

Privileges Committee

**Recommendations of the
ICAC regarding aspects of
the *Code of Conduct for
Members*, the interest
disclosure regime and a
parliamentary investigator**

Ordered to be printed 12 June 2014

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

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Terms of reference

That the Privileges Committee inquire into and report on Recommendations 22, 24 and 25 in the report of the Independent Commission Against Corruption entitled ‘Reducing the opportunities and incentives for corruption in the State’s management of coal resources’, dated October 2013.

These terms of reference were referred to the Committee by House on Thursday, 26 November 2013.

Committee membership

The Hon Trevor Khan MLC	The Nationals	Chair
The Hon Amanda Fazio MLC	Australian Labor Party	Deputy Chair
The Hon David Clarke MLC	Liberal Party	
The Hon Jenny Gardiner MLC	The Nationals	
The Hon Natasha Maclaren-Jones MLC ¹	Liberal Party	
Revd the Hon Fred Nile MLC	Christian Democratic Party (Fred Nile Group)	
The Hon Peter Primrose MLC ²	Australian Labor Party	

¹ The Hon Natasha Maclaren-Jones replaced the Hon Matthew Mason-Cox as a member of the committee on 13 May 2014.

² The Hon Peter Primrose replaced the Hon Greg Donnelly as a member of the committee on 25 November 2013.

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Chair's foreword

This inquiry was referred to the Committee by the House to investigate three recommendations made by the Independent Commission Against Corruption in its report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources*. The three recommendations related to:

- The *Code of Conduct for Members* and dealing comprehensively with improper influence by members;
- The interest disclosure regime and moving to disclosure by members of the interests of their spouses/partners and dependent children;
- The adoption of a parliamentary investigator position as a mechanism for investigating potential misconduct by members.

These three matters arose out of the ICAC's investigation reports on Operation Jasper, entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, and Operation Acacia, entitled *Investigation into the conduct of Ian Macdonald, John Maitland and others*.

The committee has examined the three recommendations closely. They are matters that have all been considered previously by the committee. However, in the light of recent investigations by the ICAC which prompted the ICAC's reports referred to above, the committee feels that it is now high time that all three matters were fully and comprehensively addressed. In summary, the committee recommends:

- The adoption of a new clause in the *Code of Conduct for Members* dealing comprehensively with improper influence by members;
- Amendment of the interest disclosure regime to require disclosure by members of the interests of their spouses/partners and dependent children, together with a range of other measures to increase the timeliness and accessibility of interest returns by members;
- The adoption of a Commissioner for Standards in New South Wales, based on the model adopted in the UK Parliament.

The Committee will also in the future review the issues of secondary employment of members, disclosure of commercial interests held by adult children of members, and members' disclosure of holdings in any trust/company/fund in which they, their spouses/partners or any adult or dependent children have an interest.

I wish to thank my fellow members of the Committee for their detailed and thoughtful consideration of the matters raised in this report. I also place on record my thanks to the Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, Mr John Sidoti, and members of that Committee for their collaboration during this inquiry.



The Hon Trevor Khan MLC
Chair

Summary of recommendations

Recommendation 1

27

That the *Code of Conduct for Members* be amended by the addition of the following clause 8:

8 Improper influence

A member must not improperly use his or her influence as a member to seek to affect a decision by a public official including a minister, public sector employee, statutory officer or public body, to further, directly or indirectly:

- (a) interests of the member, a member of the member's family, a business associate of the member or any other private interests; or
- (b) the financial interests of the member's political party.

Recommendation 2

42

That the interest disclosure regime under the Constitution (Disclosures by Members) Regulation 1983 be amended to incorporate full and open disclosure by members of the Parliament of the interests of their spouses/partners and dependent children of which they are aware subject to the following guidelines:

- members are not required to disclose the name of a spouse, partner or dependent child;
- 'dependent children' means dependent children under 18 years of age or dependent full-time students under 25 years of age who are wholly or mainly dependent on the member for support;
- 'partner' means a person who is living with another person in a *bona fide* domestic relationship;
- where interests are held jointly with a spouse or partner, former spouse or partner, or dependent children, the interests need to be included only as interests of the member, with appropriate notation such as 'jointly owned with [former] spouse/partner'.

Recommendation 3

43

That a new section should be inserted into Part 3 of the Constitution (Disclosures by Members) Regulation 1983 dealing specifically with interests in family trusts or companies and private superannuation funds where:

- the member or the spouse/partner or any adult or dependent children can exercise voting rights or control over the units or shares in the trust/company/fund, or
- the member or the spouse/partner or any adult or dependent children receive or receives in any way a beneficial interest from the trust/company/fund (but not including a trustee of an estate where no beneficial interest is held).

Members should be required to indicate the name (or a description) of the trust/company/fund, the nature of its operation and the beneficiaries of the trust/company/fund.

Recommendation 4

43

That the current system of primary, ordinary, supplementary ordinary and discretionary returns be amended to introduce a simpler system of exception reporting incorporating:

- primary returns to be lodged by a new member within 35 days of the member being sworn,
- ordinary returns to be lodged by returning members within 35 days of the first sitting day of any subsequent Parliament, and
- alteration of interests returns for a member to notify an alteration to his or her pecuniary interests against the relevant primary or ordinary return to be lodged within 35 days of the alteration occurring.

Recommendation 5

44

That in implementing a system of exception reporting incorporating primary, ordinary and alteration of interests returns, those clauses of the Constitution (Disclosures by Members) Regulation that require members to disclose the names and addresses of individuals (as opposed to corporations, trusts, associations, unions and the like) should be amended to provide that individuals should be identified by name and location only (not address), subject to satisfactory resolution of any security and safety issues that may affect members and their families.

Recommendation 6

44

That the Constitution (Disclosures by Members) Regulation 1983 be amended to provide explicitly for the publication of the Register online, with the Clerk to publish the recommended new primary and ordinary returns on the Council's website as soon as possible following the deadline for their receipt, but not later than 14 days after the deadline for their receipt, and to publish the recommended new alteration of interests returns on the Council's website within 14 days of their receipt.

Recommendation 7

44

That clause 21 of the Constitution (Disclosures by Members) Regulation 1983 continue to require the Clerk to cause the recommended new primary and ordinary returns to be furnished to the President of the Legislative Council for tabling in the Legislative Council as soon as possible following the deadline for their receipt, but not later than 21 days after the deadline for their receipt. In addition, that the Clerk cause the recommended new alteration of interests returns to be furnished to the President of the Legislative Council for tabling in the Legislative Council every six months.

Recommendation 8

62

That the Parliament of New South Wales appoints a Commissioner for Standards.

Chapter 1 Introduction

This chapter discusses the establishment and conduct of this inquiry.

Background to the inquiry

The ICAC report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources*

- 1.1 On 30 October 2013, the former Commissioner of the Independent Commission Against Corruption (ICAC), the Hon David Ipp AO QC, presented to the Presiding Officers of the Parliament a report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources*.³ The report was tabled in both Houses of the Parliament later that day.⁴
- 1.2 The report contained 26 recommendations to reduce the opportunities and incentives for corruption in the management of coal resources in New South Wales. These recommendations arose out of the Commission's investigation reports on Operation Jasper, entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, and Operation Acacia, entitled *Investigation into the conduct of Ian Macdonald, John Maitland and others*. The Operation Jasper and Acacia investigation reports were dated July and August 2013.
- 1.3 Three of the 26 recommendations in the report were specifically targeted at improving the systems that ensure the accountability and scrutiny of members of Parliament.⁵ The three recommendations were as follows:

Recommendation 22

That the NSW Parliament's Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee consider amending the Code of Conduct for Members to deal comprehensively with improper influence by members.

Recommendation 24

That the NSW Parliament's Legislative Council Privileges Committee conducts a new inquiry into the mechanism for elected members to disclose the interests of their spouses/partners and dependent children under the provisions of the Constitution (Disclosures by Members) Regulation 1983, with a view to making third-party disclosures a requirement.

³ The report was presented in accordance with section 74 of the *Independent Commission Against Corruption Act 1988*.

⁴ *Minutes*, Legislative Council, 30 October 2013, p 2127; *Votes and Proceedings*, Legislative Assembly, 30 October 2013, p 1909.

⁵ ICAC, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, October 2013, p 8.

Recommendation 25

That the NSW Parliament's Legislative Council Privileges Committee considers the establishment of a parliamentary investigator position in consultation with the Legislative Assembly Privileges and Ethics Committee.

- 1.4 The former Commissioner of the ICAC also wrote directly to the Chair of this committee on 30 October 2013 concerning these recommendations.

Government response to the ICAC Report

- 1.5 On 21 November 2013, the former Premier, the Hon Barry O'Farrell MP, was asked a question during Question Time in the Legislative Assembly concerning the findings of the ICAC's report. In response, the Premier observed in part:

... Recommendations 22, 24 and 25 relate to the Parliament and matters concerning the code of conduct for members, members' pecuniary interest disclosures and the proposal to establish a parliamentary investigator position. Today I have written to both Presiding Officers to advise that the Government will be moving motions in each House to refer these recommendations to the Legislative Council Privileges Committee and the Legislative Assembly Ethics Committee.

I have proposed that, just as we did for the 1996 inquiry into the establishment of a draft code of conduct for members of Parliament, the two committees confer together in seeking submissions and hearing evidence prior to each committee deliberating and reporting in its own right. But, just as with that code of conduct inquiry, I believe it is important for both committees to reach common outcomes as far as practicable. ...⁶

- 1.6 At the conclusion of Question Time in the Legislative Assembly, the former Premier also tabled the Government's response to the report of the ICAC. In relation to recommendations 22, 24 and 25, the Government's response was as follows:

Recommendation 22

Government Response: Support

The Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee will review the Code of Conduct for Members of Parliament.

As has previously occurred, for example when the Code of Conduct for Members was originally being developed, it is proposed that the Committees will come together to consider and hear the relevant matters with a view to a consistent approach.

Recommendation 24

Government Response: Support

The Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee will each conduct an inquiry into the mechanism for elected

⁶ *Hansard*, Legislative Assembly, 21 November 2013, p 26260.

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

members to disclose the interests of their spouses/partners and dependent children under the provisions of the *Constitution (Disclosures by Members) Regulation 1983*, with a view to making third-party disclosures a requirement. As noted above (Recommendation 22), it is proposed that the Committees hold joint hearings and deliberations for the purposes of their inquiries.

Recommendation 25

Government Response: Support

The Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee will initiate inquiries into the establishment of a parliamentary investigator position. As noted above (Recommendation 22), it is proposed that the Committees may hold joint hearings and deliberations for the purposes of their inquiries.

The NSW Government notes that the ICAC supports further consideration of a parliamentary investigator provided there is no change to its jurisdiction or the definition of corrupt conduct in the ICAC Act as a result of any review.

1.7 Later that day, the then Leader of the House in the Legislative Council, the Hon Duncan Gay, by leave under standing order 71 gave notice of a motion for recommendations 22, 24 and 25 of the ICAC to be referred to this committee for inquiry and report.⁷

1.8 On the same day, in the Legislative Assembly, the then Leader of that House, the Hon Brad Hazzard, moved, by leave, that:

- (1) The Standing Committee on Parliamentary Privilege and Ethics inquire into and report on recommendations 22, 24 and 25 in the report of the Independent Commission Against Corruption entitled “Reducing the opportunities and incentives for corruption in the state’s management of coal resources”, which was tabled in this House on 30 October 2013.
- (2) (a) The Standing Committee on Parliamentary Privilege and Ethics have leave to meet together with the Legislative Council Privileges Committee during the current Parliament.
- (b) A message be sent informing the Legislative Council.

1.9 The question was put and passed.⁸ The message was reported in the Legislative Council on 30 January 2014.⁹

Establishment of this inquiry

1.10 On 26 November 2013, the Hon Duncan Gay moved the following motion as formal business in the Legislative Council:

⁷ *Minutes*, Legislative Council, 21 November 2013, p 2249.

⁸ *Votes and Proceedings*, Legislative Assembly, 21 November 2013, pp 2004-2005.

⁹ *Minutes*, Legislative Council, 30 January 2014, pp 2290 – 2291. There was a delay in the forwarding of the message from the Legislative Assembly to the Legislative Council.

That the Privileges Committee inquire into and report on Recommendations 22, 24 and 25 in the report of the Independent Commission Against Corruption entitled ‘Reducing the opportunities and incentives for corruption in the State’s management of coal resources’, dated October 2013.

- 1.11** The question was put and passed on the voices without debate.¹⁰
- 1.12** It is notable that the inquiries referred by the two Houses to the respective committees were virtually identical in terms, and that there was a clear intention for the two Committees to work collaboratively on this inquiry. The Legislative Assembly, in referring this inquiry to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, included provision for that Committee ‘to meet together with the Legislative Council Privileges Committee during the current Parliament’. A similar provision was not included in the resolution adopted by the Legislative Council, as standing order 219 already authorised the Committee to join with the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics to take evidence, deliberate and make joint reports as part of the inquiry.
- 1.13** The Leader of the Opposition, the Hon John Robertson MP, gave notice in the Legislative Assembly on 26 March 2014 of his intention to introduce cognate private member’s bills to address the recommendations of the ICAC. On 8 May 2014 these bills, the Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Bill 2014 and the Constitution Amendment (Disclosures by Members) Bill 2014 were introduced, and read a first and second time. The main features of these bills are to:
- prescribe a ministerial code of conduct for the purposes of the *Independent Commission Against Corruption Act 1988*;
 - disclose certain pecuniary interests of any spouse or de facto partner of a member and any person under the age of 18 years who is dependent on the member for support;
 - disclose commercial arrangements that relatives of the member have entered into, or reasonably expect to enter into, with the Government; and
 - disclose the member’s annual taxable income.
- 1.14** The ICAC recommendation 23, that the NSW Government adopts the *Code of Conduct for Ministers of the Crown* as an applicable code for the purposes of section 9 of the *Independent Commission Against Corruption Act 1988*, is supported by the Government but was not referred to this committee for consideration and therefore was not considered as part of this Inquiry.

Change in membership of the committee

- 1.15** On 26 November 2013, the President informed the House that on 25 November 2013, the Clerk received advice from the Leader of the Opposition nominating the Hon Peter Primrose as a member of the Privileges Committee in place of the Hon Greg Donnelly.¹¹

¹⁰ *Minutes*, Legislative Council, 26 November 2013, p 2262.

¹¹ *Minutes*, Legislative Council, 26 November 2013, p 2261.

- 1.16 On 13 May 2014, the President informed the House that the Clerk had received advice from the Leader of the Government dated 13 May 2014 nominating the Hon Natasha Maclaren-Jones as a member of the Privileges Committee in place of the Hon Matthew Mason-Cox.¹²

Conduct of this inquiry

- 1.17 In approaching this inquiry, the committee worked collaboratively with the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics in seeking submissions.
- 1.18 In late January 2014, the Chairs of both committees wrote jointly to a range of stakeholders seeking submissions to the inquiry by Friday, 14 March 2014. The stakeholders included all members of both Houses, the Presiding Officers, the Clerks, the Department of Premier and Cabinet, the ICAC, the Parliamentary Ethics Adviser, the Auditor-General, the Director of Public Prosecutions, the St James Ethics Centre, the Presiding Officers and clerks of all Australian Parliaments, the New Zealand Parliament and the UK Parliament, the UK House of Commons Parliamentary Commissioner for Standards and the UK House of Lords Commissioner for Standards.
- 1.19 In seeking submissions to the inquiry, both this committee and the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics made available three discussion papers dealing with the three recommendations made by the ICAC. The discussion papers were also made available on the committee's web pages.
- 1.20 A total of 16 submissions were received. A list of submissions is at Appendix 1.
- 1.21 The committee met with the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics on Tuesday, 27 May 2014 to discuss the outcomes of the respective inquiries being conducted concurrently by the two committees.

This inquiry to also constitute the 2014 Review of the *Code of Conduct for Members*

- 1.22 Section 72C(5) of the *Independent Commission Against Corruption Act 1988* provides that a 'designated committee is to review a code of conduct adopted by the Legislative Council at least once every 4 years.' The Council has resolved that the Privileges Committee is the 'designated committee' for this purpose.¹³ The committee has previously conducted reviews in 2002, 2006 and 2010.
- 1.23 The current inquiry incorporates consideration of the *Code of Conduct for Members*, but also other elements of the ethics regime for members such as the interest disclosure regime and mechanisms for investigating the conduct of members. Accordingly, the committee indicates its view that this inquiry fulfils the committee's obligations under section 72C(5) of the *Independent Commission Against Corruption Act 1988* for 2014.

¹² *Minutes*, Legislative Council, 13 May 2014, p 2496.

¹³ *Minutes*, Legislative Council, 10 May 2011, pp 53-54.

Chapter 2 *Amendment of the Code of Conduct for Members relating to improper influence by members*

This chapter discusses options for amendment of the *Code of Conduct for Members* to ensure that the Code fully addresses the improper use of influence by members.

Recommendation 22 of the ICAC

2.1 Recommendation 22 of the ICAC in its report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources* was as follows:

That the NSW Parliament's Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee consider amending the *Code of Conduct for Members* to deal comprehensively with improper influence by members.

Background to the *Code of Conduct for Members*

2.2 In 1994 the *Independent Commission Against Corruption Act 1988* was amended to expand the definition of 'corrupt conduct' in relation to ministers and members of Parliament.¹⁴ The key amendment was the insertion of section 9(1)(d) which provides that conduct amounts to 'corrupt conduct' if it could constitute or involve:

(d) in the case of conduct of a minister of the Crown or a member of a House of Parliament – a substantial breach of an applicable code of conduct.

2.3 The expression 'applicable code of code' was defined in relation to a member of Parliament as 'a code of conduct adopted for the purposes of section 9 by resolution of the House concerned' (section 9(3)).

2.4 At the same time a new Part 7A was inserted into the *Independent Commission Against Corruption Act 1988* which provided for a 'designated committee' in each House of Parliament to undertake specified functions concerning members' ethics, including to prepare for consideration by the House draft codes of conduct for the members of the House.¹⁵

2.5 Following the enactment of Part 7A, the Legislative Council designated the Standing Committee on Parliamentary Privilege and Ethics to undertake the functions specified in Part 7A.¹⁶ The equivalent committee in the Legislative Assembly was the Standing Ethics Committee.¹⁷

¹⁴ *Independent Commission Against Corruption (Amendment) Act 1994*.

¹⁵ *Independent Commission Against Corruption Act 1988*, sections 72C(1)(a) and 72E(1)(a).

¹⁶ *Minutes*, Legislative Council, 24 May 1995, pp 42-43.

¹⁷ The Assembly's committee was originally constituted by the Act (former section 72D) but is now required to be designated by resolution of the Assembly (section 72DA).

