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MINISTERIAL PROPRIETY IN QUEENSLAND

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Queensland Integrity Commissioner

1. INTRODUCTION

1.1 Abstract

There are many methods used throughout the world which seek to ensure that Ministers meet the community's legitimate behavioural expectations. Mechanisms such as Parliamentary Standards Commissioners, Anti-Corruption Commissions and the like frequently have preventive and educative functions, but are sometimes seen to focus principally on standard setting; investigation; and correction when the standards are not met.

This paper will describe some practical ways of helping Ministers to act with propriety. The Queensland Integrity Commissioner is one of the few established mechanisms whose principal object is to assist Ministers to meet community expectations. The Commissioner provides confidential guidance about how Ministers should meet the legal, code of conduct and other obligations which bind them in their day to day work.

The Commissioner's work takes place in an environment which includes many other integrity mechanisms, including an anti-corruption commission; registration of lobbyists; logging of lobbyist contacts; requirements for declarations of interests; the publication of Ministerial diaries; and the recording of political donations.

A strategic review of the Commissioner's work is required under the *Integrity Act 2009* (Qld.), and has recently been completed.

The paper will assess the outcomes of that strategic review in a context of helping Ministers to do the job which they are elected to do.

1.2 The NSW Parliamentary Select Committee Report - *Ministerial Propriety in NSW*

A NSW Parliamentary Select Committee[1] on Ministerial propriety was established in August 2013 as a result of the findings of various investigations by the Independent Commission Against Corruption (**NSW ICAC**). The Select Committee's report[2] was tabled on 24 February 2015.

This paper seeks to compare the approaches to ensuring ethical standards in decision-making by Ministers proposed by the NSW Select Committee report, with the existing arrangements in Queensland.

The NSW Select Committee report canvassed various issues relating to ministerial propriety including ministerial responsibility to Parliament, measures to reduce potential conflicts of interest on the part of ministers, and the operation and enforcement of the lobbying regulatory scheme. The last two issues are also the particular focus of the *Integrity Act 2009* (Qld.), which establishes the office of Queensland Integrity Commissioner.

The NSW report made three recommendations. First, it recommended that the NSW Government bring forward legislation to implement a Commissioner for Standards model, as recommended in the Legislative Council Privileges Committee report entitled *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator.*[3]

Second, it recommended that the NSW Government require the publication of ministerial diaries online at least monthly.

Third, it recommended that the NSW Electoral Commission monitor the implementation of the *Lobbying of Government Officials Act 2011* and the Register of Third Party Lobbyists and undertake a review in 2016 to consider ways of further strengthening the lobbying scheme.

This paper will consider each of those three recommendations in the context of experience in Queensland.

2. THE *INTEGRITY ACT 2009* (Qld) IN OUTLINE

Under the *Integrity Act 2009* (Qld.), the Queensland Integrity Commissioner has two distinct roles: providing advice to designated persons, and maintaining the Queensland Register of Lobbyists.

[1] Parliament of New South Wales, Select Committee on Ministerial Propriety in New South Wales. The Committee Chair was the Hon Robert Borsak MLC.
[2] Parliament of New South Wales, Select Committee on Ministerial Propriety in New South Wales, *Ministerial Propriety in New South Wales*, Ordered to be printed 24 February 2015 according to Standing Order 231.
[3] This report, which was ordered to be printed on 12 June 2014, is available at http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/BE82C4A379E68B3CCA257CF50006F14E?open&refnavid=CO4_1, retrieved on 20 October 2015.

2.1 Advice on ethics and integrity issues

The term 'ethics or integrity issue' is simply defined as 'an issue concerning ethics or integrity and includes a conflict of interest issue'.[4] Commonly, advice has covered a range of other operational agency matters, as well as more personal issues such as:

- post separation employment
- personal investments and/or relationships
- appointments and membership of organisations
- travel and allowances
- gifts and benefits
- letters of support.

People who are 'designated' under the *Integrity Act 2009* are able to ask for advice from the Integrity Commissioner about an ethics or integrity issue. These people are:

- the Premier and Ministers
- Parliamentary Secretaries
- all MPs
- statutory officers
- chief executives
- senior executives
- senior officers in government entities
- other officers who have been nominated.

The whole process of seeking and giving advice is confidential, and the Integrity Commissioner may not make public the name of a designated person who has sought advice, or the advice that was given. The *Right to Information Act 2009* (Qld.) does not apply to the integrity functions of the Integrity Commissioner.[5]

However, a person who has sought advice may disclose it to anyone, and may make it public. Consequently, designated persons tend to seek advice as a form of insurance or protection against the risk of public criticism for sensitive matters.

The Integrity Commissioner may also meet with and give advice to MPs on ethics and integrity issues in relation to their declarations of interests. However, the principal responsibility for the maintenance of the Register of Members Interests sits with the Registrar, who is the Clerk of the Parliament.[6]

The Integrity Commissioner does not provide legal advice.

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[4] *Integrity Act 2009*, s.9(1).
[5] See *Right to Information Act 2009*, schedule 1, s. 6.
[6] See Chapter 4, Part 2A of the *Parliament of Queensland Act 2001*.

2.2 Regulation of Lobbyists

The integrity Commissioner's second responsibility is to administer the lobbyists register, and to monitor the interaction of lobbyists with government and local government. This is done through a code of conduct made under the *Integrity Act 2009*,[7] and a publicly accessible register of lobbyist contacts with government and Opposition representatives kept on the Integrity Commissioner website.

2.2.1 The limited definition of 'lobbyist'

The *Integrity Act 2009* rules and the lobbyist code of conduct only apply to entities acting for reward on behalf of a third party, who are seeking to influence a government decision. They do not extend to contact such as making arrangements preparatory to a meeting.

