

Members of
Parliament:
law and ethics

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Other standards

So far consideration has been given to those standards of conduct of members of parliament which are enforced by the general law and those which deal with a conflict of interest. There are, of course, other standards which relate to the integrity of members but fall into neither of these categories. Some are found in the various codes of conduct adopted or proposed for members. Their existence, although reinforced by their inclusion in such codes, is not dependent on that fact. They are all based, like the other standards already discussed, on the fundamental obligation of members to act always in the public interest. These standards address a range of situations in which members may be tempted to act out of self-interest. They offer practical rather than merely aspirational guidance.

This chapter considers the following standards:

- (1) the acceptance of gifts and hospitality;
- (2) the use of public resources;
- (3) on leaving public office;
- (4) personal conduct;
- (5) compensation for services rendered as a member;
- (6) the improper use of influence;
- (7) the acceptance of political donations; and
- (8) the conduct of members in the House:
 - (a) disorderly conduct;
 - (b) not to abuse freedom of speech; and
 - (c) not to mislead parliament.

Acceptance of gifts and hospitality

When a member accepts a gift or hospitality, the minimal ethical requirement is to ensure that no apparent conflict of interest arises. This means that the value of the gift or hospitality, the circumstances of its conferral, and the relationship between the member and the donor must be such as not to arouse in a fair-minded person any suspicion that the member may be influenced in the performance of his or her official duties. Obviously this test cannot be applied narrowly. A gift or hospitality conferred on a relative or friend in gratitude for a member's assistance is

subject to the same test. All forms of benefit must be capable of being viewed as a gift or hospitality, whether they be in the nature of sponsored travel, a loan on preferential terms or the waiving of a fee.

Although the disclosure of gifts and hospitality is required by most registers of members' interests, this does not, in every case, adequately deal with the conflict of interest aroused by their acceptance. Indeed, a mere requirement of disclosure may be viewed as implicitly condoning the unethical acceptance of a gift or hospitality. Accordingly, an obligation of disclosing their acceptance should be accompanied by a clearly understood standard to reject their offer in circumstances where this may arouse the suspicion that the member is being 'bought'.

The NSW and Tasmanian codes specifically address the receipt of gifts. The NSW codes, in cl 3, require disclosure of all gifts as part of the disclosure of pecuniary interests and impose an obligation on members, similar to that stated above, not to accept gifts that 'may pose a conflict of interest or which might give the appearance of an attempt to corruptly influence the Member in the exercise of his or her duties' (cl 3(b)). Expressed in this form, cl 3 provides minimal guidance to members in deciding whether they ought to accept a gift. It also appears not to extend to hospitality.

Better guidance is provided under the broader standard in the Tasmanian House of Assembly Code, where members 'must not accept gifts, benefits or favours except for incidental gifts or customary hospitality of nominal value'. Gifts and hospitality outside this exception are likely to give the appearance of a conflict of interest and so ought to be declined. Of course, an exception must apply to bona fide gifts from family and close friends. How far the exception extends is likely to be disputed; hence, the nomination of a monetary limit would be of advantage, like the \$50 limit prescribed for a single gift to a United States senator.¹

The Australian Senate resolution on declaration of gifts covers gifts intended by the donor to be 'a gift to the Senate or the Parliament' rather than to an individual senator. However, where a senator accepts a gift in excess of \$500 from an official or in excess of \$200 from a private donor, it is deemed to be for the Senate or the Parliament.

Although quite detailed rules in relation to the acceptance of gifts and hospitality are prescribed for members of the United States Congress,² this is not the case with the UK House of Commons. Such detailed rules seem unnecessary, given the very limited discretionary powers of members of parliament, unlike those of ministers. However, members need to be careful when accepting gifts or hospitality, especially if there is a possible connection with their committee work.

The dividing line between an ethical and unethical receipt of a gift or hospitality is a difficult one to draw. However, in Queensland the Electoral and Administrative Review Commission (EARC) managed to incorporate the distinction in its draft code of conduct in these terms:

A Member shall not solicit or accept for personal benefit, any form of benefit whatsoever (eg gifts, loans, discounts, considerations, etc) in connection with the

1 Rule 35 of the US Senate Code.

2 US House of Representatives Code of Official Conduct cl 4; rule 35 of the Senate Code.

performance of official duties, except as may be provided:

- (a) as part of their determined entitlements in accordance with their terms and conditions of remuneration as Members;
- (b) by other public officials on the Member's resignation, retirement, or on similar occasions.

A Member may accept, in an official capacity, any gift or benefit provided that the Member is satisfied in each instance that —

- (a) acceptance of the benefit will not bring their integrity into question; and
- (b) acceptance of the gift or benefit is in the public interest.

Use or disposal of such gifts shall be in accordance with the procedures determined by Parliament.³

The position in relation to the acceptance of political donations is considered separately below. Reference might also be made to the discussion in Chapter 8 on the criminal liability of members in relation to the acceptance of gifts and political donations.

Use of public resources

Members are under an ethical obligation to use the public resources made available for their official use efficiently and not in a wasteful manner. These resources usually include allowances for parliamentary and electorate expenses and travel entitlements.

