

Ms Helen Minnican
Clerk of the Legislative Assembly
Legislative Assembly
Parliament House
Macquarie Street
SYDNEY NSW 2000



Re: Draft Constitution (Disclosures by Members) Regulation 2024

Dear Ms Minnican,

Thank you for your letter of 5 March 2024 on behalf of the Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics (**Committee**) regarding the draft Constitution (Disclosures by Members) Regulation 2024 (**Draft Regulation**).

I enclose responses to the Committee's questions, which I hope are of assistance to the Committee in its deliberations.

As the Legislative Council Privileges Committee is similarly conducting an inquiry into the Draft Regulation, I have arranged to forward a copy of your correspondence and this reply to that Committee and the Clerk of the Legislative Council for their information.

Thank you and the Committee for your consideration of the Draft Regulation.

Sincerely,



Kate Boyd PSM
Secretary

Responses to questions

Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics

Introduction

The *Constitution Act 1902* (**Constitution Act**) provides for the making of regulations, currently the *Constitution (Disclosures by Members) Regulation 1983* (**Current Regulation**), requiring Members of Parliament to disclose certain pecuniary and other interests for inclusion on Registers of Disclosure maintained by the Clerks of Parliament.

The Independent Commission Against Corruption (**ICAC**) considered the current arrangements for the disclosure of pecuniary and other interests by Members in the July 2022 report entitled *Investigation into the conduct of the local member for Drummoyne* following an investigation known as 'Operation Witney' (**Operation Witney Report**).

The Operation Witney Report noted that the policy intent of the Registers of Disclosure is to:

- act as an accountability measure that requires a person holding a position of public trust to reveal their interests rather than conceal them
- assist members in recognising and avoiding any potential conflicts of interest that could arise between their public role and their private interests
- provide transparency to assist others in determining whether a Member is potentially conflicted.

The ICAC identified what it described in the Operation Witney Report as the following weaknesses and shortcomings in the current disclosure system:

- there are limited disclosure requirements where Members use family trusts to hold investments
- in comparison with other Australian jurisdictions, the NSW Members disclosure system 'does not reflect best practice and community expectations, and provides opportunities for hidden interests'
- the existing conflict of interest regime for Members relies heavily on self-regulation and lacks effective mechanisms to monitor and enforce its requirements.

The ICAC made two recommendations for the reform of the Current Regulation. Recommendation 1 of the Operation Witney Report was:

That the NSW Government, in consultation with NSW Parliament's Legislative Assembly Privilege and Ethics Committee and Legislative Council Privileges Committee ("NSW Parliament's designated committees"), amends the *Constitution (Disclosures by Members) Regulation 1983* to require:

- the details of interests in trusts, including discretionary trusts and self-managed superannuation funds, to be disclosed as a standalone item
- the details of real property held by discretionary trusts, where a member of Parliament is a potential beneficiary, to be disclosed
- the details of the interests of immediate family members to be disclosed (noting the option to limit access to certain information for privacy reasons)

- the dispositions of interests to family members or other associates to be disclosed
- ongoing (within 28 days) requirements to update disclosures of interests, including for members leaving Parliament
- electronic databases to improve transparency of the registers.

Recommendation 4 of the Operation Witney Report was:

That the NSW Government, in consultation with NSW Parliament's designated committees, amends the Constitution (Disclosures by Members) Regulation 1983 to provide for the mandatory registration of conflicts of interest by members of Parliament via the creation of a register for this purpose (noting the option to limit access to certain information for privacy reasons).

The NSW Government has prepared the draft Constitution (Disclosures by Members) Regulation 2024 (**Draft Regulation**) that, if made, will repeal the Current Regulation and make a new regulation prescribing the disclosure of pecuniary interests and other matters by Members and implement recommendations 1 and 4 of the Operation Witney Report.

The Constitution Act requires consultation with designated committees of both Houses of Parliament before a regulation regarding disclosures by Members may be made.

The Government tabled the Draft Regulation in Parliament on 8 February 2024 and moved motions referring the Draft Regulation to the Legislative Council Privileges Committee and the Legislative Assembly Parliamentary Privilege and Ethics Committee (**Parliamentary Committees**) for inquiry and report by 2 September 2024.

The Government will carefully consider any recommendations by the Parliamentary Committees in their inquiries into the Draft Regulation.

The Government has also invited the Chief Commissioner of the ICAC to provide feedback on the Draft Regulation.

The Cabinet Office (**TCO**) wishes to thank the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics (**Committee**) for its engagement on this important integrity reform. TCO remains available to assist the Committee in its deliberations.

Answers to questions from the Committee received on 5 March 2024

Footnotes in questions from the Committee have been omitted.