- 2.6 In accordance with Part 7A each committee conducted an inquiry into the development of a draft code of conduct for the members of its respective House. In the course of those inquiries the committees sought to agree on a single code for the members of both Houses but attempts to reach unanimity on a uniform code were unsuccessful. Each Committee ultimately presented a separate draft code of conduct to its House in 1996.¹⁸
- 2.7 In 1998, the New South Wales government released a further draft code of conduct which was intended to apply to all members of Parliament. In support of this code, the then Premier argued that the draft codes prepared by the Committees were ‘too wide and too uncertain to base the grounds for making a finding of corrupt conduct’.¹⁹ He also argued that the draft committee codes contained provisions that were open to subjective interpretations which was likely to lead to litigation.²⁰
- 2.8 The government code was referred by each House to its designated committee for inquiry and report. The Council committee recommended that the government code be adopted for the purposes of section 9 of the *Independent Commission Against Corruption Act 1988*.²¹ The Assembly committee reported that it had no objection to the government code being adopted as an amendment to its draft code.²² Each House subsequently adopted the government code as the *Code of conduct for members*.²³
- 2.9 In 2007 a revised version of the *Code of conduct for members* was adopted²⁴ following a report by the ICAC concerning members’ secondary employment.²⁵ The revised *Code* adopted in 2007 remains in force in each House.

The current *Code of Conduct for Members* and the use of influence by members

- 2.10 The *Code of Conduct for Members* contains a preamble and seven clauses which deal with the disclosure of conflicts of interest, bribery, gifts, use of public resources, duties as a member of Parliament and secondary employment or engagements.

¹⁸ Standing Committee on Parliamentary Privilege and Ethics, Legislative Council, Report No. 3, *Report on inquiry into the establishment of a draft code of conduct for members*, October 1996, pp 59, 66-72, Appendix 1; *Votes and Proceedings*, Legislative Assembly, 29 October 1996, pp 523-524; Standing Ethics Committee, Legislative Assembly, *Report on a draft code of conduct for members of the Legislative Assembly*, October 1997, pp iii-iv.

¹⁹ *Hansard*, Legislative Assembly, 2 April 1998, p 3649 (Bob Carr).

²⁰ *Hansard*, Legislative Assembly, 2 April 1998, pp 3648-3649 (Bob Carr).

²¹ Standing Committee on Parliamentary Privilege and Ethics, Legislative Council, Report No. 5, *Second report on code of conduct*, June 1998.

²² Standing Ethics Committee, Legislative Assembly, *Second report on a draft code of conduct for members of the Legislative Assembly*, April 1998, p 7.

²³ *Minutes*, Legislative Council, 1 July 1998, pp 629-630; *Votes and Proceedings*, Legislative Assembly, 5 May 1998, pp 544-548. The Council later readopted the Code of Conduct with ‘continuing effect’: *Minutes*, 26 May 1999, pp 91-92. The Assembly later adopted a modified version of clause 2 ‘Bribery’: *Votes and Proceedings*, 25 May 2006, p 66.

²⁴ *Minutes*, Legislative Council, 21 June 1997, pp 148-152; *Votes and Proceedings*, Legislative Assembly, 8 May 2007, pp 34-36; *Votes and Proceedings*, Legislative Assembly, 20 June 2007, pp 154-155.

²⁵ ICAC, *Regulation of secondary employment for members of the NSW Legislative Assembly*, September 2003.

- 2.11** The third paragraph of the preamble includes reference to members' responsibility to use their influence to advance the common good of the people of New South Wales:

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.

- 2.12** Further, clause 3, 'Gifts', prohibits members from accepting 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.
- 2.13** However, there is no substantive provision in the *Code* which specifically addresses the use of influence by members.

Background to the ICAC recommendation

- 2.14** In July 2013, the ICAC reported to Parliament on its investigation into Operation Jasper.²⁶ The investigation included consideration of the circumstances surrounding a decision made in 2008 by the then Minister for Primary Industries and Minister for Mineral Resources, the Hon Ian Macdonald MLC, to open a mining area in the Bylong Valley for coal exploration and whether the decision was influenced by the Hon Edward Obeid, who was then a member of Parliament and parliamentary colleague of Mr Macdonald.
- 2.15** The investigation revealed that a mining tenement granted by Mr Macdonald over land at Mount Penny covered properties owned by Mr Obeid's family or their associates and that the granting of a mining exploration licence for the land had substantially increased the value of the properties. It also revealed that the Obeids had taken steps to acquire properties in the area for coal mining purposes before public notification of a call for expressions of interest (EOI) for an exploration licence²⁷ and that Mr Macdonald had disclosed confidential information concerning the EOI.²⁸ It further revealed that, as a result of subsequent transactions in relation to the land involving business associates of the Obeids, the Obeid family's interest in the event that a mining lease was to have been granted could have been worth over \$50 million.²⁹
- 2.16** The report included findings that Mr Macdonald had engaged in corrupt conduct by entering into agreements with Mr Edward Obeid and one of his sons, Mr Moses Obeid, whereby Mr Macdonald had arranged for the creation of the Mount Penny tenement and provided confidential information to benefit Mr Edward Obeid and members of his family. The report also found that Mr Edward Obeid and Mr Moses Obeid had engaged in corrupt conduct by

²⁶ ICAC, *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, July 2013; *Minutes*, Legislative Council, 20 August 2013, p 1891; *Votes and Proceedings*, Legislative Assembly, 13 August 2013, pp 1715-1716.

²⁷ ICAC, *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, July 2013, p 144.

²⁸ *Ibid*, p 144.

²⁹ ICAC, *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, July 2013, pp 14-15.

entering into those agreements.³⁰ The report included recommendations that consideration be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Mr Macdonald, Mr Edward Obeid and Mr Moses Obeid for specified criminal offences.³¹

2.17 In August 2013, the ICAC reported to Parliament on its investigation into Operation Acacia which concerned the granting of a coal exploration licence over land at Doyle's Creek by Mr Macdonald when minister for mineral resources.³² In this report the ICAC found that Mr Macdonald had engaged in corrupt conduct by granting consent to apply for the licence and subsequently granting the licence itself substantially for the purpose of benefiting the chairman of the recipient company with whom Mr Macdonald had a close professional relationship.³³ The ICAC also recommended that consideration be given to the prosecution of Mr Macdonald for a specified criminal offence for his role in the matter.³⁴

2.18 In October 2013, in its report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, the ICAC observed in relation to the *Code of Conduct for Members*:

The *Code of Conduct for Members* does not contain provisions concerning members attempting to influence ministerial or bureaucratic decisions that affect their private interests and those of their family and associates, although such conduct seems quite contrary to the preamble. This ignores the reality that major decisions of considerable value are taken by the executive and by state agencies and do not come before Parliament.³⁵

Previous consideration of the use of influence by members

Draft codes of the designated committees

2.19 The draft codes of conduct developed in 1996 by the Council's Standing Committee on Parliamentary Privilege and Ethics and the Assembly's Standing Ethics Committee included provisions concerning the use of influence by members.

2.20 The Council Committee's code addressed the issue in clause 1 and clauses 5.3 and 5.4. Clause 1, 'Conduct-General', included a requirement for members to 'exercise the influence gained from their public office to advance the public interest'.³⁶ Clause 5, 'Use of public office for private gain', provided that:

³⁰ *Ibid*, pp 143-146.

³¹ *Ibid*, p 154.

³² ICAC, *Investigation into the conduct of Ian Macdonald, John Maitland and others*, August 2013.

³³ *Ibid*, pp 136-137.

³⁴ *Ibid*, pp 142-143.

³⁵ ICAC, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, October 2013, p 42.

³⁶ Standing Committee on Parliamentary Privilege and Ethics, Report No. 3, *Report on inquiry into the establishment of a draft code of conduct for members*, October 1996, Appendix 1, p 2.

5 Use of public office for private gain

- 5.1 Members will not at any time act in a manner that takes improper advantage of their status or position as a Member of Parliament.
- 5.2 Members must not engage in conduct that exploits for private reasons their positions or authorities.
- 5.3 Members shall not use the resources and status of their public office to seek to influence a decision by another person to further, directly or indirectly, their private interests or the private interests of their family.
- 5.4 Members shall not use improperly their influence in order to obtain appointment, promotion, advancement, transfer or any other advantage within the public sector on behalf of themselves or another or to affect the proper outcome of any procedure established under legislation for the management of the public sector.
- 5.5 Members should not approach Ministers, public servants or public bodies on a matter connected with a private interest, without appropriate disclosure.³⁷

2.21 Before presenting this code to the House the Council Committee sought advice from the Crown Solicitor on the terms used in an earlier (similar) draft. In relation to clause 1 of that draft, the Crown Solicitor advised that the expression ‘influence gained from their public office’ was of ‘uncertain nature’. He also referred to observations he had made concerning the preamble, to the effect that it should be the exercise of members’ functions and powers, rather than influence, which advances the common good.³⁸ In relation to the clause 5.4³⁹ the Crown Solicitor observed that the wording might suggest that there are occasions on which a member may *properly* use their influence to obtain the things referred to in the paragraph and queried whether that is in fact the case but noted that an example of the proper use of influence might be the provision of a reference for an applicant. He also suggested certain minor textual amendments to clauses 5.3 and 5.4.⁴⁰

2.22 The draft code developed by the Assembly Committee addressed the use of influence in the preamble and clause 1.⁴¹ The preamble included an acknowledgement of members’ responsibility to ‘use the influence gained as elected office-holders to advance the common good of the people of New South Wales’. This provision is now reflected in the third paragraph of the preamble to the current *Code*. Clause 1 included a requirement for members

³⁷ Standing Committee on Parliamentary Privilege and Ethics, Report No. 3, *Report on inquiry into the establishment of a draft code of conduct for members*, Report No. 3, October 1996, Appendix 1, p 5.

³⁸ Crown Solicitor, Advice to the Chair of the Standing Committee on Parliamentary Privilege and Ethics, ‘Re: Draft code of conduct for members of the Legislative Council’, 19 September 1996, p 3.

³⁹ Clause 5 of the draft code referred to the Crown Solicitor contained four unnumbered paragraphs which were equivalent to clauses 5.1-5.4 of the final draft.

⁴⁰ Crown Solicitor, Advice to the Chair of the Standing Committee on Parliamentary Privilege and Ethics, ‘Re: Draft code of conduct for members of the Legislative Council’, 19 September 1996, p 8.

⁴¹ Standing Ethics Committee, Legislative Assembly, *Report on a draft code of conduct for members of the Legislative Assembly*, October 1997, p iii.

to ‘exercise the influence gained from their public office to advance the public interest’, which was similar to clause 1 of the Council Committee’s draft.

Reviews of the *Code of Conduct for Members*

2.23 Since the adoption of the *Code of Conduct for members* in 1998, the designated committees of the Houses have conducted three reviews of the *Code* in accordance with the functions conferred by Part 7A of the *Independent Commission Against Corruption Act 1988*.⁴² The reviews have included consideration of proposals to address the use of influence by amendments to clause 1, ‘Disclosure of conflict of interest’, and clause 2, ‘Bribery’.

Clause 1 ‘Disclosure of conflict of interest’

2.24 In the 2002 review, the committees considered a proposal by the ICAC to clarify the terms of clause 1 to ensure that it encapsulates the interests of a member’s family, friends and favoured causes and addresses the potential for members to exert influence beyond the formal decisions of their office.⁴³ In relation to the use of influence the ICAC observed:

Neither does this part of the Code of Conduct address circumstances in which Members may be capable of considerable influence but do not formally participate in the decision making process.⁴⁴

2.25 The committees concluded that the issues raised by the ICAC would be difficult to encapsulate with sufficient precision in the terms of the *Code* given the role of the *Code* in the statutory definition of ‘corrupt conduct’.⁴⁵

2.26 In later reviews the ICAC has raised similar issues in relation to clause 1 without eliciting support from either committee.⁴⁶ In the 2010 review, however, the Council committee recommended that consideration be given to the introduction of a requirement to disclose family interests in the pecuniary interest register.⁴⁷

⁴² The designated committee of each House is required to review any code of conduct adopted by the House every four years: *Independent Commission Against Corruption Act 1988*, sections 72C(5) and 72E(5).

⁴³ Standing Committee on Parliamentary Privilege and Ethics, Legislative Council, Report No. 22, *Review of Members’ Code of Conduct*, December 2002, pp 6-7; Standing Ethics Committee, Legislative Assembly, *Review of the Code of Conduct*, June 2002, pp 15-16.

⁴⁴ See Standing Committee on Parliamentary Privilege and Ethics, Legislative Council, Report No. 22, *Review of Members’ Code of Conduct*, December 2002, p 6.

⁴⁵ See Standing Committee on Parliamentary Privilege and Ethics, Legislative Council, Report No. 22, *Review of Members’ Code of Conduct*, December 2002, p 17; Standing Ethics Committee, Legislative Assembly, *Review of the Code of Conduct*, June 2002, pp 15-16.

⁴⁶ See for example Privileges Committee, Legislative Council, Report No. 35, *Review of Members’ Code of Conduct and draft Constitution (Disclosures by Members) Amendment Regulation 2006*, October 2006, p 24; Standing Committee on Parliamentary Privilege and Ethics, Legislative Assembly, *Review of the proposed amendments to the Code of Conduct and draft Constitution (Disclosure by Members) Regulation 2006*, September 2006, p 14.

⁴⁷ Privileges Committee, Legislative Council, Report No. 54, *Review of the Members’ Code of Conduct 2010*, December 2010, Recommendation 2.

Clause 2 ‘Bribery’

- 2.27** In the 2010 review the ICAC submitted that clause 2 should be amended to expand the prohibition on bribery beyond the promotion of matters for reward *inside* Parliament to encompass paid advocacy outside Parliament as well. The ICAC also recommended a corresponding change to the *Constitution (Disclosures by Members) Regulation 1983* which provides for the *disclosure* of income derived from use of a member’s position outside Parliament.⁴⁸
- 2.28** The Assembly Committee considered that the recommended change would result in the *Code* becoming overly technical and legalistic.⁴⁹ The Council Committee was not persuaded that there was a need for a complete ban on all paid advocacy outside Parliament given the stringent disclosure requirements of the *Constitution (Disclosures by Members) Regulation 1983*. However, it indicated that it would be prepared to entertain an amendment to the *Code* if it could be targeted to specific situations where the promotion of matters outside Parliament involved a clear conflict of interest or abuse of the member’s position.⁵⁰

Submissions to this inquiry

- 2.29** In his submission to this inquiry, the Clerk of the Parliaments, Mr David Blunt, confirmed that the *Code of Conduct for Members* addresses the issue of the use of influence briefly in the preamble but not in any substantive clause.⁵¹ He also noted that the draft code developed by the Council’s Standing Committee on Parliamentary Privilege and Ethics in 1996 addressed the use of influence in clause 5.
- 2.30** The Clerk went on to observe that the Crown Solicitor had raised no substantive objections to clause 5 when asked to comment on a draft of the code in 1996. The Clerk also suggested that the omission of such a clause from the *Code* finally adopted by the House does not appear to have been the result of legal advice:

Whilst the Crown Solicitor’s advice raises some concerns about inclusion of reference to influence in the preamble, no substantive issues are raised in relation to the proposed clause 5. It is therefore curious that the code developed by the executive government (and adopted by both Houses) retains the reference to influence in the preamble but contains no substantive clause the equivalent of those proposed by the two Committees. It would appear that whatever the reason the proposed clause 5 was not included, it was not the result of legal advice, at least not from the Crown Solicitor.⁵²

⁴⁸ Privileges Committee, Legislative Council, Report No. 54, *Review of the Members’ Code of Conduct 2010*, December 2010, pp 21-22; Standing Committee on Parliamentary Privilege and Ethics, Legislative Assembly, *Report on review of the Code of Conduct, aspects of disclosure of interests and related issues*, December 2010, p 12.

⁴⁹ Standing Committee on Parliamentary Privilege and Ethics, Legislative Assembly, *Report on review of the Code of Conduct, aspects of disclosure of interests and related issues*, December 2010, p 12.

⁵⁰ Privileges Committee, Legislative Council, Report No. 54, *Review of the Members’ Code of Conduct 2010*, December 2010, p 23.

⁵¹ Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, p 1.

⁵² Submission 9, Mr Blunt, p 2.

- 2.31** The Director of Public Prosecutions, Mr Lloyd Babb SC, supported the amendment of the *Code of Conduct for Members* to deal with improper influence beyond the general provision currently in the preamble. He also expressed the view clauses 1 and 5 of the draft code developed by the former Standing Committee on Parliamentary Privilege and Ethics in 1996⁵³ ‘seem to be a reasonable exposition of the concept of “improper influence”’.⁵⁴
- 2.32** The Chair of the Social Issues Executive of the Anglican Diocese of Sydney, the Revd Dr Andrew Campbell, submitted that the *Code of Conduct for Members* should be amended to deal with improper influence, particularly in relation to members’ dealings with the executive government and state agencies. He noted that decisions by the executive government and its agencies which do not come before Parliament carry a greater potential for improper influence to affect the ultimate decision. He also suggested that clause 5 of the draft code developed by the Council’s Standing Committee on Parliamentary Privilege and Ethics in 1996 should be reconsidered as a means of addressing the issue.⁵⁵
- 2.33** Dr Simon Longstaff AO of the St James Ethics Centre argued that while members of Parliament are required to make decisions in the interests of their constituents and should be disinterested in their discernment of the public interest, the *Code of Conduct for Members* does not currently address the possibility that a member might be tempted to use their public power for private gain.⁵⁶ In that regard he noted that the *Code* includes a clause on ‘Bribery’ but that bribery does not necessarily encompass conflicts of interest. He went on to argue that in some cases a conflict of interest will be such that the member should not only disclose it but not act, ‘at least in terms of making representations to Ministers, their advisers or others exercising public power’.⁵⁷
- 2.34** In light of this analysis, Dr Longstaff recommended that a new provision be included within the enforceable body of the *Code* specifying that:

Members of Parliament must act only for a legitimate public purpose in the execution of their office. A legitimate public purpose is one:

- i. in which the purpose is not inconsistent with the interests of the electorate as a whole, and either
- ii. in which a Member of Parliament has no interest other than coincidentally as a member of the public or broad class, or
- iii. is approved by Parliament following a Member's declaration of a conflict of interest.⁵⁸

⁵³ Mr Babb referred to the provisions in paragraph 1.11 of the Committee’s Background Paper, which contained clauses 1 and 5 of the draft code developed by the former Standing Committee on Parliamentary Privilege and Ethics in 1996.

⁵⁴ Submission 12, Mr Lloyd Babb SC, Director of Public Prosecutions, p 1.

⁵⁵ Submission 14, Revd Dr Andrew Campbell, Chair, Social Issues Executive, Anglican Diocese of Sydney, p 2.

⁵⁶ Submission 5, Dr Simon Longstaff AO, St James Ethics Centre, pp 2-3.

⁵⁷ Submission 5, Dr Longstaff, p 3.

⁵⁸ Submission 5, Dr Longstaff, p 3.