Any use of those resources which is other than for official use is unlawful and likely to attract criminal sanction.⁴ The most obvious and prevalent instances of criminal conduct in this regard have been fraudulent claims for travel expenses. In any event, any use of public resources for personal reasons unconnected with official use is unethical and may in cases of serious abuse constitute a criminal offence. An obvious example of improper use is where a member uses or allows family or friends to use electorate office facilities or staff for private business purposes. Another blatant 'rort' is the use of travel warrants to fly to holiday destinations on 'official business'.⁵

3 See para 6.5 of the Draft Code of Conduct for Elected Representatives in Appendix G of the *Report on The Review of Codes of Conduct for Public Officials* (May 1992).

4 There is the common law offence of fraud and statutory offences such as s 408C of the *Criminal Code* (Qld) to cover the misappropriation of public resources such as the making of false travel claims. Section 408C provides for the offence of fraud whenever a person dishonestly applies to his or her own use, or to the use of any person, property belonging to another.

5 See ICAC, *Investigation into Parliamentary and Electorate Travel: Second Report* December 1998, Table 1 at 18.

The rules in relation to the official use of public resources are usually prescribed by detailed guidelines.⁶ The codes of conduct in NSW include a provision which requires members to comply with any guidelines or rules in relation to the use of public resources (cl 4). In Tasmania, members are warned not to use them for personal gain. For practical reasons, the extensive rules which normally regulate members' allowances and other benefits are not included in a code of conduct, but a reminder of their obligation to observe those rules ought to be included.⁷

Two important reports have been issued in NSW by the Independent Commission Against Corruption (ICAC) which make extensive recommendations in relation to parliamentary allowances.⁸ The general thrust of those recommendations is to provide members with clear and detailed guidelines as to their entitlements and to establish adequate auditing procedures to ensure transparency and accountability. Significantly, the public needs to be informed of the extent of these benefits, the safeguards in place, and the use to which these benefits have actually been put.

The second of these ICAC reports lists the following ethical guidelines for members in relation to their use of public resources:

- (a) Members must be open in the use of public resources and disclose any conflict of interest in utilising entitlements, be it pecuniary, personal, familial or as a result of any association;
- (b) in the interests of transparency, Members use entitlements on the understanding that this use may be made public;
- (c) ultimately, Members are personally accountable for the use of entitlements. This accountability cannot be delegated. Even though authorisation to incur expenditure may be delegated to electorate staff;
- (d) Members must use entitlements to achieve appropriate value for money while meeting parliamentary and electorate obligations;
- (e) Members must use entitlements with integrity, that is in an efficient, effective and ethical manner and in accordance with any relevant guidelines.⁹

These principles assume the obligation of members to use their entitlements only for their parliamentary and electorate purposes and not for party political purposes. Obviously, a State member is not entitled to use parliamentary or electorate office facilities to support a federal candidate, even if that federal candidate is themselves.¹⁰

6 See for example the Commonwealth Department of Finance and Administration Guidelines.

7 This was recommended by the Queensland Members' Ethics and Parliamentary Privileges Committee, *Report on a Draft Code of Conduct for Members of the Queensland Legislative Assembly* (Report No 21) at para 6.2.3.

8 ICAC, *Investigation into Parliamentary and Electorate Travel: First Report* April 1998 and ICAC above note 5. A Third Report (November 1999) deals with the implementation of the recommendations made in these two earlier respects.

9 ICAC, above note 5, rec 20.

10 An extreme application of this rule was when a federal member was asked to remove from his electorate office window election posters for a State Parliament candidate.

However, at times this distinction between party and official purposes becomes blurred. For instance, is a member entitled to use a travel warrant to attend the annual State or federal party conference?

In NSW, both Codes of Conduct and legislation recognise that the official role of members extends to party activities. Clause 6 of each Code provides:

It is recognised that some members are non-aligned and others belong to political parties. Organised parties are a fundamental part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.

Similarly, the *Parliamentary Remuneration Act 1989* (NSW) recognises that the 'parliamentary duties' of members include 'participation in the activities of recognised political parties'.¹¹ ICAC's Second Report on parliamentary and electoral travel expressed concern that this might encourage the transfer of expenses previously borne by political parties to the public purse. Accordingly, the Report recommended that the following not be permitted out of members' allowances:

- (a) activities such as those associated with membership drives;
- (b) funding of mail distributions for non-electorate or non-parliamentary activities;
- (c) costs associated with election campaigning for an individual Member;
- (d) fund raising for other party political Members (such as the purchase of raffle tickets, raffle prizes or tickets to attend functions etc);
- (e) costs previously borne by political parties which are not principally related to a Member's parliamentary or electorate duties.¹²

Similarly, in Queensland, members' travel entitlements may be used for party political purposes.¹³

On leaving public office

The basic ethical obligation which arises when a member leaves parliament is well described in the Tasmanian House of Assembly Code:

Members of the Assembly, when leaving public office and when they have left public office, must not take improper advantage of their former office.

