

Committee of Privileges and
Members' Interests

21.02.2011

Ms Anna Burke MP
Chair
Standing Committee of Privileges and Members' Interests
PO Box 6021
Parliament House
CANBERRA ACT 2600

11 February 2010

Dear Ms Burke

I refer to the Committee's inquiry into a draft code of conduct for Members of the Australian Parliament.

I understand that Mr Russell D. Grove, Clerk of the Legislative Assembly, has made a submission to the inquiry which outlines the development and amendment of the Code of Conduct for Members of the Parliament of New South Wales.

By way of submission, I would like to draw your Committee's attention to the terms of reference for the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics (the Committee) a copy of which I attach.

I would also like to provide you with two documents which arise from the Committee's functions of reviewing the Code of Conduct and carrying out educative work in relation to ethical standards applying to Members of the Legislative Assembly.

The first of these is a copy of the Committee's third review of the Code of Conduct which was tabled in December 2010 and the second document is a briefing paper on the issue of training for Members on the Code of Conduct which was considered by the Committee in response to a request by Speaker Torbay. The issues relate to recommendations made by the Independent Commission Against Corruption in its report on Operation Corinth.

Please note that the briefing note was not tabled in the House prior to prorogation and accordingly I would request that it only be given limited circulation to the Members of your Committee for the purposes of their inquiry.

Finally, by way of a more personal perspective on parliamentary standards and ethics, I enclose a transcript of my August 2009 evidence to the Victorian Parliament Law Reform Committee.

As conveyed informally to the Deputy Clerk, Mr Elder, I would be happy to assist the Committee further with its inquiry, for example, by giving evidence or participating in a round table, subject to any existing commitments I may have prior to the State election.

Yours sincerely

Mr Paul Pearce MP,
Chair

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- Terms of Reference establishing the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics;
- Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Report on a Review of the Code of Conduct, Aspects of Disclosure of Interests and Related Issues*, December 2010;
- Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Briefing Paper: Training for Members on the Code of Conduct*, December 2010; and
- Mr Paul Pearce MP, transcript of evidence, Parliament of Victoria Law Reform Committee, Review of the *Members of Parliament (Register of Interests) Act 1978*, Melbourne 17 August 2009.

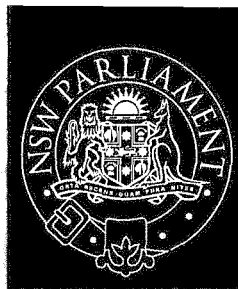


Terms of Reference Establishing Committee

See Part 7A Division 2 of the Independent Commission Against Corruption Act 1988 and Resolution of the Legislative Assembly passed 4 December 2003, V&P Entry No 7. Committee of the 54th Parliament established by resolution 20 June 2007.

The functions of the Standing Committee on Parliamentary Privilege and Ethics are to consider and report upon any matters relating to privilege which may be referred to it by the House, and to be the designated committee for the purpose of exercising the functions in Part 7A Division 2 of the Independent Commission Against Corruption Act 1988, relating to Parliamentary Ethical Standards including the Review of the Code of Conduct.

LEGISLATIVE ASSEMBLY

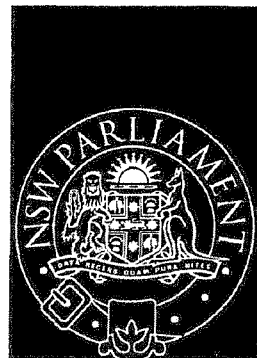


Standing Committee on Parliamentary Privilege and Ethics

December 2010

Report on Review of the Code of Conduct,
Aspects of Disclosure of Interests
and Related Issues





LEGISLATIVE ASSEMBLY

Standing Committee on Parliamentary Privilege and Ethics

REPORT ON REVIEW OF THE CODE OF CONDUCT,
ASPECTS OF DISCLOSURE OF INTERESTS AND RELATED ISSUES

December 2010

REPORT ON INQUIRY INTO THE REVIEW OF THE CODE OF CONDUCT, ASPECTS OF DISCLOSURE OF INTERESTS AND RELATED ISSUES

TABLE OF CONTENTS:

MEMBERSHIP & STAFF 2

CHAIRMAN'S FOREWORD 3

CHAPTER 1: Review of the Code of Conduct 5

CHAPTER 2: Recommendations for amendment of the Code
and Regulation 7

CHAPTER 3: Other issues raised 19

APPENDICES:

APPENDIX 1: The Code of Conduct

APPENDIX 2: Excerpts from Minutes of meetings of the Committee

APPENDIX 3: Submission from the Independent Commission Against
Corruption

APPENDIX 4: Submission from Privacy NSW

APPENDIX 5: Submission from the Public Interest Advocacy Centre

MEMBERSHIP AND STAFF

Chairman	Mr Paul Pearce MP, Member for Coogee
Members	Hon Richard Amery MP, Deputy-Chairman, Member for Mount Druitt Mr Phillip Costa MP*, Member for Wollondilly Mr Malcolm Kerr MP, Member for Cronulla Ms Lylea McMahon MP, Member for Shellharbour Mr Gerard Martin* MP, Member for Bathurst Ms Clover Moore MP, Member for Sydney Mr Frank Terenzini MP*, Member for Maitland Mr John Turner MP Member for Myall Lakes Hon Graham West MP*, Member for Campbelltown * Mr Gerard Martin appointed to serve in the place of Mr Phillip Costa MP, discharged, on 24 September 2008. * Hon Graham West appointed to serve in the place of Mr Frank Terenzini MP, discharged, on 24 June 2010.
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CHAIRMAN'S FOREWORD

This report represents the third review of the Code of Conduct for Members of Parliament since it was first adopted on 5 May 1988.

The Code was comprehensively reviewed in 2006, and an amended Code adopted in 2007. At the same time the Constitution (Disclosures by Members) Regulation 2983 was also amended to provide for members to disclose any secondary employment related to their position as a Member.

The Committee's current inquiry fulfills its statutory obligations under s72E(5) of the Independent Commission Against Corruption Act 1988 to review the Code once every four years. The Committee also took the opportunity to seek submissions from Members and relevant agencies about suggested amendments to the Code, to ensure that it remains current.

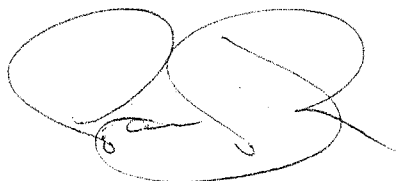
The Committee found that the current provisions of the Code of Conduct remain appropriate.

One reform recommended by the Committee is that the *Constitution (Disclosures by Members) Regulation 1983* be amended to enable the Register of Members' Interests to be placed on the internet, subject to addressing the privacy issues previously raised by the Committee, and safeguards suggested by Privacy NSW.

The Committee has also recommended additional annual training for Members, possibly on-line, on the Code of Conduct, the registration of interests requirements, and the relevant conflict of interests provisions in the Standing Orders of the Legislative Assembly.

I thank the individuals and organisations that made submissions to the Inquiry, and also the Parliamentary Ethics Adviser, Mr Ian Dickson, who met with the Committee in November 2010 to discuss the review of the Code, and related issues.

I commend the report to the House.

A handwritten signature in black ink, appearing to read 'Paul Pearce', with a large, stylized flourish extending from the end of the signature.

Paul Pearce, MP
Committee Chairman

CHAPTER 1: Review of the Code of Conduct

Under s72E(5) of the Independent Commission Against Corruption Act 1988, every 4 years the Committee is required to review the Code of Conduct for Members. The last review of the Code of Conduct was undertaken in 2006, when the Committee reviewed and agreed to proposed amendments to the Code of Conduct and the Constitution (Disclosure by Members) Regulation.

In May 2010, the Standing Committee on Parliamentary Privilege and Ethics commenced the current inquiry into the Code of Conduct for members, including aspects of the pecuniary interest disclosure regime for members under the Constitution (Disclosures by Members) Regulation 1983. The Legislative Council Privileges Committee held a concurrent inquiry. The current Code of Conduct, as adopted by the Legislative Assembly on 8 May 2007 (and amended on 7 June 2007), is at Appendix 1.

The Committees have consulted widely seeking comment on the Code of Conduct and the operation of the New South Wales pecuniary interest disclosure regime.

In particular, the Committees sought submissions on the following issues:

- Whether the Code remains current, and any suggested amendments to the Code;
- Whether the pecuniary interests disclosure regime requires amendment. For example, clause 11 which pertains to contributions to travel is unclear particularly in relation to discretionary disclosures of flight or other travel upgrades.
- Whether the Constitution (Disclosures by Members) Regulation 1983 should extend to a requirement to disclose interests of a spouse/partner;
- Whether the Register of Disclosures by Members should be published on the Parliament's website;
- The recommendations contained in the recent ICAC Issues Paper on the nature and management of lobbying in New South (<http://www.icac.nsw.gov.au/preventing-corruption/call-for-submissions-lobbying-in-nsw/lobbying-in-nsw-issues-paper>);
- The educative function of the Committee on Parliamentary Privilege and Ethics;
- Any other matter pertaining to ethical standards and conflict of interest.

Three substantive submissions were received, from the Independent Commission Against Corruption, the Public Interest Advocacy Centre and Privacy NSW. Copies of the submissions form Appendices 3,4 and 5. Other matters referred to in this report were raised by other matters raised by the Parliamentary Ethics Adviser, Mr Ian Dickson and the Speaker of the Legislative Assembly, the Hon Richard Torbay MP.

Chapter 2 of this report discusses the matters raised in the submissions, by reference to the relevant clause in the Code or Regulation. Chapter 3 addresses other matters raised in the submissions, such as the function of the Committee, and the induction and ethics education of members in general.

CHAPTER 2: RECOMMENDATIONS FOR AMENDMENT OF THE CODE AND REGULATION

This chapter reviews the recommendations made by the Independent Commission Against Corruption, commencing with the amendments proposed to Clause 1 of the Code of Conduct. The ICAC submission forms Appendix 3. Appendices 4 and 5 are the submissions from the Public Interest Advocacy Centre and Privacy NSW.

In the following chapter, the relevant clause of the Code of Conduct referred to in the ICAC recommendations appears in italics before the ICAC recommendation.

Code of Conduct Clause 1: Disclosure of conflict of interest

<p>THE CODE OF CONDUCT</p> <p>1 <i>Disclosure of conflict of interest</i></p> <p>(a) <i>Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.</i></p> <p>(b) <i>This may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner.</i></p> <p>(c) <i>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.</i></p>
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ICAC Recommendation 1:

The Commission recommends that the term "private financial interests" in clause 1(a) be clarified so that it is made clear these include the financial interests of family (including de facto partners), friends or associates whose financial interests may give rise to a conflict of interest for Members by virtue of their relationship.

ICAC Recommendation 2:

The Commission recommends that clause 1 of the Code be amended to require Members to take reasonable steps to declare any other material benefit which a Member receives which might reasonably be thought by others to influence his or her actions, speeches, or votes in Parliament, or actions taken in his or her capacity as a member of Parliament, or which the Member considers might be thought by others to influence his or her actions in a similar manner, even though the Member receives no financial benefit.

These recommendations seek to expand the range of matters required to be disclosed by members.

The ICAC notes that Clause 1(a) of the Code places the emphasis on only "private financial interests", thereby excluding members' family, friends or associates whose financial interests may give rise to a conflict of interest for members by virtue of their relationship. The ICAC also notes that local councillors and members of other

Parliaments, such as the United Kingdom House of Commons, South Australia and the ACT Legislative Assembly are required to declare family members' conflicts of which they have knowledge.

The Committee observed that the ICAC had previously recommended extending the scope of interests to be reported by members, and that the issue of disclosure of family members' interests had been extensively discussed, both at the initial drafting of the Code of Conduct, and on each occasion that the Code had been reviewed by Committee members, including during an earlier Parliament when the Committee included representatives of the public. The Committee has been consistent in its view that the Code and the current regulatory scheme, which carry a heavy penalty, and which are subject to oversight by the Independent Commission Against Corruption, sufficiently meet the purpose of a reporting scheme. Unlike some other jurisdictions, the NSW scheme publishes the complete return, unedited, as it was submitted by the member. In this regard, the Committee acknowledges that a benefit accruing to a family member has a similar potential to raise a conflict as a benefit accruing to a member alone. As recently as 2007 Clause 2 of the Code of Conduct was amended to provide that a member must not knowingly or improperly use or act in parliamentary proceedings for the benefit of family, a business associate or any other person or entity from whom the members expects to receive a financial benefit.

The Committee further observed that the fact that Clauses 1(a) and 1(c) restrict the scope of the received benefit to only the member, as opposed to "family members, friends or even favoured causes", reflects the original Committee's concerns that broadening the category of beneficiaries would be unworkable. Members are expected to be fully apprised of their own range of interests, but may not have a complete knowledge of what benefits or advantages might accrue to their family or friends as a result of a member's actions in the Parliament. The view of the current Committee is that a member who pursued an agenda that was designed to benefit family or friends should be seen as culpable as one who pursued it for personal gain, and this is reflected in the amendment made in 2007 to extend the ambit of Clause 2 of the Code.

In a meeting with Mr Ian Dickson, the Parliamentary Ethics Adviser, Mr Dickson identified various difficulties that could arise if partners' interests were among the matters required to be disclosed. The committee noted that spouses were separate from the life of members, and separately engaged. In response to a question from the committee about the ICAC recommendation to extend reporting requirements to family and associates, as occurred in local government, Mr Dickson confirmed that the position and powers of back-benchers in State Parliament was different from that of local councillors. Mr Dickson further observed that the disclosure of a partner's pecuniary interests might have the potential to damage the interests of others not also in public life such as business associates or shareholders.

The Committee also noted the submission from the Public Interest Advocacy Centre which recommended that the Committee give consideration to extending reporting requirements to family members, in the same way that the Federal Office of Prime Minister and Cabinet has in the Standards of Ministerial Ethics.

Committee's view:

This Committee upholds the view of prior committees, that to be required to regularly update, at 6 monthly intervals, potential conflicts of interest that might arise due to interests of family members, de facto partners, friends or associates would be unduly onerous, and intrusive into the private affairs of people who have not been elected to

Parliament. The Committee does not support placing an obligation on the spouse, children or extended family of a member, to lodge a declaration of interests, or be interrogated by a member as to their pecuniary or other interests. The Committee notes that the reporting requirements for Ministers in New South Wales are guidelines which are appropriately issued by the Premier.

With respect to the recommendation to extend the provision of Clause 2 to a requirement to declare any "material benefit" this Committee upholds the view of earlier Committees that the phrase is extremely broad and difficult to define with precision.

ICAC Recommendation 3:

The Commission recommends that clause 1(b) of the Code be amended to make it clear that disclosure of a conflict of interest when speaking on a matter in the House or a Committee should occur in the House or Committee before the member speaks on the matter.