The Act's regulatory scheme excludes in-house lobbyists or employees, industry associations, non-profit entities, and professions such as lawyers or accountants who undertake lobbying as an incidental activity.

However, a recent strategic review of the office of the Integrity Commissioner has recommended that 'the definition of lobbyists should be expanded to include regulation of in-house lobbyists and other professionals discharging the lobbying function'.[8] The Finance and Administration Committee of the Queensland Parliament is currently conducting an inquiry into this report.

The paper will return below to the subject of the proposed expansion of the definition.

2.2.2 Scope of obligations

Lobbyists must ensure that they are registered as such,[9] and must comply with the lobbyist code of conduct.[10] The code requires that they must provide the Integrity Commissioner with information about each and every lobbying contact undertaken by them, by filing it directly onto the Integrity Commissioner's website no later than 15 days after the end of every month.[11]

Under the code of conduct, lobbyists are required to inform representatives of their lobbyist status when initially seeking to meet with them. That is, they must confirm that they and their client are on the register, and must advise the nature of the matter they want to raise on behalf of their client.[12]

Former senior government representatives must not lobby in an area in which they have had official dealings as a government representative in the two years before they leave a government position.

This requirement applies for two years after they leave their government position. A further requirement is that they must advise the government representatives with whom they meet of the restrictions on their activities.

A government or Opposition representative must not knowingly permit an entity that is not a registered lobbyist to carry out a lobbying activity for a third party client.[13]

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[7] See Lobbyists Code of Conduct made under s.68 of the *Integrity Act 2009*, available at http://www.integrity.qld.gov.au/publications/legislation-code-of-conduct.aspx, retrieved on 20 October 2015.
[8] *Strategic Review of the Functions of the Integrity Commissioner – Final report*, Professor Peter Coaldrake, 8 July 2015, Recommendation 7.
[9] See *Integrity Act 2009*, Part 2, ss.48- 66A.
[10] See *Integrity Act 2009,* s.68(5).
[11] See Lobbyists Code of Conduct, paragraph 4.
[12] See Lobbyists Code of Conduct, paragraph 3.2.
[13] See *Integrity Act 2009,* s.71(2).

2.2.3 Sanctions for breaches

The Integrity Act provides that under various circumstances the Integrity Commissioner may refuse to register a lobbyist or may remove a lobbyist from the register. The consequence of not being on the register is that the lobbyist may not have contact with a government or local government representative for the purpose of lobbying.

2.3 Strategic review of the *Integrity Act 2009* (Qld.)

As noted above, a strategic review of the functions of the Integrity Commissioner has recently been conducted. The conduct of the review was a statutory obligation.[14]

3. THE OBLIGATIONS OF MINISTERS

When I first started work in the public sector in the distant past, I remember being impressed by a book co-authored by Professor Patrick Weller and Michelle Grattan. It was titled *Can Ministers Cope?*[15]

Five years ago, Professor Weller co-authored another book about Ministers, this time with Dr Anne Brennan. It was titled *Learning to be a Minister: Heroic Expectations, Practical Realities*.[16]

I think those are both instructive titles. We ask a lot of Ministers, and from my observations over the years – from a safe distance - it's not an easy job. Whilst we should have high expectations of Ministers, we should also be ensuring that reasonable assistance is provided to them.

3.1 Ministers as members of Parliament

It's important to distinguish between two roles (amongst others) which Ministers perform. In doing so this paper will focus particularly on how they manage conflicts of interest, but the same principles apply in respect of other integrity issues – the receipt of gifts, for example.

Under the Westminster system, Ministers are members of Parliament. In this capacity they have an obligation to represent their electors, and that requires that they should have strong ties to their communities. They need to stay in touch, and are encouraged to foster their involvement with community organisations of various types, be that a football club, a parents' association, or a local chamber of commerce.

This involvement means that they will have what might be called personal community interests, and that's a good thing. But it also means that these interests will sometimes conflict with their public duty to make decisions on behalf of all their electors – including supporters of opposing football clubs, for example.

Of course members of Parliament are also citizens in their own right, and they have private interests as well as the personal community ones. Private interests can conflict with their public duties as members too.

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[14] See *Integrity Act 2009*, Chapter 6, ss.86-88.
[15] Patrick Weller and Michelle Grattan, *Can Ministers Cope?*, Hutchinson, 1981.
[16] Anne Tiernan and Patrick Weller, *Learning to be a Minister: Heroic Expectations, Practical Realities*, Melbourne University Press, 2010.

Parliaments have their own rules about how to manage these conflicts.[17] These rules apply to Ministers in the same way as they apply to any other member, and this is entirely appropriate given that in this capacity Ministers have the same influence as any other member. They have one vote on the floor of the House, and this must be exercised in a public way.

To digress slightly, Members are often effectively bound by party discipline, and it is a moot point how much personal judgement they actually exercise in this case. It has certainly been put to me that a party position can be a factor ameliorating an allegation that a member has acted inappropriately in a conflict of interest situation, because a significant element of personal decision-making is thereby removed.

But a member has specific obligations to declare interests, and abstain from voting where they have such an interest.

First, under the Queensland Parliamentary rules, on taking their seat members must disclose their personal interests on the publicly accessible Register of Members' Interests.[18] They are obliged to lodge and update statements of interests with the Registrar, which must cover the interests of members and 'related persons', i.e. spouses and dependents of members.

Second, the Standing Orders[19] deal with members' obligations when a relevant matter comes before the House or one of its committees.

In Queensland, Standing Order 259(1) provides:

> No member shall be entitled to vote in any division upon a question (not being a matter of public policy) in which they have a direct pecuniary interest, not held in common with the rest of the subjects of the Crown.

Standing Orders 260 – 262 require the declaration of pecuniary interests in Parliamentary and committee proceedings. Further, Standing Order 261 casts an apparently wide obligation on Members in respect of the declaration of other non-pecuniary conflicts of interest in committee proceedings.