The Tasmanian Code leaves undefined what is contemplated by 'improper'. Presumably, it is designed to guard against members seeking or obtaining outside positions on the basis of providing confidential information or access to influence. It also warns members not to use their present parliamentary position to promote

11 Section 10(1)(b).

12 ICAC, above note 5, rec 24.

13 See the *Members' Salaries, Allowances and Services Handbook*.

their opportunities for future employment.¹⁴ As opportunities of this nature are less likely to arise with members than with ministers, it is the latter who are often prevented from obtaining employment in fields related to their former official duties for a number of years.

Nonetheless, unethical practices may arise with members. This standard would prevent a member, for example, from obtaining a consultancy to an organisation on the basis that information would be provided concerning a parliamentary committee inquiry on which the member previously served. While disclosure of any confidential information would probably infringe the member's common law duty of confidentiality (see Chapter 9), this standard goes further by preventing the procurement of future employment on that basis. It also prevents a member advocating the creation of a position with the intention to be appointed to it on leaving parliament.

The appointment of members to the executive branch may also raise an ethical dilemma, but this is more likely to be for those who make the appointment rather than the former member. As noted earlier in Chapter 7, this issue arose in NSW in 1992 after Dr Terry Metherell resigned from the Legislative Assembly to accept an appointment to a senior public service position.

The relevant aspect here of what is known as the 'Metherell Affair' is that it would seem that part of the motivation for the appointment of Dr Metherell was that his resignation from Parliament would most likely provide the Government with one more Liberal member in the Legislative Assembly. Dr Metherell represented a safe Liberal seat but resigned from the Liberal Party after losing his ministerial portfolio and continued to sit as an independent until his resignation. At that time, the Government parties and the ALP held an equal number of seats, with five independents, including Dr Metherell.¹⁵ This potential benefit for the Government was gained by an unorthodox process of appointment of Dr Metherell to a senior position in the Premier's Department, followed by secondment to the Environment Protection Authority. This plan was devised to avoid the requirements to advertise the position with the Authority. ICAC found that this process, which ignored the principle of merit, constituted corrupt conduct within the terms of the ICAC Act. As noted earlier, this finding was declared a nullity by the NSW Court of Appeal on the basis that it had not been arrived at by an objective standard.¹⁶

Subsequently, ICAC issued a report entitled *Integrity in Public Sector Recruitment* — the third report¹⁷ to arise out of the Metherell Affair. This report recommended a process to fetter the prospect of future appointments of members to the executive branch for a period of two years following their resignation from parliament:

14 Quite stringent restrictions are imposed on members of the United States Congress by art 1 sec 6 of the US Constitution, which prevents them from holding positions created by Congress during their term in office.

15 See the account of facts given in ICAC, *Report on Investigation into the Metherell Resignation and Appointment* July 1992 at 2.

16 *Greiner v ICAC* (1992) 28 NSWLR 125.

17 ICAC, *Integrity in Public Sector Recruitment* March 1993.

An independent committee of eminent persons should be established pursuant to statute to scrutinise the process followed for the filling of each public sector job where one of the applicants was a Member of Parliament within the preceding period of two years.¹⁸

Alternative approaches which included a ban or a moratorium on a member's employment by the executive were rejected.¹⁹

Personal conduct

This standard is concerned with the conduct of members in their personal, as distinct from their official, lives. The practice in Australia seems to be that unless their personal conduct directly impacts on their official duties, it is a matter solely for the electorate's judgment; parliament is only involved where a connection exists with a member's official duties. Personal conduct of a criminal nature is usually pursued through the courts and, if a guilty verdict results, resignation or disqualification will often be the consequence.

Nor has the electorate or even the media taken a very keen interest in the personal lives of members. Two reasons may account for this: the limited relevance of personal conduct to their public role, and the danger of acting on unsubstantiated allegations. Consequently, scandals involving members' extramarital affairs have not been as prevalent in Australia²⁰ as in the UK where they have caused the resignation of numerous ministers. On the other hand, alleged sexual offences by members in Australia are prosecuted in the courts and usually lead to resignation.²¹ It would be regrettable if the media pursued the personal lives of members where no obvious link exists with their official duties — particularly where the facts are in dispute.²²

A standard in relation to personal conduct is recognised by both the Tasmanian House of Assembly Code and the Victorian Code. The latter provides in s 3(1)(a) that members shall:

- (ii) ensure that their conduct as Members must not be such as to bring discredit upon the Parliament.

18 Recommendation 9.

19 ICAC, above note 17, pp 23-24.

20 One incident occurred in Victoria where a minister resigned over allegations by a former staffer that he had assaulted her and threatened to remove her from her position if she refused to abort her fourth pregnancy by him: *Australian Financial Review* 1 June 1995.

21 In Queensland in 2000, calls to resign were ignored by an unnamed member who faced committal proceedings for child sex offences. Just prior to being committed for trial and his name being released, Mr Bill D'Arcy MLA resigned his seat.

22 Yet Mr John Anderson MP, the leader of the federal parliamentary National Party, was quoted in *The Sydney Morning Herald* 18 January 2000 as saying 'if a man's family can't trust him, why should the nation?'

In contrast, the focus of the Tasmanian Code is on the avoidance of a conflict of interest:

Members of the Assembly must not engage in personal conduct that exploits for private reasons their positions or authorities or that would tend to bring discredit to their offices.

