook; and*
- *The Parliamentary Remuneration Tribunal's Annual Report and Determination of Additional Entitlements for Members of the Parliament of New South Wales.*

In addition it is open to any Member to seek advice on these matters from the Clerks of the House, Senior Parliamentary Officers, or the Parliamentary Ethics Adviser.

4 Use of confidential information

Information which Members receive in confidence in the course of their parliamentary duties should be used only in connection with those duties. It must never be knowingly and improperly used for the private benefit of themselves or any other person or persons.

5 Limitation on breach of Code

This code is not breached by reason of a benefit or interest that could be or was advanced or received by the persons set out in 2(b)(i)-(iv) by reason of them being a member of the public or a member of a broad class.

OPENNESS AND ACCOUNTABILITY

6 Disclosure of interests

Members shall fulfil conscientiously the requirements of the House in respect of the Register of Disclosures by Members.

Commentary

The Constitution (Disclosures by Members) Regulation 1983 (the Regulation) requires that Members lodge regular returns, disclosing certain interests such as real property, interests and positions in corporations, income, debts and gifts.

The Regulation also requires that each Clerk compile and maintain a Register of Disclosures for their respective Houses. The purpose of the Register of Disclosures is to promote greater transparency, openness, and accountability in the parliamentary process.

Members' attention is drawn to the following sources of information and advice on compliance with the requirements of the Regulation:

- *Schedule 1 of the Regulation outlines the requirements for each type of interest to be disclosed, and gives examples as to how to make entries on the return;*
- *The respective guides for Members of the Legislative Assembly and the Legislative Council explain the requirements of the pecuniary interest disclosure regime in plain language, with examples where possible; and*
- *It is also open to any Member to seek advice on these matters from the Clerks of the House or the Parliamentary Ethics Adviser.*

In conjunction with the Regulation and this code, the following Standing Orders apply in relation to personal or pecuniary interests:

- *Legislative Assembly Standing Orders 176-7 and Legislative Council Standing Order 113(2) on voting in divisions; and*
- *Legislative Assembly Standing Order 276 and Legislative Council Standing Order 210(10) on participating in committee inquiries.*

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.

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.

Commentary

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.

8 Gifts

- a. Members must take reasonable steps to disclose 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 knowingly accept gifts that could reasonably be expected to give rise to a conflict of interest or could reasonably be perceived as an attempt to improperly influence the Member in the exercise of his or her duties.
- c. Nothing in this Code precludes the giving or accepting of political donations in accordance with the *Electoral Funding Act 2018*.

Commentary

The Constitution (Disclosures by Members) Regulation 1983 (the Regulation) requires that Members lodge regular returns, disclosing certain interests such as real property, interests and positions in corporations, income, debts and gifts.

The Regulation also requires that each Clerk compile and maintain a Register of Disclosures for their respective Houses. The purpose of the Register of Disclosures is to promote greater transparency, openness, and accountability in the parliamentary process.

Members' attention is drawn to the following sources of information and advice on compliance with the requirements of the Regulation:

- *Schedule 1 of the Regulation outlines the requirements for each type of interest to be disclosed, and gives examples as to how to make entries on the return;*
- *The respective guides for Members of the Legislative Assembly and the Legislative Council explain the requirements of the pecuniary interest disclosure regime in plain language, with examples where possible; and*
- *It is also open to any Member to seek advice on these matters from the Clerks of the House or the Parliamentary Ethics Adviser.*

UPHOLDING THE CODE

9 Upholding the Code

Members have a duty to cooperate fully with any processes established under the authority of the House concerning compliance with this Code.

Breaches of this Code may result in action being taken by the House in relation to a Member. A substantial breach of the Code may constitute corrupt conduct for the purposes of the *Independent Commission Against Corruption Act 1988*.

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

Appendix Three – Extracts from Minutes

MINUTES OF MEETING No. 10

Thursday 19 November 2020, 1:15pm

Room 1043, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Michael Johnsen MP

Mr Ron Hoenig MP

Mrs Wendy Tuckerman MP

Mr Kevin Conolly MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, Committees

The Chair opened the meeting at 1:15 pm.

1. Apologies

None received.

2. ***

3. Consideration of referral from the House for the Committee to review the proposed resolution for the establishment of a Parliamentary Compliance Officer

The Chair advised the Committee of the referral from the House on 12 November 2020 to review the proposed resolution for the establishment of a Parliamentary Compliance Officer.

Discussion ensued.

