



Ethics and Integrity Adviser

Mrs Vicki Dunne, MLA
Speaker
Legislative Assembly for the Australian Capital Territory
Civic Square
London Circuit
CANBERRA ACT 2600

Dear Madam Speaker

I refer to your request of 5 August 2015 that I provide general advice about the acceptance by Members of the Assembly of "gifts" from third parties, and related issues.

I attach the requested advice.

Yours sincerely

A handwritten signature in black ink, appearing to read "Stephen Skehill".

Stephen Skehill

22 October 2015

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11 May 1989 - 11 May 2009

Legislative Assembly for the Australian Capital Territory
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ACCEPTANCE OF “THIRD PARTY BENEFITS” BY MEMBERS OF THE LEGISLATIVE ASSEMBLY

Background

On 5 August 2015 the Speaker informed the Assembly that she would seek and release advice from me about:

- the acceptance by herself, two other members and one of her staff of an offer from the government of Taipei to visit Taiwan at the expense of that government; and
- the broader question of acceptance by Members of the Assembly of what were termed “gifts” (including travel) from third parties.

In subsequent correspondence with me, the Speaker detailed a number of related issues that she wished the second advice to canvass.

I provided the first of those advices on 6 August 2015 and it was subsequently released by the Speaker.

This document sets out my advice on the second issue.

The Speaker asked that I consult with the Clerk of the Assembly in preparing this advice. I have done this and have been grateful for his input. However, sole responsibility for the content of this advice rests with me.

Use of this advice

I hope that this document will be useful in providing some broad guidance and assistance to Members. However, it is necessarily general in nature. While it contemplates various hypothetical situations, it should not be taken as providing any final advice in relation to any particular situation that may confront a Member as that situation may entail additional circumstances not contemplated in the hypotheticals discussed in this document. Members desiring the view of the Ethics and Integrity Adviser on any particular matter should seek case-specific advice.

Moreover, as with all advice provided by any Ethics and Integrity Adviser, this document simply reflects the views of one person. Matters of ethics and integrity inherently call for subjective judgement and other observers may reasonably come to different judgements. Omniscience is neither a precondition for, nor a mantle bestowed following, appointment to the position of Ethics and Integrity Adviser.

Terminology

The Speaker's statement to the Assembly used the term "gift". That term is also used in the form which is completed by Member's when making a Declaration of Private Interests as required by Continuing Resolution 6 of the Assembly

In this document I use instead the term "benefit" which I think may perhaps be more apposite. As will be seen below, it is the term used in various other applicable documents, including legislation and the *Code of Conduct for All Members of the Legislative Assembly for the Australian Capital Territory*. I intend this term to include not only physical objects that might be colloquially referred to as "gifts" but also other things of value to the recipient such as (but not limited to):

- the provision of services;
- discounts or rebates on goods or services purchased (often colloquially referred to as "mates' rates");
- things provided to or for a spouse, family person or other associate of the recipient because of their relationship with the recipient;
- payments to supplement the Member's salary as a Member; and
- a promise or intimation of future employment.

Accepting some benefits may be a criminal offence

Section 356 of the *Criminal Code 2002* (ACT) (the **Criminal Code**) deals with bribery. It provides as follows:

356 Bribery

(1) A person commits an offence if—

(a) the person dishonestly—

- (i) provides a benefit to an agent or someone else; or*
- (ii) causes a benefit to be provided to an agent or someone else; or*
- (iii) offers to provide, or promises to provide, a benefit to an agent or someone else; or*
- (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to an agent or someone else; and*

(b) the person does so with the intention that the agent will provide a favour.

Maximum penalty: 1 000 penalty units, imprisonment for 10 years or both.

(2) An agent commits an offence if—

(a) the agent dishonestly—

- (i) asks for a benefit for the agent or someone else; or*
- (ii) obtains a benefit for the agent or someone else; or*

(iii) agrees to obtain a benefit for the agent or someone else; and

(b) the agent does so with the intention—

(i) that the agent will provide a favour; or

(ii) of inducing, fostering or sustaining a belief that the agent will provide a favour.

Maximum penalty: 1 000 penalty units, imprisonment for 10 years or both.

