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Submission to the Select Committee on an Independent Integrity Commission

Clerk of the Legislative Assembly for the Australian Capital Territory

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1. INTRODUCTION

- 1.1. While the committee is tasked with inquiring into a broad range of matters associated with the establishment of an independent integrity commission, this submission is mainly confined to integrity arrangements¹ as they apply, or might apply, to MLAs in connection with their conduct and duties as members of the legislative branch of government in the ACT.
- 1.2. The Commonwealth, the Northern Territory² and the ACT are the only Australian jurisdictions without an independent integrity commission of one kind or another. However, the ACT Legislative Assembly performs reasonably strongly in relation to a range of other integrity reforms directed towards MLAs.³ The introduction of an MLA code of conduct, ethics and integrity adviser, commissioner for standards and register of lobbyists all contribute towards institutional strengthening and the maintenance and development of a culture of integrity within the legislative branch. For the most part, these measures adequately provide for: effective investigative and adjudicative mechanisms in relation to misconduct; norm-setting; general deterrence against misconduct; natural justice and procedural fairness; and importantly, the maintenance of institutional comity between three branches of government.
- 1.3. I do not express a view one way or the other as to the desirability of an independent integrity commission but I do note that a high level of public trust in public institutions, particularly parliamentary institutions, is essential to the legitimacy and ongoing viability of any democratic polity. A breach of public trust, arising from unethical or corrupt conduct on the part of a member of parliament, is uniquely corrosive to the community's confidence that parliaments exist to advance the public interest or the 'common good'. The implied contract between electors and elected representatives is broken where 'private-regarding' considerations⁴ come to actuate the exercise of a member's power or influence or the exercise of particular functions that a member performs on behalf of either the legislature, or, in the case of a minister, the executive.
- 1.4. While there is no evidence available to suggest that widespread or systemic corruption exists in the ACT, this, of itself, is not an argument against the development and maintenance of effective anticorruption and integrity arrangements. A vigilant and well-coordinated public sector integrity system—whatever form it takes—is both protective and restorative of the health of the body politic, assuring the community that misconduct in public office,

¹ I have used the term 'integrity arrangements' to refer to the broad legislative, procedural, judicial and administrative architecture that is available to promote integrity and ethical behaviour and to detect, investigate, adjudge and remedy alleged misconduct, including criminal or corrupt conduct.

² In 2015, the Northern Territory Legislative Assembly resolved to establish an anti-corruption integrity and misconduct commission. A wide-ranging report on the establishment of such a commission, by the Hon Brian Martin AO QC, former Chief Justice of the Northern Territory Supreme Court, was handed down in May 2016. I commend the report to the committee, which is available at: <https://acimcinquiry.nt.gov.au/>

³ From an interjurisdictional perspective, the Assembly performs reasonably well in this regard—See Appendix A containing a comparison chart showing the different integrity and other arrangements that apply in Australia and New Zealand.

⁴ American political scientist, Joseph Nye's widely cited and broadly cast definition of corruption is worth reflecting on—corruption is, in Nye's words, '...behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence'. Nye, Joseph (1967) 'Corruption and political development', *American Political Science Review*, vol. 61, no. 2, pp. 417-427.

particularly serious misconduct, will be detected, investigated and remedied. This general view is given expression in the Commonwealth Latimer House Principles, adopted and endorsed by the Assembly on 11 December 2008 (continuing resolution 8A), which includes the following observations relating to the oversight of government:

The establishment of scrutiny bodies and mechanisms to oversee government enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as public accounts committees, ombudsmen, human rights commissions, auditors-general, anti-corruption commissions, information commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances.⁵

- 1.5. Due to the unique democratic roles and functions performed by parliaments, special consideration needs to be given to the integrity arrangements that might come to apply to the Legislative Assembly and its members. At the heart of discussions about public sector integrity and its corollary—public sector corruption—are questions of how best to produce accountability outcomes in relation to official conduct. Accountability in this context means being answerable for one's actions. MLAs are, of course, politically accountable to ACT electors every four years through the general election but within this bandwidth there is a community expectation that elected representatives will perform their official duties— that is, their duties as parliamentarians—with a sense of propriety, probity and public mindedness. The community also rightly demands that there will be mechanisms beyond electoral accountability to detect and address conduct that falls outside of expected standards.
- 1.6. One of the challenges in developing integrity arrangements that apply to members of parliament is that parliaments themselves, by dint of history and design, have reposed in them accountability functions of their own (particularly in relation to holding executive government to account). Parliaments enjoy longstanding powers to investigate, judge and penalise members in relation to their conduct. Parliaments are also vested with specific immunities from the operation of the normal law to enable the unhindered performance of their functions. The Assembly's institutional autonomy does not mean that independent integrity bodies should play no role in upholding integrity and public interest imperatives with respect to members, but it does mean that such arrangements need to be carefully considered and calibrated.
- 1.7. The broad thrust of my submission to this inquiry is that the arrangements that have been adopted by the Assembly to date have generally operated effectively and have served the institution and the community well—both in terms of their efficient operation and their effectiveness in producing accountability and integrity outcomes. However, I acknowledge that an independent integrity commission, particularly one that has special investigative powers of one kind or another, opens up additional opportunities to shine light on improper conduct that might not normally come to the attention of either the police (in the case of potentially criminal matters) or the Assembly's own investigative and adjudicative bodies.
- 1.8. I submit that one of the key challenges for this committee, in the event that it decides an integrity commission of some kind is appropriate, will be to navigate a cautious path to ensure that the jurisdiction of such a commission gives the community additional confidence that

⁵ Principle 9, [Commonwealth \(Latimer House\) Principles on the Three Branches of Government](#)

MLAs are accountable for their actions and, at the same time, that the independence of the Assembly is properly recognised.

- 1.9. In the event that the committee and the Assembly decide to pursue an integrity commission of one kind or another, I advocate a model that preserves a number of the essential features of the existing arrangements while exposing MLAs to third-party oversight in relation to potential criminal offences which bear on their duties as public officials (i.e. corrupt conduct such as bribery, abuse of public office, payola etc.). Such an approach would enable the Assembly to maintain its exclusive jurisdiction in relation to the members' code of conduct, declaration of members' interest, matters of privilege and contempt and so on, while bringing to bear an augmented and independent investigative and adjudicative capacity in relation to matters which have the potential to fundamentally weaken public confidence in the Assembly.
- 1.10. This submission is necessarily broadly drawn and represents an attempt to bring to the attention of the committee a general approach for consideration, rather than a detailed policy proposal. In the event that the Assembly determines to establish an independent integrity commission, I submit that it is essential that the Office of the Legislative Assembly is closely consulted about the operation of existing provisions and is also intimately involved in the legislative drafting process to ensure harmonious operation with these arrangements.

STRUCTURE AND SUMMARY

1.11. The submission sets out:

- a brief examination of parliamentary privilege (section 2);
- a broad overview of the different integrity arrangements that currently apply to MLAs (section 3); and
- a number of proposals for consideration (Section 4).

1.12. Below is a summary of the submissions that I make.

Application to MLAs

- 1.13. In the event that an independent integrity commission is to be established, its jurisdiction vis-a-vis MLAs should be limited to conduct that meets the following two criteria:
 - a) the conduct, if proven, would be a criminal offence; and
 - b) the conduct relates to an MLA's duties as a Member of the Legislative Assembly.

Parliamentary privilege

- 1.14. Integrity arrangements should preserve and protect parliamentary privilege to the extent that it is required to enable the autonomous and independent operation of the Assembly. There should be express provision to protect and preserve privileges in any Bill that is drafted to establish an independent integrity commission.

Jurisdictional precedence

- 1.15. Additional clarity should be provided as to the precedence that is afforded particular investigative and adjudicative responses and in relation to the concurrent operation of

different jurisdictions (i.e. criminal jurisdiction versus parliamentary jurisdiction). Criminal matters (including associated investigations and judicial proceedings) should, as a matter of general principle, be dealt with before the Assembly determines to deal with a potential contempt.

Parliamentary officials should not be investigators or adjudicators

- 1.16. Parliamentary officials (i.e. the Clerk and other staff of the Office) should not have a specific statutory function, outside of the normal administrative responsibilities of the Office, to investigate members or their staff. I submit that the committee consider recommending amendment to the Public Interest Disclosure Act to remove the Clerk's investigative function in relation to MLAS and their staff.

Oversight

- 1.17. It is important to ensure that there is adequate parliamentary oversight of any independent integrity commission by way of an Assembly committee.

Clarify Assembly's role in ensuring compliance and cooperation with Commissioner of Standards investigations

- 1.18. There should be procedural arrangements that give the Commissioner of Standards sufficient recourse, by way of the Assembly, to facilitate compliance with investigations and to produce disincentives against non-compliance or the provision of false or misleading evidence/information to the commissioner. For instance, establishing a mechanism whereby the commissioner is able to report to the Assembly on non-cooperation would enable the Assembly to activate its own powers to produce compliance such as by requiring that evidence be given before a privileges committee.

Arrangements for the execution of search warrants

- 1.19. It would be important to establish regulatory or procedural arrangements for the exercise of search warrants and the seizure of material by an integrity commission, including specific procedural arrangements in relation to the custody of documents that are the subject of privilege claims.

Arrangements for determining whether privilege applies to certain documents

- 1.20. Specific arrangements should be articulated in a resolution of the Assembly relating to the manner in which claims of privilege over particular information/documents should be determined (for example, by way of a privileges committee).

Lobbyists

- 1.21. In considering the establishment of an independent integrity commission, it is appropriate to consider what role such a commission might play in administering and regulating lobbyist activity across the broader public sector and what role the Commissioner of Standards might have in relation to interactions between lobbyists and MLAs/their staff, including in relation to possible breaches.

Appointment of integrity commission member/s

- 1.22. It would be important to that there is broad political support for individual appointments to an integrity commission.

Members' staff

- 1.23. It is appropriate to consider the integrity arrangements that apply to persons employed pursuant to the [Legislative Assembly \(Members' Staff\) Act 1989](#).

NB To assist in reading on a desktop PC or handheld device, this submission includes hypertext links to relevant legislative, procedural and judicial authorities. Typically, a link is only provided where an authority has first been introduced unless it has been useful to draw attention to specific provisions later in the submission in which case there may be multiple links.

2. A NOTE ON PARLIAMENTARY PRIVILEGE

- 2.1. In devising and implementing integrity arrangements that apply to MLAs, due consideration should be given to the operation of the Assembly's privileges, immunities and powers. Senate Practice neatly encapsulates the meaning of the umbrella term 'parliamentary privilege':

The term "parliamentary privilege" refers to two significant aspects of the law relating to Parliament, the privileges or immunities of the Houses of the Parliament and the powers of the Houses to protect the integrity of their processes. These immunities and powers are very extensive. They are deeply ingrained in the history of free institutions, which could not have survived without them.⁶

- 2.2. Any proposal for integrity arrangements that seeks to limit the Assembly's powers, immunities and privileges should be treated with an abundance of caution given the important role that parliamentary privilege plays in undergirding the comity, or mutual respect, between the legislative branch of government and the executive and judicial branches.
- 2.3. Parliamentary privilege protects the integrity and functionality of a parliament by protecting its proceedings from external impeachment or interference. It does so in two ways.
- 2.4. Firstly, privilege provides legal immunity over what is said or done during the course of proceedings in parliament. This immunity is derived from Article 9 of the Bill of Rights, which holds that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of parliament.'⁷ The immunity exempts proceedings and participants in proceedings from the application of the ordinary law and has the following application:
- members are immune from liability for the words they say or write as part of parliamentary proceedings;
 - witnesses that appear before the parliament and its committees cannot have their evidence examined by a court or tribunal;
 - members and parliamentary officers enjoy (qualified) immunity from certain legal processes (for example, this immunity is recognised in the *Juries Act 1967*, which provides that MLAs and certain parliamentary officers such as the Clerk, committee secretaries and the Sergeant-at-Arms are exempt from jury service).⁸
- 2.5. The second way that privilege is directed towards protecting the parliament is by empowering it to determine and to punish any contempts committed against it, thereby deterring improper interference in the exercise of its democratic functions (contempt is discussed in more detail in the following section). As David Blunt, Clerk of the NSW Legislative Council has observed: 'The common law has long recognised that the Houses of the 'mother' Parliament at Westminster possess extensive powers by virtue of their origin as a court and their ancient usage and practice (*lex et consuetudo parliament[i]*), including the power to punish'.⁹
- 2.6. The privileges—particularly the immunities from the application of the ordinary law—may, on

⁶ Evan, Harry (2016) '[Odggers' Senate Practice](#)' 14th Edition, p 41.

⁷ [Bill of Rights 1688 1 Will and Mary sess 2 c 2](#)

⁸ See Schedule 2, Part 2.1 of the Act

⁹ Blunt, David '[Parliamentary Privilege: NSW still at the cutting edge](#)' Paper presented to a seminar on Parliamentary Law conducted by Legalwise Seminars, Sydney, Friday 10 June 2016, p 2.

the surface at least, appear to be a form of quaint special-pleading. However, the powers and immunities that arise under the broad banner of privilege are essential to the proper functioning and independence of the legislature. Without these privileges, the extent to which a parliament is able to represent electors, hold executive government to account, and to legislate for good government would be substantially reduced. For instance, the inquisitorial functions performed by a parliamentary committee could not operate effectively in the event that the testimony of witnesses could then later be used against them in a court. Similarly, were a parliament unable to determine and punish contempts against it, its capacity to enforce its orders, particularly against powerful executives, would be diminished.

- 2.7. It is important to note that the privileges of a parliamentary chamber are possessed by the chamber itself and not any individual member. In [*Prebble v Television New Zealand Ltd*](#), the Privy Council found that:

The privilege protected by article 9 is the privilege of Parliament itself. The actions of any individual member of Parliament, even if he has an individual privilege of his own, cannot determine whether or not the privilege of Parliament is to apply... The decision of an individual member cannot override that collective privilege of the House to be the sole judge of such matters.¹⁰

- 2.8. The privileges of the Assembly arise by virtue of:

- equivalency provisions contained in s 24 of the [*Australian Capital Territory \(Self-Government Act\) 1988*](#);
- equivalency provision of s 49 of the [*Commonwealth of Australia Constitution Act*](#);
- [*Parliamentary Privileges Act 1987 \(Cwlth\)*](#);
- Article 9 of the [*Bill of Rights 1688*](#);
- [*Standing orders 276-280*](#); and
- relevant case law.

- 2.9. The prerogatives and protections of the ACT legislature remain, with a few exceptions, largely the same as those that are enjoyed by the Australian House of Representatives (by virtue of the equivalency provisions in the ACT Self-Government Act), which itself derives, as its constitutional birthright (again, with a few exceptions), the powers, privileges and immunities enjoyed by the House of Commons immediately prior to federation (by virtue of s 49 of the Constitution).

- 2.10. Section 16 of the Parliamentary Privileges Act affirms the Article 9 protection and, without derogating from or limiting its application, defines *proceedings in Parliament* as 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee'. Any proceeding in parliament 'may not be used in the proceedings of any court or tribunal'. Section 16(3) provides that it is unlawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in parliaments, by way of, or for the purpose of:

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

¹⁰ [*Prebble v Television New Zealand Ltd*](#) [1995] 1 AC 321 at 335.

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament’.

2.11. Further, s 16(4) provides that a court or tribunal shall not:

(a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or

(b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence;

unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

2.12. Importantly, proceedings in parliament are not confined to the comments made as part of proceedings in the chamber, or to evidence or submissions made before a house or committee of parliament, or to a report made by a house of committee of parliament. Parliamentary proceedings are also taken to include the ‘preparation of a document for the purposes of or incidental to the transacting of any such business’.¹¹ Thus, the scope of proceedings is broad enough to include a range of materials that might be utilised by a member in the course of fulfilling their parliamentary-related functions and participating in proceedings.

2.13. While courts may determine the ambit of a privilege within the framework of the law, it is for the parliament to determine how a privilege, once established, will operate.¹² That is, the parliament has an exclusive jurisdiction to apply its immunities and powers in a particular set of circumstances. It is the exclusive jurisdiction of the parliament to, for instance, determine and punish a contempt or an offence against it.¹³ It is also for the parliament to determine whether or not a document held by a member is covered by parliamentary privilege.

2.14. The freedom of speech protection not only represents a settlement of sorts between the judicial and legislative arms of government, it also has implications for the interactions between the executive and the legislature, particularly in relation to the serving of a search warrant on a member of parliament. This matter is discussed further below under the section relating to criminal conduct.