QUESTION

MINISTERIAL CODE OF CONDUCT

It is understood that the purpose of the proposed Regulation 2024 is to implement recommendations 1 and 4 of the Independent Commission Against Corruption (**ICAC**) in Operation Witney, with the intention of improving transparency about the pecuniary and other interests of Members; and ensuring that Members are acting in the public interest and not for private benefit.

1. Can you confirm that the proposed disclosures regime under the draft Constitution (Disclosures by Members) Regulation 2024 (**Regulation 2024**) would involve identical disclosure requirements for *all* Members, including Ministers and Parliamentary Secretaries.

ANSWER

The Current Regulation makes provision for the disclosure of certain pecuniary and other interests by all Members of Parliament for compilation on the Registers of Disclosures by the Clerks of Parliament.

If made, the Draft Regulation would repeal the Current Regulation and make a new regulation prescribing the disclosure of pecuniary interests and other matters by all Members.

In addition to their obligations as Members under the Draft Regulation, Ministers and Parliamentary Secretaries would continue to be subject to the obligations under the NSW Ministerial Code of Conduct (**Ministerial Code**), which is an Appendix to the *Independent Commission Against Corruption Regulation 2017*. The Ministerial Code requires Ministers and Parliamentary Secretaries to disclose certain matters to the Premier. These disclosures are kept by TCO, on behalf of the Premier, on the confidential Ministerial Register of Interests.

QUESTION

2. Based on your advice, the Committee understands that it is the Government's intention that Part 3 of the *Ministerial Code*, which currently requires Ministers and Parliamentary Secretaries to disclose conflicts of interest to the Premier, will be repealed and replaced by the proposed Regulation 2024, so that clause 15 of Regulation 2024 will be the exclusive requirement imposed on all Members.
 - a. Can you confirm that is the Government's intention to repeal Part 3 of the *Ministerial Code*, meaning that all disclosures by Members, including Ministers and Parliamentary Secretaries, would then be made public (subject to the provisions of the Draft Regulation including clause 25(2))?
 - b. Is it intended that the repeal of Part 3 will occur upon the commencement of the Regulation 2024, or at some other time?
 - c. What has been the previous rationale for not publicly disclosing the disclosures made by Ministers and Parliamentary Secretaries to the Premier, as distinct from the disclosures all Members would currently make under the existing pecuniary interest regulation (which does not include conflicts of interest)?
 - d. ICAC has noted in previous reports to Parliament that Ministers and Parliamentary Secretaries have broader decision-making responsibilities than Members, including with respect to authorising public expenditure. What evaluation was done by the Cabinet Office of the impact that the proposed increased disclosure requirements would have on Members, including backbenchers and Shadow Ministers, as compared with Ministers and Parliamentary Secretaries, and if so, what level of analysis did the evaluation involve?

ANSWER

No amendment of Part 3 of the Schedule to the Ministerial Code is proposed.

If the Draft Regulation is made, consequential amendments to Part 2 of the Schedule to the Ministerial Code are contemplated, subject to the final form of the Draft Regulation and consultation with the Chief Commissioner of the ICAC.

Subsection 6(1)(a) of the Schedule to the Ministerial Code provides that, as soon as practicable upon appointment, a Minister or Parliamentary Secretary must provide to the Premier a copy of the last return provided to the Parliament under the Current Regulation.

Subsection 7(1)(a) of the Schedule to the Ministerial Code provides that a Minister or Parliamentary Secretary is to provide the Premier with a copy of Parliamentary returns under the Current Regulation, at the same time as the return is provided to Parliament.

No amendment of these subsections is proposed (other than updates to the name of the regulation made under the Constitution Act).

Subsections 6(1)(b) and (c) of the Schedule to the Ministerial Code provides that, as soon as practicable upon appointment, a Minister or Parliamentary Secretary must provide to the Premier a notice in writing of:

- any event that has occurred since their last Parliamentary return, the disclosure of which will be required to be included in the next return that is to be provided to the Parliament under the Current Regulation
- the pecuniary and other interests of their immediate family members, the disclosure of which would be required under the Current Regulation if the relevant interest were instead that of the Minister or the Parliamentary Secretary.

Subsections 7(1)(b) and (c) of the Schedule to the Ministerial Code require Ministers and Parliamentary Secretaries to provide the Premier with continuous updating of these disclosures as soon as practicable after a relevant event occurs.

It is proposed to omit these subsections (subsections 6(1)(b) and (c) and 7(1)(b) and (c)) of the Schedule to the Ministerial Code if the Draft Regulation is made, as Members of Parliament will be required to:

- make ongoing disclosures of their interests to Parliament, and as such changes in a Minister or Parliamentary Secretary's interests currently required to be disclosed to the Premier under subsection 6(1)(b) and 7(1)(b) of the Schedule to the Ministerial Code will instead be disclosed to the Premier through the operation of subsection 7(1)(a) of the Schedule to the Ministerial Code
- disclose the interests of their immediate family members to Parliament, and as such the interests of immediate family members currently disclosed to the Premier under subsections 6(1)(c) and 7(1)(c) will instead be disclosed to the Premier through the operation of subsections 6(1)(a) and 7(1)(a) of the Schedule to the Ministerial Code.