Section 357 of the Criminal Code deals with other corrupting benefits. It provides as follows:

357 Other corrupting benefits

(1) A person commits an offence if—

(a) the person dishonestly—

(i) provides a benefit to an agent or someone else; or

(ii) causes a benefit to be provided to an agent or someone else; or

(iii) offers to provide, or promises to provide, a benefit to an agent or someone else; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to an agent or someone else; and

(b) obtaining, or expecting to obtain, the benefit would tend to influence the agent to provide a favour.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(2) An agent commits an offence if—

(a) the agent dishonestly—

(i) asks for a benefit for the agent or someone else; or

(ii) obtains a benefit for the agent or someone else; or

(iii) agrees to obtain a benefit for the agent or someone else; and

(b) obtaining, or expecting to obtain, the benefit would tend to influence the agent to provide a favour.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(3) For this section, it does not matter whether the benefit is in the nature of a reward.

And section 359 of the Criminal Code deals with abuse of public office. It provides as follows:

359 Abuse of public office

(1) 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.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(2) A person commits an offence if—

(a) the person has ceased to be a public official in a particular capacity; and
(b) the person uses any information the person gained in that capacity; and
(c) the person does so with the intention of—
(i) dishonestly obtaining a benefit for the person or someone else; or
(ii) dishonestly causing a detriment to someone else.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(3) Subsection (2) (a) applies to a person—

(a) whether the person ceased to be a public official as mentioned in the paragraph before, at or after the commencement of this section; and
(b) whether or not the person continues to be a public official in another capacity.

Section 300 of the Criminal Code relevantly defines “public official” as follows:

public official means a person having public official functions, or acting in a public official capacity, and includes the following:
(a) a territory public official; ...

A Member is thus a public official for the purposes of the above provisions of the Criminal Code.

Section 353 of the Criminal Code provides definitions of the terms “agent” and “principal of the agent” with the effect that a “public official” is an “agent” and “the government or other body for which the official acts” is the principal of that person.

Clearly, any Member contemplating the acceptance of a benefit (and any person contemplating offering the same) needs to exercise caution to ensure that they do not, wittingly or unwittingly, commit a breach of the criminal law.

In my view, a Member acting in contravention of such provisions of the criminal law would almost certainly also be engaging in unethical conduct.

Accepting some benefits may be “career-limiting” – literally

Quite apart from the risk that accepting a benefit may entail a Member committing a criminal offence under the Criminal Code, section 14(1)(c) of the *Australian Capital Territory (Self-*

Government) Act 1988 (Cth) (the Self-Government Act) may mean that the accepting Member automatically loses their office as a Member. Section 14 provides as follows:

14 Disqualification of member

(1) A member vacates office if the member:

(a) at any time after the beginning of the first meeting of the Assembly after a general election, is not qualified to take a seat as a member;

(b) is absent without permission of the Assembly from:

(i) such number of consecutive meetings as is specified by enactment for the purposes of this subparagraph; or

(ii) if no such enactment is in force—4 consecutive meetings of the Assembly;

or

(c) 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.

(2) A person who has vacated an office of member may be re-elected.

(3) Paragraph (1)(c) does not apply to a superannuation scheme:

(a) that is established by or under an enactment; and

(b) under which any or all of the following benefits are provided:

(i) benefits for a person upon ceasing to hold an office of member;

(ii) benefits for a person who is or was a member in the event of the permanent or temporary disability of the person;

(iii) benefits for dependants of a person who is or was a member in the event of the death of the person.

(4) In subsection (3):

dependant has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

Section 73 of the Self-Government Act, referred to in section 14, has the effect that a Member may receive remuneration and allowances determined or specified under an “enactment”, such as the *Remuneration Tribunal Act 1995* (ACT), without triggering loss of office under section 14(1)(c).

The Self-Government Act does not define the meaning of the phrase “remuneration, allowance, honorarium or reward for services rendered in the Assembly”. In accordance with the usual rules of statutory interpretation, the phrase is therefore likely to be given by a court its ordinary meaning in English usage. While the terms “remuneration” and “allowance” may imply some form of regular payment of a pre-determined amount, the terms “honorarium” and “reward” are unlikely to be found to be limited in this way. There is thus a real prospect that acceptance by a Member of a “one-off” or irregular benefit may trigger the serious consequences of section 14 if that benefit was provided “for services rendered in the Assembly”. Quite what is encompassed by that latter terminology is not free from doubt.

If a Member were to vacate their office by reason of section 14(1)(c), in my view it is highly likely, although not certain, that they would have engaged in unethical conduct.