Clause 1(b) of the Code currently provides for members to declare their interests on the Register of Disclosures, or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner. Clause 1(b) provides a range of alternative methods of disclosing an interest. The Parliament, in agreeing to Clause 1(b), wished to ensure that members who failed to declare an interest prior to debate, in a case where the interest was overtly public, but did not fall within the scope of the Regulation, were not caught in technical breach of the Code.

The ICAC has previously reported on this recommendation in its September 2003 report on Regulation of secondary employment for Members of the Legislative Assembly.

The recommendations in that report were comprehensively considered by the Committee on Parliamentary Privilege and Ethics of the 53rd Parliament. Consequently the Code was extensively amended in 2006 to extend and strengthen Clauses 1 and 2.

Committee's view:

This Committee considers that Clauses 1 and 2, as amended in 2007, remain appropriate.

ICAC Recommendation 10:

Insert into the Code a direct reference to the Standing Order on disqualification from voting.

ICAC recommendation 10 also concerns avoidance of conflict of interests during parliamentary proceedings.

The ICAC submission notes that Standing Orders 176 and 177 of the Legislative Assembly effectively disqualify a member from voting on a matter where they have a direct pecuniary interest not held in common with other citizens of the State. The ICAC recommends that it would be preferable for the Code to include specific reference to this Standing Order in the Code.

Decisions of the Chair indicate that Standing Orders 176 and 177 have a body of precedent which is well understood by members. Standing Orders 176 and 177 have

long been interpreted as meaning that members are not prohibited from voting on a matter where they hold a direct financial interest in common with a class of citizens, for example such circumstances as being a farmer, a member of a particular union, or holding a nursing qualification. The interpretation of these Standing Orders has not been extended to a member who might be anticipating a "material benefit".

Committee's view:

The view of the Committee to date has been that the existing provisions of the Code sufficiently cover the ground.

However, the Committee does agree that Members should be reminded of these Standing Orders on a regular basis. Accordingly, the Committee supports incorporating the Standing Orders that pertain to conflicts of interests into induction and training materials, and ethics information being prepared for new members of the 55th Parliament.

Code of Conduct Clause 2: Bribery

<p>2 <i>Bribery</i></p> <p>(a) <i>A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which the member has received, is receiving or expects to receive.</i></p> <p>(b) <i>A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which any of the following persons has received, is receiving or expects to receive:</i></p> <p> (i) <i>A member of the Member's family;</i></p> <p> (ii) <i>A business associate of the Member; or</i></p> <p> (iii) <i>Any other person or entity from whom the Member expects to receive a financial benefit.</i></p> <p>(c) <i>A breach of the prohibition on bribery constitutes a substantial breach of this Code of Conduct.</i></p>

ICAC Recommendation 4:

The Commission recommends the heading of clause 2 be changed to "Paid advocacy" or something similar.

This clause was amended following the review of the Code in 2006, in line with a submission received from the Auditor General.

The Committee considers that the change suggested by the ICAC is unwarranted. Clause 2(c) specifically refers to "the prohibition on bribery". As a heading for the

clause, the term "Bribery" is more easily understood than "Paid advocacy", which term implies a lesser scope.

ICAC Recommendation 5:

The Commission recommends that clause 2 be amended to extend the prohibition on paid advocacy by members to the promotion of matters to public officials outside the Parliament or its Committees and that the Constitution (Disclosure by Members) Regulation 1983 be amended to the same purpose.

ICAC Recommendation 6:

The Commission recommends that the Constitution (Disclosure by Members) Regulation 1983 be amended so that it is consistent with the clause 2 of the Code of Conduct (as amended in accordance with Recommendations 4 and 5).

These recommendations relate to lobbying activities and conflicts arising from, secondary employment by Members of Parliament relating to, or arising from the members' position as a member of Parliament.

Clause 15A of the Regulation is black-letter law, and has been drafted in a legalistic style with multiple interrelated sub-sections and embedded definitions. In contrast, the aim of the Code of Conduct is to serve as a guide to standards and conduct. For the Code to service its purpose, the Committee does not support amending the Code in such a way as it would become more technical or overly legalistic.

Committee view:

ICAC Recommendations 4, 5 and 6 are not supported.

Code of Conduct Clause 5: Confidential Information

ICAC Recommendation 7:

The Commission recommends widening the scope of clause 5 to include misuse of confidential information generally.

5 Use of confidential information

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

The ICAC and Privacy NSW expressed concern regarding potential misuse of confidential information. There is further discussion of the broader application of privacy principles to members' correspondence and representations in Chapter 3 of this report. The issue of the scope of confidentiality or secrecy provisions, and their impact on the public interest inherent in members' freedom of speech in the House or committees, has been the subject of discussion within the committee in the wake of the Damien Green MP matter in the UK Parliament.

Committee view:

The Committee does not support this recommendation by the ICAC which could unduly restrict Members' freedom of speech in the House.

ICAC Recommendation 8:

The Commission recommends making direct reference in clause 6 to the relevant definitions of what constitutes party activities as set out in the relevant Parliamentary Remuneration Tribunal determinations.

Code of Conduct Clause 6: Duties of a member of Parliament

6 Duties as a Member of Parliament

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

Clause 6 of the Code was inserted into the Code to clarify that certain party political activities are able to be considered to be within the legitimate parliamentary duty of a member.

The Parliamentary Remuneration Tribunal has given guidance on what constitutes a "parliamentary activity" for the purposes of the Logistic Support Allocation. The definition is included in the *Members Handbook*, for example, some party activities (eg policy seminars) are considered to fall within the definition of a parliamentary activity.

The ICAC has, by separate letter to the Speaker, made other related recommendations in relation to defining "campaigning" activities. As a consequence, the Speaker has written to the Committee requesting it to investigate definitions of "campaigning", in relation to the job duties of Electorate Officers who support members in their parliamentary duties. ICAC Recommendation 8 will be considered in the context of the Committee's inquiry into the definitional issues.

The Public Interest Advocacy Centre (PIAC) also recommended that principles and regulations should apply to ensure that parliamentary entitlements cannot be used for politically partisan purposes and that any changes to the use of those resources are to be subject to independent evaluation. PIAC specifically recommended that members of the NSW Parliament report publicly on the use of their parliamentary entitlements.

Committee view:

ICAC Recommendation 8 will be considered in the context of the Committee's inquiry into the definitional issues raised by the ICAC in reporting on Operation Corinth.

Code of Conduct Clause 7: Secondary employment or engagements

ICAC Recommendation 9:

The Commission recommends that clause 7 of the Code be amended to require Members to make the disclosures referred to in that clause when voting on a matter as well as when participating in a debate on the matter, unless the disclosure has previously been made in the pecuniary interest register.

7 Secondary employment or engagements

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

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

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

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

Pursuant to section 15A of the *Constitution (Disclosures by Members) Regulation* Members are required to report at six monthly intervals on secondary employment. Standing Orders currently require a member to refrain from voting where they have a direct pecuniary interest not held in common with other citizens of the State.

The ICAC Report on Lobbying at pages 33–34 notes that the Commission has recommended that the Members Code of Conduct be amended to extend the prohibition on paid advocacy by MPs to the promotion of matters to public officials outside the parliament or its committees, and that the Regulation be amended to conform to the amended Members' Code. Currently the Regulation requires members to declare any income derived from a service arising from or relating to their position as an MP (Clause 7A). The Code's prohibition on paid advocacy (Clause 7) extends only to payments or benefits received for promoting or voting on a matter "in the Parliament or its Committees".

The Committee has been monitoring the ICAC review of lobbying, and has considered the ICAC report on lobbying at its meeting of 23 October 2010. The Committee had noted the Presiding Officers' submission to the ICAC regarding the impact of the Government's guidelines to backbenchers on lobbying, on members' roles and functions.

The Parliamentary Ethics Adviser, who was consulted by the ICAC in the course of its inquiry, briefed the Committee on 24 November on a number of issues pertinent to his role, and the role and function of members. Mr Dickson advised that he had spoken with ICAC officers about the limitations on post-separation employment of ministers, and the issue of retired MPs going directly into the role of a lobbyist. The Public Interest Advocacy Centre similarly recommended that regulations be introduced to prevent members of parliament from undertaking lobbying activities for 18 months after leaving office and from using information they had access to in their position, which was not publicly available. PIAC also recommended that members of Parliament be required to meet the same reporting requirements as lobbyists in NSW.

The committee's view is that the ICAC's proposed 18 month restriction on members becoming a lobbyist is too long a period of restraint. The committee noted that the Government is currently considering the recommendations contained in the ICAC Report on its Investigation into Corruption Risks involved in Lobbying in NSW, and awaits its response.

Committee's view:

The current provisions in the Regulation adequately address the need for transparency in avoiding conflicts of interest.

ICAC recommendation 10:

The Commission recommends that the Code be amended by including a new provision that Members are not to vote on matters where they have a financial conflict of interest.

Standing Orders 176 and 177 already provide that a Member is not able to vote on any question in which the Member has a direct pecuniary interest not held in common with other citizens of the State.

The *Constitution (Disclosures by Members) Regulation* requires members to register a range of interests that could be perceived as capable of influencing their decision making in the House or committees, or other legislative or policy activity.

Clause 1(c) of the Code reflects the current registration regime, in stating:
A conflict of interest does not exist where the member is only affected as a member of a broad class.

The principle underlying the Standing Orders, that a member is only prevented from voting in cases where there is a direct and highly personal, pecuniary interest involved, reflects the policy that declaration of that type of interest, and the resultant transparency, would be sufficient to counter any potential conflict between a member's personal interest and the public interest.

Preventing a member from exercising a vote has serious implications including depriving constituents of representation, and possibly adversely affecting policy (and the public interest) through reducing the number of voters able to support or oppose a bill or motion.

Committee's view:

The Committee does not support the ICAC recommendation, and considers that the current declaration obligations are sufficient.

ICAC Recommendation 11:

The Commission recommends the Code be amended to provide that the Code has continuing effect unless and until amended or rescinded.

The ICAC submitted that this recommendation would ensure that members understood that the Code applied to the actions of members that occur after Parliament has been prorogued and before the Code is adopted by a Sessional Order at the start of a new session.

Committee's view:

This recommendation has already been implemented. The Code is currently considered to have continuing effect from Parliament to Parliament. The Code as published on the website currently contains the statement:

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

ICAC Recommendation 12:

The Commission recommends a more comprehensive set of broad ethical principles. Consideration could be given, for example, to incorporating the seven principles of public duty defined by Lord Nolan and which appear in the British House of Commons Code of Conduct for Members.

The Nolan Committee's landmark First Report established *The Seven Principles of Public Life* in the following areas:

- **Selflessness** – Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other benefits for themselves, their family or their friends.
- **Integrity** – Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.
- **Objectivity** – In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
- **Accountability** – Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
- **Openness** – Holders of public office should be as open as possible about all the decisions and actions they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
- **Honesty** – Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
- **Leadership** – Holders of public office should promote and support these principles by leadership and example.

The Committee noted that the Ethics Committee of the 53rd Parliament did prepare draft training materials for potential use in sessions with new members. Those materials did include reference to Lord Nolan's Seven Principles of Public Life, as contextual background for presentation of the Code, and the proposed publication's outline of the obligations involved in registration of interests.

The Seven Principles of Public Life clearly form an aspirational code. As the ICAC notes, the issue of whether the Code of Conduct for members of the NSW Parliament should be regulatory, or aspirational, was widely discussed at the time of drafting the original Code of Conduct. The view of the original members of the committee, which is confirmed by the current committee, is that the genesis of the Code, in creating a nexus between breach of the Code and jurisdiction of the ICAC, means that it cannot be entirely aspirational in nature.

Committee's view:

The Committee recognises the benefit of an aspirational code in guiding members expected standards of behaviour and decision-making, so that the rationale for the obligations of members can be understood. However, the current Code, consequent to recent amendment which tend to invite highly defined legal interpretation, would not sit comfortably with such broad and generally-stated principles.

ICAC Recommendation 13:

The ICAC recommends including in the Code what sanctions might apply to a Member who breaches the Code.

The ICAC notes that the Code does not set out what sanctions might apply to a member who breaches the Code, and suggests that the text of the Code include a clause which could address:

- The accountabilities of a member;
- The powers of the Committee on Parliamentary Privilege and Ethics;
- The role of the ICAC; and
- The relationship of the Code to other accountability mechanisms.

The Committee noted that the Code of Conduct for Members is brought to members' attention not only through the website, but through induction materials.

The Committee further noted other opportunities for members to be reminded of the Code include are at the beginning of each new Parliament when there is a formal motion to adopt the Code. Members also participate in "take note" debates on Committee reports on amendments to the Code. The annual report of the Parliamentary Ethics Adviser is also tabled in each House. The link between the Code of Conduct and the jurisdiction of the ICAC is highlighted in introductory chapters of the Members' Handbook.

Apart from the ICAC's jurisdiction over substantial breaches of the Code, the Houses have a well recognised self-governing obligation, to the extent of being able to expel a Member. To date, the NSW Legislative Assembly has not formally adopted a Sessional Order prescribing a set course of action in response to a breach of the Code.

The Committee confirms the view of the earlier committee that the House should not be restricted in its options for dealing with a particular breach of the Code.

ICAC Recommendation 14:

The ICAC recommends the Code be given a more prominent place on the NSW Parliament website.

The ICAC notes that the Code is difficult to find on the Parliament's website and should be made more accessible to members of the public.

The Committee noted that the Code is currently available to members on the intranet site under "ethics" within the "members" section. The Code is also accessible on the public website within the Sessional Orders which is found under "Procedure".

The submission from Privacy NSW noted that the broad availability of information made possible by publication on the internet has, as a consequence, associated risks to security and privacy. This was recognised in 2007 when the Committee recommended an amendment to the *Constitution (Disclosures by Members) Regulation* to introduce an option for members so that they were no longer required to give a postal address to identify their principal place of residence and, if applicable, secondary place of residence. To avoid compromising the privacy and safety of members and their families, members were given the alternative of giving the suburb or area in which a property was located.

The submission from Privacy NSW recommends that the Parliament take a cautious approach to making any information about individuals available via the internet.

Privacy NSW notes:

"[T]he internet allows the user immediate access to information which, if particularly sensitive or intrusive could enable opportunistic use of the information in a way which could prove harmful to the individual to whom the information relates or to third parties who have a connection with that individual. The temporal and physical limitations of the current access regime lessen this likelihood.

In light of this and given the lack of protection and remedy for personal information relating to Members of Parliament and relevant third parties under privacy law, we suggest that if the Committee decides to amend the Regulation to allow on-line access to the Register, it should also consider building in certain privacy protections."

Privacy NSW suggested that the Regulation could include a requirement for interested parties who wish to access the information via the internet to lodge an on-line application form, requiring a name and a return email address. This would go some way to establishing the bona fides of the interested party and thereby limit the possibility that the information could be used for the purpose of vilification or harassment. Privacy NSW also suggested that consideration be given to an amendment that would allow for the consideration of the suppression of certain information not only from on-line access, but also from public inspection, in circumstances where access to the general public might place a member or Parliament or any other third party at risk of harm.