TCO will continue to maintain disclosures by Ministers and Parliamentary Secretaries on the confidential Ministerial Register of Interests. Its contents are made available only to the Premier and the Cabinet for the sole purpose of enabling them to better avoid and manage potential conflicts of interest.

The Committee may wish to consider the ICAC's comments in the Operation Witney Report regarding the policy intent of the Registers of Disclosure under the Current Regulation.

QUESTION

CONFLICTS OF INTEREST

3. Is the relevant enabling provision in the *Constitution Act 1902* relating to declaration of conflicts of interest, s. 14A(1)(a)(xii) which refers to “any other direct or indirect benefits, advantages or liabilities or other matters, whether pecuniary or not, of a kind specified in the regulations”?

ANSWER

The Draft Regulation is proposed to be made under the Constitution Act, including section 14A.

QUESTION

4. Clause 15(2) of the proposed Regulation 24 relates to conflicts of interests and requires the disclosure of *all* conflicts of interest as follows:

Clause 15

(2) A conflict of interest arises in relation to a Member if there is a conflict between the public duty and private interest of the Member in which the Member’s private interest *could objectively have the potential to influence* the performance of the Member’s public duty. (emphasis)

(3) A conflict of interest need not be pecuniary in nature.

(4) To avoid doubt, a Member’s public duty as a Member does not include the Member’s public duty as a Minister or Parliamentary Secretary.

- a. What is the purpose of the distinction drawn in the proposed cl.15(4)?
- b. To what extent do you consider that the public duty of a Member, as a Member, rather than as a Minister or Parliamentary Secretary, will be reflected in the nature and extent of the disclosures made between these two different groups?
- c. Doesn’t the distinction itself point to the need for the conflicts of interests disclosed by Ministers and Parliamentary Secretaries to be the responsibility of the Executive, considered by the Premier as matters under the Ministerial Code, and kept quite distinct from the disclosures regime that should apply for conflicts of interest on the part of ordinary backbenchers?

ANSWER

Please see the answer to question 2 above.

It is intended that:

- Members disclose all conflicts of interest arising in relation to a Member’s public duty as a Member (and not as a Minister or Parliamentary Secretary) under the Draft Regulation (noting that, in respect of Ministers and Parliamentary Secretaries, these disclosures will continue to be disclosed to the Premier under Part 2 of the Schedule to the Ministerial Code)
- Ministers and Parliamentary Secretaries continue to disclose all conflicts of interest as required by the Ministerial Code.

QUESTION

5. **Current position** - The Standing Orders of each House and the *Code of Conduct for Members* are both relevant to the regulation of Members' interests. The Standing Orders made pursuant to s. 15 of the *Constitution Act* regulate the extent to which Members may participate in proceedings in conflict of interest situations.

In the case of proceedings in the Legislative Assembly, a Member cannot vote on any question in which they have "a *direct* pecuniary interest *not held in common* with other citizens of the State". In the case of committees administered by the Assembly, the restriction is broader as it applies to *participation*, not just voting, and also applies to non-pecuniary matters where a member is "*personally interested*".

Members also may choose to disclose any potential, perceived or actual conflicts of interest in a number of other ways when participating in proceedings, or outside of proceedings, e.g. on their official websites, public statements or social media.

- a. The proposed cl.22 of the 2024 Regulation provides for discretionary disclosures generally and that such disclosures may include "a direct or indirect benefit, advantage, liability or other matter, whether pecuniary or not", that the Member considers "might appear to raise a conflict between the Member's private interest and the Member's public duty as a Member", or that the Member "otherwise wishes to disclose". What purpose is served by the additional requirements proposed in the draft 2024 regulation when disclosures of potential conflicts of interest may already be made on a discretionary basis by ordinary backbenchers under the existing regulation and, as stands, are required to be made by Ministers and Parliamentary Secretaries?

ANSWER

Clause 15 of the Draft Regulation would require Members to disclose all conflicts of interest, implementing Recommendation 4 of the Operation Witney Report. The policy intent of the ICAC's recommendation is explained in the Operation Witney Report commencing at p 177 and is summarised in the introduction above.

The Committee may wish to also consider recommendation 3 of the Operation Witney Report, which provides:

That NSW Parliament's designated committees include a clear, consistent and comprehensive conflict of interest definition in the Code of Conduct for Members. This review should include a consideration of the relevant definitions in the Ministerial Code of Conduct and any opportunities for achieving a consistent approach in regard to avoiding, recognising, disclosing and managing conflicts of interest.