Accepting some benefits may limit the capacity of a Member to act as a Member

It is also possible that acceptance of a benefit by a Member, even if it does not constitute a criminal offence under the Criminal Code or cause the Member's office to be vacated under section 14(1)(c) of the Self-Government Act, may nevertheless prevent the Member from undertaking certain of the usual duties of a Member. This is because section 15 of the Self-Government Act provides as follows:

15 Conflict of interest

(1) A member of the Assembly who is a party to, or has a direct or indirect interest in, a contract made by or on behalf of the Territory or a Territory authority shall not take part in a discussion of a matter, or vote on a question, in a meeting of the Assembly where the matter or question relates directly or indirectly to that contract.

(2) A question concerning the application of subsection (1) shall be decided by the Assembly, and a contravention of that subsection does not invalidate anything done by the Assembly.

A Member affected by section 15(1) would in my view not necessarily have acted unethically. For example, the interest in question may have been acquired by them before they became a Member. At the same time, however, such a Member could in my view act unethically if, for example:

- they participated in business of the Assembly knowing that they had an interest to which section 15(1) applied; or
- while a Member, they acquired interests affected by section 15(1) knowing that in so doing they would be precluded from participating in relevant Assembly business – such conduct would be in conflict with clause 10 of the *Code of Conduct for All Members of the Legislative Assembly for the Australian Capital Territory* under which Members have committed to “actively seek to prevent any conflict of interest”.

Other rules applicable to the acceptance of benefits by Members

While legislation of general application such as the *Income Tax Assessment Act 1936* (Cth) and the *Fringe Benefits Tax Act 1986* (Cth) may apply to benefits received by a Member, there is no other statutory law of which I am aware that defines the circumstances in which a Member may or may not accept a benefit.

There are however some other “rules” of relevance.

The *Code of Conduct for All Members of the Legislative Assembly for the Australian Capital Territory* established by Standing Resolution of the Assembly (originally on 25 August 2005 and subsequently amended on 16 August 2006 and 24 October 2013) contains a number of general and some specific provisions of relevance. It states as follows:

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.*

...

- (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.*

...

For those Members who are Ministers, the *Ministerial Code of Conduct 2012* also contains relevant provisions including the following:

Précis

Ministers in the ACT Government are rightly expected to uphold and demonstrate the highest standards of personal and professional conduct.

Ministers must apply the powers and privileges of their office solely in pursuit of the best interests of the people of the ACT.

Ministers must act lawfully and with integrity, probity and respect for others.

1. Responsibilities under legislation

*Ministers must be familiar with key Commonwealth and ACT Legislation including the:
Australian Capital Territory (Self-Government) Act 1988 (Cwth)
Human Rights Act 2004*

They must familiarise themselves with powers and obligations given to them under Territory laws for which they are responsible under the Administrative Arrangements.

Ministers also need to be familiar with the Standing Orders and Continuing Resolutions of the Legislative Assembly for the ACT. Continuing Resolution No.5 embodies the Code of Conduct for Members of the Legislative Assembly, which applies to ministers in addition to the obligations set out in this code.

Continuing Resolution 8A (the Latimer House Principles) articulates generally accepted standards of conduct in Westminster Parliaments. Part 2(f) of the Latimer House Principles explicitly obliges ministers to develop and review their own specific guidelines on ethical conduct to address conflicts of interest and enhance transparency, accountability and public confidence in their role.

Ministers should familiarise themselves, and adhere to, the relevant determination of the Remuneration Tribunal establishing their entitlements (including in relation to official travel).

...

3. Ethical Principles for Ministers

a. integrity

Ministers must act according to the highest standards of personal integrity and probity, and uphold the ACT's system of responsible government.

Ministers must not use their position or information gained in the performance of their duties to gain a direct or indirect advantage for themselves or their families or acquaintances that that would not be available to the general public.

b. honesty

Ministers must act honestly at all times and be truthful in their statements.

...

d. transparency

Ministers must make their decisions and actions as open to scrutiny as is possible consistent with the conventions of responsible government.

...

h. responsibility

Ministers must use the powers of office responsibly and in the interests of the people of the ACT.

...

Ministers must not solicit nor accept payments or gifts for services as a minister except as lawfully provided for (see sections 14 and 73 of the Self Government Act). The Code of Practice for Official Hospitality, Gifts and Protocol establishes procedures for the acceptance, surrender or retention of official gifts.

...

Ministers must ensure that their personal conduct does not bring the Legislative Assembly, the Government, or their position into disrepute, or adversely affect public confidence in the integrity of the ACT's system of government.