The full submission of Privacy NSW is appended as Appendix 4.

The Parliamentary Ethics Adviser Mr Ian Dickson also supported the placing of the Register on the internet, subject to the privacy issues previously raised by the Committee, and safeguards suggested by Privacy NSW.

CHAPTER 3: OTHER ISSUES RAISED

3.1 Use of personal information by members

In its submission Privacy NSW noted that the *Privacy and Personal Information Protection Act 1998* (PIIP Act) does not regulate the actions of Members of Parliament, and thus the information collected from members for the purpose of compilation in the Register is not subject to the Information Protection Principles in Part 2, or the Public Register Provisions in Part 6 of the PIIP Act.

Privacy NSW noted:

"The lack of privacy regulation, coupled with the freedom of expression offered by parliamentary privilege mean that Members of Parliament are in a position to collect, use and disclose personal information about their constituents in a manner which might otherwise lead to a privacy complaint. We therefore endorse the operation of the Code of Conduct and suggest the inclusion of a statement which requires that Members of Parliament consider and attempt to lessen the impact of their dealings with personal information upon the privacy of their constituents".

The Committee acknowledges the community's increasing awareness of the issue of personal privacy. There is general awareness amongst members that in attempting to deal with constituents' problems, for example through making a ministerial representation, there is a risk of misunderstandings arising regarding expectations of privacy or publication of names or specific incidents.

The right of members to raise issues in Parliamentary proceedings is also an important element of the proper function and power of the Parliament. Speakers' rulings have nevertheless drawn Members' attention to the need to exercise that freedom with responsibility, and in the public interest¹.

The Committee recommends that future induction materials and administrative guidelines made available to members and their electorate office staff include advice to ensure that constituents are either aware or consulted before their names are published.

3.2 Declaration of Frequent Flyer points and other travel loyalty schemes

At the request of the Speaker, the Committee considered whether the pecuniary interests regulation required amendment, particularly clause 11 which pertains to contributions to travel. Clause 11 is unclear in relation to discretionary disclosures of flight or other travel upgrades. The Committee noted that some Members have made discretionary declarations of membership of Chairman's Lounge etc, but it is unclear whether this type of membership is required to be declared as either a "gift" or "contribution to travel".

The Committee noted that the ICAC's Second Report on the Investigation into Parliamentary and Electorate Travel recommended that Parliament should consider a uniform approach to all forms of reward or bonus schemes, with a view to expanding the application of and otherwise amending the relevant guidelines².

¹ Speaker Ellis PD17/10/1973 p2151; Speaker Kelly 24/03/1977 p5703; Speaker Murray 6/5/1997 p4946.

² ICAC Investigation into Parliamentary and Electorate Travel: Second Report Analysis of administrative systems and recommendations for reform. June 2010, p 11

Advice was sought from other Australian jurisdictions and New Zealand regarding requirements to declare travel upgrades received in the course of travel, whether private or on official business. The obligation to report such upgrades varies greatly.

In the Australian Parliament, the resolution for both Houses requires the declaration of "any sponsored travel or hospitality received where the value of the sponsorship or hospitality exceeds \$300". "Sponsored travel" means any free, upgraded or concessional travel undertaken. The ACT Legislative Assembly has a similar provision. The Northern Territory, Western Australia, South Australia and New Zealand all require members to declare travel upgrades in their annual return of pecuniary interest, where that upgrade is a gift to them from the airline. Tasmania has no such provision. In Queensland upgraded flights and/or accommodation is specifically excluded from reporting obligations related to travel.

In the cases where upgrades are required to be declared, the basis for the requirement is that most upgrades are considered to exceed a value of \$250, the reportable threshold for contributions to travel. Upgrades that are "paid for" by redeeming air-points privately accrued, or other loyalty schemes, are not required to be reported, as they do not constitute a "gift" or "contribution to travel".

Advice has been received from the Crown Solicitor that use of the Chairman's Lounge by invitation is not a "gift" for the purposes of clause 10 of the Regulation, as it does not involve disposition of property. However, when the membership leads to an upgrade valued at more than \$250, it becomes disclosable as a contribution to travel, and should be reported under clause 11 of the Regulation.

Committee's view:

That members be advised to report upgrades that are valued at more than \$250 as a contribution to travel under clause 11 of the Regulation.

Education and induction of members

The Committee has a statutory function pursuant to s72C(b) of the *Independent Commission Against Corruption Act 1988*. At the request of the Speaker, the Committee has given specific consideration to options for ethics induction and training for Members. A Discussion Paper on Training Members for Members on the Code of Conduct, together with recommendations, has been forwarded to the Speaker in December 2010 in response to his request.

The Committee also discussed the current, and proposed options for ethics education with Mr Ian Dickson, the Parliamentary Ethics Adviser. In particular, the Committee discussed what might be the optimum timing of training to maximise effectiveness. The Committee supported continuing the current induction program which includes information on the Code of Conduct and the regulations for reporting of members' interests. In addition, there was general agreement that a fuller session later in the first year, when new Members would have offices fully up and running, and a better understanding of the day to day operations of electorate offices and the scope of their parliamentary roles, would be helpful. Mr Dickson noted that any focussed ethics training might benefit by being held outside of the induction period, possibly within 3-6 months after the General Election. Mr Dickson suggested that this type of session should involve the ICAC Commissioner, the Auditor General and the Ombudsman. The last time that the ICAC was invited to address MPs was in 1998.

Members also discussed the option of offering an ethics training module every 12 months, which would be mandatory for Members to complete. The modules could be offered by DVD or possibly on-line.

3.3 Access and Influence

The Public Interest Advocacy Centre submission submitted that the Code of Conduct could be amended to provide members of parliament with advice about the potential conflict that could arise as a result of election funding and the conflicts that may arise between a parliamentarian's role once elected and their role as an election candidate.

PIAC recommends that Members of Parliament be banned from participating in party fund-raisers.

Committee's view:

The *Parliamentary Remuneration Tribunal Guidelines and General Conditions Regarding Additional Entitlements for Members in Connection with Parliamentary Duties* currently note at 1.1.1 that additional entitlements are provided to facilitate "activities undertaken in representing the interests of constituents, but excluding activities of a direct electioneering or political campaigning nature".

At 1.1.8 the Guidelines state that one of the "particular Parliamentary duties" for which additional entitlements are provided is "*Participation in the activities of recognised political parties, including participation in national, State and regional conferences, branch meetings, electorate council meetings, executive meetings, committee meetings and meetings of the Members of the Parliamentary political party, its executive and committees*".

The committee agrees with the scope of parliamentary duties as set out in the PRT guidelines. However, the issue of the definition of "campaigning", as relevant to the duties set out in Electorate Officer Position Descriptions is the subject of a separate Briefing Note that has been forwarded by the committee to the Speaker.

APPENDIX 4: CURRENT CODE OF CONDUCT

(Votes and Proceedings, 8 May 2007, p.34)
(Votes and Proceedings, 21 June 2007, p. 154)

That this House adopt, for the purposes of section 9 of the Independent Commission Against Corruption Act 1988, the following code of conduct:

PREAMBLE

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

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

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

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

THE CODE

1 Disclosure of conflict of interest

- (a) Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.
- (b) This may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner.
- (c) A conflict of interest does not exist where the member is only affected as a member of the public or a member of a broad class.

2 Bribery

- (a) A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which the member has received, is receiving or expects to receive.
- (b) A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which any of the following persons has received, is receiving or expects to receive:
 - (i) A member of the Member's family;
 - (ii) A business associate of the Member; or
 - (iii) Any other person or entity from whom the Member expects to receive a financial benefit.
- (c) A breach of the prohibition on bribery constitutes a substantial breach of this Code of Conduct.

3 Gifts

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

4 Use of public resources

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

5 Use of confidential information

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

6 Duties as a Member of Parliament

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

7 Secondary employment or engagements

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

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

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

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

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

APPENDIX 2: Excerpts from Minutes of Meetings of the Committee
Minutes of Meeting of the Standing Committee on Parliamentary
Privilege and Ethics (no.12)
9.30 am, 20 May 2010, in Waratah Room
Parliament House

Members Present

Mr Pearce MP (Chair)
Mr Amery MP
Mr Kerr MP
Ms Moore MP
Ms McMahon MP
Mr Terenzini MP
Mr J. H. Turner MP

Apologies: Mr Martin MP

In attendance: Ms Ronda Miller

.....
3. Review of the Code of Conduct.

The Committee noted its earlier decision, as minuted on 11 March, 2010, to undertake a review the Code of Conduct, as required pursuant to the ICAC Act.

The Committee further noted that on 24 April, 2010, the Legislative Council Privileges used its self-referencing powers to resolve to inquire into the Code of Conduct for members, including aspects of the pecuniary interest disclosure regime for members under the Constitution (Disclosures by Members) Regulation 1983. A copy of the public Discussion Paper on Review of the Code of Conduct was circulated. It was noted that the Privileges Committee was *seeking comment on the proposal to place the Register of Members' Interests on the Parliament's public website*. The Committee noted that a report of a former Committee on Parliamentary Privilege and Ethics had previously recommended that the Register be placed on the internet, provided that a level of privacy was extended with regard to residences (eg only disclosure of suburb/town location required, not full address).

The Committee consequently resolved, on the motion of Mr Turner, seconded Mr Terenzini:

That the Committee inquire into the Code of Conduct for members, including aspects of the pecuniary interest disclosure regime for members under the Constitution (Disclosures by Members) Regulation 1983.

The Clerk noted that advice had been received that the Chair of the Privileges Committee proposed to write to the Auditor General, the ICAC, and the Ombudsman seeking comment on the Code of Conduct. For reasons of efficiency, the Committee resolved, on the motion of Mr Turner, seconded Mr

Terenzini, that if the Privileges Committee so agreed, any correspondence from the two privileges committees might be prepared under the name of both Chairs.

It was further agreed that a copy of the Code of Conduct, and a covering memorandum also be circulated to all Members of the Assembly, seeking comment.

Minutes of Meeting of the Standing Committee on Parliamentary Privilege and Ethics (no.13)

**9.30 am, 24 June 2010, in Room 1254
Parliament House**

Members Present

Mr Pearce MP (Chair)

Mr Amery MP

Mr Kerr MP

Mr Martin MP

Ms Moore MP

Mr J. H. Turner MP

Apologies: Ms McMahon MP, Mr Terenzini MP

In attendance: Ms Ronda Miller

- 1. Correspondence from the Department of Premier and Cabinet dated 9 June 2010, enclosing a Consultation Draft Constitution (Disclosures by Members) Regulation - Amendment (De Facto Relationships) Regulation 2010 for consideration by the Committee (copy enclosed).**

The Committee noted that it had previously considered the proposal to amend the Constitution (Disclosures by Members) Regulation to provide for expanding the definition of "de facto" under the Regulation to include relationships registered under the Relationships Register Act 2010. A copy of the Chair's prior response to the Attorney General's Department, dated 21 April 2010, was circulated.

The Committee examined the Consultation Draft Amendment Regulation and noted that it was consistent with the proposal already considered. The Committee resolved, on the motion of Mr Kerr, seconded Mr Martin, that the Chair advise the Department of Premier and Cabinet that the Draft Amendment Regulation, as forwarded, was not opposed by the Committee, and that a short report be prepared for tabling in the House.

- 2. Inquiry on the Review of Code of Conduct, and Members Registration of Interests.**

- a.** The Committee noted correspondence received from the Speaker, dated 8 June 2010, requesting that as part of the Committee's Review of the Code of Conduct and Members' Registration of Interests, comment be sought from Members, especially regarding clause 11, contributions to

travel. Debate ensued. Copies of the circulars previously despatched by the Clerk and Speaker to all Members of the Legislative Assembly were noted.

- b. A draft circular to members to be considered by committee members, for confirmation prior to release to Members of the Legislative Assembly. The Committee resolved, on the motion of Mr Martin, seconded by Mr Turner, that the circular be prepared and despatched to members.

Minutes of Meeting of the Standing Committee on Parliamentary Privilege and Ethics (no.14)

**9.30am Thursday 2 September 2010 in Waratah Room
Parliament House**

Members Present

Mr Pearce MP (Chair)

Mr Amery MP

Mr Kerr MP

Mr Martin MP

Ms Moore MP

Mr J. H. Turner MP

Hon G West MP

Apologies: Ms McMahon MP

In attendance: Ms Ronda Miller

1. Minutes of last meeting held 24 June 2010

The minutes of the meeting held on 24 June 2010 which had been circulated, were noted and adopted on the motion of Mr Turner, seconded by Mr Amery.

2. Business Arising from the Minutes

The Report on the Consultation Draft Constitution (Disclosures by Members) Regulation - Amendment (De Facto Relationships) Regulation 2010, which had been agreed to at the last meeting of the Committee, had been tabled on Tuesday 31 August, 2010 and a copy forwarded to the Premier and Department of Premier and Cabinet.

3. Inquiry on the Review of Code of Conduct, and Members Registration of Interests.

- a. The Committee noted correspondence received from Privacy NSW, the Speaker of the Victorian Legislative Assembly and the ICAC.
- b. The Clerk undertook to prepare a briefing note summarising the issues raised, for circulation prior to the next meeting.
- c. Copies of the two circulars which had been distributed to members of the Legislative Assembly were circulated to members of the Committee. The Clerk to the Committee advised that no responses had been received to date.

**Minutes of Meeting of the Standing Committee on Parliamentary
Privilege and Ethics (no.15)**

**9.30am Wednesday 8 September 2010 in Waratah Room
Parliament House**

Members Present

Mr Pearce MP (Chair)

Mr Amery MP

Mr Kerr MP

Ms Moore MP

Mr J. H. Turner MP

Hon G West MP

Apologies: Mr Martin

In attendance: Ms Ronda Miller

1. Minutes of last meeting held 2 September 2010

The minutes of the meeting held on 2 September 2010 which had been circulated, were noted and adopted on the motion of Mr Kerr, seconded by Mr Amery.

2. Business Arising from the Minutes

The Report on the Consultation Draft Constitution (Disclosures by Members) Regulation - Amendment (De Facto Relationships) Regulation 2010, which had been agreed to at the last meeting of the Committee, had been tabled on Tuesday 31 August, 2010 and a copy forwarded to the Premier and Department of Premier and Cabinet.

3. Inquiry on the Review of Code of Conduct, and Members Registration of Interests.

- a. The Clerk referred to a schedule previously circulated, which outlined the recommendations for amendment to the Code of Conduct submitted by the ICAC.
- b. The Clerk spoke to a briefing note entitled "Recommendations made by the ICAC on the Members' Code of Conduct, and circulated the following information which related to the ICAC's submitted recommendations: Standing Orders 173-179; ICAC Corruption Prevention – Operation Corinth, Operation Triton and Operation Wingate - recommendations to the Clerk of the LA and updates, as at 7/09/2010; The Committee on Standards in Public Life and the Seven Principles of Public Life.