3.2 Ministers as members of the executive

But it is the special Ministerial capacity of some members of Parliament which is of particular interest in this paper.

There are several reasons which make Ministers a special case for ethical consideration, above other members of Parliament. Fleming and Holland[20] identify that these start with the extent of power exercised by Ministers, but they also identify a further seven:

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[17] See the Legislative Assembly of Queensland, *Code of Ethical Standards*, effective from September 2004 (amended 11 May 2009), available at http://www.parliament.qld.gov.au/work-of-assembly/procedures, retrieved on 3 November 2015.

[18] See Chapter 4, Part 2A of the *Parliament of Queensland Act 2001*.

[19] See Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly*, effective from 31 August 2004 (amended 17 July 2015), p60, available at http://www.parliament.qld.gov.au/work-of-assembly/procedures, retrieved on 3 November 2015.

[20] Jenny Fleming and Ian Holland, Chapter 1, *The Case for Ministerial Ethics*, in Jenny Fleming and Ian Holland, Key Centre for Ethics, Law, Justice and Governance, Griffith University, *Motivating Ministers to Morality*, Ashgate Dartmouth, 2001, p6.

1. The protective power of Cabinet convention, which means that Ministerial decisions, mistakes and errors of judgement may be protected by Cabinet secrecy; and they are exempted from the transparency obligations under the Right to Information Act
2. As heads of their departments, Ministers have access to confidential public sector files; privileged information; and expert advice
3. Ministers are particularly likely to be subject to lobbying and lobbyists
4. Ministers' access to opinion leaders and interest groups exposes them to risks, and provides fertile ground for potential conflicts of interest and unethical behaviour
5. Ministers exercise very broad discretions. As the NSW ICAC has observed, 'a high level of delegated authority, significant autonomy and routine exercise of wide discretion puts public officials at a greater risk of exposure to corruption'[21]
6. Minister select people for public office. This has its own risks of nepotism
7. Ministers have the support of a distinctive staff cohort whose functions and employment relations set them apart from the public service.

Of those factors, in my view it is particularly significant that Ministerial decisions frequently are taken within the protections of Cabinet, and often are subject to exemptions under Right to Information laws. There is less inherent transparency associated with Ministerial decisions than with decisions made by other members of Parliament.

It is not unexpected, then, that the ethical obligations of Ministers should be different from other members of Parliament. In recent times this has led to pressure for their codification, and many jurisdictions have now established Ministerial codes of conduct.

The Westminster convention of individual Ministerial responsibility is the starting point in what has been termed 'motivating Ministers to morality', in both their personal behaviour and their departmental roles.[22] It provides the mechanism by which Ministers account to Parliament for their own actions and for those of their departments. In extreme circumstances, it may impose the requirement of resignation.

This paper will put to one side the debate about the extent to which Ministers should accept consequential or vicarious responsibility for the errors of their officials, and the relevance of the policy/operational division in that respect. It is concerned here with personal shortcomings on the part of Ministers.

It is well established that the convention of Ministerial responsibility applies to the situation in which there is some personal or causal responsibility on the part of a Minister for the situation which has arisen. Examples could involve an error of judgement of a pecuniary nature, financial impropriety or the improper use of office.

But there have been numerous examples of how conventions of collective and individual ministerial responsibility in Westminster systems have been ignored, and Ministers have not had to answer for breaches of those conventions.[23]

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[21] Independent Commission Against Corruption (NSW), *Investigation into Parliamentary and Electorate Travel:* First, Second and Third Reports, 1998-99.

[22] Diana Woodhouse, Chapter 4, *The Role of Ministerial Responsibility in Motivating Ministers to Morality*, in Fleming and Holland, op. cit., p.37.

[23] See the examples cited in Woodhouse, op. cit., at pp38-48.

In this context, what has also proved problematic is the extent of the misdoing which warrants sanction, and hence the various attempts to particularise the necessary standards that are found in the Ministerial codes of conduct.

3.3 Current mechanisms for maintaining Ministerial standards in Queensland

3.3.1 The political context

Let me start with a quote from Professor Diana Woodhouse, to make what I believe is a salutary point:

> If Ministers are to be motivated to act in accordance with constitutional morality, political and constitutional requirements need to coincide. It is a rare Minister who resigns while retaining political support.[24]

There is little doubt that the standards of behaviour required of Ministers essentially are determined by the attitude and direction set by the head of the government, and thus leadership from the top is – and in my view, should be - determinative.

However, there are three other mechanisms which warrant consideration.

3.3.2 Policing – The Crime and Corruption Commission

First, there is one qualified exception to the general rule that a minister's future rests entirely with the head of government. Where a Minister is suspected of misbehaving, an essential starting point is having robust complaint and investigation systems in place.

In Queensland, this function is fulfilled by the Crime and Corruption Commission (**CCC**) operating under the *Crime and Corruption Act 2001*. The Commission assumes jurisdiction where it suspects that 'corrupt conduct'[25] has occurred, but there is no necessary linkage to the Premier's dissatisfaction with a Minister's performance, nor to a suspected breach of the Ministerial code of conduct.

By contrast, in New South Wales, a new Ministerial code of conduct[26] was introduced in September 2014 as an appendix to the *Independent Commission Against Corruption Regulation 2010*. The regulation now prescribes the code as an applicable code of conduct for the purpose of the *Independent Commission Against Corruption Act 1988*. This means that a substantial breach of the Ministerial Code can constitute corrupt conduct in NSW.[27]

It doesn't follow that a finding by NSW ICAC is necessarily self-executing, and indeed the NSW code itself provides that the Premier is to determine sanctions.[28] However, a cursory perusal of the record suggests that an adverse finding by NSW ICAC is likely to lead to a fairly short Ministerial life expectancy, even if the Premier retains the discretion to decide.