In Queensland, EARC recommended the following provision in its draft code of conduct for members:

- Members shall ensure that their personal conduct does not adversely affect —
- (a) their ability to perform their official duties;
 - (b) the ability of other Members or other public officials to perform their official duties; and
 - (c) public confidence in the integrity of the system of government and public sector management.²³

The obvious value in this type of provision is that it operates, in effect, as a catch-all standard to cover any conduct which technically falls outside the other standards. It therefore deters any attempt by members to vindicate their unethical conduct on the basis that it is not specifically addressed in the code. On the other hand, it does little to resolve unfair allegations against members.

Compensation for services rendered as a member

Given the fundamental obligation of members to perform their official duties always in the public interest, it is evident that they should not accept any payment or benefit for themselves, their family or their friends in return for any service provided as a member. At best, such a payment or benefit creates an apparent conflict of interest which raises a suspicion that the service was provided not in the public interest but for the mutual benefit of the member and the provider thereof. At worst, it constitutes bribery. The spectrum between these points can become very murky — as Chapter 8 indicates! This standard differs from that in relation to the acceptance of unsolicited gifts and hospitality because the benefit is received for a service.

Since a version of this standard was possibly the earliest integrity rule of the House of Commons, it is worth considering the history of this standard in that House.

House of Commons

On 2 May 1695, the House of Commons adopted the following resolution:

²³ *Report on The Review of Codes of Conduct for Public Officials* (May 1992) in Appendix G Draft Code of Conduct for Elected Representatives, at G6-7.

The Offer of any Money, or other Advantage, to any Member of Parliament, for the promoting of any Matter whatsoever, depending, or to be transacted in Parliament, is a high Crime and Misdemeanour, and tends to the Subversion of the Constitution.²⁴

This resolution followed the expulsion of the Speaker, Sir John Trevor, for accepting a bribe of 1000 guineas from the City of London. A further resolution made on 22 June 1858, was prompted to prevent members who were barristers from advocating issues on behalf of their existing or former clients in the House:

It is contrary to the usage and derogatory to the dignity of this House, that any of its Members should bring forward, promote or advocate, in this House, any proceeding or measure in which he may have acted or been concerned for or in consideration of any pecuniary fee or reward.

Then on 15 July 1947, the House adopted another resolution over concerns with members being engaged as advocates for trade unions:

... it is inconsistent with the dignity of the House, with the duty of a Member to his constituency, and with the maintenance of the privilege of freedom of speech, for any Member of the House to enter into any contractual agreement with an outside body controlling or limiting the Member's complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body in regard to any matters to be transacted in Parliament; the duty of a Member being to his constituency and to the country as a whole, rather than to any particular section thereof.

This resolution was later amended on 6 November 1995 by the addition of the following:

... and that in particular no Members of the House shall, in consideration of any remuneration, fee, payment, or reward or benefit in kind, direct or indirect, which the Member or any member of his or her family has received is receiving or expects to receive —

- (i) advocate or initiate any cause or matter on behalf of any outside body or individual, or
- (ii) urge any other Member of either House of Parliament, including Ministers, to do so.

by means of any speech, Question, Motion, introduction of a Bill or Amendment to a Motion or a Bill.

24 CJ (1693-97) 331. See D Limon and W McKay (eds), *Erskine Mays' Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (22nd ed) Butterworths Sydney 1997, p 112 fn 2.

Consistent with the amended 1947 resolution, the 1996 UK *Code of Conduct for Members of Parliament* provides that 'No Member shall act as a paid advocate in any proceeding of the House'. The effect of this rule is prescribed by *The Guide to the Rules relating to the Conduct of Members* in Part 3: 'The Advocacy Rule'.²⁵

Essentially, members cannot agree to advocate an issue or initiate a matter within parliament in return for payment. The original 1947 rule was tightened after the report into the Al Fayed scandal²⁶ to cover cases where the benefit is paid to the member's family, or was given in the past or there is an expectation of one in the future. Under the Advocacy Rule, a member is prevented from acting in two respects: first, from *initiating* any parliamentary proceedings which relate directly to any person from whom the member expects to receive a financial benefit; and second, the member is prevented from *advocating* any matter in any parliamentary proceedings which will confer an exclusive benefit on such a person. In the absence of an exclusive benefit, no restriction on participation arises provided the member's interest is properly registered and declared. This Rule has led to a dramatic drop in the number of paid consultancies among members of the House of Commons.

Significantly, none of these UK rules covers paid advocacy outside parliament, for example, in dealings with ministers and other officials. Despite acknowledging that there is 'a substantial body of opinion which holds that it is wrong in principle for Members to accept money for any services, even purely advisory services rendered in their capacities as Members', the Nolan Committee concluded that 'an immediate ban in that form, would be impracticable' given that it would affect long standing, lawful arrangements with three-fifths of the members of the House of Commons.²⁷ Although the Committee recommended further thought be given to this issue, the Code and Guide do not refer to it. However, the Committee did recommend a ban on members being engaged to provide paid parliamentary advice as consultants to multi-client lobbying organisations or their clients.²⁸ This recommendation also appears not to have been acted on.