Discussion ensued. Mr Turner, Mr Kerr, Mr Pearce and Ms Moore referred to work of a committee of an earlier Parliament which had originally considered a number of the ICAC recommendations, and referred to s 122 of the ICAC Act as relevant to the relationship between the ICAC and Members of Parliament.

**Minutes of Meeting of the Standing Committee on Parliamentary
Privilege and Ethics (no.16)**

9.30am Thursday 23 September 2010 in Room 814-815
Parliament House

Members Present

Mr Pearce MP (Chair)

Mr Amery MP

Ms McMahon MP

Mr Martin MP

Mr J. H. Turner MP

Hon G West MP

Apologies: Mr Kerr, Ms Moore

In attendance: Ms Ronda Miller

1. Minutes of last meeting held 8 September 2010

The minutes of the meeting held on 8 September 2010 which had been circulated, were noted and adopted on the motion of Mr Amery, seconded by Ms McMahon.

2. Business Arising from the Minutes – Items (3) and (4) below.

Audit of WP use in Parliament House – The Clerk tabled a copy of the Chair's letter to the Speaker, requesting further advice regarding the collection of information currently possible through audit or filtering software used in the Parliament, which would be capable of revealing information about Members, or Members' staff, use of websites.

3. Inquiry on the Review of Code of Conduct, and Members Registration of Interests.

The Committee noted the letter from the Speaker to the Committee Chair, dated 23 September 2010, requesting the committee to examine three matters arising from the ICAC Report on Operation Corinth. Debate ensued.

The Committee resolved, on the motion of Mr Amery, seconded Mr Turner, that the Chair write to the Speaker and Leader of the House, requesting a formal referral of the terms of reference. The Committee also requested that the Clerk contact the Attorney General's office to establish whether the first requested inquiry involved issues currently before the DPP, or which would compromise the DPP's consideration of the issue. Debate ensued on whether to examine the meaning of "campaigning" would cut across aspects of fact, which were currently with the DPP. The Committee agreed to commence work on the orientation/training aspects of the referral.

Minutes of Meeting of the Standing Committee on Parliamentary Privilege and Ethics (no.20)

**9.00 am Thursday 2 December 2010 in Waratah Room
Parliament House**

Members Present:

Mr Pearce MP (Chair)

Hon R Amery MP

Mr Martin MP

Mr J. H. Turner MP

Hon G West MP

Apologies: Mr Kerr MP, Ms Moore MP

In attendance: Ms Ronda Miller

1. Minutes of last meeting held 24 November 2010

The minutes of the meeting held on 24 November 2010 which had been circulated, were noted and adopted on the motion of Mr West, seconded by Mr Amery.

2. Business Arising from the Minutes –

- a. MOU with NSW Police on execution of search warrants in Parliament House.

The Clerk advised that the Commissioner of Police had signed the MOU on 29 November 2010, and the MOU document was now fully executed.

3. Speaker's request to the Committee to consider the definition of "campaigning"

The Clerk advised that a draft response to the Speaker, based on the Committee's views as expressed at the last meeting, had been forwarded to the Chair for his consideration.

4. Review of the Code of Conduct – Consideration of draft recommendations

The Committee deliberated on the draft recommendations, as set out in the draft document prepared by the secretariat, which had been previously circulated. The Committee resolved, on the motion of Mr Amery, seconded Mr Martin, that the Clerk incorporate the recommendations, as confirmed, into the draft report and that the draft be circulated to members, any amendments incorporated, and the Chair be authorised to table the report as the report of the Committee.

The Committee noted the briefing note on educational options which had been prepared by the secretariat. The Committee deliberated on the recommendation for mandatory annual training, by way of a DVD training program, and the recommendations discussed with the Parliamentary Ethics Adviser, Mr Ian Dickson, as minuted on 24 November 2010, and agreed that the recommendations be incorporated into the draft report on review of the Code of Conduct.

5. Adjournment

The meeting adjourned at 10.00 am, sine die.

APPENDICES 3 – 5 : SUBMISSIONS RECEIVED

- APPENDIX 3: Submission from the Independent Commission Against Corruption
- APPENDIX 4: Submission from Privacy NSW
- APPENDIX 5: Submission from the Public Interest Advocacy Centre

**INDEPENDENT COMMISSION AGAINST
CORRUPTION**

**REVIEW OF THE CODE OF CONDUCT FOR
MEMBERS OF PARLIAMENT**

SUBMISSION

TO THE

LEGISLATIVE COUNCIL PRIVILEGES COMMITTEE

AND

**LEGISLATIVE ASSEMBLY PRIVILEGES AND ETHICS
COMMITTEE**

JULY 2010

SUMMARY OF RECOMMENDATIONS

Recommendation 1

The Commission recommends that the term “private financial interests” in clause 1(a) be clarified so that it is made clear these include the financial interests of family (including de facto partners), friends or associates whose financial interests may give rise to a conflict of interest for Members by virtue of their relationship.

Recommendation 2

The Commission recommends that clause 1 of the Code be amended to require Members to take reasonable steps to declare any other material benefit which a Member receives which might reasonably be thought by others to influence his or her actions, speeches, or votes in Parliament, or actions taken in his or her capacity as a Member of Parliament, or which the Member considers might be thought by others to influence his or her actions in a similar manner, even though the Member receives no financial benefit.

Recommendation 3

The Commission recommends that clause 1(b) of the Code be amended to make it clear that disclosure of a conflict of interest when speaking on a matter in the House or a Committee should occur in the House or Committee before the Member speaks on the matter.

Recommendation 4

The Commission recommends the heading of clause 2 be changed to “Paid advocacy” or something similar.

Recommendation 5

The Commission recommends that clause 2 be amended to extend the prohibition on paid advocacy by Members to the promotion of matters to public officials outside the Parliament or its Committees and that the *Constitution (Disclosure by Members) Regulation 1983* be amended to the same purpose.

Recommendation 6

The Commission recommends that the *Constitution (Disclosure by Members) Regulation 1983* be amended so that it is consistent with the clause 2 of the Code of Conduct (as amended in accordance with Recommendations 4 and 5).

Recommendation 7

The Commission recommends widening the scope of clause 5 to include misuse of confidential information generally.

Recommendation 8

The Commission recommends making direct reference in clause 6 to the relevant definitions of what constitutes party activities as set out in the relevant Parliamentary Remuneration Tribunal determinations.

Recommendation 9

The Commission recommends that clause 7 of the Code be amended to require Members to make the disclosures referred to in that clause when voting on a matter as well as when participating in a debate on the matter, unless the disclosure has previously been made in the pecuniary interest register.

Recommendation 10

The Commission recommends that the Code be amended by including a new provision that Members are not to vote on matters where they have a financial conflict of interest.

Recommendation 11

The Commission recommends the Code be amended to provide that the Code has continuing effect unless and until amended or rescinded.

Recommendation 12

The Commission recommends a more comprehensive set of broad ethical principles. Consideration could be given, for example, to incorporating the seven principles of public duty defined by Lord Nolan and which appear in the British House of Commons Code of Conduct for Members (selflessness, integrity, objectivity, accountability, openness, honesty and leadership).

Recommendation 13

The Commission recommends including in the Code what sanctions might apply to a Member who breaches the Code.

Recommendation 14

The Commission recommends that the Code be given a more prominent place on the NSW Parliament website.

INTRODUCTION

1. This submission has been prepared by the Independent Commission Against Corruption (“the Commission”) in response to an invitation by the Chairs of the Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee which are currently undertaking a review of the Code of Conduct for Members (“the Code”).
2. The major role of the Code is to act as a guide for Members’ behaviour by setting standards reflecting the community’s expectations of the conduct of Members.
3. The Commission’s submission concerns clauses 1, 2, 5, 6, and 7 of the Code. The submission also raises a number of other matters for consideration

THE CODE

Clause 1 – the issues

4. The heading of this clause is “Disclosure of conflict of interest”. Clause 1(a) of the Code places the emphasis on “private financial interests”. The Commission submits that this may be interpreted as excluding two important issues. First, Members may have family (including de facto partners), friends or associates whose financial interests may give rise to a conflict of interest for Members by virtue of their relationship. Secondly, conflicts of interest may not be connected with pecuniary (financial) interests.
5. The Code should make it clear that these issues are included in the requirement to disclose conflicts of interest.
6. The Commission notes that other NSW legislation and other jurisdictions have attempted to address these two issues, for example:
 - a) Under section 443(1) of the *NSW Local Government Act 1993*, pecuniary interests also include those of the person’s spouse, de facto partner, relative, a partner or employer of the person, or a company or other body of which the person, or a nominee, partner or employer of the person, is a member.
 - b) The *Model Code of Conduct for Local Councils in NSW* recognises that there are pecuniary and non-pecuniary conflicts of interest.
 - c) The *Guide to the Rules relating to the Conduct of Members* that accompanies the *British House of Commons Code of Conduct for Members of Parliament* requires a Member to include in the Register of Interests any pecuniary interest or other material benefit which a Member receives which might reasonably be thought by others to influence his or her actions, speeches, or votes in Parliament, or actions taken in his or her capacity as a Member of Parliament, or which the Member considers

might be thought by others to influence his or her actions in a similar manner, even though the Member receives no financial benefit.

7. Clause 1(b) of the Code provides that disclosure “may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner”.
8. In its September 2003 report: “Regulation of secondary employment for Members of the NSW Legislative Assembly” the Commission recommended that “A Member should be required to disclose a conflict of interest at the start of any proceedings in Parliament which relate to the interests of any employer, association or client who has employed, or is currently employing, the Member. In developing the detail for the operation of a disclosure-before-proceedings rule, consideration should be given to the experience in the British House of Commons, the Scottish Parliament and the Ontario Legislative Assembly” (recommendation 8).
9. The British House of Commons, the Scottish Parliament and the Ontario Legislative Assembly models discussed in the report require Members not only to disclose interests in a register but to disclose interests prior to proceedings in Parliament where the Member is aware that the proceedings may relate to the interests of their secondary employer or, in some cases, any former secondary employer. The purpose of declaration in the House of Commons is explained in the following way:

The main purpose of declaration of interests is to ensure that fellow Members of the House and the public are made aware, at the appropriate time when a Member is making a speech in the House or in Committee or participating in any other proceedings of the House, of any past, present, or expected future pecuniary interest which might reasonably be thought to be relevant to those proceedings.

The Commission supports this approach.

Clause 1 – recommendations

Recommendation 1

The Commission recommends that the term “private financial interests” in clause 1(a) be amended so that it is made clear these include the financial interests of family (including de facto partners), friends or associates whose financial interests may give rise to a conflict of interest for Members by virtue of their relationship.

Recommendation 2

The Commission recommends that clause 1 of the Code be amended to require Members to take reasonable steps to declare any other material benefit which a Member receives which might reasonably be thought by others to influence his or her actions, speeches, or votes in Parliament, or actions taken in his or her capacity as a Member of Parliament, or which the Member considers might be thought by others to

influence his or her actions in a similar manner, even though the Member receives no financial benefit.

Recommendation 3

The Commission recommends that clause 1(b) of the Code be amended to make it clear that disclosure of a conflict of interest when speaking on a matter in the House or a Committee should occur in the House or Committee before the Member speaks on the matter.

Clause 2 – the issues

10. The heading of this clause is “Bribery”. It is not clear why this heading is used.
11. In NSW bribery remains a common law offence. Part 4A of the *Crimes Act 1900* also covers the giving and receiving of corrupt rewards. The ambit of both extends beyond what is set out under clause 2.
12. Clause 2 is designed to prohibit Members engaging in both “paid advocacy” and “cash for questions”, and to prohibit them casting a vote in return for payment. The clause also prohibits advocacy in return for payment made to family members and other specified persons and entities, rather than directly to a Member.
13. While the use of the heading “Bribery” may have been intended to express disapproval of paid advocacy and cash for questions it potentially introduces confusion. It is possible that a Member might argue that unless a criminal offence of “bribery” is established there is no breach of the clause. It would be appropriate to change the title of clause 2 to reflect more accurately what is prohibited.
14. The general prohibitions on paid advocacy in clause 2 are qualified by the use of the phrase “in the Parliament or its Committees”. This suggests that the Code is not intended to prohibit a Member from promoting a matter in return for receiving any remuneration, fee, payment, reward or benefit of a private nature, if the promotion takes place outside Parliament or its Committees. This ignores the reality that Members can, through their advocacy, affect major decisions involving public interest and amenity and of potential considerable value both to the State and those entities that benefit from those decisions.
15. The Commission does not consider that it is appropriate for Members to accept any “remuneration, fee, payment, reward or benefit of a private nature” in return for using their position to advocate the taking of a particular course of action by public officials. There is a strong perception that a Member who is advocating a position in return for reward is primarily motivated by that reward (or the prospect of the reward) rather than the public interest and as such is not using their position “to advance the common good of the people of New South Wales” (as set out in the Preamble to the Code) but rather to advance their own private interest.
16. The prohibition on paid advocacy should not be restricted to the promotion of matters in the Parliament and its Committees but should extend to the promotion of matters to public officials outside the Parliament or its Committees.

17. The Commission notes however that the *Constitution (Disclosure by Members) Regulation 1983* contemplates that Members may derive income from providing a service arising from or relating to their position as Members. Clause 7A of the Regulation defines such a service to include:

- a) the provision of public policy advice,
- b) the development of strategies, or the provision of advice, on the conduct of relations with the Government or Members,
- c) lobbying the Government or other Members on a matter of concern to the person to whom the service is provided.

18. The Commission notes that any provision in the Code banning paid advocacy needs to be accompanied by amendment to the *Constitution (Disclosure by Members) Regulation 1983*.

Clause 2 - recommendations

Recommendation 4

The Commission recommends the heading of clause 2 be changed to "Paid advocacy" or something similar.

Recommendation 5

The Commission recommends that clause 2 be amended to extend the prohibition on paid advocacy by Members to the promotion of matters to public officials outside the Parliament or its Committees and that the *Constitution (Disclosure by Members) Regulation 1983* be amended to the same purpose.

Recommendation 6

The Commission recommends that the *Constitution (Disclosure by Members) Regulation 1983* be amended so that it is consistent with the clause 2 of the Code of Conduct (as amended in accordance with Recommendations 4 and 5).

Clause 5 – the issue

19. This clause deals with improper use of confidential information for the "private benefit" of the Member or others.

20. In its December 1998 report: "Report on investigation into Parliamentary and Electorate travel: Second Report – analysis of administrative systems and recommendations for reform" the Commission recommended that "the Ethics Committees of each House should consider the appropriateness of the term "private benefit" used in clause 5 of the Members Code of Conduct and recommend an appropriate amendment to clarify its meaning" (recommendation 54).