2.35 He also recommended that clause 2 ‘Bribery’ be amended as follows:

In ss. 2(a) and 2(b) insert after the word ‘Committees’ the words ‘and must not make any representations to Ministers, Ministerial advisers, public servants or those controlling state agencies’.⁵⁹

2.36 The Clerk of the Legislative Assembly of the Australian Capital Territory, Mr Tom Duncan, advised that the Assembly adopted a revised code of conduct in 2013. He drew particular attention to paragraphs (3) and (5) of that code which require members to act in the public interest and avoid conflicts of interest.⁶⁰ Paragraphs (3) and (5) provide:

(3) Members should always act in the public interest, make decisions and choices on merit, and not seek to gain financial or other benefit for themselves, their family or friends.

...

(5) Members should be transparent in, and accountable for, their decisions and actions, should avoid or appropriately resolve any actual or reasonably perceived conflicts of interest and should submit themselves to appropriate scrutiny.⁶¹

2.37 The Committee also received submissions on the *Code of Conduct for Members* from:

- the Clerk of the UK House of Commons⁶²
- the Clerk of the Australian Senate⁶³
- the Clerk of the Australian House of Representatives⁶⁴
- the Speaker of the New Zealand House of Representatives.⁶⁵

2.38 The submission from Sir Robert Rogers, Clerk of the UK House of Commons, provided an overview of the conduct and disciplinary system in that House. The remaining submissions indicated that proposals for a code of conduct have been considered but have not resulted in the adoption of a code. Reasons for not adopting a code include the existence of other regulatory mechanisms governing the conduct of members such as the criminal law and the contempt jurisdiction of the House.

⁵⁹ Submission 5, Dr Longstaff, p 3.

⁶⁰ Submission 10, Mr Tom Duncan, Clerk of the Legislative Assembly for the Australian Capital Territory, ACT Legislative Assembly, pp 1, 3.

⁶¹ Submission 10, Mr Duncan, p 2.

⁶² Submission 7, Sir Robert Rogers, Clerk of the House of Commons, House of Commons.

⁶³ Submission 3, Dr Rosemary Laing, Clerk of the Senate, Australian Senate, p 2.

⁶⁴ Submission 4, Mr David Elder, Clerk of the House, Parliament of Australia, House of Representatives, p 2.

⁶⁵ Submission 11, Rt Hon David Carter, Speaker, House of Representatives of New Zealand.

Committee comment

- 2.39** The preamble to the *Code of Conduct for Members* acknowledges members' responsibility for 'using their influence to advance the common good of the people of New South Wales'. However, the Code does not seek to regulate the use of influence by members in any of its substantive provisions. As identified by the ICAC, the *Code* does not address attempts by members to influence ministerial or bureaucratic decisions which affect the interests of members, their families or associates. The Committee also notes that in its recent report on the conduct of the Hon Edward Obeid MLC and Circular Quay retail lease policy, the ICAC raises issues concerning the use of influence by a member to benefit leaseholders who were relatives of the member and had made donations to the member's political party.⁶⁶
- 2.40** The Committee notes, however, that ministers and state agencies make major decisions of considerable value which do not come before Parliament making it more likely that influence can occur. While improper influence may be captured by the criminal law and to some extent by the House's contempt jurisdiction there are limitations to the reach of such mechanisms.
- 2.41** The Committee therefore supports the inclusion of a new clause in the *Code* dealing with improper influence.
- 2.42** In 1996 the former Standing Committee on Parliamentary Privilege and Ethics developed a draft code of conduct for members, clause 5 of which included prohibitions on the use of a member's office to further private interests and on the use of improper influence to obtain advantage in the public sector. These provisions provide a useful basis for considering how to address improper influence. However any new provision in the *Code* needs to take account of the broader issues which have emerged in recent ICAC inquiries as well.
- 2.43** In drafting a suitable clause the challenge is to encapsulate the range of conduct to be proscribed without curtailing the legitimate exercise of a member's role which includes advocacy and influencing others.
- 2.44** The approach adopted in dealing with this issue in clause 2 of the *Code* is to employ the qualifying term 'improperly' to delineate the range of circumstances in which the promotion of matters for reward is prohibited. While this term is capable of differing interpretations, the committee is not aware that it has led to confusion in the application of the *Code*. Clause 2 also includes other terms which are left undefined such as 'family' and 'associate'.
- 2.45** Drawing on clauses 5.3-5.4 of the code of the former Standing Committee on Parliamentary Privilege and Ethics and issues raised in more recent ICAC reports, the Committee recommends:

⁶⁶ ICAC, *Investigation into the conduct of the Hon Edward Obeid MLC and others concerning Circular Quay retail lease policy*, June 2014, p 6.

Recommendation 1

That the *Code of Conduct for Members* be amended by the addition of the following clause 8:

8 Improper influence

A member must not improperly use his or her influence as a member to seek to affect a decision by a public official including a minister, public sector employee, statutory officer or public body, to further, directly or indirectly:

- (a) interests of the member, a member of the member's family, a business associate of the member or any other private interests; or
- (b) the financial interests of the member's political party.

-
- 2.46** The *Code of Conduct for Members* also deals with the issue of secondary employment of members. This matter will be considered by the Committee in the next review of the *Code of Conduct for Members*.

Chapter 3 Disclosure of the interests of members' spouses/partners and dependent children

This chapter discusses options for the disclosure of the interests of members' spouses or de facto partners and dependent children, as well as interests held in family trusts, companies and private superannuation funds. The chapter also looks at other issues in relation to the operation of the interest disclosure regime for members.

Recommendation 24 of the ICAC

3.1 Recommendation 24 of the ICAC in its report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources* was as follows:

That the NSW Parliament's Legislative Council Privileges Committee conducts a new inquiry into the mechanism for elected members to disclose the interests of their spouses/partners and dependent children under the provisions of the Constitution (Disclosures by Members) Regulation 1983, with a view to making third-party disclosures a requirement.

Summary of the interest disclosure regime in New South Wales

3.2 Members of the Parliament of New South Wales are required to disclose their pecuniary and other interests through an interest disclosure regime. The regime is established under section 14A of the *Constitution Act 1902* and the Constitution (Disclosures by Members) Regulation 1983.

3.3 Under the regime, members are currently required to disclose their interests in relation to the following matters:

- real property;
- sources of income;
- gifts;
- contributions to travel;
- interests and positions in corporations;
- positions in trade unions and professional or business associations;
- debts;
- dispositions of property; and
- provision of client services.

3.4 Members may also make discretionary disclosures of any direct or indirect benefits, advantages or liabilities, whether pecuniary or not.

- 3.5 There are four types of returns provided by members to disclose their interests: primary returns, ordinary returns, supplementary ordinary returns and discretionary returns. The primary return is the first return provided by members upon their election to the Parliament. Ordinary returns are provided each year disclosing members' interests held during the 12 month period to 30 June each year. Supplementary ordinary returns are provided by members each year disclosing their interests held during the six month period from July to December in the previous year. Discretionary returns may be lodged by a member at any time.
- 3.6 Returns by members of the Legislative Council are consolidated in the Register of Disclosures by Members of the Legislative Council. There is an equivalent Register of Disclosures by Members of the Legislative Assembly.

The current arrangements for the disclosure of interests of members' spouses/partners and dependent children in New South Wales

- 3.7 Under the interest disclosure regime outlined above, there is no requirement for members to disclose the interests of their spouse, partner or any other family member. The Constitution (Disclosures by Members) Regulation 1983 requires only the disclosure of interests held by members themselves.
- 3.8 However, some provisions of the Constitution (Disclosures by Members) Regulation 1983 may result in the indirect disclosure of interests which are held by partners or other family members. For example, income from a trust, under clause 9(2)(e) of the Regulation, could include income from a family trust. Interests and positions in corporations, under clause 12, could include shareholdings or offices in family companies. Dispositions of property, under clause 15, could include the disposition of property to a family member.
- 3.9 In addition to these forms of indirect disclosure, members may choose to disclose interests held by a member of their family by way of a discretionary disclosure. However, leaving aside indirect and discretionary disclosures, there is no provision for the disclosure of the interests of family members.
- 3.10 The committee notes the recent development that members of the Labor Party now voluntarily disclose in their interest returns the interests of their spouses/partners and dependent children in accordance with party policy. The committee also notes that on 8 May 2014, the Leader of the Opposition in the Legislative Assembly, the Hon John Robertson, introduced a private member's bill in the Legislative Assembly, the *Constitution Amendment (Disclosures by Members) Bill 2014*, the objects of which included the disclosure by members of the interests of spouses or de facto partners and any person under 18 who is dependent on the member for support.

The previous interest disclosure regime in New South Wales

- 3.11 It is notable that in November 1979, following an inquiry by a joint committee into pecuniary interests, the Parliament of New South Wales established by resolution of both Houses an interest disclosure regime which did require the disclosure of the interests of members, their spouses, and infant children. However, in November 1980, the resolutions of the Houses establishing the registers of interests were rescinded following legal advice that the Houses did

not have the power to establish an enforceable scheme for the disclosure of members' interests in the absence of legislative authority. It is not clear why the provisions of the 1979 resolution relating to the disclosure of the interests of members' spouses and infant children were dropped when the current regime was adopted in 1983.

Comments by the ICAC in support of recommendation 24

3.12 In support of recommendation 24, the ICAC made the following comments in its report:

The current Register of Disclosures for members is also limited, in that there is no requirement for members to disclose family interests. Nor is there sufficient transparency around the lobbying of ministers and their staff. This means potential sources of private influence for members and ministers are not subject to public scrutiny.⁶⁷

3.13 The ICAC also commented that:

A register should be sufficiently robust in scope to ensure public confidence. Currently, the statutory pecuniary interest disclosure regime in NSW does not require members to disclose the interests of their spouse, domestic partner or other family members.

In 1994, the Commission argued in a submission to the Joint Committee on the ICAC that the interests of close associates are capable of influencing a member's conduct. This suggestion was rejected by the committee at that time.

In 2010, the Legislative Council's Privileges Committee considered the members' pecuniary interest disclosure regime as part of its review of the *Code of Conduct for Members*. The committee recommended that in the next Parliament, the House refer to the Privileges Committee a new inquiry into the best mechanism for members to disclose the interests of their spouses/partners and dependent children under the provisions of the Constitution (Disclosures by Members) Regulation 1983, with a view to implementing third-party disclosures if an appropriate mechanism could be found. This recommendation has not been acted on.

The Commission supports expanding the Register of Disclosures to include spouses/partners and dependent children. The benefits of expanding the register include added transparency, minimising perceptions of members avoiding scrutiny, and dealing with the potential for family interests to influence decision-making. It should also be noted that many other Australian parliaments require the disclosure of various third-party interests in a register.

The general purpose of a disclosure register is to capture private interests that *may* come into conflict with a member's public duty. This concept is distinct from, but connected to, the disclosure of conflicts of interest as they arise. The existence of both a formal disclosure system for private financial interests and transparent mechanisms for the disclosure and management of actual conflicts of interest as they arise is important. Consequently, the Commission believes that the expansion of the Register of Disclosures to capture family interests will complement any revision of the conflict

⁶⁷ ICAC, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, October 2013, p 41.

of interest provisions in the *Code of Conduct for Members*. For the sake of completeness, this should specifically include family trusts and companies.

A review of the Register of Disclosures and the *Code of Conduct for Members* would also provide a timely opportunity to reconsider related issues outside the scope of operations Jasper and Acacia. These include the timeliness with which pecuniary interest disclosures are made, the cumbersome nature of the disclosure regime and the transparency of the system.⁶⁸

Previous consideration of this issue by the committee

3.14 As noted above, the ICAC observed in its report that in 2010, this committee recommended the referral of a new inquiry to this committee into the best mechanism for members to disclose the interests of their spouses/partners and dependent children, with a view to implementing third-party disclosures if an appropriate mechanism could be found.

3.15 The committee reproduces its comments on this matter from its 2010 report below:

3.49 ... the Committee supports in principle a change to the provisions of the Constitution (Disclosures by Members) Regulation 1983 to require members to disclose the interests of their spouses/partners and dependent children. The Committee believes that disclosure of the interests of spouses/partners and dependent children would strengthen the parliamentary process by improving its transparency, openness and accountability. As discussed in Chapter 2, a systematic mechanism for the disclosure of the interests of spouses/partners and dependent children through the pecuniary interest regime would be preferable to *ad hoc* declarations under clause 1 of the Code of Conduct which may result in declarations being made in different contexts and at different times.

3.50 However, in adopting this position, the Committee accepts that such a step raises significant privacy issues that need to be considered carefully. Should, for example, a register of the interests of spouses/partners and dependent children be kept confidential, as occurs in the Senate, where disclosures are overseen by a dedicated Committee on Senators' Interests? Should such a register be made public, as in the House of Representatives? At the present time, the Committee is not in possession of detailed information on how the regimes for the disclosure of the interests of spouses/partners or third parties are operating in those Australia Parliaments that have such provisions.

3.51 Accordingly, the Committee recommends that in the next Parliament, the House refer to the Privileges Committee a new inquiry into the best mechanism for members to disclose the interests of their spouses/partners and dependent children under the provisions of the Constitution (Disclosures by Members) Regulation 1983, with a view to implementing third party disclosures if an appropriate mechanism can be found. Such an inquiry would offer the Committee the opportunity to take detailed evidence from members of Parliament and from representatives of other Parliaments, before coming to a considered view on the matter.

⁶⁸ ICAC, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, p 43.

Recommendation 2

That in the next Parliament, the House refer to the Privileges Committee a new inquiry into the best mechanism for members to disclose the interests of their spouses/partners and dependent children under the provisions of the Constitution (Disclosures by Members) Regulation 1983, with a view to implementing third party disclosures if an appropriate mechanism can be found.⁶⁹

The arrangements for the disclosure of interests of members' spouses/partners and dependent children in other Australian Parliaments and the New Zealand Parliament

- 3.16** The ICAC observed in its report that 'many other Australian parliaments require the disclosure of various third-party interests in a register'.
- 3.17** In summary, five Australian Parliaments require the disclosure of the interests of members' spouses/partners and dependent children: the Commonwealth, Queensland, South Australia, Australian Capital Territory⁷⁰ and Northern Territory Parliaments. In each case, members are only required to disclose interests of which members are *aware*,⁷¹ or which are ascertainable by the exercise of reasonable diligence.⁷²
- 3.18** One Australian Parliament, the Victorian Parliament, requires only limited disclosure of the interests of members' spouses/partners and dependent children. Members are required to disclose the interests of a member of his or her family of which the member is aware and which the member considers might appear to raise a material conflict between his or her private interest and his or her public duty as a member.
- 3.19** There are two other Australian Parliaments (in addition to the New South Wales Parliament) that do not currently require the disclosure of the interests of members' spouses/partners or dependent children: the Western Australian Parliament and the Tasmanian Parliament. The New Zealand Parliament also does not require the disclosure of family interests.⁷³

⁶⁹ Privileges Committee, Legislative Council, Report No. 54, *Review of the Members' Code of Conduct 2010*, December 2010, pp 57-58.

⁷⁰ See submission 10, Mr Tom Duncan, Clerk of the Legislative Assembly for the Australian Capital Territory, ACT Legislative Assembly, p 4.

⁷¹ Senate, *Resolutions relating to Senator's Interests* (1994, amended to 2006), resolution 3; House of Representatives, *Registrations of members' interests Requirements of the House of Representatives* (Resolution adopted 1984, amended to 2008), resolution 1(a)(ii); Queensland, *Standing Orders*, Schedule 2, 'Registers of Interests'; ACT, Continuing resolution, *Declaration of private interests of members*, Northern Territory, *Legislative Assembly (Disclosure of Interests) Act 2008*, sections 3 'related person' and 4(1)(b).

⁷² South Australia, *Members of Parliament (Register of Interests) Act 1983*, section 4(3a).

⁷³ The New Zealand Parliament's standing orders do however require a broader declaration of financial interests by a member before he or she participates in an item of parliamentary business, if the interest has not already been declared in the Register. In these circumstances, financial interest is defined as including a financial interest held by a member's spouse, partner or dependent child. Further, financial interest is also defined as a direct financial benefit that might accrue to a member personally or to any trust, company or other business entity in which the member has an appreciable interest. See submission 11, Rt Hon David Carter, Speaker of the House of Representatives of New Zealand, pp 3-4.

- 3.20** Greater detail on the arrangements across all Australian and New Zealand jurisdictions for the disclosure of the interests of members' spouses/partners and dependent children is provided in this committee's 2010 report entitled *Review of the Members' Code of Conduct 2010*.⁷⁴ However, for the purposes of this inquiry, the committee considers in greater detail below the current arrangements in the House of Representatives and the Senate for the disclosure of the interests of members' spouses/partners and dependent children.

Arrangements in the House of Representatives

- 3.21** The interest disclosure regime of the House of Representatives is established by resolution of the House.⁷⁵ Under the resolution, registrable interests include the provision of any interests of which the member is aware of the member's spouse/partner and dependent children. Paragraph 2 dealing with registrable interests states:

That the statement of a Member's registrable interests to be provided by a Member shall include the registrable interests of which the Member is aware (1) of the Member's spouse and (2) of any children who are wholly or mainly dependent on the Member for support...

- 3.22** A copy of the 'Statement of Registrable Interests' used by members of the House of Representatives to register their interests was shown at Appendix 4 of the submission from the House of Representatives. The statement provides for separate entries of the interests of the member, his or her spouse and any dependent children.
- 3.23** Subparagraph 3(d) of the resolution of the House provides that 'the Register of Members' Interests shall be available for inspection by any person under conditions to be laid down by the Committee of Privileges and Members' Interests from time to time.' Statements by all members of the House of Representatives for the 43rd and current Parliament are available in PDF format on the committee's website.
- 3.24** In his written submission, the Clerk of the House of Representatives of the Parliament of Australia, Mr David Elder, indicated that his Department 'is not aware of any particular issues created by the need for Members to declare the interests of spouses and dependent children'.⁷⁶

Arrangements in the Senate

- 3.25** The interest disclosure regime in the Senate is established by resolution of the Senate.⁷⁷ Under the resolution, senators are required to lodge statements of interests of their spouse/partner and dependent children of which they are aware.

⁷⁴ Privileges Committee, Legislative Council, Report No. 54, *Review of the Members' Code of Conduct 2010*, pp 52-56.

⁷⁵ *Registrations of members' interests Requirements of the House of Representatives* (Resolution adopted 1984, amended to 2008).

⁷⁶ Submission 4, Mr David Elder, Clerk of the House, Parliament of Australia, House of Representatives, p 4.

⁷⁷ Senate, *Resolutions relating to Senator's Interests* (1994, amended to 2006).