Australian position

The clearest position is at the Commonwealth level where s 45(iii) of the Constitution disqualifies any member of the Commonwealth Parliament who '[d]irectly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State'.

Only in one respect does this ground, which was considered in detail in Chapter 4, extend beyond the rules of the House of Commons — it prevents members acting on

25 Compare the South African Code cl 6.1 which prohibits members from 'lobbying for remuneration'.

26 See the UK Report of the Committee on Standards and Privileges, *First Report on Complaints from Mr Mohamed Al Fayed, The Guardian and Others against 25 Members and former Members*, 2 July 1997.

27 *First Report of the Committee of Standards in Public Life* Vol 1 at paras 51-52.

28 At para 55.

behalf of the Commonwealth *outside* the House. Otherwise it applies, like the House of Commons rules, only to services performed for anyone within parliament. But the major difference between the two Parliaments is, of course, that infringement of the rule constitutes contempt of the House of Commons, whereas members of the Commonwealth Parliament lose their seat! This dramatic difference has probably deterred Commonwealth members, unlike those of the House of Commons, from becoming paid consultants and advocates. A similar ground of disqualification applies in both Territories.²⁹

At the State level, Queensland and Victoria prescribe restrictions on members to prevent them from acting for the Crown. Section 7B of the *Legislative Assembly Act 1867* (Qld) denies members any fees for transacting any business or performing any service for the Crown and allows the Legislative Assembly to decide whether the member's seat should become vacant. In Victoria, a member is disqualified if engaged to act as an agent of the Crown.³⁰

The standing orders of Australian Houses have not adopted provisions similar to those of the House of Commons Resolutions and Code.³¹ However, standards similar to the House of Commons Resolutions of 1695 and 1858 are found in both the NSW Codes and the Victorian Code.

Clause 2 of the NSW Codes, entitled 'Bribery', provides:

Members must not promote any matter, vote on any bill or resolution, or ask any question in the Parliament or its Committees, in return for payment or any other personal financial benefit.

The title of this provision is surprising. Where to draw the line between bribery and unethical conduct falling short of bribery is difficult to determine — and yet this clause appears to reject any dividing line. (Further consideration was given to this difficult aspect in Chapter 8 which deals with the corruption offences of members.)

It should be noted, however, that cl 2 of the NSW Codes is unduly narrow in two important respects. First, it is confined to financial benefits provided only to the member.³² It should cover benefits whether financial or not, and whether given to the member or to any other person with his or her knowledge. Second, as with the House of Commons rules, it is confined to performing a service in parliament, not

29 Section 21(2)(e) *Northern Territory (Self-Government) Act 1978* (Cth); s 14(c) *Australian Capital Territory (Self-Government) Act 1988* (Cth).

30 Section 55 *Constitution Act 1975* (Vic).

31 There appears to be no basis for suggesting that these resolutions were adopted by the Australian Parliaments when they adopted the 'powers, privileges and immunities' of the House of Commons — because they are not of that kind. Nor were they adopted as part of the 'Rules, Forms or Usages' of the House of Commons, which appear to be confined to those rules concerned with the *procedure* of parliament: see for example SO 333 Queensland Legislative Assembly.

32 See ICAC, above note 5, at 26 (rec 56).

outside. No such restriction exists under the Victorian Code which extends to all situations in which a member acts as such:

A Member shall not receive any fee, payment, retainer or reward, nor shall he permit any compensation to accrue to his beneficial interest for or on account of, or as a result of the use of, his position as a Member.³³

Note that as the benefit must accrue to the member's beneficial interest, benefits to others and possibly the member's family may not be caught.

Apart from this weakness, the Victorian standard adequately protects the public interest by making it clear that no member should accept any benefit on account of performing official duties whether inside or outside parliament. Accordingly, no benefits ought to be accepted for any official speeches or representations made even outside parliament.³⁴ Paid advocacy is clearly unethical because of the conflict of interest it raises. Nor should any benefits be given on account of any advice provided by a member on matters connected with official duties, as this would undermine the member's primary obligation to represent the people. That is not an easy role; it requires considerable judgment to assess the competing views and evidence in order to arrive at a position on many issues. The objectivity required in this process is clearly jeopardised if benefits are provided or accepted in these circumstances. The fact that a service is provided outside parliament is irrelevant.

All of the standards or rules discussed here apply whatever the source of the benefit. Hence, benefits provided by foreign governments or organisations are caught as well. This accords with the US Constitution, which prohibits all those who hold any government office of profit or trust from accepting any remuneration from any foreign government or foreign governmental organisation.³⁵

Employment unrelated to parliament

Finally, there is the issue of members who are employed in positions unconnected with their parliamentary office or who engage in private business enterprises. Such positions and enterprises should have no connection with the public sector if the grounds of disqualification of office of profit under the Crown and government contractors are appropriately drafted and enforced. Moreover, any private sector positions and activities are usually required to be declared to a register of interests and should be declared ad hoc in appropriate situations.