In summary, the effect of these rules is effectively that, where acceptance of a benefit would not constitute a criminal offence or trigger vacation of a Member's office under section 14 of the Self-Government Act, a Member may accept a benefit from a third party so long as, in doing so:

- they act ethically and with integrity;
- they avoid or redress an actual or reasonably perceived conflict of interest;
- they declare the acceptance of the benefit as and when required; and
- they do not bring their office or the Assembly into disrepute.

Living within the present rules

It is imperative to recognise that a Member who accepts a benefit may have acted in a fully ethical manner. There is nothing inherent in a Member's acceptance of a benefit that is intrinsically unethical.

However, there may be circumstances surrounding the acceptance of a benefit that may render a Member's conduct unethical.

It is not possible in my view to exhaustively state when acceptance will be ethical and when it will be unethical. The potential range of relevant circumstances is simply too great to be foreseen in advance. For this reason, the best that I believe can be done in an advice of this nature is to raise a number of hypothetical situations that may offer some guidance.

It is also important to recognise at the outset that the present rules do not operate in a vacuum. Accompanying them is the requirement for Members to disclose their private interests, including gifts or other benefits received by them. The declaration process, by exposing these matters to public view, provides an important mechanism to temper the conduct of Members and constrain activity that might otherwise occur if it were able to be conducted entirely behind closed doors. A requirement to declare private interests is not of itself an adequate safeguard of the public interest, but it is nevertheless extremely important in supporting compliance with public expectations of ethical behaviour.

Beyond whether or not declaration is required, in my view there are a wide variety of considerations that should inform a Member's decision as to whether or not to accept an offer of a benefit.

Assuming acceptance would not infringe the legislation discussed above, these considerations include:

- whether the benefit is offered to the Member in their personal capacity or as a Member;
- the nature of the relationship between the donor and the Member;
- the nature of any past, current or likely future dealings between the donor and the Member;
- the nature of the benefit being offered;
- the terms and conditions on which the benefit is offered;
- the circumstances in which a benefit is accepted;
- the identity of the primary beneficiary; and
- community sensitivities.

I discuss such issues in the following paragraphs.

The present rules do not prevent a Member accepting a benefit on behalf of the Assembly itself – although care should of course be taken to ensure that the benefit is appropriately recorded as property of the Assembly.

Nor do the present rules prevent a Member accepting a benefit that is extended to them in their private capacity – an obvious example is an unconditional birthday or Christmas present from a close family member.

But, as the relationship between donor and donee widens, it becomes increasingly difficult to categorise a benefit as being provided to the Member in their private capacity. Beyond the circle of family, there becomes an increasing risk that gift-giving or benefit-provision is undertaken for a purpose related to the Member's capacity as a Member and should not be categorised as private.

In these situations, the circumstances surrounding the offer and acceptance of a benefit need to be examined to test its probity.

Where the donor has no past, present or foreseeable specific interest in business transacted by the Member in the Assembly, it is likely that acceptance will give rise to no reasonably apprehended conflict of interest. In contrast, where the donor's interests may be directly affected by legislation or other proceedings currently before or likely to come before the Assembly or its Committees, the acceptance of any but the most minor benefit may be most unwise and give rise to such an apprehension. Similarly, where a benefit is offered soon after Assembly business in which the Member participated has been concluded in a manner favourable to the donor's interest, acceptance may well give rise to a perception that the benefit was intended as a reward for that participation.

The value of a benefit is also a relevant consideration. The provision of a "working lunch" during a Member's visit to a business for the purposes of ascertaining its view on proposed legislation that could impact that business is unlikely, without more, to give rise to any reasonably apprehended conflict of interest. Similarly, modest presents given as a token of thanks for a speech given at a

donor function or a gift of small and inexpensive promotional items like ball-point pens or baseball caps bearing the donor's logo are unlikely to be problematical. In contrast, the acceptance of lavish entertainment or a gift or benefit of more significant value may well trigger such concerns.

But a significant value by itself, while it may trigger a requirement for disclosure via a Declaration of Private Interests, will not necessarily impugn the probity of acceptance.

For example, it is common practice for parliamentarians (and often their spouse or partner) to be invited to attend a "gala dinner" held as part of an industry association's annual conference. Conference delegates may pay \$100-200 per head for their tickets, while those provided to the parliamentarian may be provided free of charge. Sometimes the parliamentarian has an official role during or in association with their attendance – for example, they may give a "keynote" address to the conference or present industry excellence awards. On other occasions, they may have no official role but their attendance may provide a valuable opportunity for both industry members and the parliamentarian to quite properly exchange views on important official issues of mutual concern. In my view, the acceptance in such circumstances of hospitality in connection with the official attendance of a Member at a function such as a conference in a form that is no more lavish than that enjoyed by paying attendees should, of itself and without more, not give rise to ethical issues.