The Committee agreed to review the proposed resolution. The Clerk undertook to provide briefing materials before the end of the year outlining the 'jurisdictional gap' issues and some potential options.

4. ***

5. ***

6. Next meeting

The secretariat to canvass Member availability for early 2021.

Meeting closed at 2.00pm.

MINUTES OF MEETING No. 11

Thursday 11 February 2021, 1:15pm

Room 1254, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Michael Johnsen MP

Mr Ron Hoenig MP

Mrs Wendy Tuckerman MP

Mr Kevin Conolly MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 1:20 pm.

1. Apologies

None received.

2. Confirmation of Minutes

Resolved, on the motion of Mr Johnson, seconded by Mr Hoenig: That the Minutes of Meeting No. 10 be confirmed.

3. Referral from the House for the Committee to review the proposed resolution for the establishment of a Parliamentary Compliance Officer

The Chair advised Members that correspondence had been received from the Chief Commissioner of ICAC, which acknowledged the Committee's correspondence informing ICAC of the referral, and advised that ICAC are happy to work with the Committee on these matters.

The Chair invited the Clerk to distribute a briefing note prepared on the proposal to establish a Parliamentary Compliance Officer and brief the Committee.

Discussion ensued.

The Chair requested that the Clerk provide further briefing materials outlining the 'jurisdictional gap' to be considered by the Committee at its next meeting.

Resolved, on the motion of Mr Johnsen; seconded by Mr Hoenig; that the Committee in conducting its review of the proposed Compliance Officer resolution:

1. Produce a discussion paper outlining the main issues to be considered in establishing a Compliance Officer position for the NSW Parliament.
2. Put the discussion paper to targeted stakeholders for comment, for example, those in Compliance Officer type roles in comparable jurisdictions, such as Victoria and the UK, Clerks of the Australian Parliaments, Members of the NSW Parliament and the Department of Premier and Cabinet. It is not proposed to duplicate the work of the Legislative Council in respect of submissions already made to the Legislative Council, although it would still be open to the Committee to seek information from the same individuals and organisations about any specific issues not canvassed to date.
3. Conduct hearings to take evidence from targeted stakeholders on the issues identified by the Committee and any written submissions they wish to make.

4. ***

5. ***

6. Next meeting

Proposed for Wednesday, 17 February at 1.15pm. The secretariat to canvass Member availability.

Meeting closed at 2.02pm.

MINUTES OF MEETING No. 12

Wednesday 17 February 2021, 1:15pm

Room 1254, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Michael Johnsen MP

Mr Ron Hoenig MP

Mrs Wendy Tuckerman MP

Mr Kevin Conolly MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 1:16 pm.

1. Apologies

Mr Adam Crouch MP (Deputy Chair).

2. Confirmation of Minutes

Resolved, on the motion of Mr Johnsen, seconded by Mr Conolly: That the draft Minutes of Meeting No. 11 be confirmed.

3. ***

4. Referral from the House for the Committee to review the proposed resolution for the establishment of a Parliamentary Compliance Officer

The Chair referred the Committee to the discussion paper outline circulated in the meeting papers and invited the Clerk to brief the Committee on this matter.

The Clerk distributed further briefing material to the Committee concerning matters relevant to the inquiry.

Discussion ensued.

Resolved, on the motion of Mr Johnsen; seconded by Mrs Tuckerman; that:

1. the Committee note the outline for the discussion paper to be put to targeted stakeholders as per the Committee's resolution at its last meeting;
2. the secretariat draft a discussion paper in accordance with the outline, for consideration and approval by the Committee at a later meeting; and
3. the secretariat draft a list of targeted stakeholders to whom the discussion paper could be put, and circulate it to the Committee for consideration prior to its next meeting.

5. ***

6. ***

7. Next meeting

Committee Secretariat to circulate dates for Members' consideration.

Meeting closed at 2.04pm.

MINUTES OF MEETING No. 13

Monday 1 March 2021, 2:00pm

Webex and Room 1254, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Michael Johnsen MP

Mr Ron Hoenig MP

Mrs Wendy Tuckerman MP

Mr Kevin Conolly MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 2:02 pm.

1. Apologies

Mr Adam Crouch MP (Deputy Chair).

2. Confirmation of Minutes

Resolved, on the motion of Mrs Tuckerman, seconded by Mr Johnsen: That the draft Minutes of Meeting No. 12 be confirmed.

3. Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer

The Chair referred the Committee to the draft discussion paper circulated in the meeting papers and invited the Clerk to brief the Committee.