There is no such direct link between the Ministerial Code of Conduct and the Crime and Corruption Commission in Queensland. Whilst conduct which breaches the Ministerial Code may amount to

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[24] Woodhouse, op. cit., p40.
[25] See the definition of 'corrupt conduct' in s.15(1) of the *Crime and Corruption Act 2001*.
[26] See *Independent Commission Against Corruption Regulation* 2010 (NSW), Reg. 4A and Appendix 1 NSW Ministerial Code of Conduct.
[27] See *Independent Commission Against Corruption Regulation* 2010 (NSW), Reg. 4A; and Select Committee on Ministerial Propriety in New South Wales, *Ministerial Propriety in New South Wales*, Ordered to be printed 24 February 2015 according to Standing Order 231, paragraph 2.15.
[28] See Item 26 of Schedule 1 to the NSW Ministerial Code of Conduct.

corrupt conduct, it does not follow that any breach of the code would be required to be reported to the CCC for investigation.

Following amendment to its legislation in 2014, the CCC no longer has an explicit education and prevention role in relation to its corruption function.[29]

3.3.3 The Queensland Ministerial Code of Conduct

The second mechanism is the Ministerial Code of Conduct [30]. In Queensland, the code of conduct and ethical obligations on Ministers are different from, and tougher than, those applying to members of Parliament - which is as it should be. As I have said, elected representatives need to maintain their links to their communities, and their vote is unlikely to be as significant as the exercise of Ministerial discretion.

In the present context the section of the code headed 'Conflicts of interest' is particularly relevant. Ministers' obligations under the Ministerial Code include five specific obligations:

1. They must manage real, perceived and potential conflicts of interest
2. They must resign or decline memberships of boards of public companies, and declare memberships of any private companies
3. They must divest any shareholding in any company in respect of which a conflict exists or could reasonably be perceived to exist; and they must not divest that shareholding to a related person or close associate
4. They must advise the Premier in writing that they and their related persons have no other pecuniary or other interests that might affect their responsibilities
5. If a conflict arises, and if it relates to a matter before Cabinet, they must declare and withdraw from the Cabinet meeting.

Under the code, the Integrity Commissioner is required to conduct 'random checks' of Ministerial compliance, and to meet once a year with Ministers 'to discuss their compliance'.[31]

The Integrity Commissioner's advice function is not focused just on Ministers, but this is an important part of the job given the obligations under the code. In addition, the Integrity Commissioner may, on request, provide advice to the Premier on standard setting for ethics or integrity issues.[32]

The practical reality is usually that given the demands on Ministers it is not until an issue arises that advice is sought. Ministers need advice to deal with integrity issues in the same way as they deal with any other issue, and the utility of anything other than broad educative or preventive advice is therefore questionable.

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[29] See s.33 of the *Crime and Corruption Act 2001*, as amended by the *Crime and Misconduct and Other Legislation Amendment Act 2014*.

[30] Ministerial Handbook published by the Department of Premier and Cabinet, p.63, Appendix 1, *Ministerial Code of Conduct*, available at http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/assets/ministerial-handbook.pdf. , viewed on 2 November 2015.

[31] See p5 of the code, *Random Checks by the Integrity Commissioner*.

[32] See *Integrity Act 2009,* s.16(b).

The Integrity Commissioner has no investigative powers, and no ability to respond to complaints about Ministerial behaviour. This is the responsibility of the normal complaint and law enforcement bodies including the CCC, the Ombudsman and Queensland Police.

The Ministerial code specifies that the Integrity Commissioner will advise the Premier of any unresolved issues concerning Ministers' interests, but beyond this is silent as to any sanctions which may apply in the event of a breach. Although it is common for codes of ministerial conduct – including the Queensland one[33] - to relate the responsibility of ministers to parliament for their departments, they rarely articulate the conventional requirement for resignation.[34]

In this respect, the Queensland Ministerial code, like others, is not self-enforcing. The codes are essentially aspirational statements, which show no inclination to alter the traditional position that the decision on whether a Minister should resign or be sanctioned rests wholly with the head of government.

In Queensland, this position is reinforced by the fact that the *Integrity Act 2009* imposes a strict confidentiality regime on the Commissioner. [35] The Integrity Commissioner cannot disclose any Ministerial non-compliance with the code, other than to the Premier where:

- The Premier asks for a copy of the document; or
- The Integrity Commissioner reasonably believes the designated person has an actual or perceived, and significant, ethics or integrity issue, which has not been resolved within 5 days of the Integrity Commissioner giving written advice of the issue to the designated person.[36]

4.4.4 *Publication of Ministerial diaries*

Since 1 January 2013, Ministers in Queensland have published their Ministerial diaries.[37] This is done as a matter of government policy rather than legislation, and there is no reference to the practice in the Ministerial code of conduct.

The Premier and her Cabinet Ministers publicly release information about all portfolio related meetings and activities from their diaries. The publication does not extend to electorate, social or personal matters.

Queensland Ministerial diaries are published retrospectively, with the diary for one month being published at the end of the following month. For example, July diaries are published on the last day of August.

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[33] See p1 of the code, *Accountability.*

[34] Woodhouse, op. cit., p46.

[35] See the secrecy provision in s.24 of the *Integrity Act 2009*, and s.7(2) of that Act which specifies that in carrying out the public awareness function the Commissioner must not disclose information likely to identify a specific request for advice. Based on Crown Solicitor advice provided in 2007, successive Integrity Commissioners have taken the view that the usual duty to notify the CCC about corrupt conduct, which arises under s.38 of the *Crime and Corruption Act 2001*, does not apply to the Integrity Commissioner because the office is not a 'public official'. Specifically, it is not 'the chief executive officer of a unit of public administration', nor is it 'a corporate entity that constitutes a unit of public administration', as those terms are expressed in the definition of 'public official' in Schedule 2 of the *Crime and Corruption Act 2001.*

[36] These conditions are set out in s.29 of the *Integrity Act 2009*.