2.15. Notwithstanding that parliamentary privilege may only be ceded by express provision in statute, each state (with the exception of Victoria) has, in legislating for the various integrity or anticorruption commissions of one kind or another, chosen to put the matter beyond all

¹¹ Section 16(2)(c) of the Parliamentary Privileges Act

¹² Chief Justice Dixon in *R v Richards; Ex parte Fitzpatrick and Browne* held that, ‘It is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise’. [1955] HCA 36; 92 CLR 157

¹³ However, the Privileges Act, in s 4, establishes the essential element of offences so that ‘Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member’s duties as a member’. The Act also explicitly abolishes ‘contempt by defamation. Section 6 provides that ‘Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member’.

doubt and included provisions expressly preserving parliamentary privilege.¹⁴ In reporting on the [Northern Territory Anti-Corruption, Integrity and Misconduct Commission Inquiry](#), Brian Martin AO QC recommended that, in legislating for an independent commission, parliamentary privilege should be maintained and that ‘...the boundaries between the powers of the NT Anti-Corruption Commission and parliamentary privilege be clearly defined’.¹⁵

2.16. I submit that such an approach is a prudent path forward. It is consistent with the principles of comity and separation of powers and would ensure that the institutional integrity of the Assembly would not be compromised.¹⁶ In the final section of this submission I advocate that, in the event that an integrity commission is established, express provision be made in the relevant legislation to preserve the Assembly’s privileges and to circumscribe the jurisdiction of any commission in relation to the investigation and adjudication of members’ conduct.

2.17. The potential for parliamentary privilege to come into conflict with the presumed jurisdiction of an integrity commission is not of mere academic interest. The Standing Committee on Procedure and Privileges of the Western Australian Legislative Council recently had cause to issue a strong warning to that state’s Corruption and Crime Commission (CCC) after it was found to have improperly relied on parliamentary proceedings to form a judgement about the alleged misconduct of a ministerial staffer. In its report, the committee stated its position in the strongest terms possible and disabused the CCC that it had any jurisdiction—shared or otherwise—in matters falling within the exclusive cognisance of the Council:

Article 9 of the Bill of Rights 1688 (UK) states that: “The freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.” The immunity afforded by Article 9 is provided to the Houses of Parliament, its Members and others involved in parliamentary proceedings. Article 9 is part of the law of this State. The Committee has found that the CCC has breached this essential immunity by its use of parliamentary proceedings and in doing so intruded into an area of the Parliament’s exclusive jurisdiction. The Committee cannot overstate the importance of the immunity provided under Article 9 as a bulwark against oppression of the Legislature by the Executive and Judicial arms of government. This remains the *raison d’être* of the continuing relevance of a 330 year old UK statute to our parliamentary democracy...

By adopting the findings and recommendations of this Committee and enforcing any related orders, the Legislative Council will remind all those involved in parliamentary proceedings to conduct themselves with honesty, fairness and impartiality when carrying out their official duties. This task

¹⁴ Section 122 of the [Independent Commission Against Corruption Act 1988 \(NSW\)](#)
Section 192(2A)(c) of the [Crime and Corruption Act 2001 \(QLD\)](#) (see also Section 34 of the [Parliament of Queensland Act 2001 \(QLD\)](#))

Section 100 of the [Integrity Commission Act 2009 \(TAS\)](#)

Section 6 of the [Independent Commissioner Against Corruption Act 201 \(SA\)](#)

Section 3(2) of the [Corruption, Crime and Misconduct Act 2003 \(WA\)](#)

¹⁵ Martin, Brian ‘Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report—May 2016’

¹⁶ To inform its deliberations, the committee may be interested in the following papers and reports, which explore several different aspects of parliamentary privilege (including, variously, its interaction with statute law, the courts and anti-corruption/law enforcement bodies):

- Procedure and Privileges Committee, Legislative Assembly, Parliament of Western Australia ‘[Protecting the Parliament: Exclusive Cognisance and Sanctions for Breach of Privilege and Contempt of Parliament](#)’ Report No. 9, November 2015.
- NSW Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics ‘[Inquiry into Matters Arising From the ICAC Report Entitled “Reducing the Opportunities and Incentives for Corruption in the State’s Management of Coal Resources”](#)’, report 2/55—July 2014.
- Blunt, David, ‘[Parliamentary Sovereignty and Parliamentary Privilege](#)’ paper presented to seminar on *The Fundamentals of Law: Politics, Parliament and Immunity*, UNSW CBD Campus, 16 June 2015.
- Rosemary Laing ‘Exclusive Cognisance: Is it a Relevant Concept in the 21st Century?’ *Australasian Parliamentary Review*, Vol 30, No 2, 2015, pp. 58-72

falls squarely within the exclusive jurisdiction of the Houses of Parliament. The CCC has no concurrent or 'shared' jurisdiction with the Parliament to investigate and pursue matters of this nature.¹⁷

- 2.18. Affirmation of the Assembly's privileges through express provision in any establishing legislation associated with an integrity commission of one kind or another potentially obviates the kind of jurisdictional ambiguity—or 'ambit creep'—that appears to have occurred in this case. To assist in its deliberations, I commend to the select committee the Legislative Council's standing committee report.

¹⁷ Standing Committee on Procedure and Privileges, Legislative Council, Western Australia '[A Matter of Privilege raised by Hon Sue Ellery MLC](#)' Report 44, Presented by the Hon Barry House MLC (Chair), November 2016, p

3. EXISTING ARRANGEMENTS

RELEVANT PROCEDURAL AND LEGISLATIVE PROVISIONS

- 3.1. Since the commencement of self-government in 1989, the Assembly has instituted a range of different measures which have a bearing on the identification, investigation and adjudication of different types of MLA misconduct. The arrangements arise from different sources of legislative and procedural authority, including statute law, standing orders and resolutions of the Assembly.
- 3.2. Legislation that has a bearing on the conduct of members, includes, but is not limited to the following statutes:
- [Australian Capital Territory \(Self-Government\) Act 1988](#)¹⁸;
 - [Criminal Code 2002](#);
 - [Electoral Act 1992](#);¹⁹
 - [Public Interest Disclosure Act 2012](#).²⁰
- 3.3. The *Standing Orders and continuing resolutions of the Assembly* also contain provisions governing members' conduct. Relevant sources of parliamentary authority include:
- [standing orders 277-280](#) relating to contempt of the Assembly;
 - [continuing resolution 5](#) relating to the *Code of Conduct for all Members of the Legislative Assembly for the Australian Capital Territory*;
 - [continuing resolution 6A](#) relating to the Ethics and Integrity Adviser position;
 - [continuing resolution 5AA](#) relating to the Commissioner of Standards;
 - [continuing resolution 6](#) relating to declaration of members' interests requirements; and
 - [continuing resolutions 8AB](#) and [8AC](#) relating to the register of lobbyists and associated guidelines.
- 3.4. Against this background, there are three broad types of conduct which are relevant to the performance of the roles and functions of a Member of the Legislative Assembly.²¹ These are:
1. **Conduct over which the Assembly, or its agents, have sole jurisdiction to investigate and adjudge**—conduct which gives rise to potential contempts, breaches of the standing orders or resolutions of the Assembly (including potential breaches of continuing resolution 5 relating to the *Code of Conduct for all Members of the Legislative Assembly for the ACT* and continuing resolution 6 relating to the declaration of private interests of members).

¹⁸ Section 14(1)(c) of the Act provides that a member vacates his or her seat where he or she 'takes or agrees to take, directly or indirectly, any remuneration, allowance, honorarium or reward for services rendered in the Assembly, otherwise than under section 73 [which provides for the remuneration and allowances of members]'.

¹⁹ The Electoral Commissioner is empowered under the *Electoral Act 1992* to investigate and to prosecute a range of matters relating to the conduct of elections and disclosure rules. This submission does not address the operation of Electoral Act. The Electoral Commissioner is best placed to assist the committee in this regard.

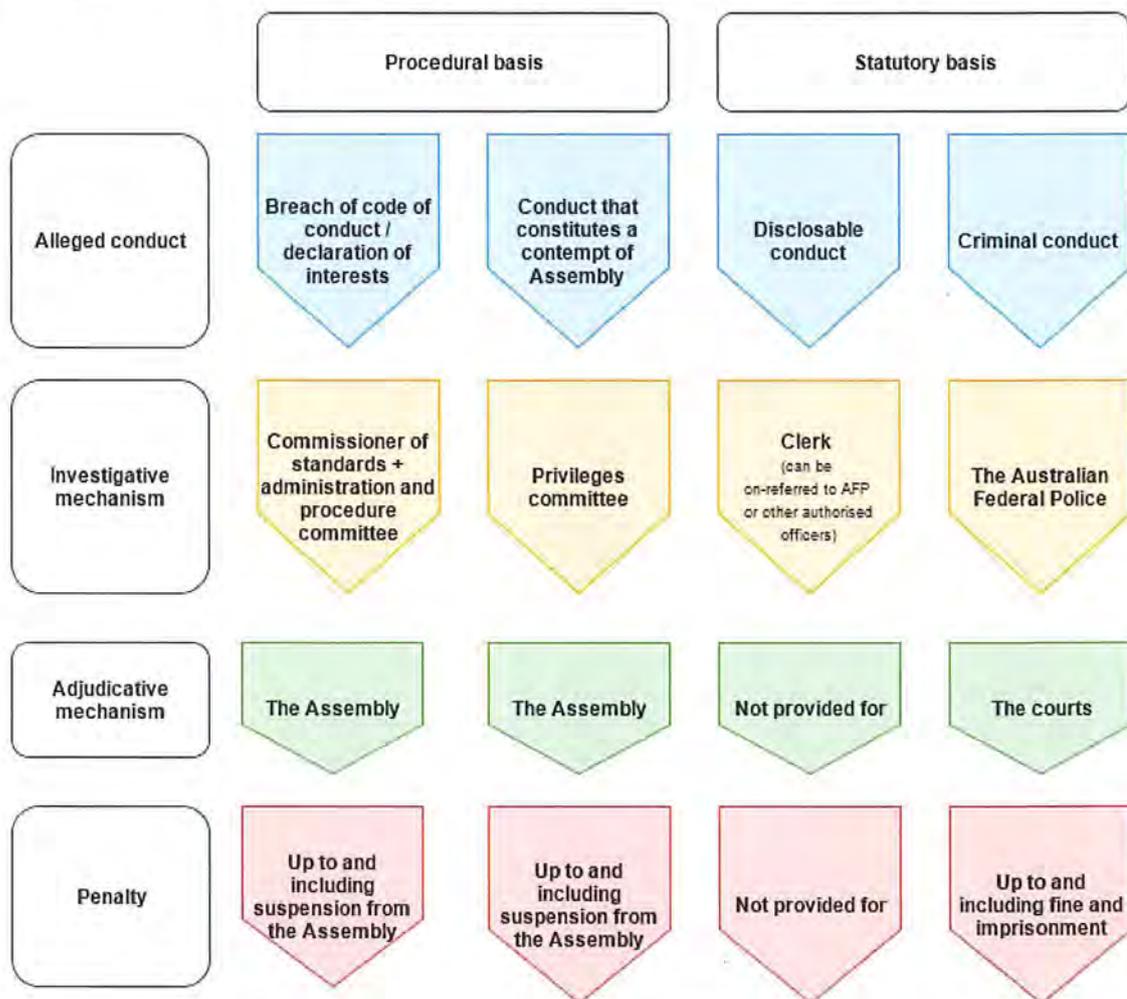
²⁰ This submission doesn't address the operation of a range of other laws which have more general application but which nonetheless potentially bear on the conduct of MLAs—for example, the [Workplace Health and Safety Act 2011](#), the [Discrimination Act 1991](#), the [Auditor-General Act 1996](#), the [Crimes Act 1900](#), the [Australian Crime Commission \(ACT\) Act 2003](#), the [Workplace Privacy Act 2011](#), the [Crimes Act 1914 \(Cwlth\)](#).

²¹ This submission does not address the [Ministerial Code of Conduct](#).

2. **Criminal conduct**—conduct which if proved amounts to a criminal offence pursuant to various ACT and Commonwealth statutes (including s 359 of the *Criminal Code 2002* relating to abuse of public office). Criminal conduct is generally investigated by the Australian Federal Police (although there are other investigative bodies that also have jurisdiction in particular circumstances). A decision about prosecution rests with the Director of Public Prosecutions and matters are determined by the courts.
3. **Disclosable conduct**—conduct which satisfies the definition of s 8 of the *Public Interest Disclosure Act 2012*, including conduct that ‘adversely affects, or could adversely affect, directly or indirectly, the honest and impartial exercise of a function of a public office or public sector entity’. The Clerk is required to investigate public interest disclosures relating to MLAs and their staff and, where there are reasonable grounds, may refer allegations to the Chief Police Officer or other officials authorised under the Act.

3.5. See below diagrammatic representation of the relevant investigative and adjudicative pathways that apply to MLAs. A more detailed table is at Appendix B.

Diagram 1: Mechanisms for addressing alleged MLA misconduct or criminal activity



3.6. Against the foregoing, there are circumstances where different investigative and/or adjudicative mechanisms could operate concurrently. For instance, an allegation that an MLA had received an improper benefit for performing his or her duties as an MLA, could,

depending on the relevant facts, come to be regarded as:

- an offence against s 359 of the *Criminal Code 2002* (falling within the jurisdiction of the AFP and the courts);
- a breach of the code of conduct, pursuant to clause 11 of the code of conduct (falling within the jurisdiction of the Commissioner of Standards);
- a contempt against the Assembly, pursuant to standing order 277(c), relating to members seeking benefits (falling within the jurisdiction of the Assembly);
- disclosable conduct, pursuant to s 8 of the Public Interest Disclosure Act (falling within the jurisdiction of the Clerk of the Legislative Assembly to investigate or to refer to the Chief Police Officer (pursuant to s 21).

3.7. Misconduct of this kind could also provide a cause of action in relation to s 14(1)(c) of the ACT Self-Government Act.

3.8. The committee may wish to consider how best to clarify the precedence that might be afforded to the different investigative and adjudicative jurisdictions in different circumstances. In the final section of this submission I advocate a role for the Assembly Commissioner of Standards in making preliminary assessments and referrals, which potentially resolves a number of jurisdictional issues.

CONDUCT WITHIN JURISDICTION OF THE ASSEMBLY

Code of conduct

3.9. The Assembly established the [*Code of Conduct for all Members of the Legislative Assembly for the Australian Capital Territory*](#) by resolution of continuing effect on 25 August 2005.²² The code was later amended on 16 August 2006 and 24 October 2013.²³ In moving the motion to adopt the code of conduct, then Speaker Berry made the following observations:

The adoption of this code is about this Assembly... demonstrating its willingness to put in place performance measures aimed at improving the standing of this legislature as the central part of the territory's parliamentary democracy. The institution of parliament is a cornerstone of our democratic principles and values, which will be improved with the adoption of a code of conduct for members. The onus falls on us, as parliamentarians, to show our commitment to the institution and to the people by our adherence to the code.²⁴

3.10. The code of conduct²⁵ commits members to the observance of a number of broad principles (paragraphs 1-9) as well as other, more specific, requirements (paragraphs 10-17). The Assembly's Commissioner for Standards may investigate alleged breaches of the code of conduct by members (more on this below). The code was reviewed by the Assembly's Ethics and Integrity Adviser, Stephen Skehill SC, in 2012 and another review is currently underway at the time of the writing of this submission. On 24 October 2013, a number of amendments to

²² The Assembly first considered the establishment of a code of conduct in 1991 through the Standing Committee on Administration and Procedures committee inquiry—[Inquiry into the Proposed Ethics Committee / Code of Conduct](#).

²³ 'Continuing resolution 5, Code of Conduct for all Members of the Legislative Assembly for the Australian Capital Territory' in *Standing Orders and continuing resolutions of the Assembly*, p 78.

²⁴ Wayne Berry MLA, [Legislative Assembly for the ACT: 2005 Week 10 Hansard \(25 August\)](#), p 3224.

²⁵ The Australian Senate and House of Representatives, the Western Australian Legislative Council and the Tasmanian Legislative Council are the only Australian parliamentary chambers that have not adopted a code of conduct of one kind or another.

the code were adopted. The committee may wish to review the Adviser's report²⁶ and the relevant Assembly debate²⁷ as further background to assist in its deliberations.

3.11. The complete code of conduct is included as Appendix C.

Declaration of interests

3.12. Pursuant to continuing resolution, the following requirements apply to members in declaring their private interests and those of their immediate family:

- declarations are to be made to the Clerk using a form available on the [Assembly webpage](#) ;
- declarations must be made within 28 days of making an oath or affirmation as an MLA;
- any alteration to a member's interests or those of their immediate family must be made within 28 days of the alteration occurring;
- the Clerk is responsible for storing members' declarations and for publishing them on the [Assembly website](#);
- alterations are published on the website in six monthly intervals (although the practice is that alterations are published immediately upon the Clerk having been advised);
- the Clerk destroys declarations that have been made by an MLA who has either vacated his or her seat or who has not been re-elected at a general election (the Clerk also removes these declarations from the Assembly website; and
- the Clerk will make a member's declaration available to any person on request.

Commissioner of Standards

3.13. The Assembly established the Legislative Assembly Commissioner of Standards by continuing resolution 5AA on 31 October 2013 (The resolution is included in full at Appendix D). The functions of the Commissioner are to:

- a. investigate specific matters referred to the Commissioner—
 - i. by the Speaker in relation to complaints against Members; or
 - ii. by the Deputy Speaker in relation to complaints against the Speaker;
- b. report to the Standing Committee on Administration and Procedure; and
- c. if the Assembly is not sitting when the Commissioner provides a report to the Committee, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation. (*Inserted 9 June 2016*).