21. The Commission's concern, expressed in its report, was that the test in this clause is whether there is a private benefit for the Member or others. Conceivably, confidential information could be used where it is difficult to substantiate a direct private benefit, such as the leaking of information to discredit a political

opponent's policy proposals, or even an opponent, in an electorate or parliamentary contest. The Code should make it clear that misuse of confidential information in this way would amount to an abuse.

Clause 5 - recommendation

Recommendation 7

The Commission recommends widening the scope of clause 5 to include misuse of confidential information generally.

Clause 6 – the issue

22. In its December 1998 report: "Report on investigation into Parliamentary and Electorate travel: Second Report – analysis of administrative systems and recommendations for reform" the Commission recommended that "the Ethics Committees of each House should consider whether the term "legitimate activities" used in clause 6 of the Members' Code of Conduct should be amended to define these as activities whose principal purpose is for Parliamentary or electorate benefit" (recommendation 57).
23. The Commission notes that the Parliamentary Remuneration Tribunal has since delineated what party activities do or do not fall within the definition of "Parliamentary activities" for the purpose of use of Parliamentary resources and allowances.

Clause 6 - recommendation

Recommendation 8

The Commission recommends making direct reference in clause 6 to the relevant definitions of what constitutes party activities as set out in the relevant Parliamentary Remuneration Tribunal determinations.

Clause 7 – the issue

24. Clause 7 of the Code requires disclosure of secondary employment or other engagements when a Member participates in debates. The Member is specifically exempted from making a disclosure if the Member is "simply" voting on a matter. The Commission does not regard this exemption as being consistent with requisite or desirable standards of transparency.
25. The Commission does not regard as onerous a requirement that Members make the disclosures referred to in clause 7 when voting on a matter as well as participating in a debate on the matter. The Commission notes that under clause 7 it would not be necessary for a Member to make a declaration every time the Member voted if the Member has already disclosed the information in the Member's entry in the pecuniary interest register.

Clause 7 - recommendation

Recommendation 9

The Commission recommends that clause 7 of the Code be amended to require Members to make the disclosures referred to in that clause when voting on a matter as well as participating in a debate on the matter unless the disclosure has previously been made in the pecuniary interest register.

OTHER MATTERS FOR CONSIDERATION

26. In addition to issues relating to specific clauses of the Code, the Commission also raises a number of other matters for consideration.

Disqualification from voting

27. The Standing Orders for both Houses generally disqualify members from voting on matters where they have a financial conflict of interest¹. It is not clear to the reader of the Code that this is the case and it would be preferable for this to be rectified. It is also preferable that the Code make it clear that a financial conflict of interest includes any situation where the Member has received or anticipates receiving a material benefit.

Recommendation 10

The Commission recommends the Code be amended by including a new provision that Members are not to vote on matters where they have a financial conflict of interest.

Application of the Code

28. Some doubt has previously been expressed as to whether the Code applies to the actions of Members that occur after Parliament has been prorogued and before the Code is adopted by a Sessional Order at the start of a new session. This issue was examined in some detail by the 2002 and 2006 reviews which recommended that the Code be amended to specifically acknowledge that it is intended to apply during prorogation.

Recommendation 11

The Commission recommends the Committees include an amendment to provide that the Code has continuing effect unless and until amended or rescinded.

¹ See Standing Order 176 of the Legislative Assembly and Standing Order 113(2) of the Legislative Council. See also Standing Order 276 of the Legislative Assembly and Standing Order 210(10) of the Legislative Council which related to Committee Inquiries.

Statement of Principles

29. In its November 1995 submission to the Legislative Assembly Standing Committee on Ethics and its June 2006 submission to the Legislative Council Privileges Committee the Commission stated that “the principles on which expected standards of behaviour are based should be included in the Code so that the rationale for the obligations of Members can be understood”.
30. The Preamble to the Code already includes honesty and integrity. Accountability is alluded to in the reference to responsibility in paragraph 2 of the Preamble.

Recommendation 12

The Commission recommends a more comprehensive set of broad ethical principles. Consideration could be given, for example, to incorporating the seven principles of public duty defined by Lord Nolan and which appear in the British House of Commons Code of Conduct for Members (selflessness, integrity, objectivity, accountability, openness, honesty and leadership).

Breaches of the Code

31. The Code does not set out what sanctions might apply to a Member who breaches the Code. Such a clause could address:
- the accountabilities of a Member
 - the powers of the Ethics Committee
 - the role of the Commission
 - the relationship of the Code to other accountability mechanisms.

Recommendation 13

The Commission recommends including in the Code what sanctions might apply to a Member who breaches the Code.

Accessibility of the Code

32. In line with the principles of openness and accountability consideration should be given to improving the accessibility of the Code by members of the public. For example it is not immediately apparent from the NSW Parliament website that there is a Code of Conduct for Members.

Recommendation 14

The Commission recommends the Code be given a more prominent place on the NSW Parliament website.

submission

Submission by Privacy NSW to

*New South Wales Legislative Council Privileges Committee
New South Wales Legislative Assembly Privileges and Ethics
Committee*



privacynsw

Issue date: 4/8/10

Thr Clerk to the Committee
New South Wales Legislative Council Privileges Committee
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SYDNEY NSW 2000

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Our ref: A10/0831
Your ref:

Thr Clerk to the Committee
New South Wales Legislative Assembly Privileges & Ethics
Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

**Re: Review of the Code of Conduct for Members of the New South Wales
Parliament**

Privacy NSW is pleased to be able to make this submission to the New South Wales
Legislative Council Privileges Committee and the New South Wales Legislative
Assembly Privileges & Ethics Committee.

Privacy NSW is the Office of the NSW Privacy Commissioner. The Privacy
Commissioner is the holder of an independent statutory office, created by Parliament
under the *Privacy and Personal Information Protection Act 1998 (PPIP Act)*. The
functions of the Privacy Commissioner include making public statements about
matters relating to the privacy of individuals generally, and publishing reports and
making recommendations about any matter that concerns the need for, or the
desirability of, legislative, administrative or other action in the interest of the privacy
of individuals.

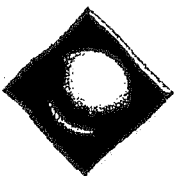
Code of Conduct

The PPIP Act does not regulate the actions of Members of Parliament or any
individuals acting in their private capacity. It only applies to NSW public sector
agencies. It is our understanding that neither the Assembly or the Council are public
sector agencies for the purpose of the PPIP Act. This means that the information
collected from Members of Parliament for the purpose of compilation in the Register
of Disclosures by Members under the *Constitution (Disclosures by Members)
Regulation 1983 (the Regulation)*, will not be subject to the Information Protection
Principles in Part 2 or the Public Register Provisions in Part 6 of the PPIP Act.

The lack of privacy regulation, coupled with the freedom of expression offered by
parliamentary privilege mean that Members of Parliament are in a position to collect,
use and disclose personal information about their constituents in a manner which in
might otherwise lead to a privacy complaint.¹ We therefore endorse the operation of

¹ For instance see :

http://www.lawlink.nsw.gov.au/lawlink/privacynsw/ll_pnsw.nsf/pages/PNSW_08_specialrpt070502



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the Code of Conduct and suggest the inclusion of a statement which requires that Members of Parliament consider and attempt to lessen the impact of their dealings with personal information upon the privacy of their constituents.

On-line Access to the Register of Disclosures

We note the proposal in the Public Discussion Paper to allow on-line access to the Register of Disclosure (the Register) by members on the Parliamentary website. In our advice to public sector agencies we suggest a cautious approach to making any information about individuals available via the internet. This is because the internet allows the user immediate access to information which, if particularly sensitive or intrusive could enable opportunistic use of the information in a way which could prove harmful to the individual to whom the information relates or to third parties who have a connection with that individual. The temporal and physical limitations of the current access regime lessen this likelihood.

In light of this and given, the lack of protection and remedy for personal information relating to Members of Parliament and relevant third parties under privacy law, we suggest that if the Committee decides to amend the Regulation to allow on-line access to the Register, it should also consider building in certain privacy protections. By way of analogy, section 57(1) of the PPIP Act provides that the agency responsible for keeping a 'public register' (as defined) must only disclose personal information kept in the register if the agency is satisfied that the purpose for which the information is accessed is consistent with the purpose for which the register was kept. Section 57(2) provides that in order to do this the responsible agency 'may require any person who applies to inspect personal information contained in the public register to give particulars, in the form of a statutory declaration, as to the intended use of any information obtained from the inspection'.

We recognise the public interest in allowing scrutiny of pecuniary interests and we do not suggest that the Regulation proscribe the intended uses of the information, however, we suggest the Regulation could include a requirement for interested parties who wish to access the information via the internet to lodge an on-line application form, requiring a name and a return email address. This would go some way to establishing the bona fides of the interested party and thereby limit the possibility that the information could be used for the purpose vilification or harassment. We also suggest that there be a processing time to allow for consideration not only by the Speaker, the President or their nominated representative, but also for consideration by the applicant prior to using the information.

Further, we suggest that there be consideration given to an amendment similar to that in section 58 of the PPIP Act to allow for consideration of the suppression of certain information not only from on-line access, but also from public inspection, in circumstances where access to the general public might place a Member of Parliament or any other third party at risk of harm. We suggest that this might be effected by requiring the Speaker, the President, or their nominated representative to consider whether the public interest in requiring public access to the information 'outweighs any individual interest in suppressing the information'. We suggest that



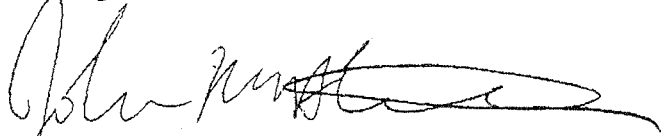
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any such provision to permit suppression should be subject to any other lawful requirement to disclose the information.

Finally, we suggest that any changes to the Register access regime be made very clear to Members of Parliament and to any third parties whose personal information appears in the register. This could possibly take the form of a notification at the commencement of each session of Parliament, followed by a written confirmation of the contents of the register sent to the individual concerned with an opportunity to confirm the information within a set period of time.

We thank you for the opportunity to provide a submission on these matters. Please contact Ms Jenner of this Office on (02) 8019 1603 if you have any queries regarding this matter.

Kind regards

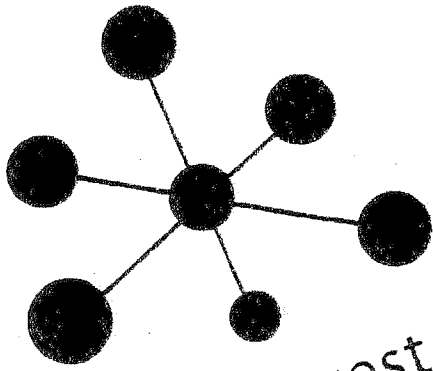


John McAteer

Acting Privacy Commissioner



privacynsw



public interest
AUSTRALIA

Code of Conduct NSW

12 July 2010

Brenda Bailey, Senior Policy Officer

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based, public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on democratic processes

PIAC is pleased to comment on the review of the *Code of Conduct for Members of the NSW Parliament*. PIAC has an interest in the role and responsibilities of members of parliament as they relate to a functioning democracy, transparent political processes and free and fair elections. PIAC's work in this area includes that undertaken on political donations and election funding for submissions to both state and Federal inquiries¹ as well as a submission to the Senate Finance and Public Affairs Committee inquiry into the Lobbying Code

¹ Kerrie Tucker and Deirdre Moor, *Deepening Democracy: Submission to the Australian Government in response to the Electoral Reform Green Paper (2009)* Public Interest Advocacy Centre
<http://www.piac.asn.au/publication/2009/02/090223-piac-electoral-reform-subhttp://www.piac.asn.au/publications/pubs/sub2009022_20090223.html> at 21 June 12 July 2010.

of Conduct² and more recently a contribution to the Independent Commission Against Corruption Inquiry into the management of lobbying in NSW.³ This submission draws upon this work, focusing on improvements that are needed to improve accountability and transparency that will create public confidence in the parliamentary process.

Disclosure and public information

The public discussion paper released by the NSW Legislative Council Privileges Committee,⁴ specifically asked for comment on whether the information disclosed by members should be available on a public website. The principle that should be applied to this issue is that all reporting requirements should be informed by the objective of ensuring easy access and comprehension by citizens. Reporting should be mandatory, detailed and regular. Members of Parliament providing reports on-line would increase efficiency in collection and distribution of the information if they could input data on-line.

This distribution of information is not the only matter in relation to reporting that should be considered. The information must also be up-to-date, and for this to occur a mechanism for monitoring the content and delivery of reports is necessary. Other countries have a more formal and more regular reporting and monitoring mechanism that is the responsibility of an office independent of Parliament. Canada, for example, has an 'Office of the Ethics Counsellor' that has responsibility for codes that cover similar matters as the NSW Code and the United Kingdom (UK) has a Parliamentary Commissioner for Standards that has responsibility for the register of pecuniary interests of members of parliament.⁵

The role of the Privileges Committee could be supported by a Parliamentary Standards Commissioner⁶ as appointed in the UK for recording and monitoring statements of interest to parliament, conflicts of interest and ensure observance of ethical practices. A Commissioner could also take over the educative role of the committee, providing guidance and training for all Members of Parliament on matters of conduct, propriety and conflicts of interest. The Australasian Study of Parliament Group reported on the role a Commissioner could take, suggesting it could also monitor and propose modifications to any guides or codes, receive and

² Kerrie Tucker, *Regulating influence and access: Submission to the Inquiry into the Lobbying Code of Conduct* by the Senate Finance and Public Affairs Committee (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/2008/06/080610-lobbying-code-conducthttp://www.piac.asn.au/publications/pubs/sub2008061_20080610.html> at 21 June 12 July 2010.

³ Brenda Bailey, *Lobbying, transparency and accountability in NSW: Submission to the Independent Commission Against Corruption* (2010) Public Interest Advocacy Centre

⁴ NSW Legislative Council Privileges Committee, *Inquiry into the Operation of the Code of Conduct for Members of the NSW Parliament, Public Discussion paper*, (2010). <<http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/C2EA15BA2CDA7B21CA257729000DB5E1>> at 8 July 2010.

⁵ Parliament of Australia, Parliamentary Library, *Codes of conduct in Australian and some overseas parliaments* (2003), E-brief, online only issue, <<http://www.aph.gov.au/library/intguide/pol/codeconduct.htm>> at 8 July 2010.

⁶ David Yencken and Nicola Henry, *Democracy Under Siege*, (2008) the Australian Collaboration, Victoria, 45.

investigate complaints and possible breaches. The Commissioner in this model would report to Parliament, and be appointed on the recommendation of an all-party Parliamentary committee.⁷

Recommendation

PIAC recommends that the NSW Parliament investigate the establishment of a Parliamentary Standards Commissioner in order to restore and maintain confidence in parliamentary processes.

Use of public resources

The code should describe the principles governing the use of public resources and how the use of resources is publicly reported. Principles and regulations should apply to ensure that parliamentary entitlements cannot be used for politically partisan purposes and that any changes to the use of those resources are be subject to independent evaluation.