QUESTION

USE OF THE REGISTER BY ICAC

Section 122(2) of the *Independent Commission Against Corruption Act 1988* (NSW) expressly provides for parliamentary privilege to be waived in relation to the pecuniary interest register, to enable the register's use by the ICAC for the following specific purposes:

- for the purpose of any investigation into whether or not a member of Parliament publicly disclosed a particular matter, or as to the nature of any matter disclosed; and
 - for the purpose of any finding, opinion or recommendation concerning the disclosure or nondisclosure.
6. The term "private interest" is defined in cl. 11 of the Ministerial Code to exclude a benefit that "comprises merely the hope or expectation that the manner in which a particular matter is dealt with will enhance a person's or party's popular standing", whereas the same exclusion is not included in the Regulation 2024 definitions.
- a. Is it intended that the same exclusion would apply when interpreting provisions relating to a "conflict of interest" in cl.15(2) of the draft Regulation 2024?
 - b. Is it envisaged that there could be circumstances where a Member's performance of their "public duty" might be affected by their "private interest" in being re-elected as a Member?

ANSWER

Section 11 of the Ministerial Code defines 'private benefit' as any financial or other advantage to a person (other than the State of New South Wales or a department or other government agency representing the State), other than a benefit that —

- (a) arises merely because the person is a member of the public or a member of a broad demographic group of the public and is held in common with, and is no different in nature and degree to, the interests of other such members, or
- (b) comprises merely the hope or expectation that the manner in which a particular matter is dealt with will enhance a person's or party's popular standing.

Section 7(3) of the Ministerial Code provides that a Minister is taken to have a conflict of interest in respect of a particular matter on which a decision may be made or other action taken if —

- (a) any of the possible decisions or actions (including a decision to take no action) could reasonably be expected to confer a private benefit on the Minister or a family member of the Minister, and
- (b) the nature and extent of the interest is such that it could objectively have the potential to influence a Minister in relation to the decision or action.

The Draft Regulation does not have a similar deeming provision, and does not use the term 'private benefit'. The Draft Regulation uses the term 'private interest' to describe a conflict of interest, which, consistent with the Ministerial Code, is not defined.

The Committee may wish to consider the ICAC's comments regarding the tension between the public interest and a Member's interest in being re-elected in its August 2022 report entitled *Investigation into pork barrelling (Operation Jersey Report)* at p 14 and its June 2023 report entitled *Report of the Investigation into the conduct of the then member of Parliament for Wagga Wagga and then Premier and others (Operation Keppel Report)* at [14.147]. The *Annotated Code of Conduct for Members a guide for members of NSW Parliament* (January 2024) published by the ICAC (**ICAC Annotated Code of Conduct**), which provides advice to Members regarding avoiding conflicts of interest, may also be of assistance to the Committee in considering these matters.

QUESTION

7. The inclusion of the provision in legislation makes justiciable action taken, or not taken, on potentially quite indirect conflicts of interest pursuant to that provision. This introduces a broader, new category for obligatory disclosures, which if breached carries the possible consequence of loss of seat.
- a. Is s. 15 of the Regulation 2024 likely to expand the scope for politically motivated allegations asserting non-disclosure of conflicts of interest, whereas that risk does not exist to the same extent in the current system? Noting that at present:
 - i. it is already open to Members to submit discretionary disclosures on such matters;
 - ii. the House has jurisdiction in relation to the conduct of Members, not just in proceedings; and
 - iii. the ICAC already has wide powers and jurisdiction to investigate possible corrupt conduct that may involve conflicts of interest.

ANSWER

Currently, the Legislative Council Members' Code of Conduct and the Legislative Assembly Code of Conduct for Members (**Members' Codes**) require Members to take reasonable steps to:

- avoid, resolve or disclose any conflict between their private interests and the public interest
- draw attention to any conflicts in any proceeding of the House or its Committees, and in any communications with Ministers, Members, public officials or public office holders.

Breaches of Members' Codes may result in action being taken by the House in relation to a Member. A substantial breach of the Members' Codes can amount to corrupt conduct under the *Independent Commission Against Corruption Act 1988*.

Members of Parliament are required to disclose conflicts of interests in the Commonwealth, Queensland, Victoria, and South Australia. Serious consequences, including contempt of the House and criminal offences, may apply for knowingly making a false or misleading disclosure in these jurisdictions. The Committee may wish to consult with the relevant parliamentary ethics committees in these jurisdictions regarding their experience of alleged failures by Members to disclose conflicts of interest.

Recommendation 4 of the ICAC's Operation Witney Report was:

That the NSW Government, in consultation with NSW Parliament's designated committees, amends the Constitution (Disclosures by Members) Regulation 1983 to provide for the mandatory registration of conflicts of interest by members of Parliament via the creation of a register for this purpose (noting the option to limit access to certain information for privacy reasons).