3.14. The resolution limits the matters about which complaints may be made. It states that:

(5) Members of the public, members of the ACT Public Service and Members of the Assembly may make a complaint to the Speaker about a Member's compliance with the Members' Code of Conduct or the rules relating to the registration or declaration of interests.

3.15. The resolution also establishes arrangements for the receipt of a complaint by the Speaker and the Speaker's authority to refer complaints to the Commissioner. It states that:

(6) If the Speaker receives a complaint about a Member pursuant to paragraph and the Speaker believes on reasonable grounds that—

²⁶ Skehill, Stephen 'Review of the Code of Conduct for Members of the Legislative Assembly for the Australian Capital Territory', 31 July 2012.

²⁷ [Legislative Assembly for the ACT: 2013 Week 12 Hansard \(24 October\)](#), pp 3778-3788.

- (a) there is sufficient evidence as to justify investigating the matter; and
- (b) the complaint is not frivolous, vexatious or only for political advantage;

the Speaker may refer the complaint to the Commissioner for investigation and report.²⁸

- 3.16. While the commissioner is given authority to investigate and report on matters that are referred by the Speaker, nothing in the resolution provides the commissioner with any powers that give practical effect to this general authority. For instance: the commissioner does not have the power to administer an oath; no offence is committed by the giving of false or misleading evidence to the commissioner during the course of an investigation; and no offence is committed where an individual refuses to answer the commissioner's questions in the course of an investigation.
- 3.17. However, given that the code of conduct requires that MLAs 'Cooperate fully with any official inquiry that may be commenced in connection with their compliance with this Code of Conduct, or that of another Member'²⁹, it is open to the commissioner to draw conclusions about the extent to which members have cooperated with the commissioner's investigation and the extent to which their evidence might be relied upon to form any judgement about a complaint.
- 3.18. It is also open to the Assembly or a privileges committees to consider whether it wishes to summons a witness. The Assembly may deal with recusant witnesses and where the Assembly determines that a witness has provided false or misleading evidence, it is open to make a finding of contempt.
- 3.19. The committee may wish to consider procedural changes, which clarify the manner in which the Assembly's existing powers might be called upon to deal with non-cooperation with an investigation that is undertaken by the commissioner or where false or misleading information is suspected. I return to this in the final section of my submission.

Investigation protocols

- 3.20. On 24 March 2015, the Standing Committee on Administration and Procedure adopted a protocol for the investigation of complaints against members by the Commissioner of Standards. Among other matters, the protocol addresses principles of natural justice and procedural fairness as well as setting out the manner in which evidence is to be gathered. Paragraph 16 of the protocols states that the protocols were developed 'with a view to ensuring that complaints can be investigated fully, fairly and efficiently. The Commissioner will not be influenced by any publicity and will ask complainants to await the results and not seek to agitate the same issues in the press at least until the investigation has been completed'.³⁰
- 3.21. The full protocols are included as Appendix E.

Standard of proof

- 3.22. In his report on the first investigation that was referred, pursuant to continuing resolution 5AA, the Assembly's Commissioner of Standards, The Hon Dr Ken Crispin AO QC, explained the

²⁸ The resolution also sets out arrangements for the receipt and handling of complaints about the Speaker.

²⁹ Paragraph 17, Continuing Resolution 5AA

³⁰ Pursuant to resolution of the Standing Committee on Administration and Procedure, 24 March 2015.

manner in which his investigation had proceeded and the fact that he did not have an adjudicative function in the process (that is ultimately a matter for the Assembly upon the receipt of a report by the Standing Committee on Administration and Procedure). He also explicated the evidentiary standard that he would adopt in forming a view as to whether or not a breach of the code or the requirements for disclosure of interests had occurred. The commissioner's remarks on these points are worth repeating in full:

The investigation is inquisitorial rather than judicial in nature. Hence the Commissioner is obliged to initiate inquiries and actively try to establish the relevant facts, unlike a judge who generally hears only the evidence that the opposing parties choose to present. The scope of the investigation may also be somewhat more elastic than that of a trial since there are no pleadings of the kind used in civil cases to identify and narrow the range of issues before the hearing. The possibility of further issues emerging as the investigation proceeds cannot be wholly excluded, though the investigation must obviously remain focused on the complaint. The Commissioner cannot pursue unrelated questions that emerge from the material examined, even if interesting and of potential public importance.

As I have no adjudicative role, any issues about the standard of proof that should be applied in relation to complaints of this nature are ultimately matters for the Committee. However, since my report is intended to assist the Committee, I have taken the view that I should record my own impressions of the evidence and express my own opinion as to whether it is capable of substantiating any aspects of the complaint.

In legal proceedings a matter is said to be substantiated only when the party with the onus of proving the relevant facts has established them to the required legal standard. Since I am not hearing a legal action, but merely enquiring into what may have occurred, neither the Leader of the Opposition nor anyone else bears an onus of proving anything. On the other hand, the very concept of substantiation involves the proposition that the relevant matter has been established to some level of satisfaction. The approach usually followed in cases involving suggested breaches of non-criminal codes of conduct is to adopt the so-called 'civil' standard of proof on the balance of probabilities, though the strength of the evidence necessary to establish the relevant facts even to that standard may vary according to the nature of what is alleged. As Dixon J. commented in *Briginshaw v. Briginshaw* ((7) (1938) 60 CLR, at p 362 "the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved." (See also *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66 Mason C.J., Brennan, Deane and Gaudron JJ at paragraph 2).

Of course, the Committee is free to determine the relevant issues as it... [sees] fit but, in the absence of some indication that it intends to adopt a more stringent standard, I have assumed that it is likely to adopt the usual approach taken in relation to such matters. Accordingly, I have borne in mind the need to consider whether evidence revealed by the investigation would be likely to be accepted by the Committee as substantiating any aspect of the complaint to that standard.³¹

- 3.23. There have been four investigations into complaints made pursuant to continuing resolution 5AA. None of the investigations conducted by the commissioner concluded that a breach of the code of conduct had occurred and in each instance the Standing Committee on Administration and Procedure agreed with the commissioner's conclusions and reported accordingly to the Assembly. Were the commissioner to conclude that misconduct had occurred in relation to a particular complaint, the following procedure would generally apply.

³¹ Report by The Hon Dr Ken Crispin QC, 28 May 2016, appended to Standing Committee on Administration and Procedure (8th Assembly) report: '[The Conduct of Ms Burch](#)', June 2015, Report 6. Appendix C, p 6.

1. The commissioner would provide his or her report to the Standing Committee on Administration and Procedure containing: the substance of the complaint; the manner of the investigation and particular facts adduced; and any conclusions formed by the commissioner on the balance of probabilities (as per the *Briginshaw* principle³²).
 2. The Standing Committee on Administration and Procedure would consider the commissioner's report, make its own findings and any recommendations to the Assembly as to further action it believed should be taken or any penalty it believed should be imposed.
 3. The Assembly would then adjudge the matter (either accepting or rejecting the committee's findings), determining both whether or not an alleged breach had occurred and, in the event that it so found, the penalty that was to apply.
- 3.24. Neither the committee's deliberations, nor the deliberations of the Assembly, are constrained by the application of any particular standard of proof in determining a matter.
- 3.25. Although the Assembly is not able to fine or imprison any person³³, it is able to suspend a member from the Assembly or require an apology.

Contempt of the Assembly

- 3.26. The power of a parliament to adjudge and punish a contempt is a longstanding one and analogous to the power of a court to determine and punish any contempt against it. Through s 24 of the *Self-Government Act*, the Assembly and its members and committees have the same powers as the House of Representatives and its members and committees, including those that arise by virtue of s 49 of the Australian Constitution and those that arise pursuant to the *Commonwealth Parliamentary Privileges Act*.³⁴ Standing Order 277 guides, without limiting or derogating from the underlying prerogatives of the Assembly, the Assembly's powers in relation to contempt.

Statutory basis

- 3.27. Section 4 of the *Parliamentary Privileges Act 1987* establishes the essential elements of an offence in respect of contempt:

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Procedural basis

- 3.28. [Chapter 26 of the Assembly's standing orders](#) sets out the rules and guidelines for dealing with matters of privilege and contempt. Chapters [20](#) and [21](#) deal with the powers of committees and procedures relating to witnesses respectively.

³² See [Briginshaw v Briginshaw](#) (1938) 60 CLR CLR 336, Dixon J.: 'The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality ... [A]t common law... it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal.'

³³ See s 24(4) of the *Self-Government (Australian Capital Territory) Act 1988*

³⁴ However, unlike the Senate and the House of Representatives, the Assembly is unable to fine or imprison a person.

3.29. Pursuant to standing orders, the Assembly has the power to:

- send for papers and persons (standing orders 239 and 240 (committees))
- issue summons to non-members to appear before the Assembly or a committee (standing order 255);
- deal with recusant witnesses (standing order 256);
- summons a member for examination by the Assembly (standing order 257); and
- examine witnesses that appear before the Assembly (standing order 262 and 263).

3.30. The standing orders provide for natural justice and procedural fairness protections and for the protection of witnesses (standing order 264A).

3.31. Standing order 277 establishes types of conduct that the Assembly may treat as a contempt, including:

- interference with the Assembly;
- improper influence of a member;
- members seeking benefits;
- molestation of members;
- disturbance of the Assembly;
- service of writs;
- false reports of proceedings;
- disobedience of orders;
- obstruction of orders;
- interference with witnesses;
- molestation of witnesses;
- refusal of a witness before a committee to make an oath or affirmation to tell the truth;
- refusal of a witness before a committee to answer questions without reasonable excuse;
- the giving of false or misleading evidence before a committee;
- refusal or failure of a person to attend before the Assembly or a committee when ordered to do so;
- refusal or failure of a person to produce documents in accordance with an order of the Assembly or a committee;
- wilfully avoiding the service of an order of the Assembly or a committee;
- destruction, damage, forgery or falsification of a document required to be produced by the Assembly or a committee;
- unauthorised publication or disclosure of evidence to the Assembly or a committee.

3.32. These provisions are broadly directed and apply equally to members and their staff.

3.33. Since self-government, privileges committees have been established on seven occasions. The substantive matters considered are outlined below as well as whether or not contempt findings were made.

- The unauthorised diversion and receipt of a member's email—[no contempt finding was made](#) but an apology was recommended.
- The possible unauthorised dissemination of a committee material, a minister's refusal to answer questions and distribution of ACT Health document—[contempt findings were made in relation to two matters but no further action was recommended](#).

- The actions of the Chair of the Standing Committee on Planning and Environment with regard to the distribution of a flyer in her name at the Belconnen Markets—[a contempt finding was made but no further action was recommended](#).
- Alleged misuse of position by a committee chair and unauthorised dissemination of committee proceedings—[no contempt findings were made](#).
- Possible interference with an Assembly committee in the exercise of its authority—[no contempt findings were made](#).
- Possible improper influence of a member—[no contempt finding was made](#).
- Evidence of Mr Mark Sullivan to the Select Committee on Estimates 2009-10—[no contempt finding was made](#).

3.34. A review of the above reports demonstrates that, with the exception of the matters raised in the privileges committee relating the unauthorised diversion of a member's email, none of the matters considered by the committee related to potentially criminal or corrupt conduct.

3.35. In the case of the authorised diversion of a member's email, the AFP and the DPP were afforded precedence to investigate and evaluate whether or not any criminal offences had been committed³⁵ before the Assembly commenced its own proceedings in relation to a possible contempt (the conduct at issue was potentially capable of sustaining findings in relation to both types of offence). The committee's commentary on its separate and distinct jurisdiction to investigate and adjudicate a contempt, rather than a criminal offence, bears consideration:

It is important to distinguish here between the role of the AFP and the role of this committee. The AFP and the DPP were required to investigate and decide whether a criminal offence had been committed. Their investigation concluded that no criminal offence had been committed.

That finding did not preclude an investigation by the Assembly itself. Matters which might be found to be contempts are not necessarily breaches of the ordinary law. Thus the impression put about that the matter was closed with the completion of the police inquiry was false. This committee's inquiry did not seek to second-guess the criminal investigation. It was a separate investigation into possible breaches of the law of parliaments.³⁶

3.36. The precedence given to the investigation and adjudication of potential criminal issues over contempt of parliament proceedings obviates the problems that potentially arise in relation to both parliamentary privilege and the *sub judice* rule³⁷ (which are, in some respects, two sides of the comity coin) were a parliamentary investigation and determination to precede—or to run concurrently—with a criminal investigation or court proceeding.

3.37. In the final section of this submission I advocate that relevant procedural and legislative arrangements should accommodate a general principle that where certain conduct has the potential to give rise to both a criminal offence and a breach of Assembly practice and procedure (including a possible contempt against the Assembly), precedence should be afforded any criminal investigation and subsequent judicial proceeding.

³⁵ Ultimately, no criminal charges were laid.

³⁶ Select Committee on Privileges, Legislative Assembly for the ACT '[Unauthorised diversion and receipt of a Member's e-mails](#)' November 2002, p 1.

³⁷ See continuing resolution 10 of the Assembly.

Ethics and integrity adviser

3.38. The Assembly first seriously contemplated the establishment of an ethics adviser in 2001³⁸ when the Standing Committee on Administration and Procedure inquired into and reported on the matter. However, it wasn't until 2008 that the Assembly established, by continuing resolution, an Ethics and Integrity Adviser. The Assembly Ethics and Integrity Adviser has the following functions:

- Advising Members of the Legislative Assembly, when asked to do so by that member, on ethical issues concerning the exercise of his or her role as a member (including the use of entitlements and potential conflicts of interest).
- Giving advice that is consistent with any code of conduct or other guidelines adopted by the Assembly, but does not include the provision of any legal advice.

3.39. The adviser has no investigative or adjudicative functions.

3.40. Under the resolution, the adviser is appointed by the Speaker and is required to maintain records of advice given, maintain the confidentiality of advice (unless permission by the seeker of the advice is given), and to meet with the Standing Committee on Administration and Procedure annually to detail the number of matters that have been raised and the number of members who had sought advice. The Assembly is able to call for the production of records of the adviser where a person to whom the advice relates seeks to rely on that advice.

3.41. In moving the motion to establish the Ethics and Integrity Adviser position, then Speaker Berry observed that:

In moving this motion today, I am not saying that the Assembly is rife with unanswered ethical issues. The intention of this motion is to be proactive in assisting members when they are faced with the inevitable issues that confront them in adhering to the code of conduct and making their declarations to the members' interests register. Currently there is no single office or authority from which they can seek advice in relation to these matters. The establishment of an ethics and integrity adviser will address this shortfall.³⁹

3.42. A review of the Ethics and Integrity Adviser's annual reports indicates that MLAs have sought and received advice on a wide range of matters from the adviser. For example, advice was provided in relation to:

- whether it was appropriate for a member to engage in certain party political activities;
- the interrelationship between a member's duties as a member and their intended post-separation employment;
- the interrelationship between a member's pre-election activities and their duties as a member;
- whether a conflict of interest could arise between a member's duties and a shareholding of a member of their family;
- whether it was appropriate for a member to accept a certain offer of hospitality; and
- whether it was appropriate for a member to participate in the proceedings of a committee of the Assembly given their pre-existing involvement in and views on the matters to be considered by that committee;

³⁸ However, even before this, the government released a discussion paper in 1999 entitled 'A Parliamentary Ethics Adviser for the ACT Legislative Assembly'.

³⁹ Wayne Berry MLA, *Legislative Assembly for the ACT: 2008 Week 4 Hansard (10 April)*, p 1279.

- whether a member could participate as a member of an Assembly committee considering a matter that related to the interests of a company in which the member had a shareholding and to those of other parties with which the member had personal friendships, and that was a matter in respect of which the member had a long-standing interest and opinions;
- whether a member could participate as a member of an Assembly committee considering a matter affecting the interests of a party that had made a publicly declared donation to the member's election campaign fund;
- whether a reasonable perception of conflict of interest by a member could be formed if a member of their staff entered into a private affiliation with a business entity operating in an industry sector in respect of which the member had a "shadow" portfolio responsibility;
- whether a minister could claim, and would need to declare on the Register of Members' Interests, a personal benefit publicly available under legislation which was considered and approved for submission to the Assembly by the cabinet of which the minister was a member, passed by the Assembly of which the minister was a member, and thereafter administered by the executive of which the minister was a member; and
- whether a member should accede to a request by a member of their staff to act in a manner that would afford to the staff member an entitlement under the *Legislative Assembly (Members' Staff) Act 1989* that would not otherwise arise.⁴⁰

3.43. The following table shows the number of occasions on which the adviser has provided advice to a member and the number of members that have sought and received advice.