Recommendation

PIAC recommends that Members of NSW Parliament report publicly on the use of their parliamentary entitlements.

Secondary employment and post-parliamentary employment

While in office, members of parliament should not receive any income from a business or from any other work other than as a member of parliament. However, receipt of royalties received from work undertaken prior to appointment to parliament is acceptable.

Former Ministers ministers and parliamentary secretaries should be banned from lobbying activities for 18 months after leaving office. Members of parliament should not take advantage of information to which they had access, which is not information available to the general public.

Recommendation

PIAC recommends that regulations are be introduced to prevent members of parliament from undertaking lobbying activities for 18 months after leaving office and from using information they had access to in their position, which was not publicly available.

⁷ Accountability Working Party, Australasian Study of Parliament Group, *Be Honest Minister – Restoring Honest Government in Australia* (2007) 14.

Consistency with other codes

Duties as a member of parliament

PIAC recently commented on the ICAC inquiry into lobbying in NSW.⁸ PIAC made several recommendations which, that to take effect require members of parliament to establish codes for their own conduct and relationship with lobbyists. For the system to be procedurally fair it is critical that both lobbyists and ministers and members of parliament are required to meet the same burden of responsibility in terms of their obligations.

The matters that intersect between the two roles are:

- increasing the reporting requirements of Members of Parliament;
- regulation of lobbyists to extend to all Members of both Houses of the Parliament and their staff;
- sanctions included in the regulations;
- ongoing independent evaluation of the effectiveness of any regulations, codes or standards for Members of Parliament, as well as of any Officer charged with monitoring, educating or enforcing codes and that such evaluations be tabled in the Parliament at regular intervals.

Family members

The Federal Office of Prime Minister and Cabinet has a *Standards of Ministerial Ethics*⁹ (the Ethics Code) that provides more detail than the NSW Code. The Ethics Code includes time frames for reporting changes to private interests, and the boundaries on the influence of family members. Application of the controls on family members, a particular aspect on which the NSW Code is silent, should be considered for all Members of Parliament in NSW. The Federal requirements include that:

- transfer of an investments and other interests in any public or private company or business to a family member, nominee or private trust is not an acceptable form of divestment;¹⁰
- members must consider the private interests of members of their families in considering whether a conflict of interest could arise;¹¹
- family members cannot be appointed to positions in their Ministerial or electorate offices or those of other members of the Executive Government, or to any position in an agency in the Minister's own portfolio.¹²

⁸ Bailey, above n 3.

⁹ Office of Prime Minister and Cabinet, *Standards of Ministerial Ethics*, (2008), www.dpmc.gov.au/guidelines/docs/ministerial_ethics.rtf at 8 July 2010.

¹⁰ Ibid Clause 2.11.

¹¹ Ibid Clause 2.12.

¹² Ibid Clause 2.18.

PIAC recommends that reporting include details of meetings with lobbyists to ensure compatibility with requirements placed on lobbyists; and to put in place the same requirements measures as the Office of Prime Minister and Cabinet requirements and including those relating to limitations on family members.

Duties as a member of parliament

The Prime Minister and Cabinet, Standard Ethics Codes refers specifically to the need for Ministers to be accountable for the power and function of their office, including those that act as their delegates.¹³ PIAC agrees that Members of parliament should not be able to claim ignorance of his or her the delegates in their office or department. Some ministers claim that they cannot be held personally responsible for the acts and omissions of others who are involved in the administration of their portfolios because they did not know when they should have known, and those directly answerable to them did know but did not tell them. They are not told because of a culture that allows information be withheld so that the minister can say 'I did not know'. Effectively, personal responsibility is denied. 'Bad government is the inevitable result of a lack of accountability' and fertile ground is prepared for corruption.¹⁴

Opposition and cross bench members should also take responsibility for their electorate and office staff. All members of parliament should be responsible because their vote can be critical. This is particularly the case where the Government does not hold a majority in both houses and balance of power is held by other members of parliament, and is also the case before an election when a change of government is possible. If integrity of the process is a key aim then codes of practice should apply to all members of parliament.

Recommendations

PIAC recommends the members of parliament meet the same reporting requirements as lobbyist in NSW.

PIAC recommends that the advice set out in the Office of Prime Minister and Cabinet, Standards of Ministerial Ethics that describe the employment of, reporting and divesting of interests in regard to family members apply to all NSW members of parliament.

PIAC recommends that the code reflect that Ministers have responsibility for the actions of their portfolios and all members for their office and delegates.

Other matters

PIAC has undertaken work on election funding and the conflicts that may arise between a parliamentarian's role once elected and the role as an election candidate. Controls are needed to prevent the perception that access and influence to a member of parliament can be sold. The Code could provide members of parliament with advice about this potential conflict. For example, the appearance of corruption by gaining undue influence by accessing a member of parliament through fund raising would be avoided if the code advised the member not to attend fundraising functions while in office. PIAC supports the recommendation

¹³ Office of Prime Minister and Cabinet, above n 9, Clause 1.3.

¹⁴ Accountability Working Party Australasian Study of Parliament Group, *Be Honest Minister – Restoring Honest Government in Australia* (2007), 2.

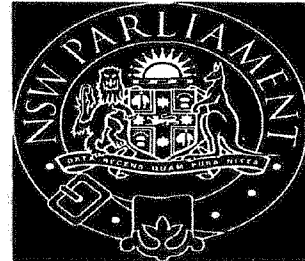
in the paper prepared for the NSW Electoral Commission by Joo-Cheong Tham that members of parliament should be banned from attending party fund-raisers.¹⁵¹⁶

Recommendations

PIAC recommends that members of parliament be banned from participating in party fund-raisers.

¹⁵ Joo-Cheong Tham, *Towards a more Democratic political funding regime in NSW*, (2010) NSW Electoral Commission, 3-5, Recommendation 17.

LEGISLATIVE ASSEMBLY



Standing Committee on Parliamentary Privilege
and Ethics

BRIEFING PAPER:

TRAINING FOR MEMBERS ON THE CODE OF
CONDUCT

December 2010

Chairman's Foreword

The Independent Commission Against Corruption ("ICAC") in its July 2010 report on an "Investigation into the submission of false claims for sitting day relief payments by a NSW MP and members of her electorate office staff" (Operation Corinth) made certain recommendations to the Clerk of the Legislative Assembly in regard to corruption prevention.

As a consequence of these recommendations, the Speaker, the Hon Richard Torbay MP, wrote to the Committee requesting that the Committee, as part of its review of the Code of Conduct, also consider the following matters:

- (1) the desirability of the delivery of mandatory training to Members on the Code and related matters either as part of the Code itself or through another process.
- (2) the development of a training course for Members on the Code of Conduct, entitlements and related matters and how to sustain and reinforce this learning.

The Committee has recently tabled a report on its review of the Code of Conduct, which includes a number of recommendations which directly respond to your request.

In particular, the report recommends continuation of early induction sessions for new members on the registration of interests, to be followed up by a session later in mid 2011. This briefing note gives further information on the discussions held with Mr Ian Dickson, the Parliamentary Ethics Adviser, and the resulting recommendation that the Parliament hold a future session for all Members in 2011, involving the Auditor General, the Ombudsman and the Commissioner of the Independent Commission Against Corruption.

The Committee has recommended the introduction of formal training programs for Members on an annual basis.

This briefing note on educational options, which includes a discussion paper prepared by the Committee secretariat, was considered by the Committee at its meeting on 2 December 2010. This report also records discussions held with the Parliamentary Ethics Adviser, Mr Ian Dickson, in November 2010. The report is published to inform Members of the contextual background to the recommendations in the Report on the Review of the Code of Conduct.

Paul Pearce
Chair

Introduction:

The two questions for the Committee's consideration are firstly whether training for Members' on the Code and related matters should be mandatory and secondly how a training course should be delivered and its lessons sustained and reinforced.

Should training be mandatory?

In 2009, the Victorian Parliament's Law Reform Committee considered induction programs for members as part of its Review of the *Members of Parliament (Register of Interests) Act 1978*. Of particular interest is the evidence the Committee took from Associate Professor K. Coghill who referred to an ongoing study being conducted by the Inter-Parliamentary Union (IPU) and academics from Melbourne's Monash University. He informed the Committee that:

"Part of our international research has been to ask the question of whether or not the training provided – this is in national parliaments – was compulsory or mandatory. We were in fact a little surprised to find that in half of the responding parliaments it was mandatory and – surprise, surprise! – the attendance was close to 100 per cent, whereas for those parliaments in which it was not mandatory, the attendance at sessions was anything from 10 up to about 60 or so per cent.

It strikes me that there is good international precedent for making it compulsory, and I would expect that with very little encouragement from the political parties, that could be achieved and a very high level of participation could be achieved."¹

In response to a question from the Committee's chair, as to whether high participation rates had delivered the desired outcomes or were treated as a 'box ticking exercise', Associate Professor Coghill explained that this was a question which could not be answered at this stage. The research he referred to was a survey which would be followed up over the next few years by interviewing parliamentarians and relevant parliamentary officers to determine the effects of providing training to parliamentarians.

The final results of the IPU/Monash study will be important in informing the debate on member training, as an article in *The Parliamentarian* noted:

"There is remarkably little research on the professional development of Parliamentarians...the IPU and many donor agencies share a concern about the need for research that will lead to improved design, delivery and evaluation of programmes for new MPs."²

Although the early IPU/Monash research clearly has identified a number of legislatures internationally that see merit in mandating training, the final report of the Law Reform Committee

¹ Assoc. Prof. The Hon. Dr Ken Coghill, transcript of evidence, Parliament of Victoria Law Reform Committee, Review of the *Members of Parliament (Register of Interests) Act 1978*, Melbourne 29 June 2009, p.4.

<http://www.parliament.vic.gov.au/images/stories/committees/lawreform/members_parliament/Transcripts/2009-06-29_Ken_Coghill.pdf> Accessed 30 November 2010.

² Coghill, Donohue, Holland, Lewis, Neesham, Richardson and Rozzoli, "Building Parliamentary Careers: Improving Induction" in *The Parliamentarian* Issue 1, 2009, pp. 64-65.

did not make any recommendation for mandatory training in the Victorian Parliament. The Committee's report noted the ethics and standards elements present in the voluntary induction programs offered in the Queensland Parliament and the Western Australian Legislative Assembly and recommended a similar approach for Victoria.

When considering mandatory training, one question of principle relates to the role played by members of parliament in a representative democracy, which is the form of government in NSW. The classic view is that members are invested with the authority to act, according to their judgement, in the public interest. It is therefore distinct from other forms of democracy³ in that the elected member is not a delegate, elected to convey the will of the electors, but a trustee who is chosen to make decisions on behalf of their constituents, based on the representative's considered opinion. In the words of Edmund Burke:

...his unbiassed opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence, for the abuse of which he is deeply answerable.⁴

The argument seems to follow that having been entrusted by the electors to exercise power on their behalf; members are deemed sufficiently capable of displaying good judgement and performing their duties in a proper manner, unless there is clear evidence to the contrary.

Compelling members to undergo ethical training and assessment by the institution of parliament might seem to doubt the assessment already made by the majority at the ballot box that members are persons who are fit to serve. Members who act unethically are subject to sanction by the House, the law and ultimately the electorate but to presume that members are, on election, ethically vulnerable could be seen to be impugning both their and the voters judgement.

In practical terms, if training were to be mandatory, the question arises of how would it be enforced. For example, it may be considered undesirable for any enforcement action taken against a member for non-attendance at a mandatory training course to be construed as a sanction for actual misconduct, when these are not the same thing.

There appears to be a not insignificant risk that member training could become highly politicised through any enforcement provisions. As the Chair of this Committee noted in his evidence to the Victorian Law Reform Committee, 'the reality is in the New South Wales Parliament, and I do not suspect it is that different elsewhere, that there is a tendency to play the man not the ball at times'.⁵

³ Other forms of democracy such as direct democracy or deliberative democracy place limitations on these elected representatives through processes such as giving the populace a veto on legislation or the right to remove elected officials from office before the end of their term.

⁴ Edmund Burke, *Speech to the Electors of Bristol*, 3 Nov. 1774.

⁵ Mr Paul Pearce MP, transcript of evidence, Parliament of Victoria Law Reform Committee, Review of the *Members of Parliament (Register of Interests) Act 1978*, Melbourne 17 August 2009, p.3. <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/members_parliament/Transcripts/2009-08-17_NSW_Legislative_Assembly.pdf> Accessed 30 November 2010.

There is also a danger that the mandatory element in any training might become a mere 'box ticking exercise'. Assuming it were relatively brief (given the other claims on Members' time) and delivered in the same format to all at a fixed point in time, there is a risk that the focus would then be on completing the universal compulsory element rather than allowing Members to assess their individual training needs over the life of the parliament.

Finally, there is the question of the extent to which Members should receive mandatory training on important matters. If Parliament mandates training on the Code and related matters, then is there not an argument for, say, mandatory Occupational Health and Safety Training or mandatory advice on the use and abuse of parliamentary privilege? Could a precedent be set which might then lead to Parliament increasingly mandating what the needs of Members are and how they allocate their time?

Given the questions posed above and the fact that the final results of the highly relevant IPU/Monash University research will not be known for a few years, it may be preferable for a future committee to commence a formal inquiry into the possible content of a general ethics program for Members of the NSW Legislative Assembly before consideration be given to making such training mandatory. A voluntary induction programme which allows Members to determine their individual training needs and balance this with their other commitments is preferred. The issue of mandatory training for continuing members is discussed in the following section.

How should a training course be delivered and its lessons sustained and reinforced?

As noted above, the Victorian Parliament Law Reform Committee conducted a Review of the *Members of Parliament (Register of Interests) Act 1978*, publishing a report in relation to the Committee's findings in December 2009. In its report, the Committee noted that the provision of information and training is one option for promoting ethical awareness amongst members of parliament.⁶

There is agreement that in circumstances where training is provided in ethics, such training should extend beyond the provision of information (described as 'Orientation') to the provision of basic skills (described as 'Induction').⁷ A survey of Australian Senators indicated that Senators thought that there could be more ethics information included during the induction process.⁸

An induction session on ethics could cover pertinent issues in the Members' Handbook, *Constitution (Disclosures by Members) Regulation 1983*, Register of Disclosures by Members of the Legislative Assembly compiled and maintained under clause 18 of the Regulation, the Code of Conduct for Members, and declarations with respect to electoral funding.

Other jurisdictions include ethical training as follows:

Queensland: Three day induction programme, featuring ethical issues in great detail.

⁶ Victorian Parliament Law Reform Committee Review of the *Members of Parliament (Register of Interests) Act 1978* Report, Melbourne, December 2009, p. 86.

⁷ Coghill et al, op cit, p. 64.

⁸ Coghill et al, op cit, p. 66.