[37] The diaries are available at http://www.cabinet.qld.gov.au/ministers/diaries.aspx, retrieved on 20 October 2015.

Ministerial diaries are also published in New South Wales,[38] where Ministers must publish summaries in the required form one month after the end of each quarter. This can mean that publication of details of a meeting may not occur until up to 4 months after it occurred.

These are the only two Australian jurisdictions in which diaries are pro-actively published. In other jurisdictions they may be available in response to Right to Information applications.

4. The United Kingdom approach to maintaining Ministerial standards

4.1 Code of Conduct for members of Parliament

The mechanisms adopted by the United Kingdom to deal with Ministerial conduct are instructive.

In 1995 the first report of the Committee on Standards in Public Life (the 'Nolan Committee')[39] recommended that the House of Commons introduce a new code of conduct for members; an improved Register of Members' Interests; an independent Parliamentary Commissioner for Standards; and a strengthened Committee on Standards and Privileges.

The new '*Code of Conduct together with the Guide to the Rules Relating to the Conduct of Members*' was adopted by the House of Commons on 24 July 1996. It included the seven general principles of conduct underpinning public life which were advocated by the Nolan Committee: selflessness, integrity, objectivity, accountability, openness, honesty and leadership. The House approved the most recent version of the code of conduct on 17 March 2015.[40]

The Parliamentary Commissioner for Standards has several roles. It oversees the Register of Members' Financial Interests, provides confidential advice to individual MPs, and advises the Parliamentary Committee on Standards about the operation of the Parliamentary code of conduct and related rules. It also considers complaints alleging that a member of the House of Commons has breached the code, and investigates them if he or she thinks fit.[41]

The House of Lords has its own Commissioner for Standards who is responsible for investigation of alleged breaches of the House of Lords Code of Conduct. This includes investigating breaches of the rules on Members' financial support and parliamentary facilities. By contrast with the Parliamentary Commissioner, the House of Lords Commissioner for Standards does not have any formal advisory roles.

In Australia, the oversight of the conduct of members of Parliament is the traditional domain of the Parliamentary Ethics Committee. Some State Parliaments[42] have also appointed ethics advisers to

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[38] See http://www.dpc.nsw.gov.au/about/publications/ministers_diary_disclosures, retrieved on 20 October 2015. The rules governing publication are available at http://arp.nsw.gov.au/m2014-07-publication-ministerial-diaries, retrieved on 20 October 2015.

[39] See https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life, retrieved on 3 November 2015.

[40] *The Code of Conduct Approved by the House of Commons on 12 March 2012 and 17 March 2015, together with The Guide to the Rules relating to the Conduct of members Approved by the House of Commons on 17 March* 2015, available at http://www.publications.parliament.uk/pa/cm/cmcode.htm, retrieved on 20 October 2015.

[41] See http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/pcfs/, retrieved on 2 November 2015.

[42] Since 2010, there have been various attempts to establish such a position in the Commonwealth Parliament. These are described in Commonwealth Parliamentary Library, Background Note *Codes of conduct in Australian and selected overseas parliaments*, prepared by Deidre McKeown, Politics and Public Administration Section,

assist Members of Parliament in carrying out their duties, but these positions do not investigate alleged breaches of the code of conduct. New South Wales first appointed such a Parliamentary Ethics Adviser in 1998, and a similar position exists in Tasmania.[43]

On 31 October 2013, the Australian Capital Territory Legislative Assembly adopted a Commissioner for Standards model similar to that in the UK.[44] The first Commissioner, Dr. Ken Crispin QC, was appointed on 14 February 2014 for a 2 year period. The position replaced an Integrity and Ethics Advisor position which had existed since 2008.

4.2 Ministerial code of conduct

The Parliamentary conduct mechanisms adopted in the United Kingdom are supplemented by a Ministerial code of conduct, which was first published in 1992. It was based on pre-existing guidelines, and has been updated and published at the beginning of each new Parliament.[45]

The current code was published in October 2015,[46] and provides that 'if there is an allegation about a breach of the Code, and the Prime Minister, having consulted the Cabinet Secretary feels that it warrants further investigation, he will refer the matter to the independent adviser on Ministers' interests'.[47]

On 28 February 2008 the then Independent Adviser, Sir Philip Mawer, appeared before the House of Commons Public Administration Select Committee (**PASC**). In his evidence, Sir Philip stated that he was employed as a consultant and described his role as having two aspects:

> … one is to be available to Ministers and to permanent secretaries to advise on avoiding conflicts between ministers' private interests on the one hand and their public responsibilities on the other, and the other aspect of the role is to investigate, when the Prime Minister, advised by the Cabinet Secretary, so decides, allegations against government ministers.

The appropriateness of the Independent Adviser having the responsibility to deal with complaints about Ministers was questioned by PASC in a later inquiry. It reported to the House on this issue on 17 March 2012.[48]

The report arose from a Prime Ministerial decision 'not to ask the Independent Adviser to investigate an alleged breach of the Ministerial Code in relation to the access by Mr Adam Werritty to the

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Updated 18 September 2012 - available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Conduct, retrieved on 10 November 2015, pp10-11.

[43] Reverend Professor Michael Tate was re-appointed to the position of Parliamentary Standards Commissioner on 9 November 2015, after completing a five year term. The Commissioner is an independent statutory office established by the *Integrity Commission Act* 2009 (Tas.) to advise the Integrity Commission and members of Parliament on ethical issues.

[44] See http://www.parliament.act.gov.au/members/commissioner-for-standards, retrieved on 2 November 2015.

[45] See Commonwealth Parliamentary Library, op. cit., p56.