Table 1: Ethics and Integrity Adviser

Year	Number of members that sought and received advice	Number of individual advices provided
2008-2009	5	6
2009-2010	2	3
2010-2011	5	6
2011-2012	3	4
2012-2013	0	0
2013-2014	4	6
2014-2015	8	12
2015-2016	7	14
Total	34	51

3.44. All of the adviser's annual reports are available on the [Assembly website](#).⁴¹

Lobbyist register and guidelines

3.45. The Assembly has established a number of requirements in relation to lobbying MLAs. [Continuing resolution 8AB](#) establishes a lobbyists register and a lobbying code of conduct. [Continuing resolution 8AC](#) establishes lobbyist regulation guidelines. Both resolutions are provided in full at Appendix F.

3.46. The requirements provided for in the relevant resolutions arose from recommendations of a [Standing Committee on Administration and Procedure report on the regulation of lobbyists](#).

⁴⁰ Ethics and Integrity Adviser Annual Reports accessed at: <http://www.parliament.act.gov.au/members/ethics-and-integrity>

⁴¹ <http://www.parliament.act.gov.au/members/ethics-and-integrity>

- 3.47. That report contained advice prepared by the Assembly Ethics and Integrity Adviser, Stephen Skehill SC, which included a draft regulation and suggestions in relation to a code of conduct for lobbyists. Both the code of conduct and the regulation were adopted, with amendments, by the Assembly on 14 August 2014 and 25 September 2014 respectively. The preamble to the ACT Lobbying Code of Conduct states that the code 'is designed to ensure that contact between lobbyists and public offices is conducted in accordance with public expectations of transparency, integrity and honesty'.
- 3.48. The guidelines establish a register, categories of person that are required to register, categories of person that are ineligible to be registered and categories of person that are not required to be registered. The guidelines also establish a number of administrative mechanisms for the publication of the register, registration arrangements, and requirements in relation to registration forms. One of the key features of the lobbyists register scheme that has been adopted by the Assembly is that the Clerk is responsible for its overall administration. This approach is unique in Australia.
- 3.49. Below is a listing of the officials that are charged with maintaining relevant registers in other jurisdictions:
- Commonwealth—Secretary of the Department of Prime Minister and Cabinet;
 - New South Wales—NSW Electoral Commission⁴²;
 - Victoria—Public Sector Standards Commissioner;
 - Queensland—Integrity Commissioner;
 - South Australia—Chief Executive of the Department of the Premier and Cabinet;
 - Western Australia—Public Service Commissioner; and
 - Tasmania—Secretary, Department of the Premier and Cabinet.⁴³
- 3.50. Pursuant to continuing resolution, the Clerk is responsible for receiving complaints where lobbying activities have been conducted by a person required to be registered but who is not registered. The Clerk is also responsible for receiving complaints where an MLA, a contractor or consultant to an MLA, or a person employed under the Public Sector Management Act has 'entertained lobbying activities by a person required to be but [is] not registered on the Register'.
- 3.51. In the final section of this report I make a submission relating to the role that an independent integrity commission—should such a commission be established—might have in regulating lobbying activities in relation to the wider public sector and I also contemplate whether the Assembly's Commissioner of Standards is better placed to assume an oversight role in relation to the interaction between lobbyists and MLAs and their staff.

CRIMINAL CONDUCT

- 3.52. While all members are subject to the applicable laws of the Territory and the Commonwealth, a number of particular offences relating to dishonesty in public office are worth noting.

⁴² Was previously the Department of Premier and Cabinet.

⁴³ Advice provided by Stephen Skehill, 5 May 2014, in Standing Committee on Administration and Procedure report '[Lobbyist regulation](#)' Report 3, June 2014, p 29.

3.53. The ACT, along with most other Australian jurisdictions, has passed a criminal code based on the Model Criminal Code developed by the Model Criminal Code Officers Committee established by the Standing Committee of Attorneys-General. The *Criminal Code 2002* (the Code) was amended in 2004⁴⁴ to include a range of offences that, broadly speaking, relate to the types of corrupt conduct that typically fall within the purview of independent integrity or anti-corruption bodies. These offences include: bribery, other corrupt benefits, payola and abuse of public Office (See Division 3.7.2) and have application to public officials (see s 353) and other persons. A public official is defined as a 'person having public official functions, or acting in a public official capacity' and includes a Member of the Legislative Assembly.⁴⁵

3.54. Given its specific application, it is worth reflecting on the 'abuse of public office' offence that is established by s 359 of the Code. The offence targets public officials⁴⁶ 'who improperly use their office to obtain a personal benefit or cause a detriment to someone else'.⁴⁷ The elements of the offence are as follows:

A public official commits an offence if—

(a) the official—

- (i) exercises any function or influence that the official has as a public official; or
- (ii) fails to exercise any function the official has as a public official; or
- (iii) engages in any conduct in the exercise of the official's duties as a public official; or
- (iv) uses any information that the official has gained as a public official; and

(b) the official does so with the intention of—

- (i) dishonestly obtaining a benefit for the official or someone else; or
- (ii) dishonestly causing a detriment to someone else.

3.55. The maximum penalty is 500 penalty units, imprisonment for 5 years or both.

3.56. The statutory offence created under s 359, originates from the common law offence of 'misfeasance in public office', which has existed for over three centuries.⁴⁸ The explanatory statement to the originating bill states that 'Like the other corruption offences in this part, the key fault element for these offences is dishonesty'.⁴⁹ Two types of conduct contemplated in the explanatory statement are nepotism and the improper use of information gained in public office for private benefit; however, all sorts of conduct conceivably fall within the relevant provisions of s 359.

3.57. Responsibility for investigating and prosecuting alleged offences in Division 3.7 of the Code rest with the Australian Federal Police and the Director of Public Prosecutions. As with other criminal matters, the presumption of innocence is afforded those that have been charged with offences under these provisions and the burden of proof in adjudging whether an offence has been committed is 'beyond a reasonable doubt'. There are no coercive or other special

⁴⁴ [Criminal Code \(Theft, Fraud, Bribery and Related Offences\) Amendment Act 2004](#)

⁴⁵ See definition of 'public official' and 'territory public official' in s 300.

⁴⁶ See definitions in s 300

⁴⁷ [Explanatory Statement, Criminal Code \(Theft, Fraud, Bribery and Related Offences\) Amendment Bill 2003](#), p 67.

⁴⁸ Australian Government Solicitor, '[Misfeasance](#)' Legal Briefing Number 98, 4 December 2012

⁴⁹ [Explanatory Statement, Criminal Code \(Theft, Fraud, Bribery and Related Offences\) Amendment Bill 2003](#), p 67.

powers available to police investigating in these offences.⁵⁰

- 3.58. Since self-government in 1989, no MLA has ever been charged with a corruption or other criminal offence.

Search warrants

- 3.59. The Legislative Assembly has sought to address the potential tensions that arise in relation to the execution of search warrants and the application of parliamentary privilege through the adoption in November 2006 of a memorandum of understanding (MOU) between the Speaker of the Legislative Assembly and the Chief Police Officer of the ACT. The MOU sets out agreed arrangements for performing the policing function within the precincts of the Legislative Assembly.⁵¹ It includes:

- a protocol for meeting with MLAs;
- arrangements for performing operational policing within the parliamentary precincts;
- liaison arrangements between the AFP and the Assembly;
- arrangements for interviewing an MLA (or other person) in relation to an investigation of an alleged offence; and
- arrangements for the carrying of firearms in the Assembly precincts.

- 3.60. Importantly, the MOU includes as a schedule an ACT Policing Practical Guide: 'Execution of Search Warrants where Parliamentary Privilege may be applied—Execution of Search Warrants and interviews with Members of the Legislative Assembly'. The stated aim of the guide is to 'ensure that AFP officers execute search warrants in a way which does not amount to a contempt of the Assembly and which gives a proper opportunity for claims of privilege to be raised and resolved'. The policing guide is similar in its scope and effect to the National Guideline issued by the AFP.⁵²

- 3.61. In the event that an integrity commission with the power to execute search warrants is established, it would be important to develop procedural and administrative arrangements that establish the manner in which warrants would be executed on members. Such an approach has been adopted by the NSW Parliament in relation to the execution of warrants by the Independent Commission Against Corruption (ICAC).

- 3.62. The NSW Legislative Council's Privileges Committee has conducted four separate inquiries into matters of privilege that have arisen in relation to the execution of search warrants against its members.⁵³ I also note the Senate's recent privilege committee inquiries relating to the status of material seized under warrant.⁵⁴ The Senate also recently referred the use of intrusive

⁵⁰ It is worth noting that the Auditor-General, the Electoral Commissioner and the Australian Crime Commission have various coercive powers available to them. Each of these statutory officers/agencies could conceivably be involved in the investigation of a member pursuant to relevant enactments.

⁵¹ The Legislative Assembly precincts are established by the [Legislative Assembly Precincts Act 2001](#)

⁵² Tabled Paper, Australian Senate, 30 August 2016, 'AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved' in 163rd Report of the Senate Committee of Privileges '[Status of material seized under warrant Preliminary Report](#)'.

⁵³ <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=192#tab-inquiries>

⁵⁴ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges

powers by law enforcement and intelligence agencies to its privileges committee.⁵⁵

DISCLOSABLE CONDUCT

3.63. Members of the Legislative Assembly are subject to the *Public Interest Disclosure Act 2012* (the PID Act). The object of the PID Act is set out in s 6, which is to promote the public interest by—

- a) providing a way for people to make public interest disclosures; and
- b) ensuring people who make public interest disclosures are protected and treated respectfully; and
- c) ensuring public interest disclosures are properly investigated and dealt with; and
- d) ensuring that appropriate consideration is given to the interests of people who make public interest disclosures and the people who are the subject of the disclosures.

3.64. Any person may make a public interest disclosure about disclosable conduct as it relates to a public sector entity, a subset of which is a Legislative Assembly entity (s 9). Members are defined as Legislative Assembly entities for the purposes of the Act.⁵⁶ Pursuant to s 8, disclosable conduct means any of the following:

- (a) conduct of a person that could, if proved—
 - (i) be a criminal offence against a law in force in the ACT; or
 - (ii) give reasonable grounds for disciplinary action against the person;
- (b) action of a public sector entity or public official for a public sector entity that is any of the following:
 - (i) maladministration that adversely affects a person's interests in a substantial and specific way;
 - (ii) a substantial misuse of public funds;
 - (iii) a substantial and specific danger to public health or safety;
 - (iv) a substantial and specific danger to the environment.

3.65. Conduct means:

- (a) for a person, regardless of whether the person is a public official for a public sector entity—conduct of, or involving, the person that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial exercise of a function of a public official or public sector entity; or
- (b) for a public official for a public sector entity—conduct of, or involving, the person that is or involves—
 - (i) the exercise of the person's functions as a public official in a way that is not honest or is not impartial; or
 - (ii) a breach of trust as a public official; or
 - (iii) a misuse of information or material acquired in or in relation to the exercise of the person's functions as a public official whether the misuse is for the person's benefit or the benefit of someone else; or

⁵⁵ Including in relation to telecommunications interception, electronic surveillance and metadata domestic preservation notices. See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/intrusivepowers

⁵⁶ The Act's dictionary (p 38) provides that a Legislative Assembly entity is:

- a) an MLA;
- b) the Office of the Legislative Assembly;
- c) a person employed in the *Legislative Assembly (Members' Staff) Act 1989*;
- d) an officer of the Legislative Assembly.

(c) a conspiracy or attempt to engage in conduct mentioned in paragraph (a) or (b).

Concurrent operation

- 3.66. The committee will note that there is considerable opportunity for the foregoing provisions of the PID Act to operate concurrently with continuing resolution 5AA so far as compliance with the Members' Code of Conduct is concerned. Indeed, broad parity between a code of conduct violation by an MLA and 'disclosable conduct' is arguably established by paragraph 8(a)(ii) of the Act (i.e. a breach of the code of conduct would also 'give reasonable grounds for disciplinary action against the person').
- 3.67. It is reasonably clear that the concurrent operation of these two sets of different arrangements for investigating the conduct of MLAs—one set of arrangements with its basis in parliamentary law and the other with its basis in statute—presents a number of problems relating to jurisdictional overlap. I return to these matters and propose amendments to the PID Act in the following section.

Investigations

- 3.68. Pursuant to s11(b) of the PID Act, the Clerk, the Auditor-General, the Ombudsman and declared Disclosure Officers⁵⁷ for Legislative Assembly entities are responsible for receiving a PID in relation to Legislative Assembly entities. The Act requires that, on receipt of a PID, the head of a public sector entity—of which a Legislative Assembly entity is a sub-type (see s 9(1)—must investigate (s18). Subject to certain conditions having been met, section 19(2) permits the head of a public sector entity to refer a disclosure to the head of another public sector entity.
- 3.69. Paragraph 3.21 of the Office's approved procedure provides that 'If the Clerk reasonably assesses that the public interest disclosure relates to a Member's compliance with the Members' Code of Conduct, the Clerk may refer the disclosure to the Speaker (or Deputy Speaker) who may refer the matter for investigation by the Commissioner for Standards appointed pursuant to continuing resolution 5AA of the Legislative Assembly'.
- 3.70. This practice is an attempt to recognise that there are types of conduct that could fall within both:
- a) the definition of disclosable conduct under the Act (s 8); and
 - b) the ambit of the Commissioner for Standards, pursuant to paragraph (6) of continuing resolution 5AA.
- 3.71. However, neither the Speaker, nor the Legislative Assembly Commissioner for Standards, are heads of a public sector entity as defined in the PID Act (see s13). It is also the case that neither the Speaker, nor the Standards Commissioner, are 'investigating entities' pursuant to the relevant definition (page 38 of the Act).

⁵⁷ The Clerk has declared that the Director, Office of the Clerk, is the Office's disclosure officer.

- 3.72. The PID Act establishes a role for the Clerk of the Assembly to investigate members⁵⁸ for disclosable conduct. However, the statutory function of the Clerk provided for in s 6 of the [Legislative Assembly \(Office of the Legislative Assembly\) Act 2012](#), and indeed the traditional role of parliamentary clerks more generally, is directed towards the provision of administrative and procedural advice and support to the legislature, its committees and its members. Investigative functions of the type provided for the PID Act have the potential to conflict with the exercise of the Clerk's, and the Office's, advisory and support functions.
- 3.73. I return to these matters in the following section.

⁵⁸ The Clerk is also responsible for investigating staff employed under the *Legislative Assembly (Members' Staff) Act 1989*.

4. PROPOSALS AND FURTHER CONSIDERATION

- 4.1. As noted at the outset, the purpose of this submission is not to provide a detailed policy proposal which attends to every issue connected the broader issues of parliamentary integrity. Instead, I hope to impart a general understanding of the arrangements that apply and how these might best be adapted to operate harmoniously with a putative independent integrity commission.
- 4.2. To this end, I outline below a number of general proposals in relation to the broad integrity architecture that might come to apply to MLAs in the event that the Assembly determines to establish an independent integrity commission. I make a number of specific submissions as to the sorts of considerations that might be brought to bear in drafting a bill to establish such a commission. I make a submission in relation to possible amendments to the Public Interest Disclosure Act for the committee's consideration.
- 4.3. Finally, I also make a number of very brief submissions in relation to:
 - jurisdictional and administrative arrangements associated with lobbying;
 - integrity arrangements that might apply to members' staff;
 - parliamentary oversight; and
 - methods of appointment for an integrity commissioner/s.

PROPOSED ARRANGEMENTS

- 4.4. I do not make any submission in relation to the general powers, investigative modalities or standard of evidence that might apply to an integrity commission in general. However, in the event that the Assembly determines to establish an independent integrity commission of one kind or another and that such a body is to be given the sorts of investigative powers that typically apply in other jurisdictions (e.g. powers to administer oaths, affirmations; coercive powers etc.), it will be a threshold issue for the Assembly to consider whether such a body should have jurisdiction over the conduct of MLAs.
- 4.5. I submit that the jurisdiction of an independent integrity commission so far as MLAs are concerned should be clearly delineated and narrow. A commission should not be given the function to investigate or to form judgements in relation to matters which properly fall within the exclusive cognisance of the Assembly—i.e. in relation to possible contempts, breaches of the standing orders or Assembly resolutions (including the code of conduct and declaration of members' interests requirements). These matters should continue to be dealt with, for the most part, by the existing arrangements based on relevant parliamentary procedure, statute and constitutional provisions. In particular, I submit that the establishment of an independent integrity commission should not have the effect of displacing the Assembly Commissioner of Standards arrangements—these arrangements should continue, albeit with a number of modifications.