The policy intent of the ICAC's recommendation is explained in the Operation Witney Report commencing at p 177, including that that the existing conflict of interest regime for Members relies heavily on self-regulation and lacks effective mechanisms to monitor and enforce its requirements.

QUESTION

8. To what extent do you consider the wording “could objectively have the potential to influence” to describe a conflict of interest, introduces considerable vagueness about what is covered by cl.15 particularly given the coverage applies to individuals other than the Member?

ANSWER

Clause 15 of the Draft Regulation would require Members to disclose all conflicts of interest, being a conflict between the public duty and the private interests of the Member in which the Member’s private interest could objectively have the potential to influence the performance of the Member’s public duty. It is not proposed that Members disclose the conflicts of interest relating to individuals other than the Member, however the private interests of a Member may include, for example, a private benefit conferred on a family member or close associate.

The drafting of clause 15 of the Draft Regulation is based on the drafting of subsection 7(3) of the Ministerial Code, which provides that a ‘conflict of interest arises in relation to a Minister if there is a conflict between the public duty and the private interest of the Minister, in which the Minister’s private interest could objectively have the potential to influence the performance of their public duty’.

QUESTION

9. To what extent do you consider political activity, particularly at the local electorate level, give rise to reporting obligations, e.g., making representations for a new facility in the Members’ own electorate, which may be perceived as having electoral benefit?

ANSWER

The Committee may wish to consider the ICAC’s comments regarding the tension between the public interest and a Member of Parliament’s interest in being re-elected in its Operation Jersey Report at p 14 and its Operation Keppel Report at [14.147]. The Operation Witney Report, where a Member was found to be acting to advance their private interests while falsely purporting to be acting in the interests of constituents and the community, may also be of assistance to the Committee in considering these matters.

QUESTION

10. To what extent do you consider a Member’s participation in Parliamentary Friendship Group (PFG) give rise to a conflict of interest, in particular where the beneficiaries of public funding (for example, sporting codes) are involved in organising functions or events for the PFG?

ANSWER

The Committee may wish to consider the ICAC’s comments (see recommendations 6 and 7) regarding promoting an ethical culture for Parliamentary Friendship Groups in the Operation Keppel Report, including to clarify that the Members’ Codes applies to Parliamentary Friendship Groups.

QUESTION**IMMEDIATE FAMILY MEMBERS****Generally**

It is understood that Member's will be required by the Regulation 2024 to take reasonable steps to disclose the information required from "immediate family members". Evidence that reasonable steps have been taken by the Member may include running title searches to identify the immediate family member's property interests, or sending letters to the immediate family member requesting information.

11. Are immediate family members expected, or required, to disclose *all* of their business and other dealings to the Member to enable the Member to assess whether *in the opinion of the Member* there is a conflict of interest?

ANSWER

Please see the answer to question 8 above.

QUESTION

12. What measures do you consider a Member could take to be able to demonstrate that they have taken all reasonable steps to ascertain the information needed for a disclosure about an immediate family member's interests where an individual does not agree to provide relevant information?

ANSWER

What would constitute reasonable steps will differ in each circumstance, however examples could include:

- providing the immediate family member with written correspondence requesting the disclosure of interests, and keeping a copy of the correspondence and any reply
- conducting searches of relevant property and other registers available to the Member
- disclosing any relevant interests of the immediate family member that are known or suspected by the Member.

QUESTION

13. Noting that trust arrangements can feature prominently in conflict-of-interest situations, and the esoteric nature of such arrangements, where can Members (and their immediate family members) obtain advice on such matters and who will pay?

ANSWER

Clause 11 of the Draft Regulation, if made, will require Members to disclose a trust if the Member or an immediate family member has a beneficial interest in the trust, including a mere expectancy as a beneficiary of a discretionary trust, or is a trustee of the trust.

Superannuation funds, whether public or self-managed, and listed investment trusts must be disclosed.

Members will be required to disclose:

- the name of the trust
- a description of the activities of the trust
- the nature of the interest in the trust
- interests held by the trust, including real property and investments.

The Committee may wish to consult relevant parliamentary ethics committees in the Commonwealth, Queensland, Victoria, and South Australia, jurisdictions which require Members of Parliament to disclose the interests of certain family members in trusts, on their experiences of Members' compliance with these disclosure requirements.

QUESTION

14. If an immediate family member entrusted a Member with confidential information about their interests – prior to ever foreseeing that the Member would run for, much less be elected to Parliament – or prior to the enactment of the draft Regulation 2024 – would the Member breach the family member's confidence by disclosing the information known to them, including having regard to the equitable doctrine that imposes obligations of confidentiality on people?