The Clerk advised the Committee that the secretariat had been drafting a list of targeted stakeholders and liaising with some on their availability to meet with the Committee and respond to issues contained in the discussion paper, once approved for distribution.

Discussion ensued.

Resolved, on the motion of Mr Hoenig; seconded by Mrs Tuckerman; that:

1. the Committee note the draft discussion paper to be put to targeted stakeholders as per the Committee's previous resolution.
2. the Secretariat draft questions to the targeted stakeholders and circulate to the Committee for approval so that they can be sent prior to the next meeting.

4. ***

5. Next meeting

Committee Secretariat to circulate a date for Members' consideration.

Meeting closed at 2.40pm.

MINUTES OF MEETING No. 14

Friday 30 April 2021, 11:30 am

Room 1254, Parliament House and Webex

Members present:

Mr Peter Sidgreaves MP (Chair)
Mr Adam Crouch MP (Deputy Chair)
Mr Ron Hoenig MP
Mrs Wendy Tuckerman MP
Mr Kevin Conolly MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly
Ms Carly Maxwell, Clerk-Assistant, House and Procedure
Mr Simon Johnston, Director, House and Procedure
Ms Elspeth Dyer, Manager, House and Procedure
Ms Rickee Murray, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 11:32 am.

1. Apologies

Ms Melanie Gibbons MP.

2. Committee Membership

The Chair noted the appointment of Ms Melanie Gibbons to replace Mr Michael Johnsen, discharged - as reported in the *Legislative Assembly Votes and Proceedings, 25 March 2021, entry no. 18*.

3. Confirmation of Minutes

Resolved, on the motion of Mr Conolly, seconded by Mrs Tuckerman: That the draft Minutes of Meeting No. 13 be confirmed.

4. Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer

The Chair noted that as resolved by the Committee, he wrote to stakeholders on the Committee's behalf, seeking their feedback on targeted questions for the Committee's Compliance Officer inquiry. Responses from the following had been received and circulated to Members:

1. Independent Commission Against Corruption (ICAC)
2. UK Parliamentary Commissioner for Standards (UK Commissioner)
3. Chief Executive, NSW Department of Parliamentary Services (Chief Executive, DPS)
4. Mr John Evans, NSW Parliamentary Ethics Adviser

The Chair also noted that a response from the Victorian Independent Remuneration Tribunal was received during the meeting and that it would be circulated to the Committee.

The Chair referred to the Clerk to distribute a paper listing possible findings and recommendations to be included in the report for the inquiry.

Discussion ensued.

Mr Hoenig departed at 12.32pm.

Mr Crouch departed at 12:41pm.

5. ***

6. Next meeting

Committee Secretariat to circulate a date for Members' consideration.

Meeting closed at 1.26pm.

MINUTES OF MEETING No. 15

Wednesday 12 May 2021, 1:15 pm

Room 1136, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Ron Hoenig MP

Mrs Wendy Tuckerman MP

Ms Melanie Gibbons MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

The Chair opened the meeting at 1:19 pm.

1. Apologies

Mr Kevin Conolly MP.

2. Confirmation of Minutes

Resolved, on the motion of Mrs Tuckerman, seconded by Mr Hoenig: That the draft Minutes of Meeting No. 14 be confirmed.

3. Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer

The Chair referred to the paper previously circulated to Members, listing possible findings and recommendations to be included in the report for the inquiry.

Discussion ensued.

Resolved, on the motion of Mrs Tuckerman, seconded by Mr Crouch: That the Committee further discuss possible findings and recommendations to be included in the report for the inquiry at its next meeting.

4. ***

5. Next meeting

Committee Secretariat to circulate a date for Members' consideration.

Meeting closed at 2.07pm.

MINUTES OF MEETING No. 16

Wednesday 9 June 2021, 1:00 pm

Room 1136, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Ron Hoenig MP (from 1:20pm)

Mrs Wendy Tuckerman MP

Mr Kevin Conolly MP

Ms Melanie Gibbons MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk of the Legislative Assembly

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

Ms Natasha Zammit, PO – Papers, House and Procedure

The Chair opened the meeting at 1:02 pm.

1. Apologies

None.

2. Confirmation of Minutes

Resolved, on the motion of Mr Crouch, seconded by Mrs Tuckerman: That the draft Minutes of Meeting No. 15 be confirmed.

3. Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer

The Chair referred to the papers previously circulated to Members, listing possible findings and recommendations to be included in the report for the inquiry.

Discussion ensued.