- 4.6. However, this is not to say that MLAs should escape the gaze of an independent integrity commission—should such a body be established—altogether. An independent integrity commission could well be a suitable mechanism for investigating allegations relating to criminal conduct where the criminal conduct is directly related to an MLA’s conduct as a member (for example, offences under Part 3.7 of the *Criminal Code 2002*). Criminal matters not related to an MLA’s conduct (for example, offences of common assault or criminal damage to property pursuant to the *Crimes Act 1900*) could continue to be investigated by the AFP.
- 4.7. To avoid potential confusion over the application of jurisdiction, the Assembly Commissioner of Standards would be ideally placed to receive all complaints made in relation to MLAs.⁵⁹ The commissioner could then make a preliminary assessment as to which investigative and adjudicative pathways would obtain, depending on the particular circumstances that apply.
- 4.8. A practice might be adopted (and reflected in relevant procedural arrangements) that precedence would be given to criminal investigations and that the Assembly and/or the commissioner would not initiate an investigation or proceedings against a member until any related criminal investigation and subsequent judicial process had been concluded. The Assembly would still have the prerogative to investigate, adjudge and punish a contempt arising from a member’s conduct but it would, by convention and procedural codification, allow criminal matters to be determined first. The precedent for such an approach is found in the Assembly’s own practice where a select committee on privileges was formed to investigate a particular matter only after an investigation undertaken by the AFP had been concluded.⁶⁰
- 4.9. Additionally, it would be desirable to specify, by way of resolution, a set of procedures to apply where the Commissioner of Standards determines that an investigation has been impeded. As example, in the event that a person refused to provide information to the commissioner to assist in his or her investigation, it would be open to the Assembly, on a recommendation by the Standing Committee on Administration and Procedure, to consider the establishment of a privileges committee, which could bring to bear its powers to call for persons and papers.
- 4.10. Below I set out in very broad terms, proposed arrangements that would place the Commissioner of Standards at the centre of all complaints or allegations made about the conduct of MLAs and at the same time enable an independent integrity commission to investigate serious criminal conduct relating to the performance of a member’s duties as an elected representative. In such an arrangement, the commissioner would be charged with receiving all complaints or allegations made about MLAs and then determining whether, on the basis of a preliminary assessment, the allegation or complaint, is:
- a) false, vexatious or only for political advantage or made on the basis of insufficient evidence so as to warrant further investigation; or
 - b) *prima facie*:

⁵⁹ I note that the Standing Committee on Administration and Procedure is currently inquiring into the referral arrangements in relation to the Commissioner of Standards. I do not pre-empt that committee’s report and recommendations.

⁶⁰ Select Committee on Privileges, Legislative Assembly for the ACT ‘Unauthorised diversion and receipt of a Member’s e-mails’ November 2002.

- i. a contempt of the Assembly or a matter that bears on the privileges of the Assembly (but one that does not fall within the commissioner’s existing jurisdiction in relation to complaints made about compliance with the code of conduct and declaration of members’ interests pursuant to continuing resolution 5AA); or
- ii. a breach of members’ code of conduct or declaration of members’ interest requirements(pursuant to continuing resolution 5AA).⁶¹
- iii. a criminal offence that relates to the MLA’s roles or functions as a public official (i.e. corruption and offences of the kind provided for in Part 3.7 of the Criminal Code 2002); or
- iv. a criminal offence unrelated to the MLA’s roles or functions as a public official (e.g. common assault pursuant to s 26 of the *Crimes Act 1900*); or

4.11. The following table and diagram set out how the Commissioner of Standards might then proceed to refer a complaint or allegation to the appropriate investigative and/or adjudicative authority.

Table 2: Proposed investigative, adjudicative and referral pathways

Commissioner’s preliminary assessment of complaint or allegation	Action/referral	Investigation	Adjudication, reporting arrangements
1. Allegation or complaint is false, vexatious or only for political advantage or made on the basis of insufficient evidence to warrant further investigation.	Commissioner reports to the Speaker noting the complaint or allegation and the commissioner’s conclusion about its doubtful veracity or lack of evidence etc.	Nil	In these cases, neither the Speaker, nor the Commissioner would be required to publicly report the particulars of an allegation or complaint.
2. Possible contempt of the Assembly or other matter of privilege.	Commissioner reports to the Speaker ⁶² or the Standing Committee on Administration and Procedure ⁶³ , which duly reports to the Assembly as to whether further action is recommended.	The Assembly may determine to establish a privileges committee to inquire into and report on the matter. Committee would take evidence, call for papers, persons etc.	Privileges committee to report to the Assembly with its findings and any recommendations. Assembly determines the matter.
3. Possible criminal offence has been committed that relates to the MLA’s roles or functions as a	Referral to the integrity commission for investigation.	Integrity commission exercises relevant investigative powers codified in statute.	Integrity commission able to make a findings and recommendations in report to the

⁶¹ It would also be possible, using this clearing house approach to enable referrals by the Commissioner of Standards to other authorities. For example, the Commissioner of Standards could refer possible electoral offences to the Electoral Commission.

⁶² This would require amendment to standing order 276 to enable the Commissioner of Standards to raise such a matter with the Speaker.

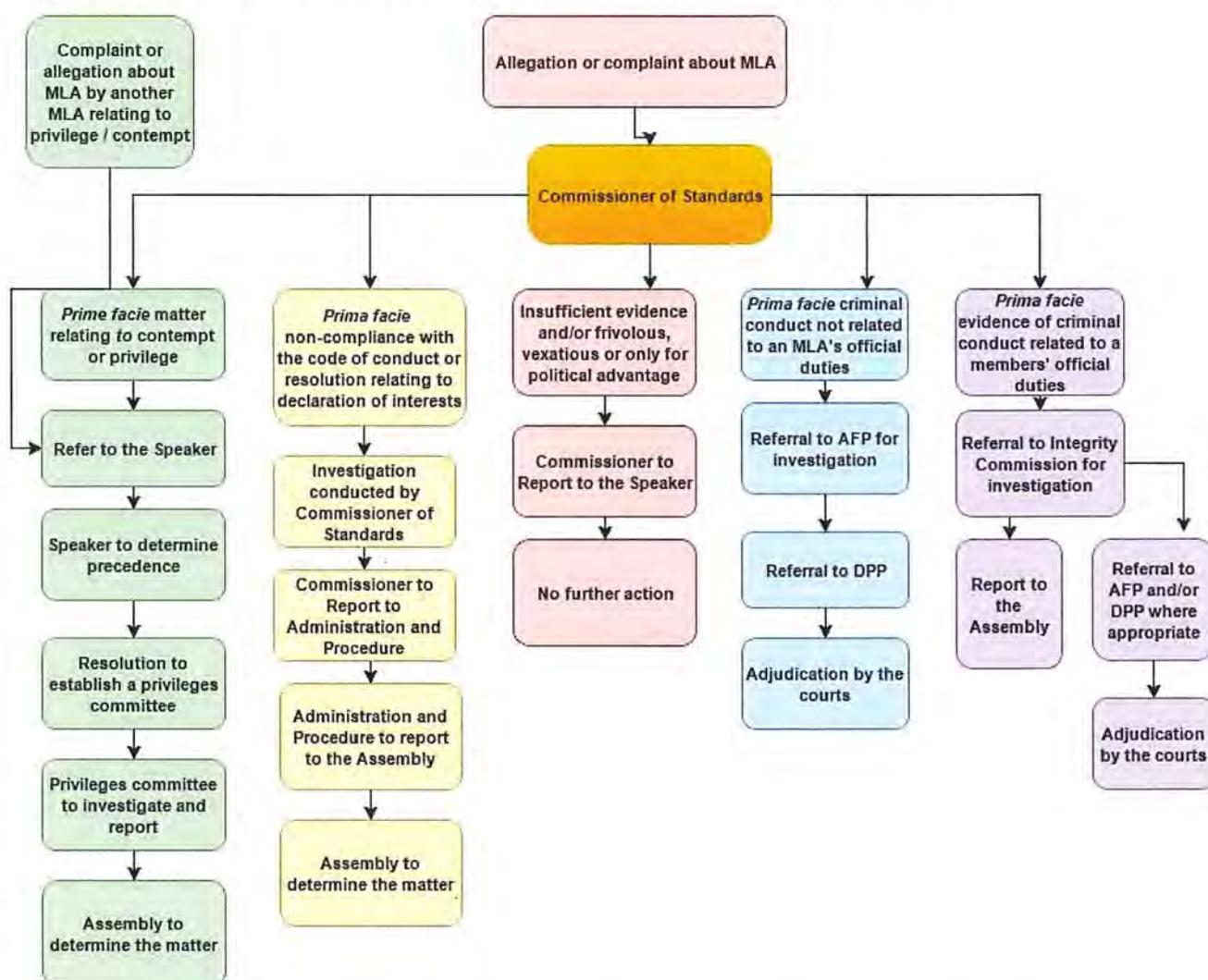
⁶³ The Commissioner of Standards could, subject to minor amendment to continuing resolution 5AA, report to the administration and procedure committee in relation to possible contempts.

Commissioner's preliminary assessment of complaint or allegation	Action/referral	Investigation	Adjudication, reporting arrangements
public official.			<p>Assembly.</p> <p>May directly refer matters to the DPP and/or the AFP for criminal investigation and prosecution.⁶⁴</p>
4. Possible criminal offence unrelated to the MLA's roles or functions as a public official.	Referral to the AFP	AFP investigate in accordance with relevant provisions of the <i>Crimes Act 1900</i> , <i>Australian Federal Police Act 1979</i> and <i>Criminal Code 2002</i> , policing guides etc.	Referred to the DPP and adjudicated by the courts where appropriate.
5. Possible breach of the members' code of conduct or declaration of members' interest requirements.	Investigation by the Commissioner of Standards	Commissioner investigates pursuant to continuing resolution 5AA and investigation protocols. Forms judgements based on the balance of probabilities. ⁶⁵	<p>Standards Commissioner to report to the Administration and Procedure. Administration and Procedure committee reports to the Assembly.</p> <p>Assembly determines the matter.</p>

⁶⁴ Depending on the manner in which evidence has been collected by an integrity commission, subsequent investigations and judicial processes may not be able to rely on that evidence (for instance, where evidence was gathered through the application of coercive powers entailing the removal of the protection against self-incrimination).

⁶⁵ Where the commissioner encountered obstruction or interference, it would be open to the commissioner to report this to Administration and Procedure to make recommendations for further action to the Assembly (i.e. the Assembly could chose to step in with a privileges inquiry and exercise its powers to call for persons, papers etc.).

Diagram 2: Flow chart of proposed investigative, adjudicative and referral pathways



4.12. Arrangements that operate along the lines set out above would establish appropriate jurisdictional separations so that the Commissioner of Standards remained central to the investigation of complaints made about MLAs, pursuant to Assembly resolution, thereby ensuring that the Assembly's parliamentary immunities and powers are not abridged. At the same time, the approach permits matters that sit outside of any inherent cognisance of the Assembly (i.e. criminal matters that bear on the performance of members' parliamentary functions) to be the subject of independent integrity commission activity. Such an approach is modulative and introduces a degree of 'process proportionality'—that is, the capacity to address different types of conduct by way of different investigative and adjudicative processes, depending on the severity and nature of the conduct. In a recent paper, David Blunt, Clerk of the NSW Legislative Council, made a number of observations about how a monolithic approach can present challenges in handling complaints and allegations across a continuum of severity. In it, he reflects on the differences between the UK approach in which a Parliamentary Commissioner for Standards (upon which the Assembly's Commissioner of Standards arrangements have been modelled) is responsible for investigating complaints made against members in relation to prescribed provisions of the Code of Conduct for

Members of Parliament⁶⁶ and the arrangements that have applied in NSW following the establishment of ICAC:

As the UK model has developed in recent years, particularly since the 2009 expenses scandal, the advantages of the model and its potential for redressing flaws in the NSW regime have become increasingly evident. The UK model has been improved through enhanced transparency of the complaints process, so that for every complaint, including those not accepted for inquiry, appropriate information is published. At the same time as this additional transparency has been built into the system, sensible arrangements have been made for the resolution of less serious matters. "Rectification" (particularly in relation to breaches of the pecuniary interest disclosure requirements) and "reimbursement" (in relation to expenses claims) have been formally recognised as appropriate responses to minor breaches of the relevant rules, usually accompanied by sanctions including apologies to the House in writing or by way of a statement. In effect these approaches provide the option of what has been termed a "yellow card" in respect of less serious matters. In contrast the current system in NSW effectively provides only one place for complaints about members conduct (both serious and less serious) to be considered: the ICAC. Appropriately concerned with serious corruption, with finite resources and independent discretion to determine which matters are investigated, only a small percentage of matters are the subject of public investigation by the ICAC. Those that are investigated and result in a finding of "corrupt conduct", even where the conduct is on a scale that in the UK would be viewed as less serious, invariably result in "red cards." Whilst in recent months the ICAC has demonstrated its great value in dealing with very serious matters, the current arrangements for dealing with complaints about less serious matters could be improved. Ensuring that all less serious matters are dealt with appropriately should also result in less corrupt conduct.⁶⁷

4.13. The committee may wish to consider whether a hybridised approach of the kind outlined earlier has the capacity to surmount some of the challenges the NSW Clerk has raised.

Establishing legislation

4.14. In the event that the Assembly determines to establish an integrity commission of one kind or another, I submit that the Office of the Legislative Assembly should be closely consulted throughout the legislative drafting process to ensure relevant issues of parliamentary law, comity, and institutional separation are brought to bear.

4.15. As a starting point, I submit the following issues for consideration:

- a) The Assembly's privileges should be preserved by express provision.⁶⁸
- b) In the event that a commission's establishing legislation is to include a definition of corrupt conduct which gives the commission jurisdiction to investigate conduct that is so defined, the definition, so far as it applies to MLAs, should be limited to conduct which satisfies both the following tests:
 - i) the alleged conduct, if proven, gives rise to a possible criminal offence; and

⁶⁶ That is, paragraphs 10-16 of the Code of Conduct. See:

<https://www.publications.parliament.uk/pa/cm201516/cmcode/1076/107602.htm#a5>

⁶⁷ Blunt, David 'A Parliamentary Commissioner for Standards for New South Wales?' Paper presented at the 44th Presiding Officers and Clerks' Conference, Canberra 1-4 July 2012, p 3.

⁶⁸ There should be no doubt, for example, of the Assembly's exclusive jurisdiction to investigate and adjudge allegations relating to noncompliance with the code of conduct or declaration of members' interest requirements, possible contempts and so forth.

ii) the conduct relates to the performance of the MLA's duties as a Member of the Legislative Assembly.⁶⁹

I submit that conduct on the part of MLAs that does not meet both criteria should not fall within the jurisdiction of an integrity commission.⁷⁰

- c) Where legislative provisions are required to enable harmonious operation with the Assembly's relevant procedural arrangements (i.e. standing orders, resolutions, directions etc.), such provisions should be drafted in such a way as to minimise justiciability so far as possible.
- d) Where specific investigative powers are to be conferred to an independent integrity commission, appropriate regulatory, procedural and administrative arrangements should be effected to ensure that powers are duly respectful of the privileges of the Assembly (for example, the development of a memorandum of understanding between the Assembly and a putative commission that establishes procedures for the execution of search warrants and the seizing of evidence etc.).⁷¹
- e) Consideration should be given as to how declaration of members' interests might be relied upon by an independent integrity commission as evidence in relation to making certain findings in connection with criminal conduct.⁷²
- f) I can see no reason why an independent integrity commission should not have own-motion powers to investigate members so long as the matters the subject of an own-motion investigation satisfy the tests outlined at 4.16(b) above. It could be prudent, however, to require that an integrity commissioner must consult with the Commissioner of Standards prior to an own-motion investigation into an MLA or MLAs being commenced so that relevant issues of privilege and jurisdiction are properly considered.

PUBLIC INTEREST DISCLOSURE ACT

4.16. The manner in which the PID Act has been drafted to include MLAs and their staff as public sector entities potentially creates threats to the proper separation between the executive and the legislature. The Act in its current form also establishes an unworkable investigative function for the Clerk of the Legislative Assembly in respect of MLAs and their staff.

4.17. I make submissions about these and related matters below.

⁶⁹ That is, conduct that affects the probity of the exercise of an official function on the part of a member (e.g. a dishonest or partial exercise of a power, a breach of public trust; or a misuse of information. See [Independent Commission Against Corruption v Cuneen \[2015\] HCA 14](#)

⁷⁰ The *Crime and Corruption Act 2001* (QLD) establishes that the Crime and Corruption Commission only has jurisdiction to investigate state parliamentarians or local government councillors where the conduct in question would, if proved, amount to a criminal offence.

⁷¹ ICAC entered into a 'Memorandum of understanding on the execution of Search Warrants in the Parliament House Offices of Members of the New South Wales Parliament' in 2009. The MOU was negotiated against the background of a 2004 Legislative Council Privileges Committee examining search warrants that had been executed against members.

⁷² See s 122 of the ICAC Act. It is also worth noting that that continuing resolution 6 requires the Clerk to destroy all declarations made by a member who vacates his or her seat or who is not re-elected at a general election. In the event that an integrity commission was to rely on declarations made by past members in the course of investigating criminal conduct, an amendment to the relevant resolution would be required so that declaration were not required to be destroyed.