On the other hand, even though the value of a benefit may be low, acceptance may nevertheless raise issues of concern – for example, where the same low-value benefit is offered and accepted on multiple occasions, or where a "package" is offered element-by-element in circumstances where each element is individually valued below the threshold which triggers the requirement for a Declaration of Private Interests.

The nature of a benefit being offered can clearly be a matter for concern. Accepting and using some benefits may be quite legal, but a Member's conduct can clearly be called into question by doing so. For example, accepting an offer of the sexual services provided by a legal escort service or brothel, or an offer of marijuana in a quantity allowable for possession for personal use, may leave a Member who is not prepared to publicly acknowledge those facts open to blackmail, may cast doubt on their ethical standards generally, and may call the standing of the Assembly into disrepute.

The fact that a Member may make some payment for goods or services being offered will not necessarily render its acceptance free of criticism. For example, goods or services for the private use of a Member or their family may be offered at discounted "mates' rates" but, if these rates are not generally available to other parties having a similar relationship to the donor or buying in similar quantities, the resultant benefit to the Member is likely to raise questions of probity because the fact of payment would not negate the special treatment thereby afforded to the Member and would leave open questions as to why that treatment was being afforded.

Circumstances may arise where an otherwise unobjectionable offer of a benefit becomes objectionable because the donor attaches conditions to its acceptance. For example, the provision of tickets to a theatre performance may be otherwise unobjectionable, but may become objectionable if, for example, the donor indicates that acceptance is conditional upon the Member taking some action such as making representations to a Minister in support of a policy position advocated by the donor. This may be so even though the Member might have willingly made those representations even if the offer of the benefit had not been made.

Even where acceptance of the benefit itself is unobjectionable, the surrounding circumstances may nevertheless leave the Member open to criticism. For example, tickets to a theatre performance in another city may be offered without any associated offer of travel to that city. If the Member were

to “manipulate” their travel entitlements as a Member so as to ensure that they were in that other city at Assembly expense on the relevant date, that conduct could be objectionable if the Assembly thereby incurred a travel expense that it would not otherwise have borne. In such circumstances, it might be the abuse of travel entitlements rather than the acceptance of the offer that would provide the justification for criticism, but public scrutiny may not make that distinction and call both acts into question.

The fact that a person other than the Member will be the primary beneficiary or user of a benefit offered may not render its acceptance free of criticism. The provision of goods or services for a spouse may still be a benefit to the Member where the Member’s personal or family funds would otherwise bear the cost of those goods or services, and acceptance should be tested in the same way as if the benefit were provided to the Member directly.

Perhaps more problematical is the question of benefits provided to persons outside the Member’s family circle but still having a connection with the Member, such as a member of the staff of a Member, where it would be less likely that the Member would otherwise provide funding to secure that benefit for that person. So, for example, both a Member and their adviser may be invited to a sporting event at no cost to themselves. The staff member may declare receipt of their ticket to the Member, but if that receipt is not a private interest of the Member and therefore not required under Standing Resolution 6 to be declared by the Member, there would be no public accountability for it even though the Member may gain some (non-pecuniary) benefit in having their adviser attend the event with them.

Finally, it needs to be recognised that even some instances of perfectly legal acceptance of a benefit can give rise to community concerns and public controversy.

The *Code of Conduct for All Members of the Legislative Assembly for the Australian Capital Territory* to which Members have committed states in clause 9 that:

Members should promote and support [the principles set out in the Code] 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.

A Member might breach clause 9 and act unethically if, for example, they were to accept a legally available benefit in the knowledge that by doing so they would call the integrity of the Assembly or of its Members into disrepute.

However, the presence or absence of community concern and public controversy is not the test of whether or not acceptance of a benefit has been ethical. The basis for such concern and controversy may well be uninformed or unreasonable. Concern and controversy that does arise may possibly be dispelled by proper explanation of the surrounding circumstances.

But even where concern and controversy cannot be dispelled by explanation and is detrimental to “public support and confidence in the integrity of the Assembly and the conduct by its Members of public business”, this does not necessarily mean that a Member’s acceptance of a benefit would involve an unethical failure to act in accordance with the commitment given by Members in agreeing to clause 9 of the Code. For example, it may be that the concern and controversy that has arisen could not reasonably have been foreseen and in such circumstances I consider that it could not be fairly claimed that the Member had failed to promote and support the Code principles.