[46] *Ministerial Code*, Cabinet Office, October 2015, available at https://www.gov.uk/government/publications/ministerial-code, retrieved on 20 October 2015.

[47] Ibid, paragraph 1.3.

[48] See Twenty Second Report of Session 2010-12, *The Prime Minister's Adviser on Ministers' Interests: independent or not?*, published on 17 March 2012, available at http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpubadm/1761/176102.htm, retrieved on 20 October 2015.

former Secretary of State for Defence, the Rt Hon Dr Liam Fox MP, and also touched on the role of the Civil Service in the events leading up to Liam Fox's resignation'.[49] Dr Fox resigned in October 2011, and the then Independent Adviser (Sir Philip Mawer) retired shortly after.

Amongst other things, PASC concluded that the Independent Adviser's position is:

- not secure – because it is appointed by the Prime Minister
- not financially independent – because it is funded through Cabinet Office
- not visible – for example, because it doesn't have a website. The committee concluded that the position will not increase public confidence in Ministerial conduct if the public does not know that the post exists.

4.3 The Government response to the PASC report

The UK Government responded to the PASC report on 12 February 2013.[50] The response is not effusive, and its tone is set as follows:

> At the core of the Government's Response to the Committee's Report is its belief that Parliament already has a powerful range of mechanisms to hold the Government, including the Prime Minister and his Ministers, to account. The Government believes that it would not be appropriate to change the Ministerial Code, as Mr Jenkin suggested on 17 July, so that it is
>
> > "owned by Parliament and controlled by Parliament in order that it can become a mechanism that can be used by Parliament to hold Ministers to account".
>
> In the government's view this would lead to an unacceptable blurring of the lines between the Executive and Parliament.

The response went on to disagree politely with several PASC suggestions, as follows:

- The resignation of a Minister should not preclude altogether some form of independent investigation when further examination of the facts would be in the public interest. The Government's view was that each issue should be considered on a case by case basis
- In the Fox case, the Independent Adviser should at least have been consulted. The Government stated that this did not occur because Dr Fox resigned first
- The Independent Adviser should be able to undertake a shorter investigations, to establish the preliminary facts of a case. The Government believed that the Independent Adviser could already do this
- The Independent Adviser should be able to initiate his own investigations. The Government believed that an investigation should commence only on reference from the Prime Minister. The response commented:

  > As set out in the Ministerial Code, Ministers only remain in office for so long as they retain the confidence of the Prime Minister. The Prime Minister is the ultimate judge

[49] PASC Report, paragraph 3.
[50] See Government Response on the PM's Adviser on Ministers' Interests available at http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-select-committee/news/govt-response-on-pms-adviser-on-ministers-interests--/, retrieved on 20 October 2015.

> of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards …
>
> The Ministerial Code sets out the standards that the Prime Minster expects from his Ministers, so it is appropriate that it is his decision whether a matter is referred to the Independent Adviser. The Government does not believe that the role should be placed on a statutory footing, and believes that the current model provides appropriate flexibility to respond to individual cases.

- The appointment process for, and the ultimate selection of a retired civil servant (Sir Alex Allan) as the Independent Adviser shortly after Dr Fox's resignation was flawed. PASC suggested that the post could not be considered independent, for the reasons outlined above. The government remained of the view that the role of the Independent Adviser should be a personal appointment made by the Prime Minister of the day, and should not be subject to a pre-appointment hearing.

4.4 A Ministerial yellow card?

Another issue which warrants thought was raised in the course of the earlier PASC deliberations. On 28 February 2008, after describing his role in the terms which I have quoted above, Sir Philip Mawer went on to discuss the problems that can arise when alleged ministerial impropriety is revealed:

> There is an important issue … which I do think it is important for the Committee to reflect upon, and, indeed, I think it is one that has concerned you in the past, which is whether there can be for ministers something of the equivalent of the yellow card, as opposed to the red card. I think a particular problem in terms of penalties for ministers for alleged wrongdoing is that, whenever an allegation is made, the immediate cry from the press and, inevitably, from their political opponents is that ministers resign. If your question is implying that it would be in the real interests of politicians of all parties to find something short of the red card, short of resignation as a penalty in appropriate cases, then I support that notion. I think it is a matter which will have to be addressed as my role unfolds.

I must confess that I have difficulty envisaging how any sort of lesser public sanction system would work in practice. Whilst I have not been privy to any candid discussions between a head of a government and a Minister, it seems to me that in that context yellow cards are quite likely to have been issued on a reasonably regular basis.

5. THE NSW RECOMMENDATIONS

5.1 NSW Recommendation 1 – Commissioner for Standards

The NSW Select Committee adopted an earlier recommendation of the NSW Parliament Privileges Committee, made in its report entitled *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*,[51] that a Commissioner for Standards should be appointed by the Parliamentary Presiding Officers in that State.

[51] This report, which was ordered to be printed on 12 June 2014, is available at http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/BE82C4A379E68B3CCA257CF50006F14E?open&refnavid=CO4_1, retrieved on 20 October 2015.

That recommendation itself arose from recommendation 25 made by the NSW ICAC in its report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources*,[52] stemming from Operation Jasper[53] and Operation Acacia.[54]

The role was to be based on the UK and ACT models outlined above, and with the following functions:

- To provide confidential advice to members on the exercise of their role as members. The Privileges Committee envisaged that the Commissioner for Standards would assume the current role of the Ethics Adviser to the NSW Parliament in this regard. It took the view that there was only minimal risk that members would be inhibited from approaching the Commissioner for advice by the fact that the Commissioner may subsequently seek to initiate an investigation into the matter
- To receive, investigate and report on complaints, and to commence 'own-initiative' investigations, in relation to the conduct of and disclosures made by members
- To monitor and make recommendations about the operation of the members' code of conduct
- To offer training and education on these matters to members.[55]

The Privileges Committee envisaged that a Commissioner for Standards would operate alongside the NSW ICAC, and that it would provide a mechanism for dealing speedily with less serious allegations of misconduct against members.[56]

In my view, there are several questions which can be asked about this proposed mechanism insofar as it applies to Ministerial conduct.