3.26 The disclosure regime is overseen by the Committee of Senators' Interests established by standing order 22A. Explanatory notes issued by the committee indicate that:

- senators are not required to disclose the name of a spouse, partner or dependent child;
- a statement is not required if the senator does not have a spouse, partner or dependent children or is not aware of their interests;
- 'dependent children' means dependent children under 16 years of age or dependent full-time students under 25 years of age;
- 'partner' means a person who is living with another person in a *bona fide* domestic relationship;
- where interests are held jointly with a spouse or partner, former spouse or partner, or dependent children, the interests need to be included only as interests of the senator, with appropriate notation such as 'jointly owned with [former] spouse/partner'.⁷⁸

3.27 Unlike in the House of Representatives, however, the disclosures concerning spouses/partners and dependent children are accessible only by the Committee on Senators' Interests except if that committee considers that a conflict of interest arises in which case the committee may table the relevant statement of disclosures in the Senate. The resolution establishing the disclosure regime provides:

Statements of the registrable interests of a senator's spouse or partner or of any dependent children (...) shall be maintained in a separate part of the register and shall remain confidential to the Committee of Senators' Interests except where the committee considers that a conflict of interest arises, at which time the committee may table the declaration.⁷⁹

Submissions to the inquiry

3.28 A number of submissions to the inquiry commented on the recommendation by the ICAC to require the disclosure of the interests of members' spouses/partners and dependent children.

3.29 Of note, the committee received only one submission from a member of the Parliament – the Opposition Whip in the Legislative Council and a member of this committee, the Hon Amanda Fazio MLC. In her submission, Ms Fazio supported the proposal that the interests of the spouses/partners and dependent children of elected members be included in the disclosure regime, noting that the intention of the interests register is circumvented by situations where assets are held by other family members.⁸⁰

3.30 Dr Simon Longstaff AO of the St James Ethics Centre indicated that in deciding whether or not to support the ICAC recommendation it was necessary to balance two competing interests. Firstly, it was not in the interests of society that spouses/partners and children be seen as mere 'extensions' of members of Parliament, and that as individuals they have a right

⁷⁸ Submission 3, Dr Rosemary Laing, Clerk of the Senate, Australian Senate, p 4.

⁷⁹ Senate, *Resolutions relating to Senator's Interests*, resolution 2 'Registrable interests of spouses or partners and dependants'.

⁸⁰ Submission 15, The Hon Amanda Fazio, MLC, p 1.

to privacy. Secondly, however, there is a clear, general public interest in ensuring the probity of the political process and that the spouses/partners and children of members of Parliament share in this interest. Weighing up these competing interests, the St James Ethics Centre supported the introduction of a mechanism to require the disclosure of the interest of the spouses/partners and dependent children of members of Parliament.⁸¹

- 3.31** The NSW Privacy Commissioner, Dr Elizabeth Coombs, indicated support for the general intent to require elected members to disclose the interests of their spouses/partners and dependent children, noting also the conflicting interests between a member's responsibilities to his or her electorate and the personal interests of the member's family.⁸² Dr Coombs suggested that any consideration of a mechanism for the disclosure of the interests of members' spouses/partners and dependent children should ensure that the privacy of these individuals is considered, and to this end noted the arrangements in the Australian Senate. The Commissioner further suggested that, with any mechanism that may be pursued, an information guide should be prepared for members' spouses/partners and dependent children who may be required to disclose their interests, which would detail the purpose for which information is collected, used, accessed, stored and disposed.⁸³
- 3.32** The Chair of the Social Issues Executive of the Anglican Diocese of Sydney, Revd Dr Andrew Cameron, agreed with the proposal requiring the disclosure of the interests of members' spouses, partners and dependent children. He noted the potential for a person to 'hide' his or her assets in the name of a spouse or dependent child.⁸⁴ He also acknowledged, however, that the disclosure of interests will involve an incursion into the privacy of members' spouses and children, and in doing so, alluded to the option of not making such disclosures public but accessible only to an appropriate body.⁸⁵
- 3.33** The Director of Public Prosecutions, Mr Lloyd Babb SC, supported the proposal, providing appropriate restrictions are placed on the publication of and access to the register. Mr Babb's submission noted that other Australian Parliaments, with the exception of Western Australia and Tasmania, have a form of spouse/partner disclosure, accompanied by privacy provisions that restrict the publication of this information.⁸⁶

Adult children

- 3.34** The submission of Dr Longstaff of the St James Ethics Centre also raised the findings made by the ICAC in relation to the activities of the Obeid family and suggested that the interests of independent children also need to be disclosed. Dr Longstaff argued that if such disclosures were required, it should only be in cases where the activities of the member are known (or

⁸¹ Submission 5, Dr Simon Longstaff AO, St James Ethics Centre, p 4

⁸² Submission 13, Dr Elizabeth Coombs, Privacy Commissioner, Information and Privacy Commission NSW, pp 1-2.

⁸³ Submission 13, Dr Coombs, p 2.

⁸⁴ Submission 14, Revd Dr Andrew Cameron, Social Issues Executive, Anglican Diocese of Sydney, pp 2-3.

⁸⁵ Submission 14, Revd Dr Cameron, p 3.

⁸⁶ Submission 12, Mr Lloyd Babb SC, Director of Public Prosecutions, p 2.

might reasonably be known) by the member to affect the interests of those independent children other than coincidentally as a member of the public or a broad class.⁸⁷

- 3.35** The submission from Mr Babb SC also noted that the disclosure of the interests of spouses/partners and dependent children does not appear to have direct application to the recent ICAC inquiries which concerned the involvement of adult children in a business deal.⁸⁸

Family trusts and companies and private superannuation funds

- 3.36** As noted above, the ICAC observed in its report that changes to the interest disclosure regime 'should specifically include family trusts and companies'.

- 3.37** This matter was also raised by the ICAC in its earlier report on Operation Jasper, entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*. In that report, the ICAC noted in relation to the Obeid family:

The Obeid family has a complex structure of trusts and corporate vehicles through which they conduct their business and financial affairs, but eventually the family's wealth comes back to one principal trust fund, Obeid Family Trust No 1. Each member of the family, including Edward Obeid Sr and his wife, Judith, have their ordinary living expenses paid through the trust, whether by loan or otherwise, and it seems that family members are relatively free, whether by way of loans or otherwise, to draw upon that same trust for extraordinary expenses.⁸⁹

- 3.38** The committee notes that under the current interest disclosure regime, members are specifically required to disclose income from a trust under section 9(2)(e) of the Constitution (Disclosures by Members) Regulation 1983. In addition, members are not exempt from disclosing interests in real property held as the trustee of a family trust.

- 3.39** However, it is far from clear that these provisions are leading to the disclosure of all family trusts and companies in which members have a beneficial interest.

- 3.40** This issue was raised in submissions. In her written submission, Ms Fazio suggested that the holdings of all family trusts and self-managed superannuation schemes in which elected members, their spouses/partners and dependent children have an interest need to also be fully disclosed.⁹⁰

- 3.41** Mr Babb SC also commented on the need to consider the current requirements of the Constitution (Disclosures by Members) Regulation 1983 and any loopholes that may exist in relation to the use of trusts and loans from family members.⁹¹

⁸⁷ Submission 5, Dr Simon Longstaff AO, St James Ethics Centre, p 4.

⁸⁸ Submission 12, Mr Lloyd Babb SC, Director of Public Prosecutions, p 2.

⁸⁹ ICAC, *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, July 2013, p 28.

⁹⁰ Submission 15, The Hon Amanda Fazio, MLC, p 1.

⁹¹ Submission 12, Mr Lloyd Babb SC, Director of Public Prosecutions, p 2.

3.42 The committee notes the following provision in the resolution establishing the Senate disclosure regime:

The statement of a senator's registrable interests to be provided by a senator shall include the registrable interests of which the senator is aware of the senator's spouse or partner and of any children who are wholly or mainly dependent on the senator for support, and shall cover the following matters:

- (a) shareholdings in public and private companies (including holding companies) indicating the name of the company or companies;
- (b) family and business trusts and nominee companies:
 - (i) in which a beneficial interest is held, indicating the name of the trust and the nature of its operation and beneficial interest, and
 - (ii) in which the senator, the senator's spouse or partner, or a child who is wholly or mainly dependent on the senator for support, is a trustee (but not including a trustee of an estate where no beneficial interest is held by the senator, the senator's spouse or partner or dependent children), indicating the name of the trust, the nature of its operation and the beneficiary of the trust;

3.43 The equivalent provision in the resolution establishing the House of Representative disclosure regime is in almost identical terms.

3.44 The committee also takes guidance from the following provisions of schedule 2 (Registers of interests) of the Standing Orders of the Queensland Parliament:

Registration of interests

...

- (2) A statement of interests required to be given by a member must contain the following details—
 - (c) in respect of any family or business trust or nominee company in which the member or a related person holds a beneficial interest—
 - (i) the name or a description of the trust, or the name of the company, as the case requires;
 - (ii) the nature of the activities of the trust or company;
 - (iii) the nature of the interest; and
 - (iv) the investments or beneficial interests of the trust;
 - (d) in respect of any family or business trust in which the member or a related person is a trustee—
 - (i) the name or a description of the trust; and
 - (ii) the nature of the activities of the trust;

- (e) in respect of any private superannuation fund in which the member or a related person is a trustee or director—
 - (i) the name or a description of the fund;
 - (ii) the nature of the activities of the fund;
 - (iii) the investments or beneficial interests of the fund (of which the member is aware);

Exception reporting and publication of members' interests online

3.45 The ICAC also noted in its report other issues previously discussed by this committee relating to the interest disclosure regime, specifically 'the timeliness with which pecuniary interest disclosures are made, the cumbersome nature of the disclosure regime and the transparency of the system'.

3.46 In its 2010 report entitled *Review of the Members' Code of Conduct 2010*, this committee made a number of recommendations for reform of the interest disclosure regime for members, in addition to the recommendation concerning the interests of partners/spouses and dependent children cited earlier in this chapter. First, it recommended that a system of exception reporting be introduced to replace the current system of primary, ordinary, supplementary ordinary and discretionary returns. Second, it recommended that steps be taken to enable the publication of members' interest returns online. The recommendations of the committee from 2010 are reproduced below:

Recommendation 3

That the current system of primary, ordinary, supplementary ordinary and discretionary returns be amended to introduce a simpler system of exception reporting incorporating primary returns to be lodged by a new member within 35 days of the member being sworn, ordinary returns to be lodged by returning members within 35 days of the first sitting day of any subsequent Parliament, and alteration of interests returns for a member to notify an alteration to his or her pecuniary interests against the relevant primary or ordinary return as the case may be, to be lodged within 35 days of the alteration occurring.

Recommendation 4

That in implementing a system of exception reporting incorporating primary, ordinary and alteration of interests returns, those clauses of the Constitution (Disclosures by Members) Regulation that require members to disclose the names and addresses of individuals (as opposed to corporations, trusts, associations, unions and the like) should be amended to provide that individuals should be identified by name and location only (not address), subject to satisfactory resolution of any security and safety issues that may affect members and their families.

Recommendation 5

That the Constitution (Disclosures by Members) Regulation 1983 be amended to provide explicitly for the publication of the Register online, with the Clerk to cause the recommended new primary and ordinary returns to be published on the Council's

website as soon as possible following the deadline for their receipt, but not later than 14 days after the deadline for their receipt, and to cause the recommended new alteration of interests returns to be published on the Council's website within 14 days of their receipt.

Recommendation 6

That clause 21 of the Constitution (Disclosures by Members) Regulation 1983 continue to require the Clerk to cause the recommended new primary and ordinary returns to be furnished to the President of the Legislative Council for tabling in the Legislative Council as soon as possible following the deadline for their receipt, but not later than 21 days after the deadline for their receipt. In addition, the Clerk is to cause the recommended new alteration of interest returns to be furnished to the President of the Legislative Council for tabling in the Legislative Council every six months.

3.47 These recommendations from 2010 entailed significant and fundamental reform of the interest disclosure regime, and followed a comprehensive review of the regime in New South Wales and other Australian and international parliaments. From that review, it was clear that the interest disclosure regime in New South Wales is considerably behind those of many other Parliaments in terms of timeliness and accessibility, and in need of reform.

3.48 Of note, the change implemented in 2007⁹² to require members to lodge a supplementary ordinary as well as an ordinary return has proven unduly complicated and cumbersome. The committee notes that in his written submission, the Clerk of the Parliaments, Mr David Blunt, observed:

... I draw attention to the discussion in that report concerning the timing and types of returns, and the recommendations for the replacement of the current system of four types of returns due at different times, with a revised, simpler system of exception reporting. As the person responsible for receiving and maintaining the Register of Disclosures by Members of the Legislative Council, I can confirm that Members continue to find the current system confusing and overly complex.⁹³

3.49 The preferred model advocated by this committee was so-called 'exception reporting', whereby members would be required to disclose their interests when they become a member of Parliament and at any time their interests changed. The committee notes that the Legislative Assembly Privileges and Ethics Committee also in the past supported a form of exception reporting.⁹⁴

3.50 The committee also recommended in 2010 that amendments be made to the interest disclosure regime to enable members' interests to be placed on the internet, subject to addressing certain privacy issues. Again the committee notes the observation of the Clerk of the Parliaments in his submission:

... I also draw attention to the discussion in that report surrounding the publication of the Register of Disclosures by Members of the Legislative Council on the Parliament's

⁹² See the *Constitution (Disclosures by Members) Amendment Regulation 2007*.

⁹³ Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, p 3.

⁹⁴ Standing Committee on Parliamentary Privilege and Ethics, Legislative Assembly, *Review of the Proposed Amendments to the Code of Conduct and Draft Constitution (Disclosure by Members) Regulation 2006*, September 2006, p 26.

website. Whilst the Committee expressed support for online publication of the register, it indicated that privacy issues concerning individuals would need to be first addressed and also recommended that the Regulation be amended to explicitly provide for such online publication. It is because these recommendations have not been implemented that the Register of Disclosures of Members of the Legislative Council is not yet published online.⁹⁵

- 3.51** Currently, the disclosures made by members of the Legislative Council are tabled in the House and are available for viewing in the office of the Clerk. However, they are not available more broadly, notably online on the Parliament's website, limiting the transparency of the process. The committee notes the following comment from its 2010 report:

There is a strong argument for placing the 'Register of Disclosures by Members of the Legislative Council' on the Legislative Council's website. Placing the Register on the Council's website would strengthen public trust and confidence in the processes of the Council by improving the transparency, openness and accountability of members. While the Register is already publicly available, the value of having the Register on the Council's website is that it would greatly increase ease of public access.⁹⁶

- 3.52** In its written submission to this inquiry, the Department of Premier and Cabinet specifically addressed these issues:

The Government considers that, in principle, there is merit in simplifying the arrangement regarding the disclosure of Members' pecuniary interests, provided there is no diminution of accountability.⁹⁷

Committee comment

- 3.53** The ICAC has recommended:

That the NSW Parliament's Legislative Council Privileges Committee conducts a new inquiry into the mechanism for elected members to disclose the interests of their spouses/partners and dependent children under the provisions of the Constitution (Disclosures by Members) Regulation 1983, with a view to making third-party disclosures a requirement.

- 3.54** As indicated in Chapter 1, the Government previously supported this recommendation in its response to the ICAC report:

Government Response: Support

The Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee will each conduct an inquiry into the mechanism for elected members to disclose the interests of their spouses/partners and dependent children under the provisions of the *Constitution (Disclosures by Members) Regulation 1983*, with a view to making third-party disclosures a requirement. As noted above

⁹⁵ Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, p 3.

⁹⁶ Privileges Committee, Legislative Council, Report No. 54, *Review of the Members' Code of Conduct 2010*, December 2010, p 59.

⁹⁷ Submission 16, Mr Chris Eccles, Secretary, Department of Premier and Cabinet, p 1.

(Recommendation 22), it is proposed that the Committees hold joint hearings and deliberations for the purposes of their inquiries.

- 3.55** The committee also supports the ICAC recommendation. As the committee indicated in its previous report on the Code of Conduct in 2010, the committee believes that disclosure of the interests of spouses/partners and dependent children would strengthen the parliamentary process by improving its transparency, openness and accountability. The events leading up to the publication of the ICAC report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources* and ICAC's subsequent proceedings as part of Operation Spicer only confirm the committee in this view. Members should be required to disclose the interests of spouses/partners and dependent children of which they are aware. As examples, real property and income of members' spouses/partners, and gifts and contributions to travel to members spouses/partners and dependent children should all be required to be disclosed, where the member is aware of them.
- 3.56** The committee acknowledges that disclosure of the interests of spouses/partners and dependent children raises significant privacy issues. As noted by various parties in their submissions to this inquiry, the demands of transparency and accountability need to be balanced against the privacy of members' spouses/partners and children who are not in public office. In the Senate, disclosures concerning the interests of spouses/partners and dependent children are kept confidential to the Committee of Senators' Interests, unless the committee decides they should be made public.
- 3.57** However, notwithstanding the adverse impact on the privacy of individuals not in office, the committee believes that in the light of recent practices exposed by the ICAC, the demands of full and open disclosure of the interests of spouses/partners and dependent children are irresistible. The committee believes that the House of Representatives model of full and open reporting of the interests of spouses/partners and dependent children should be adopted by the Parliament.⁹⁸ The committee also notes and largely endorses the guidance provided by the Senate Committee of Senators' Interests in relation to disclosures by senators of the interests of their spouses/partners and dependent children:
- senators are not required to disclose the name of a spouse, partner or dependent child;
 - 'dependent children' means dependent children under 16 years of age or dependent full-time students under 25 years of age;
 - 'partner' means a person who is living with another person in a *bona fide* domestic relationship;
 - where interests are held jointly with a spouse or partner, former spouse or partner, or dependent children the interests need to be included only as interests of the senator, with appropriate notation such as 'jointly owned with [former] spouse/partner'.

⁹⁸ From the submissions received, the committee notes that the disclosure regime of the Legislative Assembly of the Australian Capital Territory also requires members to declare not only their own interests but also those of their immediate family of which they are aware and that these details are published on the Legislative Assembly's website.

Recommendation 2

That the interest disclosure regime under the Constitution (Disclosures by Members) Regulation 1983 be amended to incorporate full and open disclosure by members of the Parliament of the interests of their spouses/partners and dependent children of which they are aware subject to the following guidelines:

- members are not required to disclose the name of a spouse, partner or dependent child;
- 'dependent children' means dependent children under 18 years of age or dependent full-time students under 25 years of age who are wholly or mainly dependent on the member for support;
- 'partner' means a person who is living with another person in a *bona fide* domestic relationship;
- where interests are held jointly with a spouse or partner, former spouse or partner, or dependent children, the interests need to be included only as interests of the member, with appropriate notation such as 'jointly owned with [former] spouse/partner'.

