



REPORT OF THE PRIVILEGES COMMITTEE
DRAFT CONSTITUTION (DISCLOSURES BY MEMBERS) REGULATION 2024 (REPORT 96,
SEPTEMBER 2024)
GOVERNMENT RESPONSE

On 8 February 2024, the Legislative Council referred the draft Constitution (Disclosures by Members) Regulation 2024 (**Draft Regulation**) to the Privileges Committee for inquiry and report.

The Government prepared the Draft Regulation to implement recommendations of the Independent Commission Against Corruption (ICAC) in its July 2022 report *Investigation into the conduct of the local member for Drummoyne*, following an investigation known as 'Operation Witney'.

The Privileges Committee tabled its report on 2 September 2024. Enclosed is a table which details the Government's response to each of the Privileges Committee's twelve recommendations, nine of which are directed to the Government.

The Government acknowledges the Privileges Committee's broad support of the reforms proposed in the Draft Regulation.

The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics Committee also inquired into the Draft Regulation and made recommendations in Report 3/58 (August 2024). The recommendations of the Privileges Committee and the Parliamentary Privilege and Ethics Committee are inconsistent. There is disagreement between the Committees of each House with respect to proposals in the Draft Regulation to require Members of Parliament to register conflicts of interest and disclose the interests of their immediate family members.

The Government understands that the Chairs of the Privileges Committee and the Parliamentary Privilege and Ethics Committee are consulting with the Chief Commissioner of the ICAC, the Hon John Hatzistergos AM, regarding these matters.

Given the significance of the Draft Regulation for Members, the disagreement between the Privileges Committee and the Parliamentary Privilege and Ethics Committee and the further discussions taking place between the ICAC and the Chairs, the enclosed table advises of options that the Government is considering taking in response to certain recommendations.

A copy of the Government's response to the Parliamentary Privilege and Ethics Committee's report will also be provided to the Privileges Committee when provided to that Committee.

The Government wishes to thank the Privileges Committee for its engagement on this important integrity reform to enhance Parliamentary transparency and accountability.

Privileges Committee Report 96, September 2024 ‘Constitution (Disclosures by Members) Regulation 2024’

	COMMITTEE RECOMMENDATION	GOVERNMENT RESPONSE
1.	<p>That section 15 of the Draft Constitution (Disclosures by Members) Regulation 2024 be amended to only require conflicts of interest of a pecuniary nature to be declared.</p> <p>That members consider their obligations under the Members’ Code of Conduct regarding conflicts of interest and ensure they make discretionary disclosures when a conflict of interest of a non-pecuniary nature is relevant to their public duties.</p>	<p>Summary of response</p> <p>The Government will carefully consider alternative means of addressing the concerns raised by the Privileges Committee regarding the disclosure of conflicts of interest, including options for a confidential register proposed by the Committee in recommendation 10.</p> <p>Response</p> <p>If made, clause 15 of the draft Constitution (Disclosures by Members) Regulation 2024 (Draft Regulation) would require Members of Parliament 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.</p> <p>The Government notes the Privileges Committee’s view that the proposal is too broad, lacking specific detail on disclosure requirements, and is more transparent than the arrangements applying to Ministers declaring conflicts of interests under the NSW Ministerial Code of Conduct (Ministerial Code). The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics Committee raised similar concerns in its report (Report 3/58, August 2024) regarding the Draft Regulation.</p> <p>However, the Government notes that the Independent Commission Against Corruption (ICAC) indicated in its submission to the Privileges Committee’s inquiry its view that the “proposed definition of a conflict of interest is clear, consistent and comprehensive”.</p> <p>The Government also notes that Members of Parliament disclose conflicts of interests in other Australian jurisdictions (the Commonwealth, Queensland, Victoria, and South Australia). The disclosure requirements in these jurisdictions are similar to those proposed in clause 15 of the Draft</p>