ANSWER

If made, the Draft Regulation would require Members to disclose the following interests of an immediate family member of the Member:

- interests in real property, unless the interest is held only in the capacity as the executor or administrator of a deceased estate the Member or immediate family member is not a beneficiary of, or as a trustee
- beneficial interests in trusts, including a mere expectancy as a beneficiary of a discretionary trust, unless the interest is held only in the capacity as the executor or administrator of a deceased estate the Member or immediate family member is not a beneficiary of, or as a trustee
- interests or a position (whether remunerated or not) in a corporation, excluding certain not-for-profit corporations
- positions in trade unions or professional or business associations (whether remunerated or not)
- debts of an aggregated value exceeding \$500, other than debts arising from a loan of money from a lender made in the ordinary course of business of the lender, debts liable to be paid to a relative and debts arising from the supply of goods or services in the ordinary course of the occupation of the Member or immediate family member
- each source of income exceeding \$500 received since the last general election, or reasonably expects to receive during the remainder of the parliamentary term
- gifts of an aggregated value exceeding \$500, other than disclosed political contributions or gifts from a relative
- contributions to travel of an aggregated value exceeding \$250, other than contributions from public funds, relatives, in the ordinary course of any occupation (not related to duties as a Member), disclosed political contributions or the Member's political party for political activity or representation
- interests in water access licences.

Members would be required to disclose the relevant interests as at the date an interest disclosure return is made.

In relation to the question of whether compliance with a Member's statutory disclosure obligations would found an action for breach of confidence, the Committee may wish to seek further advice on the public interest defence for actions for breach of confidence (see *Gartside v Outram* (1856) 26 LJ Ch 113).

QUESTION

15. What about where an immediate family member's interests are subject a non-disclosure agreement? In what circumstances could a Member's efforts to comply with the Regulation 2024 risk inducing a breach of contract?

ANSWER

A Member of Parliament should not enter into contracts that would impede the Member from complying with their disclosure obligations.

Clause 25 of the Draft Regulation provides that a Clerk may exclude information from the copy of a register made publicly available to protect the privacy of persons other than Members. If an immediate family member has entered into a non-disclosure agreement in respect of an interest, this could be a relevant factor to a Clerk's determination to exclude information from the copy of the register that is publicly available.

QUESTION**De facto relationships**

The meaning of "de facto partners and de facto relationships" is a key part of the Regulation 2024, insofar as it requires a range of interests of "immediate family members" to be disclosed by Members. The Regulation 2024 refers to the definition in s. 21C of the *Interpretation Act 1987* (as the Regulation 1983 did for more limited purposes). If a Member is not married or in a "registered relationship", whether the Member is in a "de facto relationship" depends on whether the Member and another person have a "relationship as a couple" which depends on at least nine factors (like the duration of the relationship or whether a sexual relationship exists), none of which is determinative. Ordinarily, there would be a court or other decisionmaker weighing up these s. 21C factors and making an objective determination.

16. What guidance is available for Members to make these determinations in order to comply with the regulation?

ANSWER

The question of whether two persons are in a 'de facto relationship', a relationship as a couple living together who are not married to one another or related by family, arises in multiple contexts, including, for example, Australian taxation law, social security, family law and succession.

QUESTION

17. Noting that Members must, within 1 month under s. 6(1)(a), disclose any changes to their interest disclosures returns, how are Members properly to manage the breakdown of de facto relationships where their relationship status may be unclear even to them for extended periods? What about "onagain, off-again" relationships? How, if at all, is the couple's privacy to be protected in these circumstances?

ANSWER

The Committee may wish to consult the relevant parliamentary ethics committee in jurisdictions that require the disclose of interests of a Member's spouse or partner, the Commonwealth, Queensland, South Australia, and Tasmania, and consider their experiences in this matter.

QUESTION

18. What about circumstances involving domestic violence where, for example, it might be unsafe for the Member to contact a spouse or de facto from whom they have separated? Do you consider that this would be a reasonable excuse for not being able to comply with this part of the proposed regulation?

ANSWER

A Member who has separated from their former de facto partner (they are no longer in 'a relationship as a couple living together') would no longer be in de facto relationship.

A Member who is legally married to, but separated from, their spouse should consider if they are eligible to commence divorce proceedings to legally end the marriage. Until the marriage is legally ended, it would be prudent for the Member to take reasonable steps to make themselves aware of the pecuniary and other interests of their spouse to comply with the disclosure obligations under the Draft Regulation. In this regard, see the answer to question 12.

It is a matter for the Houses of Parliament to determine if a Member has wilfully contravened their disclosure obligations. The relevant circumstances of the failure to comply with disclosure obligations would be relevant to any consideration by the Houses.

QUESTION**Children**

The definition of "immediate family member" in the draft Regulation 2024 includes a child of the Member or of the Member's spouse or de facto partner if one or more of the following apply:

- i. the child less than 18 years of age,
- ii. the child is a dependant of the Member or of the Member's spouse or de facto partner,
- iii. the child resides with the Member or the Member's spouse or de facto partner.