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- 3.58** The Committee notes that many of the issues of corruption found by the ICAC in respect of Operation Jasper dealt with actions and commercial interests of adult children of members which were not addressed by Recommendation 24 of the ICAC. The Committee believes that consideration should be given to this issue in the future.
- 3.59** Related to the disclosure by members of the interests of their spouses/partners and dependent children is the issue of interests held in family trust and companies.
- 3.60** Part 3 of the Constitution (Disclosures by Members) Regulation 1983 itemises the pecuniary and other interests required to be disclosed by members. Drawing on the models from the Senate and House of Representatives, but also the model from the Queensland Parliament, the committee believes that:
- a new section should be inserted into Part 3 dealing specifically with interests in family trusts or companies and private superannuation funds where:
 - the member or the spouse/partner or any adult or dependent children can exercise voting rights or control over the units or shares in the trust/company/fund; or
 - the member or the spouse/partner or any adult or dependent children receive or receives in any way a beneficial interest from the trust/company/fund (but not including a trustee of an estate where no beneficial interest is held).
 - Members should be required to indicate the name (or a description) of the trust/company/fund, the nature of its operation and the beneficiaries of the trust/company/fund.
- 3.61** Such an approach would be consistent with section 14A of the *Constitution Act 1902* which specifically provides that the Governor may, subject to subsections (4) and (5), make regulations for or with respect to partnerships, trusts and shareholdings or other beneficial interests in corporations.

Recommendation 3

That a new section should be inserted into Part 3 of the Constitution (Disclosures by Members) Regulation 1983 dealing specifically with interests in family trusts or companies and private superannuation funds where:

- the member or the spouse/partner or any adult or dependent children can exercise voting rights or control over the units or shares in the trust/company/fund, or
- the member or the spouse/partner or any adult or dependent children receive or receives in any way a beneficial interest from the trust/company/fund (but not including a trustee of an estate where no beneficial interest is held).

Members should be required to indicate the name (or a description) of the trust/company/fund, the nature of its operation and the beneficiaries of the trust/company/fund.

- 3.62** During the next review of the *Code of Conduct for Members* and the interest disclosure regime, the committee will further consider the issue of members disclosing their holdings in any trust/company/fund in which they, their spouses/partners or any adult or dependent children have an interest.
- 3.63** The committee also recommends again that the Parliament move to a system of exception reporting for the disclosure of interests by members. A system of exception reporting would clearly be a more effective, timely and transparent arrangement for reporting by members of their interests than the current system of six-monthly reporting. The demands that members report changes in their circumstances in a timely manner, and not up to six or even twelve months after they occur, are compelling. The current reporting system is unduly complicated and cumbersome.
- 3.64** Separately, in moving to exception reporting, the committee also recommends that amendments be made to the interest disclosure regime to enable members' interests to be placed on the Parliament's website, subject to addressing certain privacy issues raised previously by this committee in its 2010 report. Again, the demand for such transparency in the current climate is simply irresistible. The committee reiterates its recommendations from its 2010 report.
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Recommendation 4

That the current system of primary, ordinary, supplementary ordinary and discretionary returns be amended to introduce a simpler system of exception reporting incorporating:

- primary returns to be lodged by a new member within 35 days of the member being sworn,
 - ordinary returns to be lodged by returning members within 35 days of the first sitting day of any subsequent Parliament, and
 - alteration of interests returns for a member to notify an alteration to his or her pecuniary interests against the relevant primary or ordinary return to be lodged within 35 days of the alteration occurring.
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Recommendation 5

That in implementing a system of exception reporting incorporating primary, ordinary and alteration of interests returns, those clauses of the Constitution (Disclosures by Members) Regulation that require members to disclose the names and addresses of individuals (as opposed to corporations, trusts, associations, unions and the like) should be amended to provide that individuals should be identified by name and location only (not address), subject to satisfactory resolution of any security and safety issues that may affect members and their families.

Recommendation 6

That the Constitution (Disclosures by Members) Regulation 1983 be amended to provide explicitly for the publication of the Register online, with the Clerk to publish the recommended new primary and ordinary returns on the Council's website as soon as possible following the deadline for their receipt, but not later than 14 days after the deadline for their receipt, and to publish the recommended new alteration of interests returns on the Council's website within 14 days of their receipt.

Recommendation 7

That clause 21 of the Constitution (Disclosures by Members) Regulation 1983 continue to require the Clerk to cause the recommended new primary and ordinary returns to be furnished to the President of the Legislative Council for tabling in the Legislative Council as soon as possible following the deadline for their receipt, but not later than 21 days after the deadline for their receipt. In addition, that the Clerk cause the recommended new alteration of interests returns to be furnished to the President of the Legislative Council for tabling in the Legislative Council every six months.

Chapter 4 A Parliamentary Commissioner for Standards

This chapter examines the merits of implementing a Parliamentary Commissioner for Standards in New South Wales, drawing in particular on the model from the UK Parliament.

Recommendation 25 of the ICAC

4.1 Recommendation 25 of the ICAC in its report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources* was as follows:

That the NSW Parliament's Legislative Council Privileges Committee considers the establishment of a parliamentary investigator position in consultation with the Legislative Assembly Privileges and Ethics Committee.

Summary of the current arrangements for regulating the conduct of members in New South Wales

4.2 The conduct of members of the Parliament of New South Wales is regulated in a number of ways:

- Conduct in the chambers is governed by the standing orders of each House.
- As indicated in Chapter 2, both Houses have adopted an identical *Code of Conduct for Members* which deals with matters such as: disclosure of conflicts of interest; bribery; gifts; use of public resources; use of confidential information; the role of political parties; and secondary employment.
- The ICAC has jurisdiction to investigate allegations of corrupt conduct against a member, in accordance with the definition of corrupt conduct in the *Independent Commission Against Corruption Act 1988*. The role of the ICAC is considered further below.
- As indicated in Chapter 3, there is a statutory scheme for the disclosure by members of their pecuniary and other interests.
- The Parliament has appointed a Parliamentary Ethics Adviser to advise members, upon their request, on ethical issues concerning the exercise of their role as members.
- The Privileges Committees of each House have roles in relation to the review of the *Code of Conduct for Members*, educative work in relation to ethical standards, and may investigate matters referred to it by the House.

The role of the ICAC

- 4.3 As indicated, the ICAC has jurisdiction to investigate allegations of corrupt conduct against a member, in accordance with the definition of corrupt conduct in the *Independent Commission Against Corruption Act 1988*.⁹⁹
- 4.4 In his written submission, the Clerk of the Parliaments, Mr David Blunt, noted that the ICAC is currently the only body in New South Wales outside of Parliament which may investigate allegations or complaints that a member has breached the code of conduct:

... the ICAC has independent discretion to determine which matters it pursues through a formal (including possibly public) inquiry. Where the ICAC finds that a member has committed a “substantial breach” of the code of conduct and that a member’s conduct also falls within the other limb of the definition of corrupt conduct (section 8 of the *ICAC Act*), it may report that finding to Parliament. Whilst there are no direct legal consequences from such a finding, it may be accompanied by a recommendation that consideration be given to prosecution for an offence or disciplinary proceedings. Furthermore... a finding of corrupt conduct, even in relation to a matter less serious in nature, will have a significant impact upon a member’s reputation and in most cases precipitate the end of the member’s parliamentary career.¹⁰⁰

Comments by the ICAC in support of recommendation 25

- 4.5 In support of recommendation 25, the ICAC made the following comments in its report:

The conduct of members must also be open to judgment. A comprehensive, timely and independent system for dealing with complaints about the conduct of members is absent in the current system. The NSW Parliament lacks an effective mechanism to manage its own members.¹⁰¹

- 4.6 The ICAC also commented that:

The effectiveness of codes of conduct and statutory pecuniary interest regimes is dependent on timely and impartial enforcement mechanisms. No such enforcement mechanism exists in NSW outside of that provided by the Commission’s jurisdiction. This is problematic for allegations of minor breaches given the role of the Commission, as far as practicable, to direct its attention to serious and systemic corrupt conduct. Furthermore, the provisions of s 9 of the *ICAC Act* require a “substantial” breach of an applicable code of conduct.

The *Constitution Act 1902* provides that either House may declare a member’s seat vacant if they wilfully contravene the requirements of the Constitution (Disclosures by Members) Regulation 1983. A member’s seat has never been declared vacant under these provisions. In effect, sanction against a member is dependent on party numbers

⁹⁹ *Independent Commission Against Corruption Act 1988*, ss 7-9.

¹⁰⁰ Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, Attachment 1. *A Parliamentary Commissioner for Standards for New South Wales?*, July 2013, p 5.

¹⁰¹ ICAC, *Reducing the opportunities and incentives for corruption in the State’s management of coal resources*, October 2013, p 41.

and support for a member. The findings of the 2002 Legislative Council's Privileges Committee inquiry into Edward Obeid Sr's pecuniary interest returns demonstrate the shortcomings associated with relying on parliamentary committees to investigate members.

In recent years, there has been support for the creation of an external third party to deal with complaints concerning members. The background to these proposals is well documented in a paper presented by David Blunt, Clerk of the Parliaments and Clerk of the Legislative Council to the 44th Presiding Officers and Clerks Conference in 2013. Mr Blunt's paper includes a discussion on the Parliamentary Commissioner for Standards model adopted in the UK, and how this model could work in NSW.

The establishment of a parliamentary investigator to examine minor allegations about members would provide a number of benefits. These include the provision of an impartial and timely mechanism for resolving minor complaints about the conduct of members. Public confidence in the institution of parliament might be enhanced if the standards that apply to members are enforced. The creation of a parliamentary investigator may also provide for a "graded" approach to non-compliance rather than the "all or nothing" response of the current system.

The Commission supports further consideration of this idea provided there is no change to its jurisdiction or the definition of corrupt conduct in the ICAC Act as a result of any review.

Limitations of the current arrangements for regulating the conduct of members in New South Wales

4.7 As noted above, the ICAC observed in its report that there are a number of limitations to the current arrangements for regulating the conduct of members in New South Wales. The committee summarises the limitations of the current arrangements for regulating the conduct of members below:

- The ICAC is the only body outside of Parliament with jurisdiction to investigate allegations of corrupt conduct against a member, in accordance with the definition of corrupt conduct in the *Independent Commission Against Corruption Act 1988*.
- The resources of the ICAC are naturally directed towards investigations into large-scale systemic corruption, as is appropriate under the *Independent Commission Against Corruption Act 1988*. Inevitably, as a result, the ICAC cannot investigate every allegation referred to it. The Committee notes that in 2011/2012, the ICAC received 2,978 matters, commenced 73 preliminary investigations, 19 full investigations and held 10 public inquiries.
- Where the ICAC does undertake an investigation into the conduct of members and finds that there has been a substantial breach of the *Code of Conduct for Members*, there is no discretion in the finding that the ICAC may hand down: the ICAC either makes a finding of corrupt conduct or it does not.
- In the absence of alternative avenues for investigations, matters concerning members are routinely referred to the ICAC which may then undertake preliminary investigations for several months without any further announcements. Members may therefore find themselves subject to media reports of having been "referred to the ICAC" or being

“investigated by the ICAC”, and have that situation continue for some time, even though the complaint may be trivial, vexatious or less serious in nature.

- While the ICAC has wide investigatory powers, under section 122 of the *Independent Commission Against Corruption Act 1988*, parliamentary privilege is expressly preserved in relation to the freedom of speech and debates and proceedings in Parliament, save in one respect: Parliament has waived any privilege attaching to members’ interest returns to allow the ICAC to make use of members’ returns for the purposes of any investigation or for the purposes of any finding or recommendation. This limits the capacity of the ICAC to investigate or adjudicate on breaches of the *Code of Conduct for Members* where the conduct in question is protected by parliamentary privilege.
- While Parliament may itself investigate complaints against members through committees such as this committee, the instances of this are rare. In 2002, the Privileges Committee was asked to investigate the pecuniary interest returns of the Hon Eddie Obeid. In its report, the committee divided along party lines, prompting the Chair of the Committee to label the report ‘inadequate’ and ‘politicised’.¹⁰²

4.8 The committee notes that these matters are examined in more detail in the paper provided to the committee by the Clerk of the Parliaments as part of his submission to this inquiry.¹⁰³

The UK Parliamentary Commissioner for Standards model

4.9 The two Houses of Parliament in the United Kingdom both have their own independent Parliamentary Commissioners for Standards. The House of Commons appointed a Commissioner for Standards in 1995. The House of Lords followed with the appointment of a Commissioner for Standards in 2010.¹⁰⁴ The committee summarises their operation below.

The House of Commons Commissioner for Standards

4.10 The role of the House of Commons Commissioner for Standards is established by standing order 150 of the House of Commons:

- (1) There shall be an Officer of this House, called the Parliamentary Commissioner for Standards, who shall be appointed by the House.
- (2) The principal duties of the Commissioner shall be—
 - (a) to maintain the Register of Members’ Financial Interests and any other registers of interest established by the House, and to make such arrangements for the compilation, maintenance and accessibility of those

¹⁰² Standing Committee on Privilege and Ethics, NSW Legislative Council, Report No. 20, *Report on inquiry into the Pecuniary Interest Register*, October 2002, p xi.

¹⁰³ Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, Attachment 1, pp 6-9.

¹⁰⁴ For a background to the development of the Commissioner for Standards model in the UK, including the work of the Committee on Standards in Public Life, see Submission 9, Attachment 1, pp 9-10.

registers as are approved by the Committee on Standards and Privileges or an appropriate sub-committee thereof;

- (b) to provide advice confidentially to Members and other persons or bodies subject to registration on matters relating to the registration of individual interests;
- (c) to advise the Committee on Standards and Privileges, its sub-committees and individual Members on the interpretation of any code of conduct to which the House has agreed and on questions of propriety;
- (d) to monitor the operation of such code and registers, and to make recommendations thereon to the Committee on Standards and Privileges or an appropriate sub-committee thereof; and
- (e) to investigate, if he thinks fit, specific matters which have come to his attention relating to the conduct of Members and to report to the Committee on Standards and Privileges or to an appropriate sub-committee thereof, unless the provisions of paragraph (3) apply.

- (2A) In determining whether to investigate a specific matter relating to the conduct of a Member the Commissioner shall have regard to whether in his view there is sufficient evidence that the Code of Conduct or the rules relating to registration or declaration of interests may have been breached to justify taking the matter further.

4.11 The Commissioner is limited to a complaint handling function: receiving and dealing with complaints received. The Commissioner does not have an audit function to look proactively for errors in the registration of interests or respond to media reports about a member's conduct in the absence of a complaint.¹⁰⁵

4.12 As indicated above, the Commissioner is overseen by the Committee on Standards. The role of the Committee is set out in Standing Orders 149 and 149A. The role includes overseeing the work of the Commissioner for Standards.

4.13 Further guidance on the procedures followed by the Commissioner for Standards in conducting an inquiry into the conduct of a member under Standing Order 150(1)(e) is set out in 'Procedural note: Parliamentary Commissioner for Standards – Procedure for Inquiries'.¹⁰⁶ The introduction to the procedural note provides the following guidance on investigations into members by the Commissioner:

1. The Parliamentary Commissioner for Standards:
 - considers complaints alleging that a Member of Parliament has breached the Code of Conduct and its associated rules;
 - inquires into a self-referral from a Member, with the agreement of the Committee on Standards and Privileges and on an exceptional basis; and

¹⁰⁵ Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, Attachment 1, p 13.

¹⁰⁶ Available at http://www.parliament.uk/documents/documents/Procedural_Note-April_2012.pdf.

- if the Commissioner thinks fit, investigates specific matters which have come to his or her attention relating to the conduct of a Member.
- 2. Before initiating an inquiry the Commissioner will, if the matter comes within his or her remit, consider if there is sufficient evidence to justify an inquiry into whether a particular named Member may have breached the Code of Conduct.
- 3. Once initiated, an inquiry is most likely to be concluded in one of three ways:
 - i. the Commissioner may conclude that the allegation has not been substantiated: the Commissioner will not uphold it and will report that conclusion briefly to the Committee;
 - ii. the Commissioner may decide that a breach of the rules at the less serious end of the spectrum can be resolved under Standing Order No 150 through the rectification procedure (emphasis added). If so, and the Member agrees and apologises, the Commissioner will determine the matter on that basis and report the fact briefly to the Committee;
 - iii. if the Commissioner finds that there has been a breach which is not suitable for the rectification procedure, or that the inquiry raises issues of wider importance, the Commissioner will normally report the facts and his or her conclusions to the Committee in the form of a memorandum (emphasis added). The Committee will then publish the Commissioner's memorandum on the case, alongside a report setting out their conclusions in the matter, including their recommendations on any sanctions.

4.14 Under the procedures set out above, a minor or inadvertent breach of the rules is addressed through the rectification procedure:

The Member will apologise and, where appropriate, take action to rectify the breach, such as by making a formal point of order to apologise for failure to declare interests in a previous debate.¹⁰⁷

4.15 More serious matters where the Commissioner finds that the breach is not suitable for the rectification procedure are dealt with through a memorandum from the Commissioner to the Committee for Standards:

In these cases, the Commissioner submits a memorandum to the Committee: the Committee provides the Member concerned an opportunity to make a written or oral submission, and then makes a Report to the House. When the Report is published, the evidence, including the Commissioner's memorandum is made public—but until then proceedings take place in private. The Committee does its utmost to proceed quickly, but complex cases may require time. It is frequently a matter of public knowledge that the Commissioner's memorandum has been submitted to the Committee, so there can be press speculation and pressure during the period before the final report is published.¹⁰⁸

¹⁰⁷ Submission 7, Sir Robert Rogers, Clerk of the House of Commons, House of Commons, p 7.

¹⁰⁸ Submission 7, Sir Robert Rogers, p 7.

4.16 On receipt of memoranda from the Commissioner, the Committee on Standards and Privileges has in the past recommended to the House of Commons:

- an apology, in the form of a letter for publication
- a formal apology, by way of a personal oral statement to the House
- withdrawal of a retiring member's Resettlement Grant
- repayment of expenses incorrectly claimed
- withdrawal of an ex-member's Palace of Westminster photo-pass
- suspension (with loss of pay) from the service of the House for a short period, ranging from a few days to a whole month.¹⁰⁹

4.17 In his written submission, the Clerk of the Parliaments, Mr David Blunt, forwarded his 2013 paper entitled 'A Parliamentary Commissioner for Standards for New South Wales?' in which he provided the following examples of the operation of the House of Commons Commissioner for Standards model:

- A complaint was received about a member's use of pre-paid envelopes and House of Commons stationery to send unsolicited and "party political" letters. The complaint was upheld as conduct contrary to relevant rules, but not at the serious end of the spectrum. The Committee for Standards agreed with the Commissioner's findings, and the member made a written apology to the House and repaid the cost of the postage.
- Complaints were received that a member had failed to comply with pecuniary interest disclosure requirements. The Commissioner upheld the complaints and concluded they were serious matters. The member had co-operated with the inquiry and taken the first available opportunity to acknowledge the breach and apologise. The Committee for Standards agreed the matter was serious and recommended the Member apologise to the House and update the entry in the register, with the update to appear in bold, italic type with an appropriate footnote. The recommendations were implemented.
- Two complaints were received about a number of matters in relation to one member including a breach of the rules for parliamentary allowances concerning accommodation, and the use of his office for non-parliamentary purposes. The complaints were upheld, but some mitigating factors were identified. The Committee for Standards accepted the findings and recommended a repayment of £3,000 and a written apology. The recommendations were implemented.¹¹⁰
- A member self-referred a request to the Commissioners to inquire into arrangements for parliamentary funded accommodation in 2009. A serious breach of the *Code* was found. The member accepted responsibility, apologised and repaid an amount of £56,592. The Committee for Standards agreed with the Commissioner's findings and recommended the member be suspended from the House for seven sitting days and apologise to the House by way of personal statement. The House agreed to the recommended suspension and the member made his apology.