The issue which arises is whether any restriction ought to be imposed on members holding such positions or undertaking business activities while serving as a member of parliament. Restrictions are often imposed on ministers, at least in relation to outside activities which may fall within the scope of their ministerial responsibilities. However,

33 Section 3(1)(c) *Members of Parliament (Register of Interests) Act 1978* (Vic).

34 The US Senate Code of Official Conduct, Rule XXXVI(b) prohibits receipt of honoraria for 'an appearance, speech or article' on matters directly related to the member's duties.

35 Article 1, s 9 cl 8.

members can be distinguished from ministers on at least two grounds. First, their official responsibilities do not usually provide them with powers which might affect the activities in which they are interested. And second, ministerial appointments are clearly full-time, allowing no time for holding concurrent employment. Membership of a House has not always been viewed as a full-time occupation, although public perception may have changed in recent times.³⁶

Restrictions of this nature are not found in the UK House of Commons Code or in the codes presently in force in Australia. The Nolan Committee rejected any restrictions of this kind to ensure that members represented a broad cross-section of society and of experience:

We believe that those Members who wish to be full-time MPs should be free to do so, and that no pressure should be put on them to acquire outside interests. But we also consider it desirable for the House of Commons to contain members with a wide variety of continuing interests. If that were not so, Parliament would be less well-informed and effective than it is now, and might well be more dependent on lobbyists. A Parliament composed entirely of full-time professional politicians would not serve the best interests of democracy. The House needs if possible to contain people with a wide range of current experience which can contribute to its expertise.³⁷

However, the US Senate Code does impose employment restrictions to avoid conflicts of interest arising and the possibility of improper influence. Rule XXXVI of the Senate Code limits 'outside earned income' to 15 per cent of a specific executive office. Rule XXXVII proscribes paid engagement in any business or employment which is 'inconsistent or in conflict with the conscientious performance of official duties' (para 2). Limits are also imposed on senators providing paid professional services to firms (para 5) or on serving on the board of any publicly held or regulated corporation (para 6).

Far less onerous is the restriction on members of the German Bundestag, who are prevented from making reference to their legislative position in professional and occupational pursuits.³⁸

In Australia, members have traditionally been free to continue their business and professional activities. Given the obvious benefits for parliaments in terms of their practical commercial and professional experience and so as not to deter them in the first place from seeking a parliamentary seat, there is no reason for overturning this tradition, provided their outside activities do not detract from the performance of their parliamentary duties and any conflicts of interest are satisfactorily declared and resolved.

36 The Bowen Report in 1979 noted at para 2.36 that the Remuneration Tribunal fixed members' salaries on the basis of a full-time office.

37 Above note 27 at para 19.

38 Code of Conduct for members of the German Bundestag, Rule 5.

Improper use of influence

This is a difficult standard to define for members, part of whose responsibility is to represent the interests of their constituents. Clearly, that involves making submissions to appropriate authorities. But this role, as noted earlier, must be exercised in the public interest. Hence, it is improper to make representations with the objective of procuring personal gain of any sort for oneself. Nor would it be ethical to do so for others *unless, according to the public interest*, they are entitled to that benefit.

It is at this point that account must be taken of the nature of the political process — the party system — where bargaining and negotiating are the tools of trade. Influence and persuasion play a crucial role in this process. But the overriding principle remains; they must be used solely for what is best for the community. Instances of improper influence include a member seeking from government ministers or public officials an official appointment or a government contract for family members or friends. Improper influence to *deter* the exercise of power is also unethical.³⁹

A useful formulation of this standard in relation to dealings with the public service was provided by EARC in its *Report on the Review of Codes of Conduct for Public Officials*:

A Member shall not use improperly their influence in order to obtain appointment, promotion, advancement, transfer or any other advantage within the public sector on behalf of another, or to any other advantage within the public sector on behalf of another, or to affect the proper outcome of any procedure established under legislation for the management of a unit of the public sector.

Members should recognise that a non-elected public official responsible for the making of a decision under legislation governing any aspect of the management of a unit of the public sector, or for a recommendation for the purpose of making such a decision, is required to refuse to take account of any attempt by any person whatsoever to influence the making of such a decision unless the involvement of that person is required by or consistent with the provisions of the relevant legislation.⁴⁰

The second passage of this quote highlights the existence of a correlative duty on those subjected to influence: to resist any improper pressure in performing their official duties.

It should be noted that even legitimate representations may be improper unless the member discloses any conflict of interest or benefit he or she may have in the matter. It has already been suggested (in Chapter 10) that ad hoc disclosure is

39 Suggested by P Kyle, 'Contents of a Code of Conduct', a paper presented to the 19th Annual Conference of the Australasian Study of Parliament Group, 10-11 October 1997 at 3.

