



LEGISLATIVE COUNCIL

OFFICE OF THE CLERK



Mr Richard Pye  
Committee Secretary  
Senate Standing Committee of Senators' Interests  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

14 March 2011

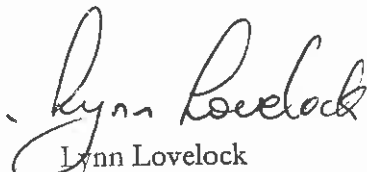
Dear Mr Pye

**Inquiry into the development of a draft Code of Conduct for Senators**

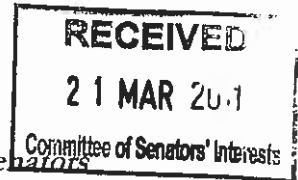
Thank you for your letter dated 10 March 2011 inviting the New South Wales Legislative Council to make a submission to your Committee's inquiry.

Please find a submission attached.

Yours sincerely

  
Lynn Lovelock  
Clerk of the Parliaments

Submission by the Clerk of the Parliaments  
New South Wales Legislative Council



*Inquiry into the development of a draft Code of Conduct for Senators*

**Terms of reference (a): the operation of codes of conduct in other parliaments**

The conduct of members of the New South Wales Parliament is regulated by the Code of Conduct for Members. The code was first adopted by the Legislative Council on 1 July 1998. The Code was readopted on 26 May 1999 and on 21 June 2007, with continuing effect.

The Code of Conduct consists of a preamble and seven clauses. The full text of the Code is enclosed. I also enclose the most recent report of the Privileges Committee concerning the provisions of the Code.

Corrupt conduct

New South Wales is unique amongst Australian jurisdictions in making a direct connection between the operation of the Code of Conduct for Members and the law concerning corrupt conduct.

Corrupt conduct is defined in sections 7, 8 and 9 of the *Independent Commission Against Corruption Act 1988*.

Section 7 provides that 'corrupt conduct' is any conduct which falls within the description of corrupt conduct contained in section 8, but which is not excluded by section 9.

Subsection 8(1) defines corrupt conduct as:

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
- (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
- (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Under subsection 8(2), corrupt conduct also includes conduct of any person that adversely affects, or could adversely affect, the exercise of official functions by any public official and which could involve certain specified matters including official misconduct, bribery and blackmail.

Subsection 9(1) provides that conduct which falls within section 8 does not amount to corrupt conduct unless it could also constitute or involve:

- (a) a criminal offence, or
- (b) a disciplinary offence, or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
- (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.** (emphasis added)

The Code of Conduct for Members has been adopted by the New South Wales Legislative Council, and the Legislative Assembly, as an applicable code for the purposes of section 9(1)(d).

Under subsections 9(4) and (5) of the *Independent Commission Against Corruption Act 1988*, 'corrupt conduct' also includes conduct of a minister or member which would cause a reasonable person to believe that it would bring the integrity of the office or the Parliament into serious disrepute, and constitutes a 'breach of the law' apart from the Act. In this context, a 'breach of the law' is construed as meaning a breach of a civil, and not a criminal, law.

The Independent Commission Against Corruption (ICAC) has the power to investigate conduct by members which could constitute or involve corrupt conduct, including a substantial breach of the Code of Conduct.

The Privileges Committees of both Houses play a role in reviewing the Code of Conduct every four years and carrying out educative work relating to ethical standards applying to member.

#### **Terms of reference (b): who could make a complaint in relation to breaches of a code and how those complaints might be considered**

As indicated above, the ICAC may investigate possible 'corrupt conduct' by a member including a 'substantial breach' of the Code of Conduct under section 9(1)(d) of the *Independent Commission Against Corruption Act 1988*.

Any person may make a complaint to the ICAC about a matter that concerns or may concern corrupt conduct (section 10). Certain public officials have a duty to notify the ICAC of possible corrupt conduct (section 11). Both Houses of Parliament may, by resolution, refer a matter to the ICAC for investigation (section 73).

However, beyond these mechanisms for investigating corrupt conduct, there are currently no mechanisms whereby possible breaches of the Code of Conduct of a less serious nature may be investigated. The designated ethics committees of each House have no power to investigate breaches of the Code.

In addition, the ICAC's jurisdiction is limited in relation to matters of parliamentary privilege. 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. While not questioning the appropriateness of this provision, it does mean that the ICAC has on occasion in the past been unable to conduct or progress certain inquiries.

In the past, options which have been canvassed to address these issues have included the establishment of a Parliamentary Integrity Commissioner or the appointment of an officer of the Parliament to undertake investigations on a needs basis.

To date, none of these options has been progressed. However, in its recent report on the Code of Conduct, dated December 2010, the Privileges Committee recommended:

That the merits of a Parliamentary Integrity Commissioner be considered by the Privileges Committee in the new Parliament, in consultation with the Legislative Assembly's Privileges and Ethics Committee.

#### **Terms of reference (c): the role of the proposed Parliamentary Integrity Commissioner in upholding a code**

As indicated above, the New South Wales Parliament does not have a Parliamentary Integrity Commissioner. However such an office has been proposed in the past,<sup>1</sup> and as indicated, is likely to be revisited in the next Parliament.

The appointment of a Parliamentary Integrity Commissioner would potentially address the issues raised above in relation to investigating less serious breaches of the Code of Conduct and the ICAC's restricted capacity to investigate breaches of the Code involving privileged material.

#### **Terms of reference (d): how a code might be enforced and what sanctions could be available to the parliament.**

Where the ICAC finds that a member of Parliament has engaged in corrupt conduct, including a substantial breach of the Code of Conduct for Members, it may report that finding to the Parliament. No penalties are attached to such a finding, and the finding has no effect on a member's legal rights and obligations.

Enforcement of the Code of Conduct for Members is the responsibility of the Houses of the Parliament. The Legislative Council has a common law power to discipline members adjudged guilty of misconduct or conduct unworthy of the House. A finding of corrupt conduct by the ICAC against a member may lead the House to take action against the member concerned, for example, by expelling the member for conduct unworthy of a member.

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<sup>1</sup> Those occasions include an inquiry into by the Independent Commission Against Corruption following a reference from the Legislative Assembly in 2003, a notice of motion in the Legislative Council in 2004, and an independent review of the *Independent Commission Against Corruption Act 1988* in 2005.

There is only one case in which the ICAC has made a finding of corrupt conduct against a member of the Council, that of Malcolm Jones in 2003. Following the release of the ICAC report in which the finding of corrupt conduct was made, Mr Jones was given an opportunity on 3 September 2003 to address the House, which he did. The next day, the Leader of the Government in the House gave notice of a motion for Mr Jones' expulsion, but shortly before the House met to consider the expulsion motion Mr Jones tendered his resignation as a member to the Governor.

Beyond this mechanism, however, there are no other mechanisms currently in place for sanctioning members for a less serious breach of the Code of Conduct. This matter is likely to form part of the proposed inquiry into the merits of a Parliamentary Integrity Commissioner in the new Parliament.