



INQUIRY INTO RECOMMENDATIONS OF THE ICAC REGARDING ASPECTS OF THE CODE OF CONDUCT FOR MEMBERS, THE INTEREST DISCLOSURE REGIME AND A PARLIAMENTARY INVESTIGATOR

**Background Paper No. 3:
A parliamentary investigator position?**

Recommendation 25 of the ICAC

- 1.1 In October 2013, the Independent Commission Against Corruption (ICAC) released a report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources*. The report is available on the website of the ICAC at www.icac.nsw.gov.au.
- 1.2 Chapter 6 of the report contained recommendations concerning the conduct of members of Parliament and ministers. Recommendation 25 was as follows:

That the NSW Parliament's Legislative Council Privileges Committee consider the establishment of a parliamentary investigator position in consultation with the Legislative Assembly Privileges and Ethics Committee.
- 1.3 The Houses of the Parliament have referred the recommendation to the Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee for inquiry and report.

Background to the ICAC recommendation

The current arrangements for regulating the conduct of members of the Parliament of New South Wales

- 1.4 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.
 - 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.

- There is a statutory scheme for the disclosure by members of their pecuniary and other interests.
- 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*, provided also that the conduct amounts to a ‘substantial breach’ of the *Code of Conduct for Members*.
- 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* and educative work in relation to ethical standards.

The ICAC recommendation

- 1.5 The ICAC report entitled *Reducing the opportunities and incentives for corruption in the State’s management of coal resources* included recommendations 22 and 24 in relation to the *Code of Conduct for Members* and the interest disclosure regime for members. These are the subject of the two other background papers. However, following on from recommendations 22 and 24, ICAC observed in its report:

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 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.

- 1.6 ICAC emphasised in its report, however, that while it supported further consideration of a ‘parliamentary investigator’ position, it did so on the basis that there would be no change to its jurisdiction or the definition of corrupt conduct in the *Independent Commission Against Corruption Act 1988* as a result of any review. The Committees do not propose to consider changes to the jurisdiction of the ICAC or the definition of corrupt conduct as part of their inquiries.

Previous discussion of a 'parliamentary investigator position' in New South Wales

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

- In 2002, in response to a resolution of the Legislative Assembly requesting that ICAC investigate the regulation of secondary employment by its members, ICAC advised that it had no authority to investigate matters where parliamentary privilege applies. Subsequently, in 2003, in a report to the Speaker of the Legislative Assembly, ICAC raised various possible models for addressing this issue, including the establishment of a Parliamentary Commissioner to investigate such matters. However, ICAC also canvassed the appointment of a parliamentary committee, such as the Privileges Committees, to conduct investigations of such issues, or the appointment of an officer of the Parliament on an as needs basis to undertake necessary investigations.¹ In 2004 the Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics concluded that it would be preferable for the Assembly to consider options for investigating matters coming before the ICAC which involve parliamentary privilege 'on a case by case basis'.²
- In 2004, a member in the Legislative Council, the Hon Peter Breen MLC, gave notice of a bill for an Act relating to the appointment and functions of a Parliamentary Commissioner for Standards.
- In 2005 Mr Bruce McClintock SC, in a review of the *Independent Commission Against Corruption Act 1988*, recommended the adoption of a parliamentary investigator. Mr McClintock cited two potential benefits: the speedy resolution of minor complaints about the conduct of members, and an avenue to allow investigation of matters where the jurisdiction of the ICAC is limited due to parliamentary privilege.³ However this recommendation was not adopted in the amending bill which implemented most of Mr McClintock's recommendations.

1.8 The Clerk of the Parliaments in New South Wales, Mr David Blunt, recently published a paper entitled 'A Parliamentary Commissioner for Standards for New South Wales?', which discussed limitations in the current arrangement for dealing with complaints about the conduct of members of Parliament in New South Wales, detailed the operation of the UK model of a Parliamentary Commissioner for Standards, and suggested how the UK model could be adopted in New South Wales. This paper is available on the website of the Legislative Council under the link 'Articles on the Council'.

¹ ICAC, Regulation of secondary employment for Members of the NSW Legislative Assembly, Report to the Speaker of the Legislative Assembly, September 2003, pp 16-17.

² Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, Regulation of Secondary Employment for Members of the NSW Legislative Assembly, September 2004, p 31.

³ McClintock B, Independent review of the Independent Commission Against Corruption Act 1988, Final Report, January 2005, p 87.

The United Kingdom Parliamentary Commissioner for Standards model

- 1.9 As indicated, a possible model for a ‘parliamentary investigator position’ in New South Wales is the UK Parliamentary Commissioner for Standards model.
- 1.10 In the UK House of Commons, the Office of the Parliamentary Commissioner for Standards deals with the application of the Code of Conduct and related rules that apply to members of the British Parliament. This includes the registration of financial interests held by MPs and the investigation of complaints about MPs who have allegedly breached the Code of Conduct or related Rules. Functions of the Commissioner include:
- Providing advice on a confidential basis to individual members and to the Select Committee on Standards about the interpretation of the Code of Conduct and Guide to the Rules relating to the Conduct of Members.
 - 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 and Guide to the Rules. In dealing with complaints about the conduct of members of Parliament, less serious matters are generally dealt with in a timely manner through “rectification” and “reimbursement” and apology.
- 1.11 The work of the Parliamentary Commissioner for Standards is overseen by the Committee on Standards, which is appointed by the House of Commons. The Committee receives reports of the Commissioner, and makes recommendations to the House of Commons on the findings of the Commissioner, particularly in relation to more serious matters.
- 1.12 The House of Lords has similarly appointed a Commissioner for Standards. The Lords Commissioner has a similar role to the Commons Commissioner in respect of complaints, and reports to a sub-committee of the Committee on Privileges and Conduct, which fulfills a similar role to the House of Commons Standards Committee.

Other models

- 1.13 The Legislative Assembly Privileges and Ethics Committee has previously reported on ethics regimes in other jurisdictions including the Canadian federal and provincial parliaments, and Commissioners in Scotland and Wales.

Submissions sought

- 1.14 The Legislative Council Privileges Committee and Legislative Assembly Privileges and Ethics Committee seek submissions on the merits or otherwise of changing the current arrangements for regulating the conduct of members of Parliament. The Committees are interested in parliamentary investigator models in other jurisdictions.