First, in adopting the Privileges Committee recommendation, the Select Committee did not make any specific comment about the applicability of the Parliamentary Commissioner model to Ministers as members of executive government, and the different standards which customarily apply to them.[57]

Second, it did not comment on the issue raised by the UK government response that giving a Parliamentary body direct jurisdiction over the conduct of Ministers would constitute an unacceptable extension of Parliament's power of scrutiny of the executive, at a cost to the ability of the head of government to determine whether he or she retains confidence in a Minister.

Third, there is in my view an inherent conflict in a body having both advisory and investigative roles. Whilst it is not uncommon for this to occur – and indeed Parliamentary Commissioners and the UK Independent Adviser have such dual roles – it is in my view preferable that an advisor should not be

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[52] NSW ICAC, *Reducing the opportunities and incentives for corruption in the State's management of coal resource*, October 2013, available at http://www.icac.nsw.gov.au/publications-and-resources/investigations-publications?option=com_pubsearch&view=search&task=doSearch&Itemid=89#results, retrieved on 2 November 2015.

[53] NSW ICAC, *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, July 2013, described at http://www.icac.nsw.gov.au/investigations/current-investigations/investigationdetail/192, retrieved on 2 November 2015.

[54] NSW ICAC, *Investigation into the conduct of Ian Macdonald, John Maitland and others*, August 2013, available at www.icac.nsw.gov.au/component/docman/doc_download/4193, retrieved on 2 November 2015.

[55] Ibid., paragraph 4.65, pp63-64.

[56] Ibid., paragraph 4.57, pp61-62.

[57] The Select Committee's views on this issue are set out in its report, paragraphs 2.26-2.29, pp9-10.

placed in a situation of needing to decide whether to exercise investigatory powers in relation to a matter about which advice is sought.

Further, there is a significant disincentive to the obtaining of preventive advice if the person giving advice may also investigate and/or sanction the seeker of advice. In my view, this may well defeat the purpose of providing the advisory mechanism in the first place.

5.2 NSW Recommendation 2 – Publication of Ministerial Diaries

As noted above, publication of Ministerial diaries has been occurring in Queensland since 2013, and in New South Wales since 1 July 2014. The Select Committee recommendation suggested that publication in NSW should occur at least monthly, which would bring the practice in that state into line with current practice in Queensland.

For the future, it seems to me to be worth asking whether there is any real reason why publication could not occur in real time - or at least, very shortly after a meeting occurs. This would assist in ensuring that relevant and topical information is in the public domain at the time that it is likely to be of interest, and to reflect the aphorism that a week is a long time in politics.

5.3 NSW Recommendation 3 – Regulation of Lobbying

The NSW Select Committee also considered the operation of the lobbying regulatory scheme in that State. It is reasonable to infer that, in so doing, it considered that lobbying is an activity which directly affects the standards of Ministerial conduct.

5.3.1 The current position in Queensland

Queensland was the first Australian jurisdiction to legislate for a scheme regulating lobbying, and the strategic review of the functions of the Integrity Commissioner issue addressed the operation of the scheme in some detail.

Experience has demonstrated that the lobbying regime established by the Act is becoming less successful in meeting its expressed purposes. The strategic review concluded that this is largely due to the fact that the regime does not capture in-house lobbyists, and other professionals who undertake comparable activities.

Registered lobbying contacts in Queensland have decreased significantly over the past year.[58] In the six months from January to June 2014, there were 164 registered contacts on the log which lobbyists are required to complete. For the comparable period this year i.e. January to June 2015, that dropped to 64. So that is a reduction of 61% over the two periods.

The trend has been confirmed in a review of lobbying contacts conducted by my office covering the month of June 2015. The review involved matching contacts reported by lobbyists against Ministerial diaries and records held by agencies and local government councils. It confirmed that the number of contacts between lobbyists and government representatives has dropped since they were last reviewed in February 2014. Also, it confirmed that there were very few contacts between lobbyists and Ministers or Ministerial staffers. Further details are provided in Attachment A.

[58] For further comment on this issue see Transcript - Meeting with the Queensland Integrity Commissioner – 15 July 2015, p. 2, available at http://www.parliament.qld.gov.au/work-of-committees/committees/FAC/inquiries/current-inquiries/I3-IntegrityCommissionerFunctions, retrieved on 20 October 2015.

These findings suggest a changed culture since the lobbying regime was first introduced. In my view, they reflect a number of factors:

- Lobbyists have changed their business models to focus more on providing advice to clients
- Meetings with government representatives are undertaken either by clients themselves, or with the assistance of people who aren't required to be registered as lobbyists – such as associated law firms, or in-house lobbyists
- A better understanding of the system by lobbyists has reduced the number of incorrect and unnecessary entries in the register
- Other methods of seeking to influence government, such as political donations, have assumed greater significance in the public mind. The point has been made by Lord Nolan as follows:

> Even since the major reforms of the system which have followed the committee's reports, it is apparent that the need for vigilance is as great as ever. The process is a bit like squeezing a balloon. Compression and containment of misconduct at one point leads to its expansion at another.[59]

- Anecdotally, the current Queensland government has been reticent to meet with registered lobbyists.

The result is that the lobbyists register no longer – if it ever did - gives a comprehensive picture of the organisations and individuals seeking to influence government. Also, the current lobbying regime was devised in the days before Ministerial diaries were published in Queensland.

In other words, the world has moved on since the scheme was initiated.