¹⁰⁹ Submission 7, Sir Robert Rogers, p 7.

¹¹⁰ Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, Attachment 1, pp 14-15.

4.18 A feature of the Committee on Standards and Privileges is that since January 2013, the membership of the Committee has included three lay members (that is, non-elected members of the public). The Committee can only meet if a lay member is present. The Clerk of the House, Sir Robert Rogers suggested that lay members act to ensure that the Committee is operating properly:

Although lay members do not have the power to vote, they each have the power to have their own or collective opinion published with any Report agreed by the Committee. In these circumstances, the Committee proceeds by consensus, with the lay members playing a full part in its proceedings. The capacity to have an opinion published would put them in a very strong position if they ever considered that the Committee was not acting properly.¹¹¹

4.19 The annual cost of the Office of the Parliamentary Commissioner for Standards, which produces the Registers of Financial Interests as well as investigating complaints, is less than £500,000.¹¹²

4.20 The committee notes that in the year beginning 1 April 2012, 117 formal complaints against members and former members were received. This was very slightly more than in the previous year.¹¹³

The House of Lords Commissioner for Standards

4.21 The role of the House of Lords Commissioner for Standards is established under the Code of Conduct for Members of the House of Lords:

Enforcement of the Code of Conduct

16. A House of Lords Commissioner for Standards is appointed to investigate alleged breaches of this Code, or of the rules governing Members' financial support or use of parliamentary facilities. Any such investigation is conducted in accordance with procedures set out in the Guide to the Code of Conduct.
17. After investigation the Commissioner reports his findings to the Sub-Committee on Lords' Conduct; the Sub-Committee reviews the Commissioner's findings and, where appropriate, recommends a disciplinary sanction to the Committee for Privileges and Conduct. The Member concerned has a right of appeal to the Committee for Privileges and Conduct against both the Commissioner's findings and any recommended sanction.
18. The Committee for Privileges and Conduct, having heard any appeal, reports its conclusions and recommendations to the House. The final decision rests with the House.
19. In investigating and adjudicating allegations of non-compliance with this Code, the Commissioner, the Sub-Committee on Lords' Conduct and the Committee

¹¹¹ Submission 7, Sir Robert Rogers, Clerk of the House of Commons, House of Commons, p 8.

¹¹² Submission 7, Sir Robert Rogers, p 5.

¹¹³ Parliamentary Commissioner for Standards, Annual Report 2012–13, p 14.

for Privileges and Conduct shall act in accordance with the principles of natural justice and fairness.

20. Members shall co-operate, at all stages, with any investigation into their conduct by or under the authority of the House.
21. No Member shall lobby a member of the Committee for Privileges and Conduct or the Sub-Committee on Lords' Conduct in a manner calculated or intended to influence their consideration of a complaint of a breach of this Code.

4.22 The House of Lords Commissioner for Standards made a submission to this inquiry in which he summarised his role and the process for imposing sanctions as follows:

My role is to investigate complaints and to determine if a breach has occurred. If I find that a member has breached the Code [of Conduct] but the breach is minor and acknowledged by the member concerned, the option is open for me to agree remedial action with that member. In all other cases of breach the question of sanction is decided by the sub-committee. An appeal against both sanction and finding lies to the Committee for Privileges and Conduct, with the final decision on whether a member has breached the Code and what sanction should apply being made by the House as a whole.¹¹⁴

4.23 In general terms, the committee notes that the roles of the House of Commons and House of Lords Commissioners for Standards are similar in respect of complaints concerning the conduct of members. However, there are differences in other areas. Of note, it is accepted that the House of Lords does not have a power to expel one of its members,¹¹⁵ unlike the House of Commons. It is also notable that the House of Lords Commissioner is not required to maintain the register of interests of members in the House of Lords, unlike the role performed by the House of Commons Commissioner.

Comments on the Commissioner for Standards model in the UK Parliament

4.24 The committee received submissions from the Clerk of the House of Commons, the Clerk of the Parliaments in the House of Lords, the House of Lords Commissioner for Standards and the Clerk of the Parliaments in New South Wales in which they commented on the operation of the Commissioner for Standards model in the UK Parliament.

4.25 In his submission, the Clerk of the House of Commons, Sir Robert Rogers, commented as follows:

The inclusion of a strong independent element in the House's disciplinary system is a strength in itself. The House of Commons system allows minor infractions of the rules to be dealt with speedily by an independent investigator. Nonetheless, the Committee on Standards and, ultimately, the House itself, retain responsibility for adjudicating on serious breaches of the Code of Conduct and for deciding on the House's own disciplinary rules.¹¹⁶

¹¹⁴ Submission 2, Mr Paul Kernaghan, Commissioner for Standards, House of Lords, p 2.

¹¹⁵ *Erskine May*, 24th edn, pp 200-201.

¹¹⁶ Submission 7, Sir Robert Rogers, Clerk of the House of Commons, House of Commons, p 8.

4.26 The Clerk of the Parliaments in the House of Lords, Mr David Beamish, indicated in his submission that prior to the establishment of the Commissioner for Standards in the House of Lords in 2010, complaints concerning the conduct of members were considered by the Sub-Committee on Lords' Interests, as it was then called. However, it was felt that an independent Commissioner was required in order to secure public confidence in the integrity and independence of investigations.¹¹⁷

4.27 Since the post of Commissioner was created in the House of Lords, the work of the Commissioner has steadily increased from two matters in 2010-2011, to six in 2011-2012 and 10 in 2012-2013. The Clerk suggested that as the role of the Commissioner has become more widely known, so the number of complaints has increased.¹¹⁸

4.28 Commenting on the operation of the Commission, Mr Beamish observed:

... I think it is fair to say that, although there was some resistance to the proposal to create a Commissioner, since 2010 the post has come to be accepted by the House and, it seems, the public. There is no suggestion of returning to the previous system of solely internal investigations. Moreover, the Commissioner's findings have generally been accepted; to date no appeal against one of his findings has succeeded.¹¹⁹

4.29 This position was supported by the House of Lords Commissioner for Standards, Mr Paul Kernaghan, in his written submission:

My role was created as a result of a series of cases involving allegations of misbehaviour by members of the House of Lords. Previously, complaints and allegations were investigated by the Clerk of the Parliaments (if they related to use of expenses, as he is Accounting Officer of the House) and/or a sub-committee of five members. It was felt that this arrangement was no longer viable and that the introduction of an independent investigator would strengthen public confidence in the system.¹²⁰

4.30 In his written submission, the Clerk of the Parliaments in New South Wales, Mr David Blunt, forwarded his 2013 paper entitled *A Parliamentary Commissioner for Standards for New South Wales?* in which he recorded the following views on the Commissioner for Standards model from his visit to the UK Parliament in 2013:¹²¹

- 'We are better off with an independent commissioner to whom complaints can be directed and who can conduct investigations than we were without one. It is an altogether sensible approach.'
- 'When serious matters arise there is a real sense of relief that the Commissioner is there to deal with them.'

¹¹⁷ Submission 6, Mr David Beamish, Clerk of the Parliaments, House of Lords, p 1.

¹¹⁸ Submission 6, Mr Beamish, p 2.

¹¹⁹ Submission 6, Mr Beamish, p 2.

¹²⁰ Submission 2, Mr Paul Kernaghan, Commissioner for Standards, House of Lords, p 2.

¹²¹ The Clerk met with the current House of Commons Parliamentary Commissioner for Standards, senior Clerks of both the House of Commons and House of Lords, and representatives of the Independent Parliamentary Standards Authority and the Committee on Standards in Public Life. The views of MPs were also gauged through a session on the standards framework at the 62nd Westminster Seminar on Parliamentary Practice and Procedure.

- ‘The Commissioner and Committee are now widely accepted – they have become part of the furniture.’
- ‘The only complaints from MPs about the Commissioner or Standards Committee these days tend to arise from a minority of those investigated who sometimes feel their own matter has taken too long to resolve or who, very occasionally these days, will disagree with the finding and seek to convince the Committee the Commissioner was wrong – not a very wise course and likely to backfire.’
- ‘There has been one instance where the Committee dissociated itself from a finding of a previous Commissioner and which caused considerable grief. However, for more than ten years now there has not been a single instance in which the Committee has been dissatisfied with an investigation or the reasoning of a Commissioner – there is complete respect for the Commissioner.’
- ‘It is better to have an independent person who can decide when to investigate matters than to have politicians making such decisions on the run in response to the ebbs and flows of media pressure about particular matters.’

The ACT Commissioner for Standards model

- 4.31** On 31 October 2013, the ACT Legislative Assembly established by resolution of the House a Commissioner for Standards. The committee believes that this is the first such position established in Australia.
- 4.32** The Committee reproduces the resolution of the Legislative Assembly establishing the ACT Commissioner in Appendix 2. In summary, the resolution provides that:
- A Commissioner is to be appointed at the commencement of each parliament, or whenever the office becomes vacant for the remaining life of that parliament.
 - The Commissioner must investigate specific matters referred to the Commissioner by the Speaker in relation to complaints against members, or by the Deputy Speaker in relation to complaints against the Speaker, and is to report to the Standing Committee on Administration and Procedure.
 - Members of the public may make complaints to the Speaker about a member’s compliance with the Code of Conduct or the rules relating to the registration or declaration of interests. The Speaker in turn may refer the matter to the Commissioner for investigation and report. Similarly provisions relating to complaints about the Speaker may be sent to the Deputy Speaker.
 - The Commissioner must not make a report to the Standing Committee on Administration and Procedure if the matter was minor or the failure inadvertent, and the member has taken action to rectify the failure.
 - Before providing a report to the Standing Committee on Administration and Procedure, the Commissioner must give a copy of the report to the member who is the subject of

the complaint under investigation, allowing the member time to comment. The Commissioner must consider any comments provided by the member.¹²²

4.33 The Honourable Dr Ken Crispin QC, a former judge of the ACT Supreme Court, was appointed as the inaugural Commissioner for Standards on 6 March 2014. No matters have yet been referred to the Commissioner for investigation and report.¹²³

Previous discussion of a Commissioner for Standards in New South Wales

4.34 The establishment of a parliamentary investigator position or similar has been proposed in the past in New South Wales.

4.35 The UK model of a Parliamentary Commissioner for Standards and Standards Committee was highlighted by the Legislative Council Privileges Committee as early as October 1996, although without expressing any firm view.¹²⁴ The model has since received renewed interest in the context of attempts to address the consequences of the ICAC's limited capacity to investigate breaches of the *Code of Conduct for Members* where matters of parliamentary privilege arise.

4.36 In 2002, in response to a request from the Legislative Assembly to consider issues concerning the conduct of a member of the House, the ICAC advised that it had no authority to investigate matters where parliamentary privilege applies.¹²⁵ Subsequently, in 2003, in a report to the Speaker of the Legislative Assembly, the ICAC raised various possible models for addressing the limitations on the ICAC's jurisdiction due to parliamentary privilege:

- The appointment of a parliamentary committee, such as the Privileges Committee, to conduct investigations of such issues. However, the ICAC acknowledged that in the past, parliamentary committees in various jurisdictions have made observations on the limited capacity of committees to conduct investigations of this type.
- The establishment of a Parliamentary Commissioner to investigate such issues. However, the ICAC noted that in New South Wales, where the ICAC can investigate all corrupt conduct allegations apart from those to which parliamentary privilege applies, the likely need to call on a Parliamentary Commissioner would be relatively seldom.
- An amendment to the *Independent Commission Against Corruption Act 1988* to allow the Parliament to waive parliamentary privilege for specified matters which are referred to the ICAC by resolution of the House. This was one option recommended by the ICAC.
- The appointment of an officer of the Parliament to undertake an investigation on an as needs basis. This was the ICAC's preferred option. The ICAC suggested that such a

¹²² Submission 10, Mr Tom Duncan, Clerk of the Legislative Assembly in the Australian Capital Territory, ACT Legislative Assembly, pp 6-7.

¹²³ Submission 10, Mr Duncan, p 7.

¹²⁴ Legislative Council, Standing Committee on Parliamentary Privilege and Ethics Report No. 3 *Report on Inquiry into the establishment of a Draft Code of Conduct for Members*, October 1996, pp 77-89.

¹²⁵ Correspondence from the ICAC Commissioner to the Speaker of the Legislative Assembly, dated 16 December 2002, reported in ICAC, *Regulation of secondary employment for Members of the NSW Legislative Assembly*, Report to the Speaker of the Legislative Assembly, September 2003, p 17.

procedure 'would provide a means for the Parliament to enforce its own privileges in such a way as to ensure public confidence in the integrity and impartiality of the outcome yet still maintain the independence and self-regulation of the House'. The ICAC also recommended the provision of certain safeguards in the appointment and duties of the investigating officer.¹²⁶

- 4.37** In 2004 the Assembly's Standing Committee on Parliamentary Privilege and Ethics considered the options proposed by the ICAC. The Committee recommended that the Act not be amended but that the Assembly consider options for investigating matters coming before the ICAC which involve parliamentary privilege 'on a case by case basis'.¹²⁷
- 4.38** In 2004 the Hon Peter Breen gave notice of a motion in the Legislative Council for a bill providing for the appointment and functions of a Parliamentary Commissioner for Standards. The Commissioner was to be the final authority on members' use of parliamentary resources and their obligations with respect to their entitlements and allowances. As such, the bill was to follow the model already in place in other Parliaments such as the British House of Commons. Notice of the bill was given on a number of occasions and remained on the business paper until 2007, but the bill was never introduced into the House.¹²⁸
- 4.39** In 2005, Mr Bruce McClintock SC was appointed by the Government to review the *Independent Commission Against Corruption Act 1988*. The review included consideration of Mr Breen's proposed bill but did not support its terms, apparently at least in part because the bill sought to oust the ICAC's jurisdiction in relation to members entirely.¹²⁹ However, the final report on the review included a recommendation that consideration be given to the establishment of a parliamentary investigator or parliamentary committee to investigate:
- minor matters involving members of Parliament so as to permit ICAC to focus on serious and systemic allegations of corruption, and
 - allegations of corruption that ICAC is unable to investigate because of Parliamentary privilege as preserved by section 122 of the Act.¹³⁰
- 4.40** Subsequently, amendments to the *Independent Commission Against Corruption Act 1988* were made to give effect to certain recommendations contained in Mr McClintock's report.¹³¹ However, these did not include any changes to the ICAC's capacity to investigate members of Parliament or any provision for a parliamentary investigator.

¹²⁶ ICAC, *Regulation of secondary employment for Members of the NSW Legislative Assembly*, Report to the Speaker of the Legislative Assembly, September 2003, pp 75-80.

¹²⁷ Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Regulation of Secondary Employment for Members of the NSW Legislative Assembly*, September 2004, p 31.

¹²⁸ Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, Attachment 1, p 16.

¹²⁹ McClintock B, *Independent review of the Independent Commission Against Corruption Act 1988*, Final Report, January 2005, pp 85-86.

¹³⁰ *Ibid*, p 87.

¹³¹ See the *Independent Commission Against Corruption Amendment Act 2005*.

- 4.41** In 2010 two parliamentary committees in New South Wales briefly commented on the Parliamentary Commissioner for Standards model and recommended further consideration of the model in the new (now current) Parliament.
- 4.42** The first committee, the Joint Select Committee on Parliamentary Procedure, was established to consider the applicability to the New South Wales Parliament of any of the reforms to parliamentary procedure introduced in the Australian Parliament under the ‘Agreement for a Better Parliament: Parliamentary Reform’ which followed the 2010 federal election. As that agreement canvassed the possible appointment of a parliamentary integrity commissioner, this issue was considered by the Joint Select Committee. The Joint Select Committee agreed that the merits of a parliamentary integrity commissioner should be considered by the Privileges Committee of each House in the new Parliament.¹³²
- 4.43** The second committee, the Legislative Council Privileges Committee, discussed the issue in its 2010 review of the *Code of Conduct for Members*. In a submission to that review the Public Interest Advocacy Centre (PIAC) recommended the investigation of the establishment of a parliamentary standards commission:

The role of the Privileges Committee could be supported by a Parliamentary Standards Commissioner 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 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.¹³³

- 4.44** In its report on the review the Privileges Committee endorsed the recommendation of the Joint Select Committee that the merits of a parliamentary integrity commissioner be considered by the Privileges Committees of each House in the new Parliament.¹³⁴

The role of the Parliamentary Ethics Adviser in New South Wales

- 4.45** Following the adoption by both Houses of the *Code of Conduct for Members* in 1998, the Council agreed to the appointment of a Parliamentary Ethics Adviser. The position has continued to

¹³² Joint Select Committee on Parliamentary Procedure, New South Wales Parliament, *Reforms to Parliamentary Processes and Procedure*, October 2010, pp 29-30 and 64-65.

¹³³ Privileges Committee, Legislative Council, Report No. 54, *Review of the Members’ Code of Conduct 2010*, December 2010, p 44. The reference to the Australian Study of Parliament Group (ASPG) was to a publication entitled *Be Honest, Minister! Restoring Honest Government in Australia* dated 2007 published by an ‘Accountability Working Party’ under the rubric of the ASPG

¹³⁴ Privileges Committee, Legislative Council, Report No. 54, *Review of the Members’ Code of Conduct 2010*, December 2010, p 45.

be reappointed from time to time since, most recently by a resolution of both Houses at the commencement of the 54th Parliament.¹³⁵

- 4.46** The position is part-time, and is appointed by the President and Speaker on a renewable contract with the joint Clerks.
- 4.47** The functions of the Parliamentary Ethics Adviser include advising members, upon their request, on ethical issues concerning the exercise of their role as members, including the use of entitlements and potential conflicts of interest. In 2007, the functions of the Ethics Advisers were expanded to include the provision of advice, on request, to ministers and former ministers, on post-separation employment. The role excludes the giving of legal advice.
- 4.48** In providing advice, the Ethics Adviser is guided by the *Code of Conduct for Members*, determinations of the Parliamentary Remuneration Tribunal and resources such as past reports of the ICAC.
- 4.49** The Ethics Adviser does not have any capacity to receive complaints in relation to the conduct of members or to undertake investigations.