The word "child" simply describes the child's relationship to the parent(s) and, therefore, a "child" can be an adult of any age provided the circumstances in ii. or iii. exist. It is understood that children are included in the Regulation 2024 because their financial and other interests, in the above circumstances, are sufficiently connected with the Member's interests such the public interest favours disclosure.

19. To what degree are the financial interests of adult children, who may reside with the Member or the or the Member's spouse or de facto partner, but who provide their parents with board or rental payments (either at, or below, market rates), likely to be "connected"?

ANSWER

The Draft Regulation defines 'immediate family member' in relation to a Member to include a child of the Member or of the Member's spouse or de facto partner if the child resides with the Member or the Member's spouse or de facto partner. Whether the child pays board or makes rental payments is irrelevant.

The definition of 'immediate family member' proposed in the Draft Regulation is consistent with the Ministerial Code. The policy intent is to recognise that, in many circumstances, an immediate family member's interests will be closely connected with the interests of the Member.

The Committee may wish to consider the definitions that Commonwealth, Queensland, and South Australia have adopted in relevant resolutions and legislation for the purpose of determining who is a family member or related person for whom a Member is required to disclose relevant interests. The Committee may also wish to consider the arrangements in Tasmania, where Members are required to disclose interests of spouses, but not children.

QUESTION

20. Isn't the real issue the nominal transfer of the Member's interests to their child, rather than any risks posed by the child's own interests which might be private and/or completely independent from the Member except for needing a place to live? If so, did you instead consider a more limited provision that asks whether the Member has transferred interests, or directed benefits, to the child?

ANSWER

Please see the answer to question 19 above.

Clause 19 of the Draft Regulation would require Members to disclose particulars of the disposition of:

- each interest that would otherwise be required to be disclosed under the Draft Regulation (but for the disposition) if the Member retained the use and benefit of the interest, or the right to reacquire the interest at a later time
- property to a person by another person under arrangements made by the Member, if the Member kept the use and benefit of the property.

QUESTION**Compassionate grounds**

21. Are there exceptional circumstances where Members may have some grounds for not complying with these requirements within the 1 month time frame to update the register, e.g. on compassionate grounds? Was there any consideration of about a grace period?

ANSWER

It is a matter for the Houses of Parliament to determine if a Member has wilfully contravened the disclosure obligations. The relevant circumstances of the failure to comply with disclosure obligations would be relevant to any consideration by the Houses.

TCO is not aware of compassionate grounds or grace periods applying in other jurisdictions (the Commonwealth, Queensland, and Victoria) that require Members to make continuous disclosure of interests.

QUESTION**WATER ACCESS LICENCES**

Section 14A(1)(a)(viic) of the Constitution provides for “water entitlements and other interests in water” to be subject to disclosure under the regulations that can be made. However, under s. 21 of the draft Regulation 2024, disclosure requirements apply to “the water access licence number of each water access licence in which the Member or [their] immediate family member has an interest”.

22. What consideration was given to the complexities of water rights when drafting the proposed Regulation 2024?

ANSWER

Clause 21 of the Draft Regulation would require Members to disclose their interests, and the interests of their immediate family members, in water access licences within the meaning of the *Water Management Act 2000*. Members would be required to disclose the licence number to which the interest relates and describe the interest.

TCO consulted the Department of Climate Change, Energy, the Environment and Water when preparing the Draft Regulation. The Committee may wish to seek the assistance of that Department in assessing the appropriateness of the proposed water interest disclosure provisions.

QUESTION

23. Previous advice obtained from the Crown Solicitor for the information of Members points to the different positions with respect to a water licence issued under the *Water Act 1912*, as distinct from a water access licence issued under the *Water Management Act 2000*, for which the position is less clear but which also may require disclosure. The advice indicated that the need for disclosure depended upon the terms of the licence and that income received under the licence also may need to be disclosed in certain circumstances. The Crown Solicitor indicated that Members may need to obtain their own legal advice.

- a. Is the level of disclosure proposed in the draft Regulation 2024, which requires the disclosure of all licence numbers, likely to produce information of significance or any meaningful disclosure about a Member’s water interests?

ANSWER

TCO understands that a Memorandum was issued by the Office of the Clerk of the Legislative Assembly on 19 November 2019 providing advice on whether Members have to declare any interest they may have in water under the Current Regulation. The Regulation 2024, if made, would resolve any uncertainty in relation to disclosure requirements by requiring interests in water access licences within the meaning of the *Water Management Act 2000* to be disclosed.

QUESTION**RESOURCES AND FUNDING**

There are currently 17 Ministers and 12 Parliamentary Secretaries in the Legislative Assembly, and 6 Ministers and 2 Parliamentary Secretaries in the Legislative Council. In total, there are 93 Members of the Legislative Assembly and 42 Members of the Legislative Council. Accordingly, only around 27% of Members are subject to the *Ministerial Code* and, therefore, the draft Regulation 2024 would represent a significant expansion of the number of Members who would need to declare conflicts of interest.