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		<p>Regulation. Conflicts of interest disclosed by Members of Parliament in these jurisdictions are broadly comparable to the discretionary disclosures currently made by Members of the NSW Parliament.</p> <p>The proposed disclosure requirements would apply to all Members of Parliament, including Ministers in their capacity as Members of Parliament. The confidential Ministerial Register of Interests supports the avoidance and management of potential conflicts of interest by the Premier and the Cabinet, including during confidential deliberations of Cabinet. Confidentiality may be less relevant in respect of a register that supports the avoidance and management of potential conflicts of interest during Parliamentary proceedings conducted in public.</p> <p>In respect of the Privileges Committee’s proposal to only require conflicts of interest of a pecuniary nature to be declared, the Government notes that the NSW Court of Appeal affirmed in the recent decision of <i>Berejiklian v Independent Commission Against Corruption</i> [2024] NSWCA 177 that conflicts of interest are not only created by narrow financial interests; they can be caused by any private interest.</p> <p>Non-pecuniary conflicts of interest can lead to corrupt conduct and the commission of criminal offences. Only requiring the disclosure of pecuniary conflicts of interest may cause confusion by implying that non-pecuniary conflicts are less serious.</p> <p>The Government will carefully consider alternative means of addressing the concerns raised by the Privileges Committee regarding the disclosure of conflicts of interest, including options for a confidential register proposed by the Committee in recommendation 10.</p>
2.	That once the Draft Constitution (Disclosures by Members) Regulation 2024 takes effect, the Department of the Legislative Council update the Members' Guide to reflect the relevant provisions relating to conflicts of interest.	This recommendation is directed to the Department of the Legislative Council.

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3.	That once the Draft Constitution (Disclosures by Members) Regulation 2024 takes effect, the NSW Parliament amend the Commentary of the Members' Code of Conduct to ensure that is consistent with the provision of mandatory disclosure of conflicts of interest.	This recommendation is directed to the NSW Parliament.
4.	That once the Draft Constitution (Disclosures by Members) Regulation 2024 takes effect, the Clerk of the Legislative Council consult with the Independent Commission Against Corruption to enhance the conflict of interest framework, with a view to develop guidance materials and examples for members to appropriately disclose and manage their conflicts of interest.	This recommendation is directed to the Clerk of the Legislative Council.
5.	<p>That the Draft Constitution (Disclosures by Members) Regulation 2024 be amended to set out a process for members to follow:</p> <ul style="list-style-type: none"> • when unable to obtain the information required for disclosures of interests of immediate family members, and for this to be reflected on the public register, • that takes into account the potential for relationship breakdowns and separation to limit the ability of a member to disclose interests of immediate family. 	<p>If made, the Draft Regulation would require Members of Parliament to disclose the interests of their immediate family members.</p> <p>The Government acknowledges the practical difficulties identified by the Privileges Committee where a Member is unable to obtain information from an immediate family member, particularly in complex and sensitive situations such as relationship breakdown.</p> <p>The interaction of relationship breakdown with the proposed disclosure requirements in the Draft Regulation was also a concern of the Parliamentary Privilege and Ethics Committee (Finding 6 of Report 3/58).</p> <p>The Government is considering options to respond to these concerns, including amending the Draft Regulation to enable Members to make a declaration that they have taken all reasonable steps to obtain information (as contemplated by the Privileges Committee in its report).</p>

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6.	<p>That the Draft Constitution (Disclosures by Members) Regulation 2024 be amended so that members who are a member of a public superannuation fund are only required to declare the name of the fund, not the interests held by that fund.</p>	<p>Summary of response</p> <p>The Government will consider options to amend the Draft Regulation to implement recommendation 6, while requiring the disclosure of interests in a public superannuation fund where a Member has elected to invest in a particular asset or asset class.</p> <p>Response</p> <p>Clause 11 of the Draft Regulation proposes requiring Members to disclose each trust in which the Member or an immediate family member of the Member:</p> <ul style="list-style-type: none"> • has a beneficial interest, including a mere expectancy as a beneficiary of a discretionary trust, or • is a trustee. <p>Subclause 11(4) provides that, to avoid doubt, trusts that are superannuation funds, whether public or self-managed, and listed investment trusts must be disclosed under clause 11.</p> <p>Clause 11(2) provides that the following information must be disclosed about the trust:</p> <ul style="list-style-type: none"> • the name of the trust • a description of the activities of the trust • the nature of the interest the Member or immediate family member has in the trust • the interests held by the trust, including interests in real property and investments. <p>The Government will consider options to amend the Draft Regulation to implement recommendation 6, while requiring the disclosure of interests in a public superannuation fund where a Member has elected to invest in a particular asset or asset class.</p>