Role of the Clerk

- 4.18. As outlined earlier in my submission, the Clerk is currently required to investigate MLAs and their staff in relation to disclosable conduct pursuant to the PID Act.
- 4.19. I regard this as undesirable both as a matter of principle and as a practical matter.
- 4.20. The primary statutory role of the Clerk of the Legislative Assembly (and indeed the historical role of parliamentary clerks more generally) is to advise and support members in relation to administrative and procedural matters associated with their parliamentary roles. Critical to the integrity of this role is that the Clerk's advice is independent, accurate and confidential. A Clerk's first loyalty is to the institution of parliament itself—to its traditions, its practices and procedures and the democratic functions that it performs on behalf of electors. I submit that the obvious conflicts that arise by giving to the Clerk a responsibility for investigating those to whom he or she is duty bound to advise are, for the most part, insurmountable. How might, for instance, the Clerk properly advise an MLA on a matter of parliamentary privilege where that matter happened to be relevant (i.e. potentially inculpatory or exculpatory) in relation to a PID investigation?
- 4.21. Further, the Clerk has no authority to make findings or to impose penalties on MLAs or their staff (either by virtue of the PID Act or any other source of authority). While the Clerk is able to refer potentially criminal conduct to the AFP (see s 21), administrative mechanisms that are available to make findings and impose penalties in relation to, say, staff of the Office, are not available to the Clerk in respect of MLAs and their staff. Such an arrangement means that the Clerk is potentially placed in a position where he or she is required to investigate an allegation of disclosable conduct but is constrained in the extent to which he or she might be able to address that conduct.
- 4.22. I note that the Office's [Public Interest Disclosure Procedures](#) permit the Clerk to refer a complaint about an MLA to the Speaker where he or she 'reasonably assesses that the public interest disclosure relates to a Member's compliance with the Members' Code of Conduct'. Pursuant to continuing resolution 5AA, the Speaker may then refer the matter to the Commissioner of Standards. However, in the event that this procedure is followed, all the protections that are provided for in Part 7 of the Act are no longer afforded to a discloser⁷³, thereby undermining the primary objectives of the legislation.

Role of the Public Sector Standards Commissioner

- 4.23. I also regard as impractical and inappropriate provisions in the PID Act that permit the Public Sector Standards Commissioner to perform oversight functions in respect of PID investigations, including PID investigations undertaken by the Clerk into MLAs and their staff.
- 4.24. Provisions in s 25 of the PID Act provide that the Public Sector Standards Commissioner must be kept informed about particular matters associated with an investigation. Section 28 of the Act, provides that the commissioner is to 'ensure just outcomes for people who make public interest disclosures, including by preventing and remedying the effect of detrimental action against people because of disclosures'. Section 29 gives the commissioner substantial review

⁷³The Office has obtained legal advice supporting this interpretation.

powers in relation to investigations that are conducted.

- 4.25. Given the Public Sector Standards commissioner is appointed by the Chief Minister, performs a number of functions directly on the behalf of the Chief Minister,⁷⁴ and primarily operates as an agent of the Executive, it would appear anomalous that the commissioner is able to exercise the functions provided for in s 25, s 28 and s 29 in relation to an investigation of non-executive MLAs over which the commissioner has no inherent jurisdiction. It is unclear, for instance, how the commissioner might go about ensuring 'just outcomes' in the event that an MLA made a public interest disclosure about another MLA.

Limiting the Assembly's contempt power

- 4.26. Section 35(iv) establishes that a public interest disclosure is not a contempt of the Assembly and section 37 provides that a court may, subject to certain conditions, remove the immunity from liability (including in relation to immunity from being found in contempt of the Assembly).⁷⁵
- 4.27. While these provisions are consistent with the overall purpose of the Act, they appear to have derogated from the original privileges of the Assembly, pursuant to s24 of the Self-Government Act.

Proposal

4.28. I submit that:

- provisions which make the clerk responsible for investigating MLAs or staff employed under the *Legislative Assembly (Members' staff) Act 1989* should be removed;
- consideration be given to removing the conduct of MLAs from the definition of disclosable conduct (i.e. disapplying the application of the PID Act to MLAs);
- consideration be given to removing the provisions which give the Commissioner for Public Sector Standards an oversight role in relation to MLAs and their staff;
- consideration be given to the appropriateness of provisions in s 35 and s 37 relating to contempt.

ARRANGEMENTS FOR LOBBYISTS

- 4.29. When the existing procedural arrangements were adopted to establish a register of lobbyists, the Assembly did so in the absence of any specific proposal to establish a public sector integrity commission. With such a proposal now before the committee, it is timely to consider the role that such a commission, were one to be established, might play in administering lobbyist regulations and guidelines.⁷⁶

⁷⁴ See s 144 of the [Public Sector Management Act 1994](#)

⁷⁵ Part 5 of the Act also raised potential issues in that it purports to provide for a set of requirements that must be satisfied in relation to disclosures to third parties (including MLAs). Such requirements could, broadly be construed as seeking to interfere with the exercise of members' duties by circumscribing the circumstances in which representations might be made to them.

⁷⁶ I query whether the Clerk of the Legislative Assembly is the most appropriate administrative locus for operating a register of lobbyists that applies across the entire ACT public sector. As noted earlier in my submission, the ACT is the only jurisdiction in Australia with such an arrangement. It is also the case that the Clerk's role in receiving complaints about

- 4.30. My view is that an integrity commission with broad statutory responsibilities in relation to public sector integrity would well placed to administer and oversee lobbying obligations and requirements as they apply to persons employed under the Public Sector Management Act. Consideration could even be given to statutory or regulatory codification of relevant lobbying arrangements as has been done in Queensland where that state's integrity commissioner administers the scheme.⁷⁷ Such arrangements needn't depart significantly from the broad principles and provisions that have been embodied in the relevant Assembly resolutions.
- 4.31. The existing Commissioner of Standards would, I submit, be well placed to receive complaints and investigate these matters so far as they concern MLAs and their staff. There are a number of mechanisms by which a single register of lobbyists could be established for application across the ACT public sector while at the same time providing for separate investigative and adjudicative functions so that: 1. MLAs and their staff fall within the jurisdiction of the Commissioner of Standards; and 2. public servants and other public sector officials fall within the jurisdiction of an integrity commission.
- 4.32. In the event the committee determines an integrity commission proposal of one kind or another is desirable, I submit that the committee consider the appropriate demarcations that might apply in relation to the regulation of lobbyists.

MEMBERS' STAFF

- 4.33. Staff employed by non-executive members are covered by a code of conduct (see Appendix G). Pursuant to paragraph 14 of the members' code of conduct, members are required to:
- c) direct their personal staff to be mindful of the Member's commitment to this Code of Conduct, and to assist the Member to comply with this Code of Conduct; and
 - d) direct their personal staff to comply with any code of conduct applicable to those staff from time to time.
- 4.34. Notwithstanding these provisions, there are currently no clear procedural or statutory arrangements for investigating, adjudicating and penalising breaches.
- 4.35. Given the critical role that staff employed by members play in assisting members in the performance of their duties as elected members, the absence of arrangements represents a substantial accountability gap.
- 4.36. I submit that the committee consider the jurisdiction of the Commissioner of Standards, the Assembly itself, and any putative independent integrity commission to investigate the conduct of members' staff, including staff employed by ministers, employed under the *Legislative Assembly (Members' Staff) Act 1989*.

PARLIAMENTARY OVERSIGHT

- 4.37. I submit that appropriate parliamentary oversight vis-à-vis an integrity commission be

members' conduct vis-a-vis lobbying activities gives rise to the same sorts of conflict that I outlined in relation to the matters associated with public interest disclosures.

⁷⁷ See the [Integrity Act 2009](#) (QLD)

considered by the committee. There are a range of different models in place in Australian jurisdictions, most of which entail a parliamentary committee performing oversight and accountability functions. Various best practice models invariably advocate such an arrangement.⁷⁸

- 4.38. Rather than establishing a dedicated committee for such a purpose, I submit that such a role could be performed by either the Standing Committee on Justice and Community Safety or the Standing Committee on Administration and Procedure.

APPOINTMENT OF COMMISSIONER/S

- 4.39. The committee may wish to consider the arrangements for the appointment of a Campaign Advertising Reviewer, pursuant to the *Government Agencies (Campaign Advertising) Act 2009*, as a model for appointing member/s of an independent integrity commission. Section 12(4) of the Act provides that 'The Minister must not appoint a person as reviewer unless the Legislative Assembly has approved the appointment, by a resolution passed by a majority of at least 2/3 of the members'.
- 4.40. The committee may also wish to consider whether an integrity commissioner or commissioners are established as Officers of the Assembly along similar lines to the arrangements that apply to both members of the Electoral Commission and the Auditor-General.

⁷⁸ See, for instance, Faulkner, Nicholas and Prenzler, Timothy 'Towards a Model Public Sector Integrity Commission' *Australian Journal of Public Administration*, Volume 69, Issue 3, 2010, p 15.

APPENDIX A: INTEGRITY ARRANGEMENTS IN AUSTRALIA AND NEW ZEALAND⁷⁹

	Cwth	NZ	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Ethics adviser	No	No	Yes	No	Yes	No	No	Yes	No	Yes
Officers of parliament	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Commissioner for standards	No	No	Under Review	No	No	No	No	Yes	No	Yes
ICAC or equivalent	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Under Review	Under Review
Code of conduct	No	No	Yes	Yes	Yes	No	Yes/No ⁸⁰	Yes/No ⁸¹	Yes	Yes
Lobbyist register	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Under Review	Yes
Register of interests—members	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

⁷⁹ Duncan, Tom, 'Ethical Governance: Accountability, transparency and responsibility in parliaments', presented the 39th Commonwealth Parliamentary Association Australia and Pacific Regional Conference, Cook Islands, November 2016.

⁸⁰ The WA Legislative Assembly has a code of conduct, while the WA Legislative Council does not.

⁸¹ The Tasmanian Legislative Council does not have a code of conduct.

APPENDIX B—OVERVIEW OF EXISTING MECHANISMS FOR ADDRESSING CRIME AND MISCONDUCT

Conduct	Relevant procedural or statutory authority	Investigating entity	Powers	Referring entity / complainant	Adjudicative entity	Assessment of evidence / standard of proof	Penalty
<ul style="list-style-type: none"> • Noncompliance with the Code of Conduct for all Members of the Legislative Assembly for the ACT • Noncompliance with declaration of members interest requirements 	<ul style="list-style-type: none"> • Continuing resolution 5, which establishes the Code of Conduct for all Members of the Legislative Assembly for the Australian Capital Territory. • Continuing resolution 5AA, which establishes a Commissioner for Standards to investigate specific matters (see paragraphs 4-9 of the resolution) • Continuing resolution 6 in relation to the declaration of private interests of members • Protocols for the investigation of complaints against members—the duties of the Legislative Assembly Commissioner for Standards are prescribed by the instrument of appointment made under the resolution of the Legislative 	<p>Commissioner for Standards</p>	<ul style="list-style-type: none"> • The Commissioner is granted a general authority to investigate but no specific powers to enforce the exercise of this authority. • The Commissioner must report to the Standing Committee on Administration and Procedure in relation to his or her investigation. • No criminal offences are created in respect of a witness’s non-compliance with any aspect of the Commissioner’s investigation (this is in contrast to integrity officers that have been created under statute – e.g. Auditor-General, Electoral Commissioner, Public Sector Standards Commissioner, each of whom have significant investigative powers). • It is open to the Commissioner to report to the Standing Committee on Administration and Procedure in relation to any interference in, or non-compliance with, his or her investigation. The Commissioner would also be permitted, in his or her report, to reflect on the extent to which a member had, in assisting the Commissioner with his or her investigation, complied with paragraph 17 of the Code of Conduct which provides that a member should ‘cooperate fully with any official inquiry that may 	<ul style="list-style-type: none"> • Any member of the public, the ACT Public Service or an MLA may make a complaint to the Speaker about a member’s compliance with either the code of conduct or declaration of interests requirements. • The Speaker of the Legislative Assembly may refer a complaint to the Commissioner for standards where the Speaker believes on reasonable grounds that there is sufficient evidence as to justify investigating the matter; and is satisfied that the complaint is not frivolous, vexatious or only for political advantage. 	<p>The Assembly</p>	<ul style="list-style-type: none"> • The Standing Committee on Administration and Procedure and the Assembly itself will collectively form a view, informed by a report produced by the Commissioner, as to whether alleged conduct can be substantiated. The manner in which the Standing Committee on Administration and Procedure (or the Assembly itself) might proceed to consider a report by the Standards Commissioner is not articulated in the standing orders or a resolution of the Assembly. • The standard of proof in establishing whether or not noncompliance with the code of conduct or the rules relating to declaration of interest, are not explicitly codified by way of standing order or resolution. • The manner in which evidence might be assessed by the Commissioner are outlined in paragraphs 15-20 of the Commissioner’s report into a complaint against Ms Joy Burch MLA. Commissioner Crispin observes that ‘The approach usually followed in cases involving suggested breaches of non-criminal codes of conduct is to adopt the so-called ‘civil’ standard of proof on the balance of 	<ul style="list-style-type: none"> • The Assembly may determine an appropriate penalty by way of a resolution or direction. • The Assembly is not able to fine or imprison a person (pursuant to 24 of the Self-Government Act) • The Assembly is not able to expel a member from the Assembly (see s 8 of the Parliamentary Privileges Act)

Conduct	Relevant procedural or statutory authority	Investigating entity	Powers	Referring entity / complainant	Adjudicative entity	Assessment of evidence / standard of proof	Penalty
	<p>Assembly for the Australian Capital Territory dated 31 October 2013.</p> <ul style="list-style-type: none"> • Paragraphs 15-20 of the Commissioner's Report into a Complaint Against Ms Joy Burch MLA relating to the nature of the approach the Commissioner adopted in relation to the investigation. 		<p>be commenced in connection with their compliance with... [the] Code of Conduct, or that or another Member'.</p> <ul style="list-style-type: none"> • It would be open to the Assembly to consider any report of the Standing Committee on Administration and Procedure in connection with a report by the Commissioner and to itself consider whether a possible contempt had been committed and whether a privileges inquiry might be formed to examine relevant matters. 			<p>probabilities. Crispin approvingly quotes Dixon J. in Briginshaw v. Briginshaw: 'the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved'⁸²</p>	
<ul style="list-style-type: none"> • Contempt of the Assembly 	<ul style="list-style-type: none"> • Standing Orders 277-280 • Equivalency provision in s 49 of the Australian Constitution Act relating to privileges • Equivalency provision in s 24 of the Self Government Act (Cwth) relating to privileges • Relevant provisions of the Parliamentary Privileges Act 1987 (see ss 3-6) 	<ul style="list-style-type: none"> • Privileges committee 	<ul style="list-style-type: none"> • Standing order 239 provides that a committee shall have the power to send for persons, papers and records • Standing order 240 provides that a committee may summons witnesses to be examined before the committee • Standing order 277 sets out a number of prohibitions that may be treated by the Assembly as a contempt. The following are particularly relevant in relation to the conduct of a privileges inquiry: <ul style="list-style-type: none"> (i) Interference with witnesses— A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or 	<ul style="list-style-type: none"> • A privileges committee may only be established by an Assembly resolution of appointment. See also standing order 277. 	<ul style="list-style-type: none"> • The Assembly is responsible for considering a report of a privileges committee and determining: <ul style="list-style-type: none"> • a) whether a contempt has been committed; and • b) what, if any, action might be taken in respect the contempt. 	<ul style="list-style-type: none"> • The standard of proof in establishing whether or not a contempt has been committed are not explicitly codified by way of standing order or resolution. However, standing order 277 provides that: <p>The Assembly will take into account the following criteria when determining whether matters possibly involving contempt should be referred to a Select Committee on Privilege and whether a contempt has been committed, and requires the committee to take these criteria into account when inquiring into any matter referred to it:</p> 	<ul style="list-style-type: none"> • The Assembly may determine an appropriate penalty by way of a resolution or direction (for instance, suspension of the MLA from the Assembly). • The Assembly is not able to fine or imprison a person (pursuant to 24 of the Self-Government Act) • The Assembly is not able to expel

⁸² *Briginshaw v. Briginshaw* (1938) 60 CLR, at p 362

Conduct	Relevant procedural or statutory authority	Investigating entity	Powers	Referring entity / complainant	Adjudicative entity	Assessment of evidence / standard of proof	Penalty
			<p>by other improper means, influence another person in respect of any evidence given or to be given before the Assembly or a committee, or induce another person to refrain from giving such evidence.</p> <p><u>(k) Molestation of witnesses</u>—A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Assembly or a committee.</p> <p><u>(l) Offences by witnesses etc</u>—A witness before the Assembly or a committee shall not:</p> <ul style="list-style-type: none"> (i) without reasonable excuse, refuse to make an oath or affirmation or give some similar undertaking to tell the truth when required to do so; (ii) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so; or (iii) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular. <p>(m) A person shall not, without reasonable excuse:</p> <ul style="list-style-type: none"> (i) refuse or fail to attend before the Assembly or a committee when ordered to do so; or 			<p>(a) the principle that the Assembly's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Assembly and its committees and for Members against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Assembly;</p> <p>(b) the existence of any remedy other than that power for any act which may be held to be a contempt; and</p> <p>(c) whether a person who committed any act which may be held to be a contempt:</p> <ul style="list-style-type: none"> • (i) knowingly committed that act, or • (ii) had any reasonable excuse for the commission of that act. <i>(Inserted 6 March 2008)</i> 	<p>a member from the Assembly (see s 8 of the Parliamentary Privileges Act)</p>

Conduct	Relevant procedural or statutory authority	Investigating entity	Powers	Referring entity / complainant	Adjudicative entity	Assessment of evidence / standard of proof	Penalty
			<p>(ii) refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Assembly or of a committee.</p> <p>(n) A person shall not wilfully avoid service of an order of the Assembly or of a committee.</p> <p>(o) A person shall not destroy, damage, forge or falsify any document required to be produced by the Assembly or by a committee.</p> <p>See also procedures outlined in standing order 264A and standing order 280</p>				
<ul style="list-style-type: none"> Disclosable conduct about an MLA 	<ul style="list-style-type: none"> Public Interest Disclosure Act 2012 	<ul style="list-style-type: none"> The Clerk (ss 13 and 18 of the PID Act) The Chief Police Officer (s 21 of the PID Act) Pursuant to s19 of the PID Act, the head of a public sector entity (in this case, the Clerk) may refer the disclosure to another public sector entity that has a power 	<ul style="list-style-type: none"> Various, depending on the nature of the allegation and pursuant to relevant legislation, including: the <i>Auditor-General Act 1996</i>, the <i>Electoral Act 1992</i>, the Australian Federal Police Act, the Crimes Act, Criminal Code. 	<ul style="list-style-type: none"> Any person may make a public interest disclosure pursuant to s14 of the PID Act Upon receipt of a PID, the head of a public sector entity must investigate. The Clerk is the head of a Legislative Assembly entity Referral to other officers with a power or function to investigate is permissible pursuant to s19 of the PID Act 	No particular adjudicative entity applies in relation to 'disclosable conduct'. However, where criminality is involved, the courts have jurisdiction to adjudicate.	Different burden of proof depending on the nature of the alleged disclosable conduct and the means by which it is investigated and resolved.	Not explicitly provided for (disclosable conduct is not a category of offence but a broad range of different conduct that activates relevant a range of investigative arrangements and immunities in that apply to a discloser.