- Western Australia:* Regular briefings on the Code of Conduct, including a half day seminar on ethics in 2009.
- Victoria:* Considering the introduction of an ethics component in the 2010 induction process.

The abovementioned Victorian Report included a recommendation that ethics training be introduced into the Victorian Parliament, with such training featuring external presenters with backgrounds in ethics and politics.⁹

Training could be delivered in line with adult learning techniques. Adult learning techniques acknowledge that participants need to understand the reason for learning something, that experience provides the basis for learning activities, with participants needing to be responsible for their decisions on education (which may be incompatible with mandatory training) and also involved in the planning and evaluation of their instruction. Adult learning techniques also acknowledge that participants are most interested in learning subjects that have an immediate relevance to their work and that such learning should be problem-centred rather than content-oriented. Useful methodologies include group discussions, brain storming, case studies and team presentations.¹⁰

The abovementioned survey of Australian Senators indicated that Senators thought that a follow-up ethics session six months after the initial induction session would be beneficial.¹¹

Letters from the Clerk when Ordinary and Supplementary disclosures are due may also reinforce lessons learnt during training. An expanded role for the Parliamentary Ethics Advisor could also be considered. Lessons can also be sustained and reinforced through the use of forms for the purposes of declaring interests and funding, by way of an example, which include explanatory cover sheets and sample entries.

Learning on the Code of Conduct, entitlements and related matters might also be sustained and reinforced through the development of online resources such as a short video presentation on the current obligations on members; a 'scenario bank' which explored relevant case studies such as conflicts of interest or other ethical dilemmas; and a frequently asked questions page. These could be accompanied by the contact details of appropriate persons able to offer guidance and advice.

Whilst new Members are the focus of an induction programme there would seem to be no reason to exclude more experienced Members should they wish to participate, as they may find the training valuable and their contributions could be of great benefit to the newly elected.

Recommendation

The Committee recommends that the Clerk of the Legislative Assembly develop a training course for Members on the Code of Conduct, entitlements and related matters, to be offered at induction and for continuing Members.

⁹ Victorian Parliament Law Reform Committee Review of the *Members of Parliament (Register of Interests) Act 1978* Report, Melbourne, December 2009, Recommendation 22.

¹⁰ Smith, M. K. (2002) 'Malcolm Knowles, informal adult education, self-direction and andragogy', *the encyclopedia of informal education*, www.infed.org/thinkers/et-knowl.htm, accessed 30 November 2010

¹¹ Coghill et al, op cit, p. 66.

Committee discussion with Mr Ian Dickson, Parliamentary Ethics Adviser

On 24 November 2010 the Committee met with Mr Ian Dickson, the Parliamentary Ethics Adviser, to discuss the desirability of the development of a training course for Members on the Code of Conduct, entitlements and related matters and whether there should be a mandatory program to sustain and reinforce this learning.

The Committee had previously deliberated on the question of educational options at meetings held on 13 May, 20 May, 23 September, and 21 October 2010.

The Committee also discussed the current, and proposed options for ethics education with Mr Ian Dickson, the Parliamentary Ethics Adviser. In particular, the Committee discussed what might be the optimum timing of training to maximise effectiveness. The Committee supported continuing the current induction program which includes information on the Code of Conduct and the regulations for reporting of members' interests. In addition, there was general agreement that a fuller session later in the first year, when new Members would have offices fully up and running, and a better understanding of the day to day operations of electorate offices and the scope of their parliamentary roles, would be helpful. Mr Dickson noted that any focussed ethics training might benefit by being held outside of the induction period, possibly within 3-6 months after the General Election. Mr Dickson suggested that this type of session should involve the ICAC Commissioner, the Auditor General and the Ombudsman. The last time that the ICAC was invited to address MPs was in 1998.

Members also discussed the option of offering an ethics training module every 12 months, which would be mandatory for Members to complete. The modules could be offered by DVD or possibly on-line.

Other matters to be included in training and induction

In the report on the Review of the Code of Conduct, tabled in December 2010 the Committee also recommended that the following matters be included in induction or other training offered to on-going members:

- The application of privacy principles to Members' correspondence and representations
- Information on the Standing Orders that pertain to conflicts of interests, such as the disqualification from voting on a matter in which a Member has a direct pecuniary interest not held in common with other citizens of the State
- Reference to standards common to aspirational codes, such as The Nolan Committee's Seven Principles of Public Life.

CORRECTED VERSION

LAW REFORM COMMITTEE

Review of the Members of Parliament (Register of Interests) Act 1978

Sydney — 17 August 2009

Members

Mr C. Brooks

Mr R. Clark

Mr L. Donnellan

Mr M. Foley

Mrs J. Kronberg

Mr J. Scheffer

Mrs H. Victoria

Chair: Mr J. Scheffer

Deputy Chair: Mr R. Clark

Staff

Executive Officer: Ms K. Riseley

Research Officer: Ms S. Brent

Administration Officer: Ms H. Ross-Soden

Witnesses

Mr Paul Pearce MP, Chair, Standing Committee on Parliamentary Privilege and Ethics,
Legislative Assembly.

CHAIRMAN'S WELCOME

Mr PEARCE—I understand you have had presentations already from my upper house colleagues, including the President of the upper house, so there may be some repetition in this.

I think you have had a chronology of how New South Wales has got to where it has got to. We also have, of course, the ICAC Act, which has an impact on the whole nature of Parliament's relationship to declarations and the like. I got elected in 2003, so for the period prior to that I am relying on notes I have been given.

There was a Legislative Assembly Standing Committee on Ethics with three community members, 1995-96. 1997 committees of the Assembly and the Council both tabled draft codes which differed in some areas. Both committees met and tabled further reports. I would add that actually getting a meeting of the two committees has been fairly problematic. We have not had one, despite some repeated requests. I am sure the Legislative Council have explained why they could not meet with the Legislative Assembly on this matter. Anyway, we have not been able to get it together, and there are some issues there which obviously have to be resolved between the two Houses, because we do not want glaring inconsistencies between the two codes.

We have a Parliamentary Ethics Adviser, which I imagine you have been advised of. The role of that ethics adviser is fairly limited in that he cannot give legal advice. Consequently, the amount of work he does is fairly low. Members do inquire from time to time, but it is advice of a generic nature, rather than specific legal advice, and quite frankly, members I think, if they do have an ethical issue they have to resolve, really need some specific advice. If it is a real issue, I suspect they would be seeking their own legal advice on the matter. But in general terms there is an ethics adviser there.

My personal view is I would like to see that role expanded, and again speaking from my own perspective, I think some of the changes being mooted in the House of Commons may be advantageous when it comes to ethics advisers. Mind you, the House of Commons has had a few more difficulties than any of us recently.

The ICAC in 2002 recommended a review of the code and the regulation in its reports on the investigation of parliamentary electorate travel. I think as the upper house members may have advised you, some of these arose from specific circumstances developed by members over a period, including some where members finished up on the wrong side of the discussion with the ICAC in circumstances where there was a general belief that somebody was acting in accordance with standard practice, former member Langton in particular, the former Minister for Transport in Opposition, and it related to travel and the capacity to transfer travel between members. That was found to be corrupt conduct by the ICAC. I was not in Parliament at that stage but I know my predecessor in the seat certainly found that very surprising. I understand that members of all parties found that sort of decision very surprising, because it had been a practice which had been very common for basically the best part of 100 years.

I would emphasise there that the ICAC legislation has a very wide definition when it comes to corrupt conduct and it is well beyond anything that would be corruption in the sense of the Crimes Act or what a general member of the public would recognise as corruption. Corrupt conduct actually goes to issues such as maladministration as well as partiality and the like, which is well beyond what corruption is generally considered.

In June 2002, the Standing Ethics Committee considered the ICAC recommendations for changes to the code: the application of the code during promulgation of Parliament; the provision in the code relating to bribery be amended to broaden private benefit and to clarify the provision; any inconsistency between the requirements for declaration thresholds of gifts and travel, one being \$500, one being \$250; references for the threshold to be increased in recognition of the impact of inflation and parity with certain provisions of local government declarations; consideration be given to residents of New South Wales being able to view the information on the parliamentary web site, but acknowledging there were security implications; and that more information be made available to candidates for election about the ethical environment in which they were expected to work. Recommendations 1, 2 and 6 were ultimately adopted, the other three, being the gifts, the quantum being increased and the public information, at that stage were not adopted.

In 2006 the Standing Ethics Committee examined the Parliament's proposed amendments to the code and regulation to introduce six monthly reporting through a supplementary return, to introduce the capacity for

discretionary reporting and to introduce a requirement for members to give information about clients to whom members were providing consultancy advisory services related to their parliamentary role.

Again, the first two of those actually arose from specific circumstances. One related to an upper house member whose circumstances had changed and there was a delay in advising of the changes. There was certainly no suggestion that anything unlawful had taken place, but there was a perception in the upper house, or by some members of the upper house, that there was a problem. My personal view is there was not a problem. It was just simply a case of the timing. The declaration was accurate at the time it was made. Circumstances changed after that. The other related specifically, as I recall, to the circumstances of the former Leader of the Opposition in the lower house, who had been doing advisory consultancy services for a client. Again, the matter was referred to the ICAC and I think there was no case to answer at the end of the exercise.

I suppose what that does show is that this tendency to get involved becomes very much within the party political process. That in a way, from my perspective, is wrong, that you go down that path. Parliamentary ethics should stand outside of that party political process. The reality is in the New South Wales Parliament, and I do not suspect it is that much different elsewhere, that there is a tendency to play the man not the ball at times and if he is the captain of the team it is even better to go after him, and so that is what has happened. If there is a certain level of notoriety in the public's mind, it is a good idea to go after him. That tends to get caught up in this.

A lot of the changes that have been made over the period have been in response to that to, on the one hand, protect members and on the other hand to apparently respond to those public concerns or parliamentary concerns about individual members' circumstances and what they did and did not do, or allegedly did or did not do.

The upper house committee disagreed with the requirement for six monthly reporting, recommending annual reporting and mandatory updating after 35 days if there was a change in the interest, which would have addressed this specific circumstance that arose from the upper house member. Notwithstanding that we do have now six monthly reporting.

The Government further proposed minor changes to the regulation. I think you have copies of all the regulations, so I won't go through the detail there and the appropriate forms.

There are amendments to the sample given in the corporations section of the form. There was an issue as to exactly what we are talking about and how broad that definition was. One interpretation was that it was extremely broad and was it going to relate to a federal definition and was it going to relate to what other people would understand a corporation is. That was clarified. There was an example inserted and the sample form clarified the disclosure requirements of proprietary limited companies.

The committee considered the amendments to the Constitution (Disclosure by Members) Regulation 1983, reported in 2006 and adopted in 2007. The draft regulation was forwarded to the committee for consideration prior to introduction. The draft regulation contained four new forms, which I will leave with you, which were substantially reformatted to provide extra information about what needed to be declared with sample entries.

In 2008 the Government forwarded proposed amendments to the regulation the Committee on Parliamentary Privilege and Ethics. A major amendment was to further reformat the pecuniary interests form so that the section filled in by members was less than 15 pages long. The new form, which was adopted, is in two sections, the first section being explanatory and the second being the actual return. Members were required to make the first supplementary return by 31 March 2008 and we currently have an obligation to provide the annual return at the end of September 2009. You can see the sort of document which is the compiled register there. I think that gives you an outline.

Perhaps I will answer questions and expand on any of those issues. I believe there was some discussion earlier in relation to members' induction programs. I found the induction program in 2003, when I became a member, very informative but equally it was a hell of a lot of information supplied in a relatively short period of time, some of which I personally didn't find particularly relevant, partly because I had spent 21 years in local government and was fairly familiar with some of the declaration requirements. Having said that,

certainly other members found it valuable.

I think it is a good way of doing it and it is a good way of giving members a concept. All members are issued with a handbook and I assume that would be the same in the Victorian Parliament and it has in their members' code of conduct, implications of the code of conduct and, particularly, reference to terms of corrupt conduct under Sections 8 and 9 of the ICAC Act.

It makes a point, quite correctly so, an action mentioned in section 8 of the ICAC Act will not constitute corrupt conduct unless it amounted to either a criminal offence or disciplinary offence, reasonable grounds for dismissing or dispensing with services or otherwise terminating the services of a public official.

In the case of a minister of the Crown or a member of parliament it needs to be a substantial breach of the applicable code of conduct, and then there is a further section there in disclosure of pecuniary and other interests and discussing what is actually involved as a pecuniary interest.

I did find this interesting when I came here from a local government background that the type of declaration and type of interest we had at local government varied and in some areas it was much more rigorous at local government than it was at the State level. There is probably good reason for that.

Local government in New South Wales, despite recent changes, acts as the consent authority under the provisions of the Environmental Planning & Assessment Act, whereas a backbench member of parliament isn't in that sort of role, so that specific capacity for potential corruption or perception of corruption or corrupt conduct clearly doesn't exist, so I can understand why there was that change.

The one area that leapt out at me as a change was that in local government you had to declare a whole range of interests, including those interests you had out at quite some distance and the interests stretching off those family members elsewhere, whereas of course that does not apply as a State member. It is a more constrained level of declaration. It relates more to the member personally than it would to general circumstances.

The CHAIR—I note that you were saying earlier on that the Privileges Committee and the Ethics Committee, those two components had not met, is that correct?

Mr PEARCE—No, the upper house and lower house committees hadn't met. I chair the Privileges and Ethics Committee. We have a combined Committee.

The CHAIR—They have met together but not separately?

Mr PEARCE—There is only one committee. Privileges and ethics is a single committee in the lower house. There is an upper house Committee also. They call themselves the Privileges Committee. The two committees, the upper house and lower house committee haven't met, so there were some inconsistencies in the two codes.

The CHAIR—My question related to the reviews. I see that one of the tasks you have is to review the code of conduct for members. Can you talk to us how you go about those reviews and that is in the context of in Victoria our code has been criticised because it is really guidelines. Maybe they should be further developed, but being guidelines they don't really contain a statement of values or a statement of principles and it has been put to this Committee in our discussions that these kinds of documents benefit from being expanded in that way.

How do you review and are those kinds of considerations taken into account?

Mr PEARCE—We have a statutory obligation to review the code over each term of Parliament, and basically the objective is to keep it relevant, to obviously take into account any findings or recommendations that might come from other bodies, particularly the ICAC, and to respond.

Obviously if something has come up through the Ethics Adviser, if there is a matter that he or she may have identified, we look at that. We make recommendations to the Government for amendment, if necessary, to the regulation.

The CHAIR—Did you include MPs in that review process, through surveys and questionnaires?

Mr PEARCE—I don't know that we got all that many responses, from my recollection, but we included MPs in it and it was one of those things that most MPs see that as a pain, frankly, filling out the paperwork on a regular basis. Some take the view that it is intrusive on their private existence but it happens to be a requirement of holding the position, so yes, we did inquire of the MPs but didn't get a lot of feedback.