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7.	<p>That either section 6 or 19 of the Draft Constitution (Disclosures by Members) Regulation 2024 be amended to clearly state that the obligation to disclose the disposition of an interest by a member does not extend to the disposition of an interest by an immediate family member, except where the member themselves benefit from such disposition.</p>	<p>Clause 19 of the Draft Regulation proposes requiring Members to disclose particulars of the disposition of each interest that would otherwise be required to be disclosed under the 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.</p> <p>Clause 19 is not intended to require Members to disclose the particulars of the disposition of interests by the Member's immediate family members.</p> <p>The Government will consult with the Parliamentary Counsel's Office regarding drafting changes to clarify the intent of clause 19.</p>

8.	That sections 9 and 20 of the Draft Constitution (Disclosures by Members) Regulation 2024 be amended to ensure consistency with the prohibition on paid advocacy in clause 2(a) of the Members' Code of Conduct.	<p>Summary of response</p> <p>The Government agrees that requiring conduct to be disclosed under clause 20 of the Draft Regulation that is now prohibited by the Legislative Council Members' Code of Conduct and the Legislative Assembly Code of Conduct for Members (Members' Codes of Conduct) is unnecessary.</p> <p>The Government will amend the Draft Regulation to omit clause 20 and clause 9 (a consequential interpretation provision).</p> <p>Response</p> <p>Clause 20 of the Draft Regulation substantively remakes clause 15A of the <i>Constitution (Disclosures by Members) Regulation 1983 (Current Regulation)</i>, which requires Members to disclose if they have been engaged to provide any service that involves use of the Member's parliamentary position.</p> <p>Clause 15A was inserted into the Current Regulation in 2007. At that time, the Members' Codes of Conduct prohibited paid advocacy by Members in Parliament or its committees, but did not generally prohibit Members from engaging in paid advocacy with public officials. The policy intent of clause 15A was to deter Members from engaging in this conduct by requiring disclosure.</p> <p>The Houses adopted new Members' Codes of Conduct in 2020 containing new clause 2(c), prohibiting a Member from knowingly and improperly using 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 officer of a public body, to further, directly or indirectly, the private interests of the Member, a member of the Member's family, or a business associate of the Member.</p> <p>The Government agrees that requiring conduct to be disclosed under clause 20 of the Draft Regulation that is now prohibited by the Members' Codes of Conduct is unnecessary.</p> <p>As a result, the Government will amend the Draft Regulation to omit clause 20 and clause 9 (a consequential interpretation provision) in accordance with the ICAC's submission to the Privileges Committee on this matter and to deal with the Committee's recommendation.</p>
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9.	That the transitional arrangements in the new regulation ensure that the date required for the first interest disclosure by members in the 57th Parliament be at least six months from the lodgement date of the last return required under the old regulation.	The Government will amend clause 30 of the Draft Regulation to ensure appropriate transitional arrangements, noting that the arrangements proposed by the Privileges Committee appear appropriate, given the practical difficulties that the Committee has identified.
10.	That the Draft Constitution (Disclosures by Members) Regulation 2024 be amended to incorporate a separate and confidential conflicts of interest register for members, including for the interests of their immediate family members.	<p>Summary of response</p> <p>The Government is carefully considering options to respond to the concerns raised by Privileges Committee and the Parliamentary Privilege and Ethics Committee.</p> <p>Response</p> <p>Subsection 14A(1A) of the <i>Constitution Act 1902</i> requires that the registers of disclosure be accessible by members of the public, subject to any limitations prescribed by the regulations to protect the privacy of persons other than Members, or the safety of a person or class of persons.</p> <p>Consistent with this requirement, 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, or the safety of a person. Clause 26 of the Draft Regulation provides for the “complete” (unredacted) registers to be available for inspection by a Member or an officer of the ICAC.</p> <p>The Government acknowledges the Privileges Committee’s concerns regarding the privacy and safety of disclosed information under the Draft Regulation, particularly in respect of the interests of Members’ immediate family members. The Privileges Committee has also identified issues about the storage and deletion of information obtained under the Draft Regulation that require careful consideration.</p> <p>As the Privileges Committee has acknowledged in its report, there are varying approaches to the publication of the interests of family members in other Australian jurisdictions. The Commonwealth Senate provides that the registerable interests of a Senator’s spouse, partner or any dependent</p>