Conduct	Relevant procedural or statutory authority	Investigating entity	Powers	Referring entity / complainant	Adjudicative entity	Assessment of evidence / standard of proof	Penalty
		or function to investigate.					

Conduct	Relevant procedural or statutory authority	Investigating entity	Powers	Referring entity / complainant	Adjudicative entity	Assessment of evidence / standard of proof	Penalty
<ul style="list-style-type: none"> Alleged criminal conduct 	<ul style="list-style-type: none"> Australian Federal Police Act 1979 (Cwlth) Criminal Code 2002 Crimes Act 1900 Crimes Act 1914 (Cwlth) The Prosecution Policy of the Australian Capital Territory Memorandum of Understanding between the Speaker of the Legislative Assembly for the Australian Capital Territory and the Chief Police Officer for the Australian Capital Territory (Signed in 2006; tabled in the Assembly, 29 May 2007) Execution of search warrants where parliamentary privilege may be applied and execution of search warrants and interviews with members of the Legislative Assembly, dated June 2006 	<ul style="list-style-type: none"> Australian Federal Police 	<ul style="list-style-type: none"> The AFP's powers are outlined in Part II of the <i>Australian Federal Police Act 1979</i> Part 10 of the <i>Crimes Act 1900</i> sets out relevant provisions in relation to criminal investigations Protocols that aim to preserve parliamentary privilege in the course of a police investigation are outlined in a memorandum of understanding between the Speaker and the Chief Police Officer. An attachment to the protocols dealing with parliamentary privilege also applies. 	<ul style="list-style-type: none"> Any person may refer a matter to the AFP for investigation. 	<ul style="list-style-type: none"> The ACT Courts 	<ul style="list-style-type: none"> The DPP's prosecution policy applies in respect of whether or not a prosecution will proceed in a given case (see Chapter 2) Beyond reasonable doubt in the case of a criminal trial 	<ul style="list-style-type: none"> A range of penalties apply, including fine and imprisonment depending on the particular offence. In relation to an 'abuse of public office', pursuant to s 359 of the Criminal Code 2002, the maximum penalty is 500 penalty units, 5 years imprisonment or both. By virtue of s 103(4) of the Electoral Act 1992 a person becomes ineligible to be an MLA if the person is under sentence of imprisonment for 1 year or longer for a conviction of an indictable offence.

APPENDIX C—CONTINUING RESOLUTION 5

CODE OF CONDUCT FOR ALL MEMBERS OF THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

This resolution provides for a code of conduct for Members of the Legislative Assembly.

Resolution agreed by the Assembly

25 August 2005 (amended 16 August 2006, 24 October 2013)

108. CODE OF CONDUCT FOR ALL MEMBERS OF THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

109. The Members of the Legislative Assembly for the Australian Capital Territory acknowledge that, in a parliamentary democracy they cannot command, but must constantly strive to earn and maintain, the respect and support of those who have elected them to their positions of honour and privilege as Members.

110. In committing to this Code of Conduct, Members undertake, to the community and to one another, that the following principles shall guide their conduct as Members in all matters:

- (1) Members should at all times act with integrity, honesty and diligence.
- (2) Members should act only in the interests of, and with respect for, the people of the Australian Capital Territory and in conformity with all laws applicable in the Territory.
- (3) Members should always act in the public interest, make decisions and choices on merit, and not seek to gain financial or other benefit for themselves, their family or friends.
- (4) Members should be reasonably accessible to the people of the electorate they have been elected to serve, and should represent their interests conscientiously.
- (5) Members should be transparent in, and accountable for, their decisions and actions, should avoid or appropriately resolve any actual or reasonably perceived conflicts of interest and should submit themselves to appropriate scrutiny.
- (6) Members should make only proper use of those public resources to which they have access.
- (7) Members should respect the dignity and privacy of individuals, and not disclose confidential information to which they have official access other than with consent or as permitted by law.

- (8) Members should observe proper standards of parliamentary conduct, and observe respect for differences and fairness in their political dealings.
- (9) Members should promote and support these principles by leadership and example, in order to maintain and support public trust and confidence in the integrity of the Assembly and the conduct by its Members of public business.

Consistent with the above principles, Members further undertake that they should:

- (10) Actively seek to prevent any conflict of interest, or the perception of such a conflict, arising between their duties as a Member and their personal affairs and interests, take all reasonable steps to resolve any such conflict or perception of a conflict that does arise, and:
 - (a) comply with section 15 of the *Australian Capital Territory (Self-Government) Act 1988* (Cwth);
 - (b) declare their pecuniary interests and ensure that their declaration is kept up to date pursuant to the resolution of the Assembly 'Declaration of Private Interests of Members' agreed to on 7 April 1992 (as amended or replaced from time to time). Include in the Member's Statement of Registrable Interests all gifts, payments, fees, rewards or benefits valued at more than \$100 received in connection with the Member's functions as a Member; and
 - (c) disclose in a manner appropriate to the circumstances any other financial or non-financial interest that they may hold, or which they may be reasonably perceived to hold (other than as a member of the public or of a broad class of persons) which a reasonable observer, informed of that interest, might perceive as giving rise to a conflict of interest with the performance of the Member's duty as a Member.
- (11) Not solicit to undertake, or undertake, any activity as a Member in return for the provision, promise or expectation of any improper benefit to the Member or to another person.
- (12) Take care to consider the rights and reputations of others before making use of their unique protection of parliamentary privilege consistent with the resolution of the Assembly 'Exercise of freedom of speech' agreed to on 4 May 1995 (as amended or replaced from time to time).
- (13) Not use information received by them as a Member that is not in the public domain in breach of any obligation of confidence applicable to their receipt of that information, or improperly for the private benefit of themselves or another person.
- (14) In their capacity as an employer on behalf of the Territory under the *Legislative Assembly (Members' Staff) Act 1989*:
 - (a) familiarise themselves and comply with the terms and conditions on which their personal staff are engaged and with all applicable policies and practices (including those related to occupational health and safety, discrimination, harassment and bullying, equal employment opportunity and use of information technology);

- (b) not employ a family member as defined in that Act;
 - (c) direct their personal staff to be mindful of the Member's commitment to this Code of Conduct, and to assist the Member to comply with this Code of Conduct; and
 - (d) direct their personal staff to comply with any code of conduct applicable to those staff from time to time.
- (15) In all their dealings with staff of the Assembly and members of the ACT Public Service:
- (a) extend professional courtesy and respect; and
 - (b) recognise the unique position of impartiality and the obligations of Public Service officials.
- (16) Only make a complaint about the compliance of another Member with this Code of Conduct where they believe there are reasonable grounds to suspect non-compliance and not make any such complaint that is frivolous or vexatious or only for political advantage.
- (17) Cooperate fully with any official inquiry that may be commenced in connection with their compliance with this Code of Conduct, or that of another Member.

APPENDIX D—COMMISSIONER FOR STANDARDS (CONTINUING RESOLUTION 5AA)

COMMISSIONER FOR STANDARDS

This resolution provides for the appointment of a Legislative Assembly Commissioner of Standards.

Resolution agreed by the Assembly

31 October 2013

COMMISSIONER FOR STANDARDS

That this Assembly requests the Speaker to appoint a Legislative Assembly Commissioner for Standards on the following terms:

- (1) The Speaker must, after each Assembly is elected or whenever the office becomes vacant, appoint a Commissioner for the life of that Assembly and the period of three months after each election. The initial appointment is for the term of the 8th Assembly and the period of three months after the election at the conclusion of that term.
- (2) Before appointing a Commissioner, the Speaker must consult with the Chief Minister, the Leader of the Opposition and Crossbench Members.
- (3) The Commissioner may be dismissed only following a resolution of the Legislative Assembly resolving to require the Speaker to end the Commissioner's appointment—
 - (a) for misbehaviour; or
 - (b) for physical or mental incapacity, if the incapacity substantially affects the exercise of the Commissioner's functions.

However, a motion for such a resolution may only be debated after the Standing Committee on Administration and Procedure ('the Committee') has reported to the Assembly that it is satisfied that the Commissioner is unfit for the office or unable to fulfil the Commissioner's functions.

- (4) The functions of the Commissioner are to:
 - (a) investigate specific matters referred to the Commissioner—
 - (i) by the Speaker in relation to complaints against Members; or
 - (ii) by the Deputy Speaker in relation to complaints against the Speaker;
 - (b) report to the Standing Committee on Administration and Procedure; and
 - (c) if the Assembly is not sitting when the Commissioner provides a report to the Committee, the Committee may send its report to the Speaker,

or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.
(Inserted 9 June 2016)

- (5) Members of the public, members of the ACT Public Service and Members of the Assembly may make a complaint to the Speaker about a Member's compliance with the Members' Code of Conduct or the rules relating to the registration or declaration of interests.
- (6) If the Speaker receives a complaint about a Member pursuant to paragraph (5) and the Speaker believes on reasonable grounds that—
 - (a) there is sufficient evidence as to justify investigating the matter; and
 - (b) the complaint is not frivolous, vexatious or only for political advantage;the Speaker may refer the complaint to the Commissioner for investigation and report.
- (7) Members of the public, members of the ACT public service and Members of the Assembly may make a complaint to the Deputy Speaker about the Speaker's compliance with the Members' Code of Conduct or the rules relating to the registration or declaration of interests.
- (8) If the Deputy Speaker receives a complaint about the Speaker pursuant to paragraph (7) and the Deputy Speaker believes on reasonable grounds that—
 - (a) there is sufficient evidence to justify investigating the matter; and
 - (b) the complaint is not frivolous, vexatious or only for political advantage;the Deputy Speaker may refer the complaint to the Commissioner for investigation and report.
- (9) In exercising the functions of Commissioner the following must be observed:
 - (a) The Commissioner must not make a report to the Committee if the Member or the Speaker about whom the complaint was made has agreed that he or she has failed to register or declare an interest if —
 - (i) in the Commissioner's opinion the interest involved is minor or the failure was inadvertent; and
 - (ii) the Member concerned has taken such action to rectify the failure as the Commissioner may have required within any procedure approved by the Committee for this purpose.
 - (b) The Commissioner must not make a report to the Committee unless the Commissioner has—
 - (i) given a copy of the proposed report to the Member or the Speaker who is the subject of the complaint under investigation;
 - (ii) the Member or the Speaker has had a reasonable time to provide comments on the proposed report; and
 - (iii) the Commissioner has considered any comments provided by the Member or the Speaker.

- (c) The Commissioner must report by 31 August each year to the Speaker on the exercise of the functions of the Commissioner.
- (10) The Committee must review the operation of the Commissioner after two years following the initial appointment of the Commissioner and report to the Assembly in the last sitting period in 2016. *(Amended 9 June 2016)*

APPENDIX E—PROTOCOL FOR INVESTIGATION OF COMPLAINTS AGAINST MEMBERS

1. ACT LEGISLATIVE ASSEMBLY

Protocol for investigation complaints against members

The duties of the Legislative Assembly Commissioner for Standards are prescribed by the instrument of appointment made under the resolution of the Legislative Assembly for the Australian Capital Territory dated 31 October 2013.

Paragraph 2 of the instrument provides that:

(1) *The Appointee will:*

(a) *investigate specific matters referred to him—*

(i) *by the Speaker of the Legislative Assembly (Speaker) in relation to complaints against Members of the Legislative Assembly (Members); or*

(ii) *by the Deputy Speaker of the Legislative Assembly (Deputy Speaker) in relation to complaints against the Speaker; and*

(b) *report to the Standing Committee on Administration and Procedure (the Committee).*

(2) *In carrying out the duties pursuant to this appointment, the Appointee shall exercise the care, skill and diligence that can reasonably be expected of a person having the same responsibilities under an equivalent appointment.*

Paragraph 3 provides, inter alia, that:

In exercising his functions under paragraph 1(b), the Appointee:

(a) *must not make a report to the Committee concerning a complaint that a Member or the Speaker failed to register or declare an interest if the Member or the Speaker about whom the complaint was made has agreed that he or she failed to do so and —*

(i) *in the Appointee's opinion the interest involved is minor or the failure was inadvertent; and*

(ii) *the Member concerned has taken such action to rectify the failure as the Appointee may have required within any procedure approved by the Committee for this purpose.*

(b) *must not make a report to the Committee unless he has —*

- (i) given a copy of the proposed report to the Member or the Speaker who is the subject of the complaint under investigation;*
- (ii) the Member or the Speaker has had a reasonable time to provide comments on the proposed report; and*
- (iii) the Appointee has considered any comments provided by the Member or the Speaker.*

Clause 5 also requires the Commissioner to maintain the confidentiality of information provided to him and any reports prepared in exercising the Appointee's role, though he may make public any report if the Member subject of the report gives permission for it to be made public or as required by the Assembly.

Consistent with these requirements, the Commissioner has formulated the following protocol.

1. Upon receipt of a complaint referred by the Speaker or Deputy Speaker of the Legislative Assembly the Commissioner will forward a copy to the member or speaker against whom the complaint has been made ("the member") with an accompany letter inviting him or her to submit a written response within a stipulated period.
2. Should the terms of the complaint seem unclear, the Commissioner may seek clarification from the complainant and, in any event, may indicate particular points or issues that the member might wish to address in his or her response.
3. The member shall be free to respond personally or to have an advocate respond on his or her behalf.
4. In either event, the Commissioner will expect the member to ensure that the response promptly addresses the complaint and any related issues raised by the Commissioner and that it does so as fully and accurately as possible. It should be understood that the Commissioner will usually have no personal knowledge of what has occurred and will be dependent upon the response for information as to which allegations, if any, are disputed and the nature and extent of any such dispute. The response should also reveal any grounds upon which the member relies in support of his or her contention that the conduct in question was duly authorized or otherwise permissible and any further facts that the member feels should be taken into account. A response that merely offers a general denial of impropriety or raises retaliatory criticism of the complainant without dealing with the relevant facts and the issues will be inadequate and may leave the member unnecessarily exposed to the risk of adverse findings.

5. Should the member seek further time to formulate an appropriate response, he or she may write to the Commissioner requesting an extension of the period stipulated, and explaining the reasons why such additional time is said to be necessary.
6. Any such request will be duly considered and the Commissioner will advise the member in writing of his decision to extend or maintain the previously stipulated period.
7. Upon receipt of any response to the complaint or upon the expiration of the stipulated period the Commissioner will decide whether he has sufficient information and/or evidence to complete his investigation.
8. If the Commissioner decides that he needs further information and/or evidence, he may write to the complainant, the member and/or any other person who may have knowledge of the relevant facts requesting the production of documents, answers to specific questions or other assistance.
9. Any responses, statements or other evidence received by the Commissioner can be expected to be made public, though the Commissioner and the Committee may consider any reasonable request for confidentiality to be maintained if there are exceptional circumstances or the relevant information proves irrelevant to the outcome of the investigation.
10. It is the Commissioner's intention to rely upon written material and not to hold any face to face discussions or otherwise receive oral evidence unless such a course proves necessary for the fair and satisfactory completion of a particular investigation.
11. Upon completion of the investigation the Commissioner may either draft a proposed report or decline to make a report if satisfied of the matters referred to in paragraph 3 of the instrument of appointment.
12. A copy of any proposed report will be given to the member and he or she will be invited to provide comments on it within a further stipulated period.
13. Any such comments will be duly considered and, if necessary, further investigation may be undertaken before the Commissioner finalizes the report and submits it to the Committee or, in the light of the response, determines that the provisions of clause 3 of the instrument of appointment apply and declines to make a report.
14. The Commissioner will not provide updates to complainants or to the press during the course of investigations.
15. If the Commissioner declines to make a report he will inform the Committee of that decision in writing and will also inform both the member and the complainant.