Resolved, on the motion of Ms Gibbons, seconded by Mrs Tuckerman: That the Committee further discuss possible findings and recommendations to be included in the report for the inquiry at its next meeting.

4. ***

5. Next meeting

Committee Secretariat to circulate a date for Members' consideration.

Meeting closed at 1:38 pm.

MINUTES OF MEETING No. 17

Monday 21 June 2021, 3:00 pm

Room 1254, Parliament House (and via Webex)

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Ron Hoenig MP

Mrs Wendy Tuckerman MP

Mr Kevin Conolly MP

Ms Melanie Gibbons MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, PO – Projects, Office of the Clerk

Ms Natasha Zammit, PO – Papers, House and Procedure

The Chair opened the meeting at 3:07 pm.

1. Apologies

None.

2. Confirmation of Minutes

Resolved, on the motion of Mrs Tuckerman, seconded by Mr Hoenig: That the draft Minutes of Meeting No. 16 be confirmed.

3. Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer

3.1 Responses from targeted stakeholders: publication

The Chair noted that pursuant to the Committee's resolution he had previously written to targeted stakeholders, seeking feedback on questions related to the Committee's inquiry. The Chair further noted that he had received responses from the following stakeholders, attached to the meeting papers, which had also been circulated to Committee Members by email in April:

5. NSW Independent Commission Against Corruption (ICAC)
6. UK Parliamentary Commissioner for Standards (UK Commissioner)
7. Chief Executive, NSW Department of Parliamentary Services
8. Mr John Evans, Parliamentary Ethics Adviser
9. Secondary Compliance Officer, Victorian Independent Remuneration Tribunal.

In addition, the Chair noted that all stakeholders had indicated there are no concerns with the responses being published.

Resolved, on the motion of Mr Hoenig, seconded by Mrs Tuckerman: That the Committee publish on its webpage correspondence received from the following targeted stakeholders in response to the Committee's questions related to its inquiry to review the proposed resolution for the establishment of a Parliamentary Compliance Officer:

- NSW Independent Commission Against Corruption (ICAC)
- UK Parliamentary Commissioner for Standards (UK Commissioner)
- Chief Executive, NSW Department of Parliamentary Services
- Mr John Evans, Parliamentary Ethics Adviser
- Secondary Compliance Officer, Victorian Independent Remuneration Tribunal.

3.2 Draft Report

The Chair referred to the draft report, *Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer*, circulated prior to the meeting and invited the Manager, House and Procedure to speak to the draft Findings and Recommendations.

Mr Hoenig departed at 3:30 pm.

The Clerk spoke further to the draft report.

Discussion ensued.

4. ***

5. Next meeting

Proposed for Wednesday, 23 June 2021 at 5.15pm. Committee Secretariat to circulate confirmation.

Meeting closed at 3:54 pm.

MINUTES OF MEETING No. 18

Wednesday 23 June 2021, 5:15 pm

Room 1043, Parliament House (and via Webex)

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Kevin Conolly MP

Mrs Wendy Tuckerman MP
Ms Melanie Gibbons MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly
Mr Simon Johnston, Director, House and Procedure
Ms Elspeth Dyer, Manager, House and Procedure
Ms Rickee Murray, PO – Projects, Office of the Clerk
Ms Natasha Zammit, PO – Papers, House and Procedure

The Chair opened the meeting at 5:16 pm.

1. Apologies

Mr Adam Crouch MP and Mr Ron Hoenig MP.

2. Confirmation of Minutes

Resolved, on the motion of Mr Conolly, seconded by Mrs Tuckerman: That the draft Minutes of Meeting No. 17 be confirmed.

3. Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer

The Chair referred to the draft report, *Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer*, as circulated to Committee Members on 21 June 2021.

Discussion ensued.

The Clerk referred the Committee to the Executive Summary of the draft report, circulated prior to the meeting.

Meeting interrupted for a Division, 5:38 pm to 5:44 pm.

Discussion ensued.

Resolved, on the motion of Mrs Tuckerman, seconded by Mr Conolly: That the Committee note the draft Executive Summary to be further considered during report deliberations.

4. ***

5. Next meeting

Proposed for next week via Webex. Committee Secretariat to circulate a date for Members' consideration.

Meeting closed at 5:56 pm.