Are the current rules adequate ?

It is not the role of the Ethics and Integrity Adviser to make rules governing the conduct of Members. Rather the Adviser's primary role is to provide advice, within a context of ethical considerations, in relation to conduct within whatever rules apply from time to time.

However, the relevant Assembly Resolution also provides that the Adviser may suggest to the Assembly proposals to address issues concerning Members' entitlements that give rise to requests for such advice.

From an ethical perspective, I do not perceive any inadequacy in the present rules affecting the acceptance of benefits by Members. It seems to me that the legislation to which I have referred and the *Code of Conduct for All Members of the Legislative Assembly for the Australian Capital Territory*, operating together, provide a mechanism that is capable of leading to balanced outcomes in this area.

Nevertheless, in recent times there have been some public comments that suggest that new or different rules affecting the acceptance of benefits by Members should be made.

Essentially, the content of the rules applicable to Members is a matter of policy for consideration by the Assembly itself.

New or different rules of binding effect (as opposed to exhortatory guidelines or similar) might be made in various ways, including:

- by resolution of the Assembly – for example, by amending the Code of Conduct for Members;
- by new legislation passed by the Assembly; or
- under amendments made to existing legislation of the Assembly - for example, by amending the *Remuneration Tribunal Act 1995* to authorise the Tribunal to set terms and conditions in relation to matters other than remuneration and allowances payable by the Assembly.

[Whether new rules of binding effect could be made by the ACT Branch of the Commonwealth Parliamentary Association, as recently seemed to be suggested in some media comment, is less clear.]

And new rules to be applicable only to that sub-set of Members who are Ministers could be set by the Chief Minister - for example, by amending the *Ministerial Code of Conduct 2012*.

Should such changes be contemplated, however, I would caution the taking of great care in the formulation of any new rules.

For example one commentator, having noted my advice that did not raise objection to the visit to Taiwan by Assembly Members at the expense of the government of Taipei, recently suggested that "the bigger issue of all freebies from corporations and governments shouldn't be too difficult ... a simple 'no' would suffice".

While perhaps elegant in its simplicity, a rule prohibiting a Member from accepting any benefit from a corporation or government would pose a number of problems – for example:

- clearly an exception would be required to allow the receipt of salary and allowances determined by the Remuneration Tribunal;
- the lack of any constraint on the acceptance of benefits from individuals would not only be irrational but might also pose a major avenue for abuse; and
- the prohibition would extend to acceptance of any hospitality while attending industry or inter-governmental meetings that constitute important forums for Members to gain feedback on community concerns, promote uniform national laws and other worthy purposes and potentially impact adversely and needlessly on the efficiency of these forums and the capacity of Members to work in the public interest.

It has also been suggested recently that there should be a ban on accompanied travel unless it is “privately funded”. The Remuneration Tribunal determination applicable to Members as recently changed precludes accompanied travel publicly funded at Assembly expense. If this suggestion for further change to the applicable rules were to be adopted, detailed consideration would need to be given to what did or did not constitute “privately funded” travel – for example:

- would accompanied travel at the expense of another government and without any cost to the Assembly or the ACT Government be precluded;
- would accompanied travel at the expense of a quasi-public body whose expenditure decisions were outside the control of the Assembly or the ACT Government be precluded -
 - where that body derived no funding from the Assembly or the ACT Government; or
 - where that body did derive some funding from the Assembly or the ACT Government;
- would travel funded by a private person other than the Member or the accompanying person be precluded;
- would travel funded by a non-government owned corporation be precluded and, if yes, would that extend to travel funded by the accompanying person’s employer who wished to allocate their employee to duty in a place and at a time that happened to coincide with the Member’s travel;
- would travel by a Member and spouse funded without any cost to the Assembly or the ACT Government be precluded where it was undertaken at a lower class of travel than would be provided if the member were to travel alone and even if the overall cost were no greater or even less;
- would the requirement for private funding extend to accompanied travel where the Member and accompanying person were both attending an official function as representatives of the Assembly;
- what rule would apply where a member of the Member’s staff otherwise entitled to accompany the Member at Assembly expense had commenced a personal relationship with the Member; and

- would the revised rule apply to all travel regardless of mode and distance – for example, would it apply to a bus trip to a function venue in a rural area of the ACT, or only to interstate and international air travel.