The Departments of the Legislative Assembly and the Legislative Council have sought additional funds to cover the initial development of the online system and implementation phase of the new scheme. However, the role of the Clerks as Registrars under the existing scheme has not involved the regular provision of detailed advices on the interpretation and application of the regulation, particularly in relation to a Member's personal circumstances.

24. What level of resourcing is needed by the Cabinet Office to administer the disclosures regime under the Ministerial Code and what level of advice is provided to Ministers collectively and individually in relation to Ministers' interests?

ANSWER

The former Department of Premier and Cabinet did not receive additional resourcing to assist the Premier in administering the Ministerial Code. This work is undertaken by The Cabinet Office in addition to the Department's other work.

The Committee may wish to consult with relevant parliamentary ethics committees in jurisdictions that require Members of Parliament to disclose conflicts of interest (the Commonwealth, Queensland, Victoria, and South Australia) regarding their experiences with this matter.

Should the Draft Regulation be made, TCO will continue to provide advice to Ministers and Parliamentary Secretaries on their obligations under the Ministerial Code.

QUESTION

25. What form does the advice take, e.g. guidance notes, detailed advices on individual circumstances?

ANSWER

TCO supports the Premier in relation to the administration of the Ministerial Code.

TCO provides advice and assistance to Ministers and Parliamentary Secretaries in relation to the Code. Ministers and Parliamentary Secretaries remain responsible for their compliance with the Code.

TCO undertakes the following actions to support Ministers and Parliamentary Secretaries to understand their obligations under the Code:

- writes to and meets with all new Ministers and Parliamentary Secretaries to explain their obligations under the Code
- writes to all current Ministers and Parliamentary Secretaries to remind them of their obligations under the Code, including by reminding them to advise the Premier of any changes to their interests or to those of their immediate family members
- provides guidance materials on the Code to Ministers and Parliamentary Secretaries which are updated and re-circulated as and when required, such as fact sheets, checklists, and template disclosure letters.

Where a Minister or Parliamentary Secretary discloses a potential or perceived conflict, or a potential private benefit, TCO briefs the Premier on the disclosure so that the Premier is informed and approves any management of the matter proposed by TCO.

TCO provides advice to individual Ministers and Parliamentary Secretaries as and when requested.

QUESTION

26. Is it envisaged that Members will incur the cost of legal advice themselves?

ANSWER

Arrangements that apply to Members seeking advice regarding their obligations under the Current Regulation would continue to apply under the Draft Regulation, if made.

QUESTION**REGISTERS TO BE PUBLICLY AVAILABLE AND AVAILABLE TO MEMBERS AND THE ICAC**

27. Does the reference to the “complete registers” in s 26 simply mean a copy of the register which includes any information which the Clerk may have excluded on privacy or safety grounds under clause 25(2)? Or does it also require under clause 10(1) “the address of each parcel of real property in which the Member or an immediate family member of the Member had an interest”, and the nature of that interest, noting that it is permissible to use the “alternative” of simply providing “the location of the parcel by suburb or area”?

ANSWER

It is contemplated that the publicly available registers on the NSW Parliament website could have information excluded by the Clerks under clause 25(2), while the registers available for inspections by Members and officers of the ICAC would be complete.

Consistent with section 8 of the Current Regulation, Members would not be required to disclose the address of a residential property under clause 10(1) of the Draft Regulation if the Member provides a statement that the property is the principal or secondary place of residence for the Member or an immediate family member, and provides the location of the property by suburb or area.

QUESTION

28. Clause 25 gives the Clerk discretion to exclude information from the public register if satisfied that this is needed to protect a person's privacy (except for a Member) or safety. Is it envisaged that this discretion will be exercised only on request from a Member?

ANSWER

The drafting of clause 25 of the Draft Regulation does not fetter the Clerk's discretion to exclude information only on request from a Member. It would be open to the Clerks to determine that certain types of information are to be excluded from the copy of a register made publicly available on the website of the NSW Parliament to protect the privacy of persons other than Members.

QUESTION

29. Clause 25 will take effect "immediately before the end of a period of 12 months after the Regulation 2024 is made". For clarity, is it intended that this affords the Clerk 12 months as a reasonable period within which to make searchable copies of the registers publicly available on the website? Or is it intended that the Clerk will not make the registers available on the website until immediately before the 12 months?

ANSWER

The obligation in clause 25 of the Draft Regulation for the Clerks to make searchable copies of the registers publicly available for inspection on the website of the NSW Parliament does not take effect until immediately before 12 months after the regulation is made. This is a requirement of subsection 14A(1A) of the Constitution Act, which provides that, if a regulation is made requiring the compilation and maintenance of registers, the regulation must require that the registers be kept in an electronic format, that is searchable, within 12 months after the making of the regulation.