40 EARC, *Report on the Review of Codes of Conduct for Public Officials* May 1992 para 6.1.

required in these situations even if disclosure has been made to a register of interests. This view was put strongly in a report by the Queensland Auditor-General after an investigation into the granting by the Queensland Government of an interactive gambling licence to a company in which a member had a financial interest.⁴¹ Despite proper declarations having been made to the register of members' interests, the report expressed significant concern that those officials to whom the representations were made had only 'general knowledge of their interests in internet gambling'. Formal statements of those interests ought to have been made at the time the representations were made. The report concluded:

Audit considers that on all occasions where Members have personal interests in a subject on which they are making representations, that such interest should be clearly and formally communicated to all concerned. This should be in addition to the declaration of interests in the Register of Members' and Related Persons' Interests.⁴²

Improper influence can also be criminal, as *R v Boston*⁴³ illustrates. Without unduly repeating what was said in Chapter 8 on this important High Court decision, the case concerned an agreement whereby certain persons would corruptly give to a member of the NSW Legislative Assembly large sums of money in return for persuading the NSW Government, and in particular the Minister for Lands, to acquire certain property. Given that a criminal conspiracy requires an agreement between two or more people to commit an unlawful act, the issue at stake in *R v Boston* was whether the acceptance of money by a member to exert pressure on the executive constituted an unlawful act. The defendant argued that it did not because the agreement contemplated no act on the part of the member which was to be performed in parliament — hence what was to occur fell outside the member's official duties.

A majority of the High Court rejected this argument. Knox CJ regarded such an agreement as tending to the *public mischief* and hence capable of constituting a criminal conspiracy:

In my opinion, the payment of money to, and the receipt of money by, a member of Parliament to induce him to use his official position, whether inside or outside Parliament, for the purpose of influencing or putting pressure on a Minister or other officer of the Crown to enter into or carry out a transaction involving payment of money out of the public funds, are acts tending to the public mischief, and an agreement or combination to do such acts amounts to a criminal offence.⁴⁴

41 Auditor-General of Queensland, *Audit of Certain Matters Associated with the Issue of an Interactive Gambling Licence* Report No 1 1999-2000, September 1999, at 77.

42 Auditor-General of Queensland, above note 41 at 79.

43 (1923) 33 CLR 386.

44 At 392-3.

The Chief Justice saw this situation as giving rise in many ways to a public mischief:

It operates as an incentive to the recipient to serve the interest of his paymaster regardless of the public interest, and to use his right to sit and vote in Parliament as a means to bring about the result which he is paid to achieve. It impairs his capacity to exercise a disinterested judgment on the merits of the transaction from the point of view of the public interest, and makes him a servant of the person who pays him, instead of a representative of the people.⁴⁵

His Honour regarded buying a member's influence over a minister as being just as serious as buying a member's vote in parliament.⁴⁶ The other majority Justices, Isaacs and Rich JJ (in a joint judgment)⁴⁷ and Higgins J,⁴⁸ expressed similar views.

Despite their hyperbole, Isaacs and Rich JJ outlined most clearly the special ethical obligations of members. Their Honours⁴⁹ considered a member 'guilty of a breach of high public trust' for entering into an agreement to influence a minister, given 'the fundamental obligation' of a member being '*the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community'.⁵⁰ And so, if a member agrees to promote the interests of another in return for some consideration,

[t]he power, the influence, the opportunity, the distinction with which his position invests him for the advantage of the public, are turned against those for whose protection and welfare they come into existence. He can never afterwards properly discharge in relation to that matter his duties of public service — the parliamentary duty of honest, unbiased and impartial examination and inquiry and criticism which must arise; and he has therefore essentially violated his legal duty to the State.⁵¹

The dissent of Gavan Duffy and Starke JJ adopted a strikingly different position. Their Honours accepted that it may not be unlawful for a member in certain cases to act for reward in exerting influence on the executive:

It is perhaps desirable that members of Parliament should under no circumstances accept money to induce them to urge any course of action on the Executive Government, but it cannot be said that an agreement to do so must in every case constitute a criminal conspiracy by the member and those employing him.⁵²

Their Honours indicated no criminal conspiracy arises where a member:

45 At 393.

46 At 394-5.

47 At 402-403.

48 At 409.

49 At 405.

50 At 400.

51 At 403.

52 At 415.

was to be employed to forward a transaction which he believed to be, and which in fact was, entirely beneficial to the purchasers and desirable in the interests of the community, and which had never been and could never be the subject of parliamentary enactment or discussion.⁵³

While this may not constitute a criminal conspiracy, it would still be unethical for a member to accept such employment in view of the conflict of interest it creates.

Acceptance of political donations

The basic safeguard provided in relation to the receipt of political donations is their public disclosure. At the Commonwealth level, the *Commonwealth Electoral Act 1916* (Cth)⁵⁴ imposes an obligation on the agent of each candidate to supply, within 15 weeks of polling day, a return detailing the value of all gifts directly received and the total number of donors. In addition, details of each donor and the value or amount of their gift must be given for gifts in excess of \$200. Political parties are also required to disclose details of all gifts. Also, returns must be lodged of all election campaign expenditure.⁵⁵

For administrative convenience, Queensland has adopted the Commonwealth regime by incorporating the actual provisions of the *Commonwealth Electoral Act* in a Schedule to the *Electoral Act 1992* (Qld).⁵⁶ Similar requirements are imposed on candidates in Western Australia.⁵⁷ The NSW Codes in cl 3(c) require members to accept political contributions in accordance with Pt 6 of the *Election Funding Act 1981* (NSW).⁵⁸