Submissions to the inquiry

- 4.50** A number of submissions to the inquiry commented on recommendation 25 by the ICAC to consider the establishment of a parliamentary investigator position.
- 4.51** In his written submission, the Clerk of the Parliaments in New South Wales indicated:
- The major advantage of the UK model as outlined in my paper is the scope for complaints about less serious matters, particularly for example in respect of mistakes in the disclosure of interests or the use of entitlements, to be resolved in a timely, mature and transparent manner through mechanisms such as “rectification” or “reimbursement” and apology, instead of through the ICAC. Of course, it would also provide a mechanism for the investigation and resolution of matters in relation to which parliamentary privilege arises.¹³⁶
- 4.52** Dr Simon Longstaff of the St James Ethics Centre supported the appointment of a Parliamentary Commissioner for Standards, suggesting that the role of the existing Parliamentary Ethics Adviser be extended. Based on the UK Parliamentary Commissioner for Standards model, Dr Longstaff recommended that the Commissioner’s functions include:
- Providing advice, on a confidential basis, to: individual members, the Legislative Assembly Privileges and Ethics Committee and the Legislative Council Privileges Committee about the interpretation of the *Code of Conduct for Members* and other matters relating to the conduct of Members.
 - Providing advice, on a confidential basis, to: individual members, the Legislative Assembly Privileges and Ethics Committee and the Legislative Council Privileges

¹³⁵ *Votes and Proceedings*, Legislative Assembly, 27 June 2007, pp 196-198; *Minutes*, Legislative Council, 28 June 2007, pp 207-209.

¹³⁶ Submission 9, Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council, p 3.

Committee, upon their request, on ethical issues arising in their role as Members of Parliament.

- Preparing guidance and providing training for members on matters of conduct, propriety and ethics.
- Receiving and investigating complaints about members who are allegedly in breach of the *Code of Conduct for Members*. ‘Serious matters’ (that is, matters falling within a class deemed to be so by the ICAC Commissioner) would be referred by the Parliamentary Commissioner to ICAC. Other ‘less serious’ matters could be dealt with in a timely manner through ‘rectification’ and ‘reimbursement’ and apology.¹³⁷

4.53 The Director of Public Prosecutions, Mr Lloyd Babb SC, also considered that the creation of a parliamentary investigator position has merit. However, he expressed concerns as to how any such office would intersect with the roles of ICAC, the NSW Police and the criminal justice system:

I am concerned, however, that any such office has well defined investigation powers and clear protocols as to how the proposed office intersects with the roles of ICAC, the NSW Police and the criminal justice system. The creation of a system where the remedies are limited to “rectification”, “reimbursement” and apology, risks creating a closed system where appropriate matters are not dealt with by the criminal justice system.

Private citizens who dishonestly misuse company funds, for example, face investigation by the NSW Police and possible criminal charges under fraud offences.

...

Additionally, where it is revealed that the matter could possibly involve corruption, referral to the ICAC should also be an option.

As such, I am also anxious that any Investigator have defined powers that will lead to the collection of evidence that is admissible in any possible criminal prosecution.¹³⁸

4.54 In response to this concern, the committee notes that the House of Commons Commissioner for Standards has protocols in place with various law enforcement agencies. For example, the Commissioner last year released a revised Memorandum of Understanding with the Police called *The House of Commons Code of Conduct and the Criminal Law*, the precise terms of which are available online.¹³⁹ At the outset, however, the MOU provides:

- 1.1 The purpose of this protocol is to record formally an agreement between the Metropolitan Police Service (MPS), Parliamentary Commissioner for Standards (PCS) and Parliamentary Committee on Standards in respect of allegations received concerning the conduct of Members of Parliament (MP’s or Members).

...

¹³⁷ Submission 5, Dr Simon Longstaff AO, St James Ethics Centre, p 5.

¹³⁸ Submission 12, Mr Lloyd Babb SC, Director of Public Prosecutions, pp 2-3.

¹³⁹ The protocol is available here:
<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmstandards/903/903.pdf>

1.3 The protocol is intended to ensure that:

- public confidence is maintained in respect of potentially criminal conduct by Members;
- the administration of justice is not impeded by actions undertaken by the Parliamentary Commissioner or the Committee on Standards;
- the Parliamentary Commissioner's investigations and the Committee on Standards's determinations are not unnecessarily impeded or delayed;
- there is transparency about the relationship between the House's disciplinary system and the law; and
- Members whose conduct is under investigation are treated fairly.

4.55 The Committee also notes the evidence of the House of Lords Commissioner for Standards, who indicated that priority is explicitly given to criminal misconduct investigations relating to an alleged breach of the Code of Conduct, and to investigations by the relevant bodies of bribery. He also indicated that he would suspend an investigation if civil proceedings were before a court, such as an action for defamation.¹⁴⁰

4.56 On a separate matter, the committee also notes that the House of Lords Commissioner for Standards recommended that if the Parliament of New South Wales chooses to appoint a Commissioner for Standards:

... the appointment should be conducted in accordance with your rules for other senior non-political appointments. It is important that the investigator is non-party political and seen to be so. In my case, my selection was ratified by the House of Lords as a whole; whilst I am an officer of the House, I am wholly independent and am classified as self-employed. A fixed tenure is desirable. My experience indicates that a part-time role is all that is required.¹⁴¹

Committee comment

4.57 The committee supports the appointment of a Commissioner for Standards in New South Wales as an additional and alternative mechanism besides ICAC for investigating allegations of misconduct against members. In the Committee's view, the Commissioner for Standards model adopted in the UK Parliament and also in the ACT Legislative Assembly has undoubted benefits:

- It would provide a mechanism for investigation of less serious allegations of misconduct against members, given the limited capacity of the ICAC, and the focus of the ICAC on large-scale corruption.
- It would allow allegations against members to be investigated and dealt with more speedily than through the current ICAC processes.

¹⁴⁰ Submission 2, Mr Paul Kernaghan, Commissioner for Standards, House of Lords, p 1.

¹⁴¹ Submission 2, Mr Kernaghan, p 2.

- It would allow more ready resolution of less serious allegations of misconduct against members, including through mechanisms such as ‘rectification’ and ‘reimbursement’.
- It would increase the transparency with which the Parliament deals with complaints against members, with appropriate information on investigations made public.
- It would provide an independent mechanism for assessing possible misconduct by members, removing concerns that direct investigation by specially appointed committees would be politicised.
- It would ensure that matters in which issues of parliamentary privilege were raised could be appropriately investigated.

4.58 The committee believes that the cost of a Commissioner for Standards would not be significant given the needs it would address. The Committee notes evidence that the annual cost of the House of Commons Office of the Parliamentary Commissioner for Standards is less than £500,000 for a significantly larger number of members. The cost in New South Wales would likely be significantly less. A Commissioner for Standards would likely free-up the resources of the ICAC through a reduction in referral of more minor matters to the Commission.

Recommendation 8

That the Parliament of New South Wales appoints a Commissioner for Standards.

4.59 The committee notes that there is a range of considerations in relation to the method of appointment of a Commissioner for Standards, the role of the Commissioner, the oversight of the Commissioner and related matters. The committee explores these issues and sets out below for the benefit of the House its views on the optimum Commissioner for Standards model for the Legislative Council.

Establishment of the Commissioner for Standards

4.60 The committee believes that the Commissioner for Standards should ideally be established by resolution passed by both Houses, and appointed by the Presiding Officers within three months of the commencement of each Parliament on a part-time basis, and whenever the office becomes vacant. On the first appointment of the Commissioner, the term of appointment could cover the remainder of the 55th Parliament, the 56th Parliament, and the first three months of the 57th Parliament.

4.61 Appointment of a Commissioner by resolution of the two Houses would in no way alter the jurisdiction of the ICAC in relation to corrupt conduct or the definition of corrupt conduct in the *Independent Commission Against Corruption Act 1988*. This point was made strongly by the ICAC in its comments supporting recommendation 25.

4.62 Establishment of the Commissioner by resolution of the Houses would also ensure that the operations of the Commissioner remained within the exclusive cognisance of the Houses.

There would be no scope for matters considered by the Commissioner to be appealed to outside bodies, notably the courts.

4.63 Establishing a Commissioner by resolution of the Houses would also enable the Commissioner to investigate matters where issues of privilege arise.

4.64 The committee notes that there is discretion open to both Houses in how they interact with a Commissioner for Standards. In the UK, the House of Lords and House of Commons have appointed two separate Commissioners. While the committee believes that such an outcome would be unfortunate in the smaller Parliament of New South Wales, and that a joint appointment by both Houses of the same commissioner would be preferable, this does not mean that the model of how both Houses work with the Commissioner needs to be the same. The committee presents a model below whereby the Commissioner for Standards would report to the Privileges Committee of the Legislative Council, and through that committee to the House. The same model would not necessarily need to be adopted by the Legislative Assembly.

The role of the Commissioner for Standards

4.65 The committee believes that the Commissioner should have the following roles:

- To provide confidential advice to members on the exercise of their role as members, including the use of entitlements and potential conflicts of interest. The role of the Commissioner should also include the provision of advice, on request, to ministers and former ministers, on post-separation employment. This is in effect the current role of the Ethics Adviser. The Committee discusses this issue further under a separate heading on page 67.
- To monitor the operation of the *Code of Conduct for Members* and the Constitution (Disclosures by Members) Regulation 1983, and to make recommendations thereon to the designated oversight committee of the Legislative Council.¹⁴²
- To offer annual presentations to all parliamentary parties/caucuses, as well as independent members, in the Parliament of New South Wales, with a view to informing and educating members so that they are as well-equipped as possible to fulfil their obligations under the *Code of Conduct for Members* and the Constitution (Disclosures by Members) Regulation 1983 (as is offered by the Conflict of Interest and Ethics Commissioner to members of Canada's House of Commons).
- To receive complaints in relation to the conduct of members, either from members or from others, including the general public. Members should also be able to self-refer matters to the Commissioner.
- To investigate:
 - complaints alleging that a member has breached the requirements of the *Code of Conduct for Members* or the Constitution (Disclosures by Members) Regulation 1983

¹⁴² This arrangement would not affect the existing functions of the Legislative Council Privileges Committee to review the *Code of Conduct for Members* under section 72C of the *Independent Commission against Corruption Act 1988*.

- if the Commissioner thinks fit, specific matters which have come to his or her attention relating to a possible breach of the requirements of the *Code of Conduct for Members* or the Constitution (Disclosures by Members) Regulation 1983
- matters self-referred by a member concerning a possible breach of the requirements of the *Code of Conduct for Members* or the Constitution (Disclosures by Members) Regulation 1983, on an exceptional basis.

Before initiating an investigation the Commissioner will, if the matter comes within his or her remit, consider if there is sufficient evidence to justify an inquiry into a particular member.

- To report on the outcome of investigations. The Commissioner may:
 - A) conclude that there has been no misconduct by the member, and report that finding to the oversight committee.
 - B) find a minor transgression, take remedial action in agreement with the member concerned, and report that finding to the oversight committee. Remedial action may include the member repaying incorrectly claimed allowances, correcting an incorrect interest disclosure return and apologising to the House.
 - C) find significant misconduct by a member, and report the facts and his or her conclusions to the oversight committee.

Where the Commissioner concludes that there has been no misconduct by a member or finds a minor transgression (category A or B), the Commissioner is to publish on the Commissioner's webpage his or her finding(s) and the relevant evidence on which that was based. Reports on investigations where there is a finding of significant misconduct by a member (Category C) are to be provided to the oversight committee.

- To provide an annual report at the end of each financial year to the designated oversight committee of the Legislative Council.

4.66 Consistent with the UK model, the committee does not believe that the Commissioner should have a pro-active audit function to systematically audit the conduct of all members of the Legislative Council on a routine basis. The committee notes that under the annual determinations of the Parliamentary Remuneration Tribunal, the Auditor-General is required to audit all members' additional entitlements annually for compliance. The Parliament may also conduct internal audits.¹⁴⁵ It is possible that matters may come to the attention of the Commissioner as a result of this process.

4.67 The committee also believes that the role of compiling the *Register of Disclosures of Members of the Legislative Council* should remain with the Clerk of the Parliaments. Either the Clerk or the Commissioner for Standards would be in a position to provide advice to members on completing their interest returns.

¹⁴⁵ For the most recent determination, see Parliamentary Review Tribunal, *Annual Report and Determination of Additional Entitlements for Members of the Parliament of New South Wales*, 4 July 2013, p 26, cited at http://www.dpc.nsw.gov.au/data/assets/pdf_file/0017/154250/PRT_Annual_Report_and_Determination_2013.pdf.

Oversight of the operations of the Commissioner for Standards

- 4.68** The committee believes that the Legislative Council should designate the Privileges Committee to oversight the operations of the Commissioner for Standards.¹⁴⁴ Alternatively, a specific committee could be established by the Legislative Council for the purpose.
- 4.69** The role of the oversight committee would be to receive from the Commissioner for Standards:
- reports and recommendations in relation to the operation of the *Code of Conduct for Members* and the Constitution (Disclosures by Members) Regulation 1983
 - reports on investigations by the Commissioner into significant misconduct by a member involving a breach of the requirements of the *Code of Conduct for Members* or the Constitution (Disclosures by Members) Regulation 1983
 - annual reports of the Commissioner at the end of each financial year.
- 4.70** The oversight committee would also receive and approve guides on the operation of the Commissioner from time to time.
- 4.71** On receipt of a report on an investigation by the Commissioner into the conduct of a member where the Commissioner finds significant misconduct by a member (Category C), the role of the oversight committee would be to review the Commissioner's findings, consider any submission from the member concerned, and then make a report to the House, including recommended sanctions as appropriate. The Commissioner's report should be published as an appendix to the report of the Committee.
- 4.72** The oversight committee should not, however, be in a position to intervene in investigations being conducted by the Commissioner.
- 4.73** The committee is open to the option of including lay persons on the oversight committee for the purposes of considering reports on an investigation by the Commissioner, as occurs under the House of Commons model. The committee believes that this option is not necessary at the current time, but could be considered in future should it prove desirable.

The role of the House

- 4.74** Where the Commissioner for Standards makes a finding of significant misconduct against a member and reports that to the oversight committee, the oversight committee reviews the matter and makes a report and recommendations to the House. The House may then impose sanctions against the member concerned, in light of the matters raised by the Commissioner and the recommendations of the oversight committee.

¹⁴⁴ The committee notes that the Privileges Committee is the designated committee of the Legislative Council for the purposes of section 72C of the *Independent Commission Against Corruption Act 1988*. One of the functions of the committee under section 72C(1)(c) is to give advice in relation to ethical standards in response to requests for advice by the Legislative Council, but not in relation to actual or alleged conduct of any particular person. The committee does not interpret this provision as restricting the capacity of the committee to receive reports from the Commissioner on the conduct of members.

- 4.75 Currently, the Houses of the Parliament of New South Wales do not have punitive powers against members. They only have self-protective powers. While these powers would be sufficient to enable the Houses to seek apology or to reprimand a member, they would likely not support suspension or expulsion of members in most circumstances, or the imposition of financial penalties such as loss of pay. Should the issue arise where the House clearly required punitive powers, the Parliament would need to consider privileges legislation setting out the powers of the Houses.

Powers of the Commissioner

- 4.76 The committee notes that issues may arise in relation to the powers of the Commissioner, especially should a member not comply with an investigation by the Commissioner.

- 4.77 The Procedural note to the operation of the Commissioner for Standards in the UK House of Commons indicates:

Under paragraph 19 of the Code of Conduct Members are required to cooperate, at all stages, with any inquiry. The Committee may also exercise its power to summon persons, papers and records, either independently or at the Commissioner's request.

- 4.78 The committee would envisage the same arrangements applying in the Council. In the event that a member did not cooperate with an investigation by the Commissioner, this would be referred by the Commissioner to the oversight committee, which could then exercise its powers to seek information at the request of the Commissioner. Failure to cooperate with the Commissioner and the committee would itself be a matter that could be addressed in the committee's recommendations to the House.

Guidance on the operations of the Commissioner

- 4.79 The committee believes that there would be merit in the Commissioner for Standards, as soon as possible following his or her appointment, preparing detailed guidance on the operation of the Commissioner, including the conduct of investigations and powers of the Commissioner. This guidance should be submitted to the designated oversight committee of the Legislative Council (and any similar mechanism for the Legislative Assembly).

Protocols with law enforcement agencies

- 4.80 The committee believes that as with arrangements in the UK, the Commissioner for Standards should develop protocols with law enforcement agencies, notably the ICAC and the Police, for the management of allegations in relation to the conduct of members.

- 4.81 A protocol with the ICAC should specify the circumstances in which the Commissioner may refer matters that prima-facie concern corrupt conduct to the ICAC where there may have been a 'substantial breach' of the *Code of Conduct for Members*. The protocol should also specify instances in which the ICAC may refer matters back to the Commissioner.

The Parliamentary Ethics Adviser

- 4.82** As indicated previously in this chapter, the Parliamentary Ethics Adviser currently provides confidential advice to members on the exercise of their role as members, including the use of entitlements and potential conflicts of interest. The Ethics Adviser also provides advice, on request, to ministers and former ministers, on post-separation employment.
- 4.83** The committee has considered whether the role of the existing Parliamentary Ethics Adviser and that of the proposed Commissioner for Standards should be combined.
- 4.84** The concern arising from combining the roles is that members may be reticent to seek advice from the Commissioner for Standards on matters concerning the *Code of Conduct for Members* or the interest disclosure regime if they know that the Commissioner could then initiate an inquiry into their circumstances.
- 4.85** The committee, however, does not overstate this concern. It seems likely that most requests for advice by members will relate to issues concerning the *Code of Conduct for Members* or disclosure of interests with which the member is currently grappling, rather than past actions that may in hindsight be the subject of an investigation. Accordingly, in most instances, the question of an investigation will not even arise.
- 4.86** Where members do seek advice from the Commissioner on past actions, under the UK House of Commons model and the model proposed for the Legislative Council, the Commissioner may, if he or she thinks fit, investigate matters that have come to his or her attention. In those instances, the Commissioner's investigation mechanism sets up three outcomes:
- A finding of no misconduct (Category A).
 - A finding of a minor transgression (Category B). The Commissioner and the member may then agree on a rectification procedure, and although there is a report to the oversight committee, and possibly even an apology to the House, rectification remains entirely a matter for the Commissioner and the member concerned.
 - A finding of significant misconduct by a member (Category C). The Commissioner reports his or her findings to the oversight Committee which then decides what sanctions, if any, to recommend to the House.
- 4.87** In the committee's view, it would be unlikely that members would seek advice from the Commissioner if they thought that their past conduct amounted to significant misconduct (Category C). Conduct falling into this category, the committee expects, would most likely involve deliberate contravention of the *Code of Conduct for Members* or interest disclosure regime.
- 4.88** However, for all other members not in this category, who at worst think that they may have inadvertently breached the *Code* or the interest disclosure regime in the past, the matter would in all likelihood be rectified by the Commissioner and the member concerned according to Categories A and B above, with no outside involvement. Indeed, in some instances, a member may deliberately seek an investigation to sort out a matter in doubt, as the UK model, and the proposed model for the Legislative Council, provide for in exceptional circumstances.
- 4.89** The committee also believes that there would be downsides to keeping separate the positions of Ethics Adviser and Commissioner for Standards. Notably, the committee feels that not

providing the Commissioner for Standards with an advice function would mean that the Commissioner would not become familiar with the spectrum of issues on which members routinely seek advice, and would be in a poorer position to make judgements on difficult issues when they arise. The Commissioner also would not be in as good a position to provide advice to the oversight committee of the Council on the operation of and possible changes to the *Code of Conduct for Members* and the interest disclosure regime.