16. These protocols have been drafted with a view to ensuring that complaints can be investigated fully, fairly and efficiently. The Commissioner will not be influenced by any publicity and will ask complainants to await the results and not seek to agitate the same issues in the press at least until the investigation has been completed.

Adopted 24 March 2015

Standing Committee on Administration and Procedure

APPENDIX F—CONTINUING RESOLUTIONS RELATING TO LOBBYISTS

Continuing resolution 8AB

**LOBBYIST REGISTER—
ACT Lobbying Code of Conduct**

Resolution agreed by the Assembly

5 August 2014

- (1) Preamble:
 - (a) Free and open access to the institutions of government is a vital element of our democracy.
 - (b) Ethical lobbying is a legitimate activity and an important part of the democratic process.
 - (c) Lobbyists can enhance the strength of our democracy by assisting individuals and organisations with advice on public policy processes and facilitating contact with public officials.
 - (d) In performing this role, there is a public expectation that lobbyists will be individuals of strong moral calibre who operate according to the highest standards of professional conduct.
 - (e) This Code of Conduct is designed to ensure that contact between lobbyists and public officials is conducted in accordance with public expectations of transparency, integrity and honesty.
- (2) When making initial contact with public officials with the intention of conducting lobbying activities, a lobbyist who is proposing to conduct lobbying activities must inform the public official:
 - (a) that they are a lobbyist or a person engaged by a lobbyist to conduct lobbying activities;
 - (b) whether or not they are currently listed on the ACT Register of Lobbyists;
 - (c) the name of the person(s) on whose behalf they seek to conduct those lobbying activities; and
 - (d) the nature of the matters that they wish to raise in those lobbying activities.
- (3) When engaging with a public official, a lobbyist must observe the following principles:
 - (a) a lobbyist shall conduct their business to the highest professional and ethical standards, and in accordance with all relevant requirements with respect to lobbying activities;

- (b) a lobbyist shall act with honesty, integrity and good faith and avoid conduct or practices likely to bring discredit upon themselves, public officials or those whose interests they represent;
- (c) a lobbyist shall not engage in any conduct that is corrupt, dishonest or illegal, or unlawfully cause or threaten any detriment;
- (d) a lobbyist shall use all reasonable endeavours to satisfy themselves of the truth and accuracy of all statements and information provided by them to clients whom they represent, to the wider public, or to public officials;
- (e) a lobbyist who becomes aware that information they have previously provided to a public official was or is now inaccurate shall provide accurate and updated information to that public official if they believe that the official may be relying on the accuracy of the information previously provided;
- (f) a lobbyist shall not make misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature and extent of their access to public officials, members of political parties or any other person;
- (g) a lobbyist shall keep strictly separate from their duties and activities as lobbyists any personal activity or involvement as a member of or on behalf of a political party;
- (h) a lobbyist shall not disclose confidential information of another party unless they have obtained the informed consent of that party, or they are required to do so by law;
- (i) a lobbyist shall not represent conflicting or competing interests without having obtained the informed consent of the parties whose interests are involved;
- (j) a lobbyist shall take all reasonable steps to ensure that their details as recorded on the ACT Register of Lobbyists are and remain correct from time to time;
- (k) a lobbyist who was previously a Member of the ACT Legislative Assembly shall not, within 18 months of ceasing to hold that office, engage in lobbying activities relating to any matter that they had official dealings with in their last 18 months in office;
- (l) a lobbyist who was previously employed under the *Legislative Assembly (Members' Staff) Act 1989* shall not, within 12 months of ceasing to be so employed, engage in lobbying activities relating to any matter that they had official dealings with in their last 12 months in such employment;
- (m) a lobbyist who was previously employed under the *Public Sector Management Act 1994* as a Head of Service, Director-General or Executive shall not, within 12 months of ceasing to be so employed, engage in lobbying activities relating to any matter that they had official dealings with in their last 12 months in such employment;

- (n) a lobbyist who is appointed to a Government board, committee or other entity must not represent the interests of a third party to a public official in relation to any matter that relates to the functions of entity and must, where they have made such representations prior to that appointment, ensure that they comply with all honesty, integrity and conflict of interest provisions and procedures applicable to appointees to that entity;

- (o) a lobbyist who:
 - (i) is sentenced to a term of imprisonment of 30 months or more;
 - (ii) is convicted of an offence, one element of which involves dishonesty, such as theft or fraud; or
 - (iii) becomes or commences to act as a member of a federal, state or territory political party executive or administrative committee, or similar;shall thereupon cease to engage in lobbying activities and shall so advise the Clerk of the ACT Legislative Assembly; and

- (p) a lobbyist shall ensure that any owner, partner, shareholder or other individual involved in the management of the business of the lobbyist does not occupy or act as a member of a federal, state or territory political party executive or administrative committee, or similar.

Continuing resolution 8AC

LOBBYIST REGISTER—

ACT Lobbyist Regulation Guidelines

Resolution agreed by the Assembly

25 September 2014

Persons/Entities required to be registered

- (4) A “lobbyist” is defined as:

Any person, company or organisation who conducts lobbying activities on behalf of a third party, or whose employees or other personnel conduct lobbying activities on behalf of a third party, where such lobbying activities are ordinarily carried out in the expectation of receiving direct or indirect financial reward or other valuable consideration whether or not the amount thereof is ascertainable at the time such activities are conducted.

- (5) In relation to part (1), “lobbying activities” are defined as:

Any oral or written (including electronic) communication with a public official to influence legislation or policy, regulatory or administrative decisions of the public official or another public official other than a communication:

- (a) with a committee of the Assembly;
 - (b) with a Minister in their capacity as a local Member and in relation to matters falling outside their ministerial responsibilities;
 - (c) in response to a coercive requirement by a public official for information;
 - (d) in response to a request by a public official for information or the submission of view;
 - (e) in response to a request for tender, expression of interest, etc;
 - (f) protected by a government-endorsed whistle-blower regime;
 - (g) that is only an approach to a public official for publicly available information without any attempt to influence;
 - (h) as part of a grassroots campaign;
 - (i) made in a public forum; or
 - (j) for the avoidance of doubt:
 - (i) by one government to another government; or
 - (ii) by one government official to another government official in the course of the official duties of the former.
- (6) A “public official” means:
- (a) a Member of the Legislative Assembly;
 - (b) any person employed by such a person under the *Legislative Assembly (Members’ Staff) Act 1989*; and
 - (c) any person employed under the *Public Sector Management Act 1994*.

Persons/Entities ineligible to be registered

The following persons are ineligible to be registered as a lobbyist or authorised person:

- (7) a person who has ever been sentenced to a term of imprisonment of 30 months or more;
- (8) a person who has been convicted, as an adult, in the last 10 years, of an offence, one element of which involves dishonesty, such as theft or fraud;
- (9) a person who is, or acts as, a member of a federal, state or territory political party executive or administrative committee, or similar;
- (10) a person whose name has been previously removed from the Register because of a contravention of the ACT Lobbying Code of Conduct; and

- (11) a person who, in the opinion of the Clerk, has not acted, or cannot be relied upon to act, in a manner consistent with general standards of ethical behaviour.

Persons/Entities not required to be registered

The following categories of persons/entities are not required to be registered before conducting defined lobbying activities even though they might otherwise fall within the definition of lobbyist:

- (12) religious bodies;
- (13) charities;
- (14) not-for-profit organisations that represent the interests of their members, such as trade unions, trade and industry associations, etc;
- (15) members of foreign trade delegations;
- (16) persons/bodies registered under government laws where dealings with government are part of the normal day-to-day work of people in their profession, for example, architects, customs brokers, etc;
- (17) members of professions who make occasional representations to government on behalf of others in a way that is incidental to the provision of their professional services, for example, doctors, accountants, lawyers; and
- (18) persons who conduct lobbying activities only for relatives or friends provided that such are only in respect of the personal rather than business or commercial affairs of such persons.

Public content of the ACT Register of Lobbyists

The public section of the Register is to contain the following detail for each registrant:

- (19) For a natural person:
- (a) full name;
 - (b) trading name, if applicable;
 - (c) business address;
 - (d) contact details;
 - (e) ABN, if applicable;
 - (f) full name and address of any other person authorised to conduct lobbying activity on behalf of the registrant;
 - (g) for the registrant and any other named person, place of and title in previous public sector employment and date of separation;
 - (h) name and address of each client on whose behalf lobbying activity is or may be conducted; and
 - (i) name and address of each person or entity on whose behalf lobbying has been conducted in the preceding 12 months, whether or not for reward.

- (20) For a partnership:
- (a) full name of each partner;
 - (b) trading name of partnership, if applicable;
 - (c) business address of partnership;
 - (d) name and contact details for partner principally responsible for registration;
 - (e) ABN of partnership, if applicable;
 - (f) full name of any person authorised to conduct lobbying activity on behalf of the partnership;
 - (g) for each partner and any other named person, place of and title in previous public sector employment and date of separation;
 - (h) name and address of each client on whose behalf lobbying activity is, or may be, conducted; and
 - (i) name and address of each person or entity on whose behalf lobbying has been conducted in the preceding 12 months, whether or not for reward.
- (21) For a company:
- (a) registered company name;
 - (b) trading name of company, if applicable;
 - (c) business address of company;
 - (d) name and address of each director of the company;
 - (e) name and address of any entity or other person holding 10% or more of the issued capital of the company;
 - (f) name and contact details for company officer principally responsible for registration;
 - (g) ACN/ABN of company;
 - (h) full name of any person authorised to conduct lobbying activity on behalf of the company;
 - (i) for each director and any other named person, place of and title in previous public sector employment and date of separation;
 - (j) name and address of each client on whose behalf lobbying activity is, or may be, conducted; and
 - (k) name and address of each person or entity on whose behalf lobbying has been conducted in the preceding 12 months, whether or not for reward.

Registration Forms

In addition to providing the information required to be shown on the public ACT Register of Lobbyists, applications for registration must declare on the Registration Form that he or she:

- (22) has never been sentenced to a term of imprisonment of 30 months or more;
- (23) has not been convicted, as an adult, in the last 10 years, of an offence, one element of which involves dishonesty, such as theft or fraud;
- (24) is not and does not act as a member of a federal, state or territory political party executive or administrative committee, or similar; and
- (25) gives an undertaking to comply with the ACT Lobbying Code of Conduct, separately signed by each person whose name will appear on the Register.

Changes to registered details

- (26) A registered lobbyist is required to advise the Clerk of any change to any detail appearing on the public register within 10 days of that change occurring.
- (27) A registered lobbyist is additionally required to advise the Clerk within 10 days of becoming aware that any person named on the Register has:
 - (a) been sentenced to a term of imprisonment of 30 months or more;
 - (b) been convicted of an offence, one element of which involves dishonesty, such as theft or fraud; or
 - (c) become or is acting as a member of a federal, state or territory political party executive or administrative committee, or similar.

Maintaining accuracy of the Register

In addition to providing notification of changes in registered details, a registered lobbyist is required to provide the Clerk with a quarterly return, within 10 working days of 31 March, 30 June, 30 September and 31 December in each year, which return is required to:

- (28) confirm that their registered details are accurate; and
- (29) update the listing of each person or entity on whose behalf lobbying has been conducted in the preceding 12 months, whether or not for reward.

Registration decisions

- (30) The Clerk is precluded from placing on the Register a lobbyist or authorised person who has not provided all required documents.
- (31) The Clerk is also:
 - (a) empowered to deny registration where he or she believes that registration documents provided are false or misleading;
 - (b) empowered to remove from the Register any currently registered lobbyist or authorised person who the Clerk considers has since become ineligible for registration;
 - (c) empowered to remove from the Register any lobbyist or authorised person who the Clerk considers has acted in contravention of the ACT

Lobbying Code of Conduct unless satisfied that the contravention was unintentional and that adequate steps have been implemented to render any further contravention unlikely;

- (d) required to remove from the Register any lobbyist or authorised person who, once registered, does not provide all required change notification or confirmation documents; and
 - (e) has a general discretion to refuse (or remove) registration of an otherwise eligible lobbyist or person authorised to lobby on their behalf where the registering authority considers that there are reasonable grounds to believe that that lobbyist or person has acted, or cannot be relied upon to act, in a manner consistent with general standards of ethical behaviour.
- (32) Before exercising any of these listed powers, the Clerk is required to offer the lobbyist and any authorised person in question a reasonable opportunity to make a submission in relation to the proposed decision and should be required to have regard to any submission made before taking a final decision.

Access to the Register

Internet access to the Register is to be available to the public free of any charge.

Timing of entries on or changes to the Register

To avoid any unwarranted delay in the conduct of the business of a lobbyist, new entries or changes to existing entries should be available on the Register webpage on average within two (2) business days of the receipt of properly completed registration forms.

Handling of Complaints

- (33) If the Clerk receives a complaint that lobbying activities have been conducted by a person required to be registered but not registered on the Register, he is to contact that person and ensure that they are aware of the registration requirements. If that person does not become registered within a reasonable period, the Clerk is to advise all Members and the Head of Service that the person in question is not registered and that Members, their staff, consultants and contractors and persons employed under the *Public Sector Management Act 1994* are not permitted to knowingly entertain lobbying activities from that person.
- (34) If the Clerk receives a complaint that a person registered on the Register has breached the ACT Lobbying Code of Conduct, the Clerk is to consider whether or not that person should be removed from the Register. Before taking any such action the Clerk is required to offer the lobbyist or authorised person in question a reasonable opportunity to make a submission in relation to the proposed decision.

- (35) If the Clerk receives a complaint that a Member has entertained lobbying activities by a person required to be but not registered on the Register, the Clerk should refer that matter to the Member in question for their consideration, and copy that referral to the Speaker.
- (36) If the Clerk receives a complaint that a staff member of or contractor or consultant to a Member has entertained lobbying activities by a person required to be but not registered on the Register, the Clerk should refer that matter to the Member in question for their consideration of any necessary further direction to or other action in respect of that staff member or contractor or consultant, and copy that referral to the Speaker.
- (37) If the Clerk receives a complaint that a person employed under the *Public Sector Management Act 1994* has entertained lobbying activities by a person required to be but not registered on the Register, the Clerk should refer that matter to the Head of Service for their consideration of any necessary further direction to or other action in respect of that person, and copy that referral to the Chief Minister.

This resolution has effect from 1 January 2015 and continues in force unless amended or repealed by this or a subsequent Assembly.

APPENDIX G—CODE OF CONDUCT FOR STAFF OF NON-EXECUTIVE MEMBERS
(DI2015-320)

1. Staff of Non-Executive Members are required to familiarise themselves with, and meet their obligations under, the following:
 - a) the terms of any industrial agreement or employment contract relevant to their employment;
 - b) *Continuing Resolutions of the Legislative Assembly for the ACT*, in particular the Members' Code of Conduct in continuing resolution no. 5 and the Assembly's endorsement of the Commonwealth (Latimer) House Principles on the Three Branches of Government in continuing resolutions no. 8A;
 - c) the *Legislative Assembly (Members' Staff) Act 1989* and relevant disallowable instruments made under the Act; and
 - d) this Code of Conduct.
2. Staff of Non-Executive Members must:
 - a) act with propriety, honesty and integrity;
 - b) act with fidelity and in good faith;
 - c) avoid conflicts of interest and report any potential conflicts to their employing member or supervisor as soon as possible after the relevant facts come to their notice;
 - d) never solicit nor accept a payment or other benefits as reward for anything done in connection with their employment;
 - e) not unlawfully coerce a member of the public or another public employee;
 - f) not inappropriately use or disclose information acquired in the course of their employment;
 - g) not make, or seek to make, improper use of their position or access to information to gain, or seek to gain, a benefit or advantage for themselves or any other person; and
 - h) not misuse or misappropriate resources provided by the Territory; and
 - i) demonstrate appropriate standards of professional conduct in their interaction with officials.
3. As part of their general obligations of employment, staff of Non-Executive Members are required to:
 - a) perform duties diligently, with care and to the best of their skill and ability;
 - b) comply with any lawful and reasonable direction given by a person having authority to give the direction;
 - c) observe appropriate standards of behaviour at all times;
 - d) treat others with respect, courtesy and with proper regard for their human rights; and

- e) support their employing member's compliance with any code of conduct that applies to that member.