Perhaps more significantly, it seems to me that there is no reason, inherently or in principle, why accompanied travel should be singled out for special treatment over and above the provision of any other benefit that might be extended to a Member's spouse or family members. While acknowledging that recent controversy has focussed on accompanied travel, it seems to me that it would be far preferable that any change to the existing rules as they affect the provision of benefits for persons other than the Member directly should be of general application. To do otherwise may simply promote a change on the form of benefits offered without dealing with the underlying issues of ethics and integrity.

Other Issues

In addition to the above issues affecting Members, the Speaker asked that I also address the question of the acceptance of third party benefits by Members' staff and by staff of the Office of the Legislative Assembly.

The provisions of the Criminal Code to which I have referred in the context of Members above apply equally to such persons.

Other relevant provisions in ACT law set out other ethical and integrity requirements that are also applicable.

Sections 6 and 11 of the *Legislative Assembly (Members' Staff) Act 1989* (ACT) provide that relevant provisions of the *Public Sector Management Act 1994* (ACT) apply to Members' staff in relation to matters not otherwise covered by the former Act.

Section 9(4) of the *Legislative Assembly (Office of the Legislative Assembly) Act 2012* (ACT) provides that the Clerk of the Assembly is appointed on the terms (if any) in relation to matters not provided for by Part 3 of that Act or a determination under the *Remuneration Tribunal Act 1995* that are prescribed by the management standards under the *Public Sector Management Act 1994*.

Section 7(1) of the *Legislative Assembly (Office of the Legislative Assembly) Act 2012* (ACT) provides that staff of the Office of the Legislative Assembly are to be employed under the *Public Sector Management Act 1994*.

The *Public Sector Management Act 1994* includes the following provisions:

6 Values and principles

Government agencies shall have an objective of implementing the following values and principles:

- (a) service to the public;*
- (b) responsiveness to—*
 - (i) the requirements of the government; and*
 - (ii) the needs of the public;*
- (c) accountability to the government for the ways in which functions are performed;*

- (d) fairness and integrity;*
- (e) efficiency and effectiveness.*

7 General principles of public administration

The public sector shall be administered with an objective of giving effect to the following principles:

- (a) the public sector shall be administered to provide quality services to the public;*
- (b) decisions shall be as fair as possible;*
- (c) the best management practices shall be used;*
- (d) the public sector shall be structured and organised to facilitate the timely and effective performance of its functions;*
- (e) there shall be a clear and explicit delineation of the responsibilities and accountabilities of public employees, administrative units and territory instrumentalities;*
- (f) the public sector shall be managed in accordance with principles of access and equity by giving all members of the public the opportunity to have a fair share of the resources which the Territory manages on their behalf and an opportunity to gain access to the resources to which they are entitled;*
- (g) the public sector shall be administered to minimise the possibility of unlawful discrimination.*

9 General obligations of public employees

A public employee shall, in performing his or her duties:

- (a) exercise reasonable care and skill;*
- (b) act impartially;*
- (c) act with probity;*
- (d) treat members of the public and other public employees with courtesy and sensitivity to their rights, duties and aspirations;*
- (e) in dealing with members of the public, make all reasonable efforts to assist them to understand their entitlements under the territory laws and to understand any requirements that they are obliged to satisfy under those laws;*
- (f) not harass a member of the public or another public employee, whether sexually or otherwise;*
- (g) not unlawfully coerce a member of the public or another public employee;*
- (h) comply with this Act, the management standards and all other territory laws;*
- (i) comply with any lawful and reasonable direction given by a person having authority to give the direction;*
- (j) if the employee has an interest, pecuniary or otherwise, that could conflict, or appear to conflict, with the proper performance of his or her duties—*
 - (i) disclose the interest to his or her supervisor; and*
 - (ii) take reasonable action to avoid the conflict;**as soon as possible after the relevant facts come to the employee's notice;*
- (k) not take, or seek to take, improper advantage of his or her position in order to obtain a benefit for the employee or any other person;*
- (l) not take, or seek to take, improper advantage, for the benefit of the employee or any other person, of any information acquired, or any document to which the employee has access, as a consequence of his or her employment;*

- (m) not disclose, without lawful authority—
 - (i) any information acquired by him or her as a consequence of his or her employment; or
 - (ii) any information acquired by him or her from any document to which he or she has access as a consequence of his or her employment;
- (n) not make a comment that he or she is not authorised to make where the comment may be expected to be taken to be an official comment;
- (o) not make improper use of the property of the Territory;
- (p) avoid waste and extravagance in the use of the property of the Territory;
- (q) report to an appropriate authority—
 - (i) any corrupt or fraudulent conduct in the public sector that comes to his or her attention; or
 - (ii) any possible maladministration in the public sector that he or she has reason to suspect.