4.90 The committee also notes that the UK model seemingly successfully combines the advice and investigations role into one office.

4.91 Accordingly, the committee concludes that while there are valid arguments both ways, on balance the roles of the existing Parliamentary Ethics Adviser and the proposed Commissioner for Standards should be combined.

Appendix 1 Submissions

No	Author
1	All Saints Investigations
2	Commissioner for Standards, House of Lords
3	Clerk, Senate
4	Clerk, House of Representatives
5	St James Ethics Centre
6	Clerk, House of Lords
7	Clerk, House of Commons
8	Ombudsman NSW
9	Clerk, NSW Legislative Council
10	Clerk, ACT Legislative Assembly
11	Speaker, New Zealand House of Representatives
12	Director of Public Prosecutions
13	Information and Privacy Commission NSW
14	Anglican Diocese of Sydney
15	Hon Amanda Fazio MLC
16	Department of Premier and Cabinet

Appendix 2 Minutes

Minutes No. 35

Tuesday 26 November 2013

Members' Lounge, Parliament House, Sydney, at 6.30 pm

1. Members present

Mr Khan, *Chair*
Mr Clarke
Miss Gardiner
Mr Mason-Cox
Revd Mr Nile

In attendance: Stephen Frappell, Susan Want.

2. Apologies

Ms Fazio, Deputy Chair
Mr Primrose

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Revd Mr Nile: That minutes no. 34 be confirmed.

4. Committee membership

The Chair noted the advice of the Leader of the Opposition discharging Mr Donnelly from the Committee and appointing Mr Primrose to the Committee.

The Chair further noted Mr Buckingham had ceased to be a member of the Committee as he was appointed to the Committee for the purposes of the Mt Penny order for papers inquiry which has now concluded.

5. Correspondence

The Committee noted the following items of correspondence received:

- 30 October 2013 – Letter from the Hon David Ipp, Commissioner of the ICAC to the Chair concerning the recommendations in the Commission's Report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, dated 30 October 2013.
- 4 November 2013 – Letter from Ms Jeannine Biviano, A/Director General, NSW Trade and Investment to the Chair in relation to further documents relating to the 2009 Mt Penny order for papers.

6. Inquiry into recommendations of the ICAC regarding aspects of *The Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

The Committee noted the following terms of reference referred by the House this day:

That the Privileges Committee inquire into and report on Recommendations 22, 24 and 25 in the report of the Independent Commission Against Corruption entitled 'Reducing the opportunities and incentives for corruption in the State's management of coal resources', dated October 2013.

The Committee also noted that:

- The Premier made a statement in the Legislative Assembly in relation to the inquiry on 21 November 2013, and tabled a response to the recommendations of the ICAC.

- the Legislative Assembly passed a resolution on 21 November 2013 referring similar terms of reference to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, including a provision that the Legislative Assembly Committee 'have leave to meet together with the Legislative Council Privileges Committee during the current Parliament'.

The Committee also noted advice from the Committee secretariat that the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics met on 21 November 2013 to discuss the inquiry and that the Legislative Assembly Committee resolved, in general terms, that the two Committees jointly seek submissions to the inquiry. The Legislative Assembly Committee also proposed a list of people and organisations to be invited to make a submission.

The Committee deliberated.

Resolved, on the motion of Revd Mr Nile: That:

- 1) The Committee secretariat, in cooperation with the secretariat of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, prepare discussion papers on the three issues raised in the recommendations of the ICAC for use in guiding submissions to the inquiry; and
- 2) The Committee secretariat, in cooperation with the secretariat of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, seek written submissions to the inquiry by Friday, 6 March 2014 from the following individuals and organisations:

- Members of the Legislative Council and Legislative Assembly
- The Presiding Officers and Clerks of the Legislative Council and Legislative Assembly
- The Department of Premier and Cabinet
- The Commissioner of the ICAC
- The Inspector of the ICAC
- The Parliamentary Ethics Adviser
- The Auditor General
- The NSW Ombudsman
- The Public Interest Advocacy Centre
- The St James Ethics Centre
- The Law Society
- The NSW Bar Association
- The NSW Director of Public Prosecutions
- The Presiding Officers and clerks of all Australian Parliaments and the New Zealand Parliament, and the UK Parliament
- The UK House of Commons Parliamentary Commissioner for Standards
- The UK House of Lords Commissioner for Standards
- The Chair, UK House of Commons Select Committee on Standards
- The Chair, UK House of Lords Select Committee on Privilege and Conduct

(Assembly Committee parties)

- The Commonwealth Privacy Commissioner
- The State Privacy Commissioner
- Cameron Murphy, Civil Liberties Council
- The Public Service Commissioner
- Rev Dr Andrew Cameron, Ethicist, Moore College
- The Judicial Commission of New South Wales (which has a role in 'considering conflicts of interest for the judiciary' in terms of the Assembly Committee's resolution)

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

- The Local Government Pecuniary Interest and Disciplinary Tribunal (which has a role in 'considering conflicts of interest for local government' in terms of the Assembly Committee's resolution)
- Stephen Blackadder, local government identity

7. ***

8. **Adjournment**

The Committee adjourned at 6:50 pm, *sine die*.

Stephen Frappell
Clerk to the Committee

Minutes No. 36

Tuesday 13 May 2014

Members' Lounge, Parliament House, Sydney, at 6.33 pm

1. **Members present**

Mr Khan, *Chair*
Ms Fazio, *Deputy Chair*
Mr Clarke
Miss Gardiner
Mrs Maclaren-Jones
Mr Primrose
Revd Mr Nile

In attendance: Steven Reynolds, Stephen Frappell.

2. **Confirmation of minutes of previous meeting**

Resolved, on the motion of Revd Mr Nile: That minutes no. 35 be confirmed.

3. **Committee membership**

The Chair noted the advice of the Leader of the Government discharging Mr Mason Cox from the Committee and appointing Mrs Maclaren-Jones to the Committee.

4. **Correspondence**

The Committee noted the following items of correspondence received:

- 30 January 2013 - Letter from Mr Adrian Galasso, formerly with the Local Government Pecuniary Interest and Disciplinary Tribunal, indicating he will not be making a submission to the inquiry into the recommendations of the ICAC regarding aspects of *The Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator.
- 5 March 2014 - Letter from the Hon Megan Latham, Commissioner of the ICAC, indicating that the Commission will not be making a submission to the inquiry.
- 17 March 2014 - Email from Ms Sandra Tavares, Executive Secretary to the Auditor-General, indicating that the Audit Office of NSW will not be making a submission to the inquiry.

5. **Inquiry into recommendations of the ICAC regarding aspects of *The Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator**

The Committee noted the receipt of submissions 1 – 16.

Resolved, on the motion of Mr Clarke: That the Committee authorise the publication of submissions 1 – 16.

The Chair noted the distribution of a draft report outline.

The Committee deliberated on the timing of the report and collaboration with the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.

Resolved, on the motion of Mr Clarke: That the Committee Chair write to the Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics seeking a meeting with the Assembly Committee to discuss the respective possible responses of the two committees to the ICAC report.

The Committee deliberated on possible recommendations of the Committee.

6. Adjournment

The Committee adjourned at 7.08 pm, *sine die*.

Stephen Frappell
Clerk to the Committee

Minutes No. 37

Tuesday 27 May 2014

Parkes Room and Members' Lounge, Parliament House, Sydney, at 6.33 pm

1. Members present

Mr Khan, *Chair*
Ms Fazio, *Deputy Chair*
Mr Clarke
Miss Gardiner
Mrs Maclaren-Jones
Mr Primrose
Revd Mr Nile

Members of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics present:

Mr Sidoti, *Chair*
Mr Anderson
Mr Cornwell
Mr Rohan
Mr Zangari

In attendance: David Blunt, Steven Reynolds, Stephen Frappell, Rebecca Main, Ronda Miller, David Hale.

2. Inquiry into recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

Pursuant to standing order 219, the Committee met with the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics for the purposes of discussing the concurrent inquiries of both Committees into the recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator.

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

The Committee Chair tabled a 'Summary of Recommendations' from the Chair's Draft Report.

The Committees deliberated on the content and timing of the Committee's reports.

The Privileges Committee withdrew to the Members' Lounge.

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Mrs Maclaren-Jones: That minutes no. 36 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence:

Sent

- 13 May 2014 – Letter from the Chair to the Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics concerning a possible meeting of the Committees in relation to the inquiry into the recommendations of the ICAC.

Received

- 14 May 2014 – Letter to the Chair from the Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics agreeing to a meeting of the Committees in relation to the inquiry into the recommendations of the ICAC.

5. Inquiry into recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

The Chair noted the distribution of the Chair's Draft Report.

Resolved, on the motion of Revd Mr Nile: That the Committee meet on Tuesday, 10 June 2014 at 10.00 am to consider the Chair's Draft Report.

Resolved, on the motion of Revd Mr Nile: That the Chair write to the Premier, the Leader of the Opposition, the Speaker and the President noting that the position of Ethics Adviser is currently vacant, that the Legislative Council Privileges Committee is currently considering the position as part of its inquiry into the recommendations of the ICAC, and that it would be desirable for the appointment of a new Ethics Adviser to be delayed until after the Committee has tabled its report.

6. Adjournment

The Committee adjourned at 7.54 pm until Tuesday, 10 June 2014 at 10.00 am.

Stephen Frappell
Clerk to the Committee

Minutes No. 38

Tuesday 10 June 2014

Room 1152, Parliament House, Sydney, at 11.35 am

1. Members present

Mr Khan, *Chair*

Ms Fazio, *Deputy Chair*

Mr Clarke

Miss Gardiner

Mrs Maclaren-Jones
Mr Primrose
Revd Mr Nile

In attendance: Steven Reynolds, Stephen Frappell, Rebecca Main, Velia Mignacca, Ian Young, Kerry Blandon.

2. Confirmation of minutes of previous meeting

Resolved, on the motion of Revd Mr Nile: That minutes no. 37 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Sent

- 28 May 2014 - Letter to the Premier, copied to the Leader of the Opposition, the President, the Speaker and the Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, in relation to the position of Parliamentary Ethics Adviser and the Committee's inquiry into the recommendations of the ICAC.

Received

- 28 May 2014 – Letter from the Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics in relation to the meeting of the two committees on 27 May 2014 and the Senate system for members declaring interests.

4. Inquiry into recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

The Chair tabled his draft report entitled 'Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator', which, having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Ms Fazio: That a new paragraph be inserted after paragraph 1.12 to read: 'The Leader of the Opposition, the Hon John Robertson MP, gave notice in the Legislative Assembly on 26 March 2014 of his intention to introduce cognate private member's bills to address the recommendations of the ICAC. On 8 May 2014 these bills, the Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Bill 2014 and the Constitution Amendment (Disclosures by Members) Bill 2014 were introduced, and read a first and second time. The main features of these bills are to:

- prescribe a ministerial code of conduct for the purposes of the *Independent Commission Against Corruption Act 1988*;
- disclose certain pecuniary interests of any spouse or de facto partner of a member and any person under the age of 18 years who is dependent on the member for support;
- disclose commercial arrangements that relatives of the member have entered into, or reasonably expect to enter into, with the Government; and
- disclose the member's annual taxable income.'

Resolved, on the motion of Ms Fazio: That a new paragraph be inserted after paragraph 1.12 to read: 'The ICAC recommendation 23, that the NSW Government adopts the *Code of Conduct for Ministers of the Crown* as an applicable code for the purposes of section 9 of the *Independent Commission Against Corruption Act 1980*, is supported by the Government but was not referred to this committee for consideration and therefore was not considered as part of this Inquiry.'

Resolved, on the motion of Ms Fazio: That Chapter 1, as amended, be adopted.

Chapter 2 read.

Revd Mr Nile moved: That paragraph 2.39 be amended by inserting a new sentence at the end of the paragraph to read: ‘The Committee also notes that in its recent report on the conduct of the Hon Edward Obeid MLC and Circular Quay retail lease policy, the ICAC raises issues concerning the use of influence by a member to benefit leaseholders that had made donations to the member’s political party.’

Ms Fazio moved: That the question be amended to omit the word ‘that’ after ‘leaseholders’ and inserting instead ‘who were relatives of the member and’.

Question put and resolved in the affirmative.

Original question, as amended, put and passed.

Revd Mr Nile moved: That Recommendation 8 be amended by omitting all words and inserting instead: ‘A member must not improperly use his or her influence as a member to seek to affect a decision by a public official including a minister, public sector employee, statutory officer or public body, to further, directly or indirectly:

- a) the private interests of the member, a member of the member’s family, a business associate of the member or any other private interests; or
- b) the interests of the member’s political party.’

Ms Fazio moved: That the question be amended by inserting the word ‘financial’ before the word ‘interests’ in paragraph (b).

Question put and resolved in the affirmative.

Original question, as amended, put and passed.

Ms Fazio moved: That:

- a) a new paragraph be inserted after paragraph 2.45 to read: ‘The current *Code of Conduct for Members* deals with the issue of secondary employment of members. The committee considers that in order to avoid any conflicts of interest and/or use of public office for private gain, the practise of members undertaking secondary employment should be prohibited in the *Code of Conduct for Members*. This measure will assist in avoiding suggestions that members are subject to improper influence or that they are improperly using their entitlements for personal gain.’
- b) a new recommendation be inserted after Recommendation 1 to read: ‘That the *Code of Conduct for Members* clause 7 be amended to read: That members are prohibited from undertaking secondary employment or engagements.’

Question put.

The Committee divided.

Ayes: Ms Fazio, Revd Mr Nile, Mr Primrose.

Noes: Mr Clarke, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones.

Question resolved in the negative.

Resolved, on the motion of Revd Mr Nile: That a new paragraph be inserted after Recommendation 1 to read: ‘The *Code of Conduct for Members* also deals with the issue of secondary employment of members. This matter will be considered by the committee in the next review of the *Code of Conduct for Members*.’

Resolved, on the motion of Mrs Maclaren-Jones: That Chapter 2, as amended, be adopted.

Chapter 3 read.

Ms Fazio moved: That a new paragraph be inserted after paragraph 3.10 to read: ‘The committee notes the provision that members disclose their taxable income in pecuniary interest returns in the *Constitution Amendment (Disclosures by Members) Bill 2014* introduced in the Assembly by the Leader of the Opposition.’

Question put.

The Committee divided.

Ayes: Ms Fazio, Mr Primrose.

Noes: Mr Clarke, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Revd Mr Nile.

Question resolved in the negative.

Resolved, on the motion of Ms Fazio: That a new paragraph be inserted after Recommendation 2 to read: 'The Committee notes that many of the issues of corruption found by the ICAC in respect of Operation Jasper dealt with actions and commercial interests of adult children of members which were not addressed by Recommendation 24 of the ICAC. The Committee believes that consideration should be given to this issue in the future.'

Ms Fazio moved: That a new paragraph be inserted after paragraph 3.57 to read: 'The committee believes that the disclosure regime would be enhanced in regard to the interests of spouses/partners and dependent children by the disclosure of the sources and amount of income that they receive.'

Question put.

The Committee divided.

Ayes: Ms Fazio, Mr Primrose.

Noes: Mr Clarke, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Revd Mr Nile.

Question resolved in the negative.

Ms Fazio moved: That a new paragraph be inserted after paragraph 3.58 to read: 'The committee supports members disclosing their taxable income in pecuniary interest returns in the *Constitution Amendment (Disclosures by Members) Bill 2014*.'

Question put.

The Committee divided.

Ayes: Ms Fazio, Mr Primrose.

Noes: Mr Clarke, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Revd Mr Nile.

Question resolved in the negative.

Ms Fazio moved: That Recommendation 2 be amended by deleting all words in the first paragraph and inserting instead: 'That the interest disclosure regime under the Constitution (Disclosure by Members) Regulation 1983 be amended to incorporate full and open disclosure by members of the Parliament of their taxable income and the interests of their spouse/partners and dependent children of which they are aware including the sources and amounts of income received, subject to the following guidelines:'

Question put.

The Committee divided.

Ayes: Ms Fazio, Mr Primrose.

Noes: Mr Clarke, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Revd Mr Nile.

Question resolved in the negative.

Ms Fazio moved: That:

- a) a new paragraph be inserted after paragraph 3.59 to read: 'To ensure full disclosure and transparency, the holdings of the trust/company/fund should also be disclosed, as required by the Australian Senate.'

Recommendations of the ICAC regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator

- b) Recommendation 3 be amended by omitting the last paragraph and inserting instead: ‘Members should also be required to indicate the name (or a description) of the trust/company/fund, the nature of the operation, the holdings and the beneficiaries of the trust/company/fund, as required by the Australian Senate.’

Question put.

The Committee divided.

Ayes: Ms Fazio, Revd Mr Nile, Mr Primrose.

Noes: Mr Clarke, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones.

Question resolved in the negative.

Resolved, on the motion of Ms Fazio: That a new paragraph be inserted after Recommendation 3 to read: ‘During the next review of the *Code of Conduct for Members* and the interest disclosure regime, the committee will further consider the issue of members disclosing their holdings in any trust/company/fund in which they, their spouses/partners or any adult or dependent children have an interest.’

Resolved, on the motion of Revd Mr Nile: That Chapter 3, as amended, be adopted.

Chapter 4 read.

Resolved, on the motion of Miss Gardiner: That paragraph 4.65 be amended to insert a new bullet point three to read: ‘To offer annual presentations to all parliamentary parties/caucuses, as well as independent members, in the Parliament of New South Wales, with a view to informing and educating members so that they are as well-equipped as possible to fulfil their obligations under the *Code of Conduct for Members* and the Constitution (Disclosures by Members) Regulation 1983 (as is offered by the Conflict of Interest and Ethics Commissioner to members of Canada’s House of Commons).

Resolved, on the motion of Revd Mr Nile: That Chapter 4, as amended, be adopted.

The committee considered the Chair’s Foreword.

Resolved, on the motion of Ms Fazio: That the Chair’s Foreword be amended to include a paragraph after the dot points on the issues identified by the committee in its report for further consideration.

Resolved, on the motion of Miss Gardiner:

1. That the draft report, as amended, be the report of the committee and that the committee present the report to the Clerk;
2. That the submissions, minutes of proceedings, correspondence and briefing notes relating to the inquiry be tabled with the Clerk along with the report; and
3. That upon tabling, submissions, minutes of proceedings, correspondence and briefing notes relating to the inquiry not already made public be made public by the committee except for material redacted from submissions.

Resolved, on the motion of Revd Mr Nile: That the dissenting statement be submitted to the secretariat within 24 hours of the receipt of the minutes.

5. Adjournment

The Committee adjourned at 1.03 pm *sin die*.

Stephen Frappell
Clerk to the Committee