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		<p>children are confidential to the Committee of Senators' Interests. In Queensland, the Register of Related Persons' Interests may only be inspected by certain Members (the leader of a political party and members of the Ethics committee) and integrity agencies. Other jurisdictions that require Members of Parliament to disclose the interests of immediate family members – that is, the Commonwealth House of Representatives, South Australia, and Tasmania (which requires the disclosure of the interests of spouses but not children) – do not restrict access to disclosures in this way. The matters required to be disclosed, and the accessibility of the published registers, also vary in each Australian jurisdiction.</p> <p>The Government is not aware of an Australian jurisdiction that specifically registers the conflicts of interest of Members of Parliament (distinct from the interests of their family members) on a confidential register, noting that Parliamentary proceedings are conducted in public.</p> <p>The Government notes that the Interest Disclosure Return Form (Schedule 1 to the Draft Regulation) does not require the names of immediate family members to be disclosed (unless the person is the settlor of a trust from which disclosable income is received, which is an existing requirement of the Current Regulation).</p> <p>The Draft Regulation provides for the disclosure of a principal or secondary place of residence by suburb or area as an alternative to disclosing the address of the property. Recommendation 3 of the Parliamentary Privilege and Ethics Committee's Report 3/58 was that these arrangements be extended to investment properties.</p> <p>Report 3/58 of the Parliamentary Privilege and Ethics Committee makes the following recommendations to the Government with respect to proposals in the Draft Regulation to require Members to register conflicts of interest and disclose the interests of their immediate family members:</p> <ul style="list-style-type: none"> the Draft Regulation should not require the disclosure by Members of Parliament of pecuniary interests and other matters relating to the immediate family members of Members (recommendation 2)

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		<ul style="list-style-type: none"> the Draft Regulation should not include a mandatory register of conflicts of interest (recommendation 5) the Committee advises the Government that it should not proceed with aspects of the Draft Regulation requiring Members of Parliament to disclose the interests of immediate family members and for mandatory disclosure of conflicts of interest (recommendation 7). <p>Page 36 of the Parliamentary Privilege and Ethics Committee’s report provides that if the Government were to proceed with these proposals, “the confidential register maintained by the Australian Senate would be a much better way of dealing with the safety and privacy of persons other than members” than clause 25(2) of the Draft Regulation.</p> <p>The Government is carefully considering options to respond to the concerns raised by Privileges Committee and the Parliamentary Privilege and Ethics Committee.</p>
11.	That the Privileges Committee take on a role similar to the Senators' Interests Committee in the Australian Senate and consider access to the confidential register of interests, which contain the declarations of family members' interests, on a case-by-case basis.	<p>The Government will carefully consider this recommendation, should the Government determine to amend the Draft Regulation to implement the confidential register proposed by the Privileges Committee in recommendation 10.</p> <p>The Government notes that, should a confidential register be introduced, it would be important to ensure that officers of the ICAC, and potentially other persons performing integrity functions, had direct access to the register.</p>
12.	That the Draft Constitution (Disclosures by Members) Regulation 2024 or a resolution of the House specify the consequences for a member who breaches the confidentiality of another member's disclosures that have been listed on a confidential register of interests.	<p>The Government will carefully consider this recommendation, should the Government determine to amend the Draft Regulation to implement the confidential register proposed by the Privileges Committee in recommendation 10.</p> <p>The Government notes that, should a confidential register be introduced, it would be important to ensure that officers of the ICAC, and potentially other persons performing integrity functions, had direct access to the register.</p>

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