The CHAIR—In our hearings witnesses have acknowledged that it is difficult to engage in these kinds of processes, maybe for very good reasons because people are busy and have a lot of onerous duties and don't tend to this part of their work. It has been put to us that part of our work is to enhance the standing of the Parliament, as the institution of democracy in our society, and that we as MPs are really the stewards of the process which is much greater than us and will go on afterwards and that we need to pay some attention to making sure that is strengthened and developed and if we don't get MPs to subscribe to that objective we are not going to be able to strengthen democracy. Is that part of what you are thinking?

Mr PEARCE—Yes, it is. Most recently I have put on the agenda of our Committee, which Ronda has been doing some work on, the whole impact of what has happened in the House of Commons. Obviously we have different objective and legal circumstances, but there are issues there which go to the ethics of members of parliament and how Parliament responds and how the public responds to that sort of circumstance.

We so far have not had anything like cleaning out of moats or building duck ponds or anything along those lines and I think it would be extremely unlikely, certainly under the New South Wales system that that would eventuate, quite apart from the fact that most of the State is still in drought.

What it does, particularly when you look at the way the tabloid media has handled it, is that it brings Parliament and parliamentarians generally into a level of disrepute or reinforces what has effectively been done over a number of years in terms of sniping at members of parliament.

The risk that I see in what is, if you like, a wash-up from the House of Commons and then the attempt to identify matters at Federal Parliament and then at State levels, is that you will get the executive, of which the ICAC is obviously part, increasingly intruding on an area of Parliament sovereignty and parliamentary privilege.

The general public simply doesn't understand that. When you talk about parliamentary privilege the general public do not understand and the media do not want to understand what you are actually talking about, that it is bigger than members of parliament, it is not the individual members of parliament, it is the institution of Parliament and the role of the legislature relative to the executive.

I know when I told some of the my friends I was chairing the Privileges and Ethics Committee there was raised eyebrows all around. The general perception was that we didn't have enough ethics and we had far too many privileges. I then had to explain to them exactly what it was that I was meant to be doing.

There is an issue there and I think it is an issue that I do not think our Committee has necessarily grappled with directly, although it has certainly been alluded to by our current Committee and also my predecessor, John Price, and that is that you are gradually whittling away the concept of parliamentary privilege, that Parliament is the master of its own internal arrangement.

The ICAC legislation does do that and there has not always been a very good relationship between Parliament and the Independent Commission Against Corruption. I think the upper house members may well have referred to an incident where the ICAC raided an office of a former member here and seized documents, both in electronic and paper form and that was viewed as a significant breach of privilege.

Now there is a protocol in place, but the fact that an agency of the executive felt that they had no issues of stepping in and clearly breaching parliamentary privilege, I think is disturbing. You have to remember the ICAC legislation is a very powerful piece of legislation. It is a piece of legislation which was developed by a former Government in the late 1980s, about 1988 I think, in response to what was perceived to be a specific situation, and I won't go into the politics of it but it was very much targeted at a former Government and several former Ministers, none of whom I might add finished up in any strife, although the perpetrators of the said legislation certainly did, which had a certain irony.

You are dealing with a very powerful body there. The question really is the general public have a perception about the ICAC and its role. It has become a very politicized role in my opinion, in that it is viewed as part of the tools of the political debate in New South Wales. The grand statement, 'I will refer the matter to the ICAC', and the general public immediately assume that something is not right, to the extent that the ICAC, I think, actually issued guidelines at one point prior to a local government election, which put limitations on people referring other people to the ICAC. The workload is overwhelming.

So there is a problem with that type of organisation on a broader principle issue. It really is an example of an executive intruding quite significantly on parliamentary privilege. They are able to do it because there was a lack of understanding, I believe, in the community. That could mean that there is a need for an educative role. We do not currently have that role, I do not believe, as far as the general public is concerned.

Mrs KRONBERG—Is there any consideration to amend the Act?

Mr PEARCE—The ICAC legislation?

Mrs KRONBERG—Yes.

Mr PEARCE—My view is no, because from the simple political perspective anyone who sought to go down that path will be pilloried, despite the fact, I suspect, that there is a number of members on all political sides, with the possible exception of one of the minor parties in the upper house, who take a similar analysis that I will be taking here. I do not think I am verballing anyone there by saying that. I think there is a very real concern.

You have got a piece of legislation which was modelled on the Hong Kong legislation, which was designed to deal with the triad gangs in Hong Kong. We did not have that level of corruption in New South Wales, notwithstanding what was said from time to time or portrayed in various television shows. So we end up having a very powerful piece of legislation which pursues driving instructors who are taking a sling. It is a proportionality issue in a way and it does intrude on Parliament.

Those provisions, sections 8 and 9 of the Act, and I am relying on memory here, are worded in a manner which attempts to respect parliamentary sovereignty and parliamentary privilege, but also, when you read the Act in totality, I am not sure that it actually does protect or recognise those requirements.

Mrs KRONBERG—Are you saying that it is like having the genie out of the bottle, the tail wagging the dog?

Mr PEARCE—The genie is well and truly out of the bottle and I think it is a political reality that the ICAC will remain in New South Wales. Again speaking personally, there are elements of the ICAC which have got elements of the star chamber about it and I do not like star chambers. I think there is a real problem in that it has an element of a standing royal commission that can demand answers.

It also has certain evidentiary problems further down the track, depending how they acquire their information, and that has the consequence that prosecutions are not particularly common arising from ICAC reports relative to the number of reports and number of inquiries which take place, because of the nature of the way the evidence is gathered. However, I know the strict legal definition is that there has probably not been a criminal sanction arise from an adverse ICAC report. However, if you are a member of parliament or if you are a senior public servant, your career prospects are extremely limited as a direct consequence of an adverse finding.

There is also within the ICAC legislation no actual method to purge the record if you are subsequently cleared by a court or in fact if you are able to establish that the information upon which the adverse finding was made was flawed. So you can see it is a very dangerous piece of legislation.

Mrs KRONBERG—If I could just follow this, to be a member of the ICAC, I am assuming there are appointments?

Mr PEARCE—Yes.

Mrs KRONBERG—Fixed term?

Mr PEARCE—Yes, there are fixed terms.

Mrs KRONBERG—And that some people are appointed term after term?

Mr PEARCE—They can be. I think we do have commissioners who have done two terms, yes.

Mrs KRONBERG—In terms of any management of their activities, if that was to be looked at, would the only instrument or means available perhaps be restricting their budget?

Mr PEARCE—No. To put on another hat, I am deputy chair of a parliamentary oversight committee on the Ombudsman and the Police Inspector General and formerly a member of the Committee on the ICAC. Neither oversight committee can look into any individual case. It is really looking at their budget and looking at the general practice and procedures rather than any individual case.

However, with the PIC we did establish an inspectorate who acts on the committee's behalf. The inspector, again constrained under the provisions of the Act that established the role, can go into the PIC and dig deeper than a parliamentary committee would be capable of doing. We have public hearings and we regularly meet with the commissioner as well and we meet with the inspector. Certainly, if you look at the published documents for the last meeting of that particular committee, you will see that there is an issue between the inspector and the commissioner in interpretation of a whole range of areas, in that the commissioner takes a particular view as to what the role is and where they do or do not have to abide by the rules of natural justice and administrative fairness, which is contrary to the view of the inspector. I raise this because the PIC Act and ICAC Act have similar provisions that have similar impacts on persons brought before them. The current chairperson of the PIC committee is essentially - how is a polite way of putting it - refereeing the debate between the two, the inspector and the commissioner. What that does reflect is that there is an issue in terms of natural justice and procedural fairness.

Mr BROOKS—You spoke about the role of ongoing education. I think you alluded to it by saying you had a good induction course.

Mr PEARCE—Yes. It was a very compressed induction course, but it was good, yes.

Mr BROOKS—So you would suggest it may be useful when we are looking at a new system of ongoing education in terms of parliamentary standards?

Mr PEARCE—To be frank, given the public's perception of parliaments generally, I think there is an advantage in having a vigorous induction course, including looking at issues of ethics and parliamentary standards. The induction is very compressed, and it tends to be very much focussed on how you go about managing your office, what is the nature of the allowances, how do you go about claiming those allowances, what paperwork is required, all those sort of things.

Yes, your obligations of disclosure are part and parcel of that. I think it is generally over two days, about three or four hours a session. So it is intense, and like anything of that nature, and particularly when you have newly elected members who are sort of wide-eyed anyway walking around the place, it does not always sink in. Then, of course, you get your members handbook, which you can see from the fact that it has not been folded back, is not something that members generally refer to, although you obviously flick into it. So, yes, I think there is a role for that. Possibly that will be twofold. One, it will re-establish some level of public confidence in the parliamentary process and also defend the parliamentary process from undue impacts from the executive.

Mr BROOKS—On a different topic, we had Mr Cripps in earlier on from the ICAC, and the nuts and bolts of the information given to us is that in terms of MPs - we are only looking at MPs' register of interests - there has been one successful prosecution stemming from an ICAC inquiry in the whole time they have had those extensive powers. They have a budget this year of \$18 million and I am assuming it was similar in the past. Can you offer any suggestion as to why Victoria would look at something like that, with that sort of cost with a limited outcome?

Mr PEARCE—I think you have got to look at your circumstances. This is speaking as me personally, not as a government member or anything else. I think you have got to look at the objective circumstances that you find yourself in. Is there a genuine widespread problem that cannot be dealt with by existing legal mechanisms? Do you really need a standing royal commission, which is effectively, with the nature of the powers, what the ICAC is? It may be worthwhile to look at the Queensland model, which I think is called maladministration. I think WA has a similar type of model.

I think the naming of the body is part of the problem. Independent Commission Against Corruption immediately puts this image in the public mind of brown paper bags, whereas in fact a lot of what the ICAC looks at is probably more in the area of maladministration, possible partiality, rather than corruption in the sense of the Crimes Act.

I question whether you would do it, and if you did do it, whether you really need to go down the path of the fairly extensive investigatory powers and the powers that the ICAC has to demand answers. From a legal background I find that offensive. I do not think I am alone on that one, but we have got it.

Mrs VICTORIA—As a supplement to what Mr Foley has just asked, do you think it is because you have an ICAC that is there, and this looming body, that there are not as many prosecutions as there could be or cases leading to prosecution? Does it make you a little more aware of what you are doing?

Mr PEARCE—If the ICAC has had an impact anywhere it has been in a limited number of areas in the bureaucracy. There have been issues around the RTA, the driving testers, which I might add was pretty small beer when you looked at it, but in terms of the public impact of dangerous driving, yes, there is obviously an issue. There is a major inquiry going on in the area of State Rail in relation to corruption there, and it appears to be genuine corruption in that instance.

Part of the issue there arises, if you are going to move away from a pure public provision of infrastructure and move into contracting out and privatisation, then you do have an issue about how you go about managing that. Within the public sector there are generally pretty solid guidelines about how you go about ensuring transparency and appropriate behaviour. Once you bring the private sector in, you have by nature a different game that you are playing.

As I understand it, the ICAC does have a role when it comes to the private sector, the private sector acting as the government would be. That brings a whole interesting debate into the equation because the private sector operation does not have to go down the path that the public sector generally has to go. So there are issues there.

I do not know whether the existence of the ICAC has reduced the amount of corruption. My personal view is that there was not a particularly high level of corruption, certainly at the State level. There were certainly issues at local government level. They tended to be amongst officers rather than councillors, simply due to the delegated nature of the approval process. Anyone who is able to approve something behind a closed door, there is a potential for corruption. That is my view. If you are looking at a parliamentary member, what can they approve behind a closed door? Zilch. If you look at ministers, you have a very limited and over the last 20 odd years reduced level of ministerial discretion.

Certainly, in New South Wales we had an issue in the early 1980s with a former Minister for Corrective Services, where he was exercising discretion in a corrupt manner and finished up in the Berrima nick for his troubles. One of my party I might add, but so be it. But you are looking at isolated incidents. As I say, there was a belief afoot that a former minister was going to be caught up in the ICAC and there was absolutely nothing that came out of that fairly rigorous evidentiary process. So there is a public perception that there might be an issue rather than a reality. Do you therefore need a body with the sort of powers, and in some elements fairly offensive powers, of the ICAC to deal with what is a public perception or are you simply generating headlines in the tabloid media?

Mrs KRONBERG—You mentioned the investigator and his or her dialogue with ICAC.

Mr PEARCE—Yes, inspector general. There are two--

Mrs KRONBERG—For an investigative role, a dialogue?

Mr PEARCE—No, the ICAC and the commissioner have the investigative role and can conduct a hearing. We have an oversight committee of Parliament, because the ICAC is notionally answerable to Parliament. It puts in annual reports and reports on individual issues. But what the committee found was that we were unable, because of the nature of the committee and the fact that we are not able to walk into the ICAC offices as a committee, we found that it was relatively ineffective, parliament's oversight role.

I suppose matters to some extent came to a head as a result of the upper house matter, with the former member and the raid on the offices, and the views expressed by the ICAC commissioner at the time. I might add that the new commissioner has a different range of views on that. With the ICAC, as with the PIC, we established with government legislation to have an inspector general who was answerable to the committee and in a sense acts as the agent of the committee to better fulfil the role of the committee and then report to the committee. So he, he in this case, is our person on the inside, if you want to put it that way.

Mrs KRONBERG—And that report is only to the committee, that is not publicly available?

Mr PEARCE—It is a public document, tabled in Parliament.

The CHAIR—Just two quick things, if you would not mind. The timing of returns is six monthly?

Mr PEARCE—Six monthly, so it is the end of March and the end of September.

The CHAIR—Is that working well?

Mr PEARCE—It is working fine. People are putting them in. There is a lot of paperwork involved. Most members do not have radical changes in their declarations. Certainly, I do not and I think if you go through those, if you are so inclined, you will find that most members more or less fill in the same thing return after return. There may be a change in their real property holdings if they have moved home or acquired an investment property, but there is not a lot. Members of Parliament by nature, certainly lower house members, are pretty engaged in their political activities. They have not got all that much time to run around and run a business as well.

The CHAIR—Any thoughts on on-line, real time registration and publication?

Mr PEARCE—This is a bit of a vexed question as to how you do it. Certainly, one of the minor parties in our upper house has been pushing for this real time declaration. You have got to remember we have a fairly extensive and complex overlay on electoral funding donations, where we have to report every six months as well. In a way, in the public mind at least, there is a certain amount of this all getting tangled up together. I think it is more in the area of electoral donations, and real time updating of that is probably more of a demand rather than this. Although, the public mind seems to think that this might be it as well, in actual fact it is the other one where you have got the electoral donations, and there is an overlap between the two and certainly the public mind has become very blurred as to what role is what.

I think we probably have a multiplicity of forms and returns and so-called transparency, which is actually leading to a lack of transparency, because it is confusing issues more than anything else.

The CHAIR—Thank you very much for that and we will send you the transcript. It was much appreciated.

Committee adjourned.