Whilst this trend can be perceived as the intention of the legislation being achieved, there is also a cost to it. It is usually acknowledged that lobbyists can, and often do, make a positive contribution to the democratic process.[60]

5.3.2 Regulating in-house lobbyists and other professionals who lobby

In Queensland, proposals for extension to the regulatory scheme to include in-house and industry lobbyists have been advanced for some time, including by my predecessor, and by the Finance and Administration Committee of the Queensland Parliament, which oversees my office.

In July 2014, the Hon Campbell Newman MP, the then Premier of Queensland, advised me that his government considered that any expansion would involve a fundamental change to the scope of the Act and would impact on a range of businesses, industry associations and peak bodies; and that his government was of the view that the Act currently strikes the right balance between openness and accountability and the Government's objective to minimise the regulatory burden.

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[59] The Right Hon. Lord Nolan, Chapter 2, *Motivating Ministers to Morality*, in Fleming and Holland, op. cit., p.14.

[60] For example, the preamble to the Queensland Lobbyists Code of Conduct contains the following statement:

> Professional lobbyists are a legitimate part of, and make a legitimate contribution to, the democratic process by assisting individuals and organisations to communicate their views on matters of public interest to the government, and so improve outcomes for the individual and the community as a whole.

The issue has been squarely raised by the strategic review of my office, and is a principal focus of the inquiry currently being conducted by the Finance and Administration Committee of the Queensland parliament.

The strategic review recommendation for an extension referred to the Ontario model, which requires all those people who spend 50 hours or more per year on lobbying to be registered, whether they do it for a third party or not.

The review report acknowledges that such an extension could be administratively burdensome. For my part, given the amorphous nature of the legislated definition of lobbying, I believe it would be very difficult in practice for an in-house or incidental lobbyist to determine when the 50 hour per year threshold is exceeded.

It would be even more difficult for a body without investigative powers, such as my office, to satisfy itself that the obligation is being complied with.

5.3.3 The NSW changes

Against this background, I share the view that the current lobbying regime in Queensland needs reconsideration. I believe that the aim should be to ensure maximum transparency about who is seeking to influence whom.

I don't say that because I want to discourage organisations from exercising their right to seek their elected representative's assistance, and to influence them appropriately. Rather, I want to ensure that the broad public interest prevails in government decision-making. The community needs to see that everyone is getting a fair go, not just those who are particularly well-placed – for whatever reason – to influence government.

As a minimum, amendments along the lines of those now adopted in New South Wales should be implemented in Queensland,[61] both to ensure that the regime captures a larger proportion of the lobbying actually occurring, and in fairness to the existing registered lobbyists.

In particular, the new arrangements in NSW include a new prescribed *NSW Lobbyists Code of Conduct*. This is closely based on the previous administrative code, but it imposes a set of minimal ethical obligations on all organisations seeking to influence government policy and decision-making. The previous code only applied to third party lobbyists, as is currently the case in Queensland.

The NSW arrangements also include a new enforcement mechanism, the Lobbyist Watch List, which can be published by the Electoral Commission on the same website as the Lobbyists Register. I perceive it as operating as a form of 'negative licensing'.

The Electoral Commission can determine that the names and other identifying details of any organisation seeking to influence government policy and decision-making (i.e. not only third party

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[61] Amendments to the *Lobbying of Government Officials Act 2014* (NSW) commenced on 1 December 2014. The amendments implemented the NSW government's response to the Independent Commission Against Corruption's 2010 report *Investigation into corruption risks involved in lobbying*.

The amendments replaced the previous administrative regime for regulating lobbying activities with a legislative scheme that established the NSW Electoral Commission as a new independent regulator of lobbying. The NSW Electoral Commission now maintains and enforces the Register of Lobbyists and the *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014*, which also took effect on 1 December 2014.

lobbyists) should be published on the watch list because of a contravention of legislation or the lobbyist code.

The watch list operates alongside the sanction of removal from the register of a third party lobbyist for contravention of legislation or the lobbyist code.

6. CONCLUSIONS

In summary, I think both NSW and Queensland can learn from each other in this space.

I would suggest that NSW should consider whether a Parliamentary Commissioner for Standards alone is sufficient to assist Ministers to maintain the highest standards of conduct. I am not persuaded that mixing the advisory and investigative roles is a good idea, nor do I believe that the right and responsibility to deal with minor instances of Ministerial wrongdoing should effectively be transferred from the head of executive government to the Parliament. Parliament should only become involved when it has lost confidence in a Minister.

For Queensland, the new NSW lobbying regime provides an instructive precedent, given the reduced effectiveness of the current lobbying regulatory regime. The introduction of the timely publication of Ministerial diaries is another factor which justifies that reassessment.

ENDS

ATTACHMENT A

AUDIT OF THE QUEENSLAND REGISTER OF LOBBYISTS CONTACTS, June 2015.

	July 2013	**February 2014**	**June 2015**
Reported by State departments and agencies	31[1]	14[1]	13
Reported by local governments	24	Not reviewed	16
TOTAL	**55**	**NA**	**29**
Reported by lobbyists	33	42[2]	19

Notes

1. To allow for a more useful comparison, this table omits submissions made in previous years to the Office of Liquor and Gaming Regulation (**OLGR**), which administers the granting of liquor licences.

The bulk of organisations seeking a liquor licence use a liquor licensing consultant to assist them in going through the necessary processes. Historically, there has been debate about whether the activities of the consultants amount to lobbying, and hence whether the consultants should be registered.

In previous monthly reviews, OLGR submitted over a hundred interactions with consultants. On the other hand, the liquor licensing consultants did not record any contact with OLGR.

This year, OLGR has submitted a nil return. It appears it has decided that it has not been lobbied as defined in the Act. This decision follows advice from my predecessor that it is OLGR's responsibility to make this determination.

2. This figure includes contacts with local government.