The *Public Sector Management Standards 2006* made under that Act include the following:

6 ACTPS code of conduct

- (1) The Commissioner must develop a code of conduct that applies to all government agencies and all public employees (the **ACTPS code of conduct**).
- (2) The Commissioner must consult the head of service in the development of the ACTPS code of conduct.
- (3) The ACTPS Code of Conduct under subsection (1) is a notifiable instrument.

7 Supplementary code of conduct

- (1) A head of a government agency may develop additional conduct requirements that apply to that agency (a **supplementary code of conduct**).
- (2) A supplementary code of conduct may be developed to apply to—
 - (a) all of the relevant government agency; or
 - (b) a part of the relevant government agency; or
 - (c) a class of public employees in the relevant government agency.
- (3) The Commissioner must determine that a supplementary code of conduct is consistent with the ACTPS code of conduct before it can be applied.

10 The employee values

The employee values are—

- (a) respect; and
- (b) integrity; and
- (c) collaboration; and
- (d) innovation.

11 Promoting the employee values

The employee values must be used to inform and evaluate the operation of the service, including—

- (a) management practices; and*
- (b) the performance of a public employee; and*
- (c) the implementation of government policy.*

The *Public Sector Management (ACT Public Service) Code of Conduct 2013* made under those Standards requires that employees must:

be aware of, and properly manage, potential conflicts of interest.

So far as the staff of the Office of the Legislative Assembly is concerned, there is a Code of Conduct which “expands on section 9 of the PSM Act”. It contains the following specific provisions,

Gifts and benefits are items or services that are provided to you, your family or anyone associated with you resulting from your employment. These can include hospitality, money, and/or travel.

Accepting a gift or benefit from a person who could benefit from influencing you places you in a difficult position. This applies to Members of the Assembly as well as the general public. Even the appearance of influence may damage your reputation or affect the public or Members’ trust in the independence and integrity of OLA.

Strict rules apply to ACT public servants about accepting gifts or other benefits through official duties. The basic rule is not to accept gifts or benefits without the approval of the Clerk, unless the gift is of little financial value (under \$25) and there is no reasonable possibility that it could cause a real or apparent conflict of interest. Staff should report to their manager the receipt of all gifts in order to provide an opportunity for OLA to assess the value of particular gifts and to weigh any conflict of interest issues that might exist. Managers may direct staff not to accept a gift were that manager considers that the gift would give rise to a conflict of interest situation (whether perceived or actual).

Staff also need to be mindful that repeated offers of gifts, particularly from one source, even should they fall under the \$25 threshold, is likely to give rise to perceptions of conflict of interest. Managers will direct staff not to accept gifts where they detect an emerging pattern of gifts being repeatedly offered to particular staff members.

All ‘official gifts’ should be submitted to the Strategy and parliamentary Education Office along with a filled-out gift register form (available on the intranet). A decision as to whether the item will be accepted as an official gift or whether it can be retained by the individual staff member that received it will be made on a case by case basis.

Frequent flyer points accrued as a result of travel and accommodation paid for by OLA must be used for further official travel and not for private purposes.

If, at any time, you are unsure about what to do in relation to a gift or benefit discuss the matter immediately with your manager.

There is no Code of Conduct or similar document that is specifically applicable to the staff of Members (although I understand that one may be in contemplation and I would support the finalisation of such a code).

As a result of the above, there is no absolute prohibition on a Member's staff member, the Clerk or a member of the staff of the Office of the Legislative Assembly accepting a benefit offered by a third person. However, such acceptance must meet a series of test including:

- integrity and probity;
- avoidance, disclosure and management of conflicts of interest; and
- not taking advantage of the person's position for personal gain or inappropriate benefit to another.

While expressed differently to the Code of Conduct provisions applicable to Members, the relevant obligations of a Member's staff member, the Clerk or a member of the staff of the Office of the Legislative Assembly are in my view effectively consistent with those applicable to a Member in respect of the acceptance of third party benefits and the above discussion of those issues appears to me to be, in principle, equally applicable.

Stephen Skehill

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22 October 2015