UNCONFIRMED MINUTE EXTRACTS OF MEETING No. 19

Wednesday 14 July 2021, 9:00 am
Via Webex videoconference

Members present:

Mr Peter Sidgreaves MP (Chair)
Mr Adam Crouch MP (Deputy Chair)
Mr Ron Hoenig MP
Mr Kevin Conolly MP
Mrs Wendy Tuckerman MP
Ms Melanie Gibbons MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly
Mr Simon Johnston, Director, House and Procedure
Ms Elspeth Dyer, Manager, House and Procedure
Ms Rickee Murray, PO – Projects, Office of the Clerk
Ms Natasha Zammit, PO – Papers, House and Procedure

The Chair opened the meeting at 9:04 am.

1. Apologies

None received.

2. Confirmation of Minutes

Resolved, on the motion of Mr Hoenig, seconded by Mrs Tuckerman: That the draft Minutes of Meeting No. 18 be confirmed.

3. ***

4. Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer

The Chair referred to the draft report, *Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer*, circulated to Committee Members by e-mail on 12 July 2021.

Discussion ensued.

Resolved, on the motion of Mr Hoenig, seconded by Mr Crouch: That the Committee consider the Chair's draft report *in globo*, commencing with consideration of the proposed amendments to Recommendations 33 and 34, previously circulated by Mr Conolly.

Chair's draft report proposed.

Mr Conolly spoke to his proposed amendments.

Upon which, Mr Conolly moved, seconded by Mr Hoenig:

That the word 'required' be deleted from the first paragraph of recommendation 33 and replaced with the word 'stipulated'.

Question put: that the amendment be agreed to.

Question resolved in the affirmative.

Upon which, Mr Conolly moved, seconded by Mr Hoenig:

That the words 'or declined to do so pending appeal' be inserted into the first paragraph of recommendation 33, after the words 'rectification action'.

Question put: that the amendment be agreed to.

Question resolved in the affirmative.

Upon which, Mr Conolly moved, seconded by Mr Crouch:

That the word 'required' be deleted from the first dot point of recommendation 34 and replaced with the word 'stipulated'.

Question put: that the amendment be agreed to.

Question resolved in the affirmative.

Upon which, Mr Conolly moved, seconded by Mr Crouch:

That the following words be deleted from recommendation 34 'However, it also be open to the Assembly Committee to decide that a report to the House and/or sanctions are not warranted in a particular case e.g. where the Committee disagrees with the investigator's findings' and be replaced with a dot point and the words 'have the power to decide that a report to the House and/or sanctions are not warranted in a particular case e.g. where the Committee disagrees with the investigator's findings'.

Question put: that the amendment be agreed to.

Question resolved in the affirmative.

The Clerk requested that the Secretariat have an opportunity to further review the sections of the report concerning the legal advice obtained from the Crown Solicitor, with a view to circulating for the Committee's consideration minor amendments to make explicit aspects of the advice. Providing there is consensus among Members on any proposed minor amendments circulated by the Clerk via email after the meeting, the changes would be included in the final report for tabling.

Discussion ensued.

Resolved, on the motion of Mr Hoenig, seconded by Mr Conolly that:

- i. the Committee adopt the Chair's draft report as amended;
- ii. the Clerk be permitted to do a final review of the report as adopted by the Committee, in particular in relation to those sections dealing with the legal advice from the Crown Solicitor, and distribute any proposed amendments to Members via email for consideration;
- iii. if Members concur with any amendments proposed and circulated by the Clerk, the report be adopted, as further amended;
- iv. any amendments included by concurrence be attached to the minutes of this meeting;
- v. the report, as finally adopted, be signed by the Chair and tabled out of session;

- vi. the Committee Secretariat be permitted to make appropriate final editing and stylistic changes as required;
- vii. once tabled, the report be published on the Committee's webpage.

Mr Hoenig thanked the Clerk and the Secretariat for their support in the conduct of the inquiry.

5. ***

6. Next meeting

Committee Secretariat to circulate a date for Members' consideration.

Meeting closed at 9:31 am.

ATTACHMENT TO MINUTES OF MEETING NO. 19: AMENDMENTS PROPOSED AND CIRCULATED BY THE CLERK OF THE LEGISLATIVE ASSEMBLY FOLLOWING MEETING NO. 19, 14 JULY 2021, AND INCLUDED IN THE REPORT BY CONCURRENCE

- That the following words be inserted at the end of paragraph 1.44: 'However, while sexual assault, stalking and harassing phone calls constitute criminal offences, harassment under the *Anti-Discrimination Act 1977* is unlawful and not criminal. Hence, it would be more correct for the policy to refer to unlawful conduct under the *Anti-Discrimination Act 1977* rather than to offences. Legal advice confirms that the majority of remedies available under the *Anti-Discrimination Act 1977* are in the nature of civil remedies while contraventions of the WHS Act are, in general, criminal offences. For example, harassment such as to constitute a failure to ensure the health and safety of workers could constitute a contravention of the WHS Act.'
- That paragraph 1.47 be amended by deleting the word 'offences' and inserting instead 'unlawful conduct under the *Anti-Discrimination Act 1977*'.
- That paragraph 1.59 be amended by deleting the word 'indicates' and inserting instead the word 'notes'.
- That paragraph 1.59 be amended by deleting the words 'notwithstanding the vicarious liability provisions in sections 24 and 25 of the MOPS Act, Members would not be exempt from laws that expressly apply to an 'employer' in respect of the exercise of employer functions by a Member on behalf of the State pursuant to the MOPS Act' and inserting instead 'the vicarious liability protection of section 24 of the MOPS Act is relevant only in respect of torts committed by a Member of Parliament. As unlawful conduct prohibited by the *Anti-Discrimination Act 1977* is not a tort, the advice indicates that the protection would not be applicable'.
- That the first sentence of paragraph 1.60 be amended by inserting after the word 'that' the words ',with respect to the operation of section 25 of the MOPS Act,'.
- That the first sentence of paragraph 1.63 be amended to delete the words 'However, the' and to insert instead the word 'The'.

- That the second sentence of the first dot point of paragraph 1.63 be amended by inserting the words 'but are, in general, criminal offences' after the word 'tortious'.
- That all words in paragraph 1.65 'And more broadly, it would appear that there is capacity under a number of pieces of NSW legislation for Members to be held liable, including criminally liable, should they engage in workplace bullying or inappropriate behaviour such as harassment, discrimination and sexual harassment' be deleted and the following words instead inserted 'In conclusion, the legal advice indicates that there is capacity for Members to be held liable for unlawful conduct under the *Anti-Discrimination Act 1977* and potentially criminally liable under the provisions of the WHS Act'.
- That paragraph 1.66 be amended by deleting 'However, as noted, while' and inserting instead 'While'.

Table Listing Examples of Standard Rectification Actions that could apply under the Independent Complaints Officer System

Appendix Four – Table Listing Examples of Standard Rectification Actions that could apply under the Independent Complaints Officer System

Matter	Possible standard rectification action
<p>Minor breaches surrounding use of additional entitlements determined by the Parliamentary Remuneration Tribunal*</p>	<p>Repayment of monies incorrectly claimed (<i>n.b. as detailed in Chapter One, where minor entitlements breaches have occurred, DPS can currently request repayment of expense claims submitted</i>).</p> <p>There could also be a scheme under which Members had to pay a small loading (perhaps linked to the Consumer Price Index) when making their repayment for monies incorrectly claimed. There would need to be a legislative amendment – for example, to the <i>Parliamentary Remuneration Act 1989</i> – to achieve this.</p>
<p>Inadvertent failure to disclose an interest as required under the <i>Constitution (Disclosures by Members) Regulation 1983</i>#</p>	<p>Lodgement of a return disclosing the interest as required under the <i>Constitution (Disclosures by Members) Regulation 1983</i>; and Clerk of the Legislative Assembly to amend the Register of Disclosures s/he is required to keep under the Regulation.</p> <p>This may require legislative amendment to the <i>Constitution Act 1902</i> to supplement the current section 14A(2) that deals with more serious cases of disclosure failures, and may require amendment to the <i>Constitution (Disclosures by Members) Regulation 1983</i>.</p>
<p>Lower level bullying and inappropriate behaviour complaints+</p>	<p>Training, behavioural agreements and apologies by the Member to the complainant.</p>

* In more serious cases where there is prima facie evidence of fraud or other criminal conduct, matters would not be dealt with by the Legislative Assembly Compliance Framework but would be referred to relevant agencies e.g. the NSW Police Force or the ICAC.

Table Listing Examples of Standard Rectification Actions that could apply under the Independent Complaints Officer System

In more serious cases where a Member has wilfully contravened the *Constitution (Disclosures by Members) Regulation 1983*, this could be dealt with under section 14A(2) of the *Constitution Act 1902* (rather than under the Legislative Assembly Compliance Framework) which provides that either House can declare a Member's seat vacant in such circumstances.

+ In more serious cases reaching the relevant prima facie legal thresholds matters may be referred to relevant agencies e.g. the NSW Police Force or the Anti-Discrimination Board, as discussed in this report.