Conduct of members in the House

By virtue of its standing orders and privileges, each House has the power to control its members during the course of parliamentary proceedings. Accordingly, the following standards, while not usually found in codes of conduct, are imposed by each House on its members through its standing orders.⁵⁹

53 At 414.

54 See Div 4 of Pt XX, ss 303-307.

55 See Div 5 of Pt XX.

56 See Part 7 *Electoral Act 1992* (Qld), ss 126A-126D.

57 Section 175O *Electoral Act 1907* (WA).

58 See s 85 in relation to candidates.

59 This list of standards is taken from the *Draft Code of Ethical Conduct for Members of the Queensland Legislative Assembly* at 4-6 in the Queensland Members' Ethics and Parliamentary Privileges Committee Report No 21 May 1998 Part B.

Disorderly conduct

The power of the House to control its own proceedings so as to protect its capacity to function enables it to suspend and, in serious cases, to expel members whose conduct is disrupting the proceedings of the House.

In most Australian legislatures, the presiding officer is empowered to warn a member for grossly disorderly conduct and, if that conduct continues, to suspend the member for up to a day. In some Houses, the matter is only dealt with by the House.⁶⁰ For persistent and wilful obstruction, the Speaker may name the member and the House will vote on whether the member should be suspended. Suspension will be for a prescribed period which in some Houses may be up to 14 days.⁶¹

Not to abuse freedom of speech

The scope of the important immunity of freedom of speech was outlined in Chapter 6. Under this privilege, a member cannot be questioned or called to account in any court or tribunal or by any government official for what the member said or did within parliamentary proceedings. In particular, members may make adverse comments about anyone with complete immunity from legal action. However, members remain accountable to their House for their actions. Essentially, members are entitled to make adverse comments provided they are made fairly in the public interest. Accordingly, a House should not tolerate allegations being made which are reckless and completely unfounded or which were motivated on other than public interest grounds. In such circumstances, a member has misled the House.

The Australian codes of conduct do not include any express standard in relation to freedom of speech, preferring to rely on general aspirational standards. The Queensland Members' Ethics and Parliamentary Privileges Committee considered inappropriate the inclusion of any threshold test in its draft code of conduct.

Some protection is afforded those injured by statements made under privilege by the procedure which confers them a right of reply. This mechanism was considered in Chapter 6.⁶²

Not to mislead parliament

It is a contempt of the House to deliberately mislead it. There are three elements to the offence: the statement was misleading; the member knew this at the time; and the member intended to mislead the House. Even if the member were unaware the statement was misleading, this is still regarded as a serious matter. In such cases, the member must correct the record and usually apologise to the House.⁶³ A factually

60 WA Legislative Council SO 116-120; NT SO 239-245.

61 Legislative Assembly of Queensland SO 123A-125; WA Legislative Assembly SO 42-50; ACT SO 202-209;

62 Queensland was the first State to accord a right of reply, by resolution of 18 October 1995.

63 *Draft Code of Ethical Conduct for Members of the Queensland Legislative Assembly*, above note 59 at 5.

correct statement may still be misleading where relevant information is deliberately undisclosed.⁶⁴

Reference has already been made in Chapter 6 to the inquiry established by the NSW Legislative Council into the allegations made by Mrs Franca Arena MLC of a paedophile cover-up. The report by the Hon John Nader QC (dated 7 November 1997) found her allegations to be 'false in all respects'. The report also concluded that the evidence given to the inquiry 'strongly suggests Mrs Arena knew she had no such evidence' and that her conduct was 'objectively reprehensible'. After consideration of the report by the Standing Committee on Parliamentary Privileges and Ethics, the Legislative Council required a specific apology from Mrs Arena within five sitting days or else be suspended. Instead, a 'statement of regret'⁶⁵ by Mrs Arena was accepted by the House.⁶⁶

Not to mislead the public

Proposals have been made at times to impose on members an obligation to comply with electoral promises or other political undertakings; that is, not to mislead the public. Proposals of this nature which contemplate legal enforcement are untenable, since courts are not equipped to deal with such political issues. Apart from relying on the ballot box to sanction misleading promises, the only other control available is that provided by the members' House. This is where a code of conduct can be useful. Surprisingly, the Queensland Members' Ethics and Parliamentary Privileges Committee rejected the suggestion that a members' code ought to require members 'to respond or comment truthfully in all dealings':

The committee agrees that members should not deliberately mislead the Parliament or the public. However, it would be simplistic and a denial of the political realities to specifically impose an obligation on members to respond or comment truthfully in all dealings, and enforce this obligation through a code of conduct. Electors vote for a particular member of Parliament at election time in good faith, and by virtue of voting for that member the electorate places its confidence in him or her. The electorate in so doing draws a conclusion about the member's judgment. It would be a derogation of the member's mandate for any code of conduct to withdraw from the member his or her right to exercise political judgment.⁶⁷

The Committee's dislike of this proposal is understandable if legal enforcement of the obligation were contemplated. But as this is inappropriate, there is a strong case for the inclusion in a code of conduct of a specific obligation not to mislead

64 See Report No 4 of the Members' Ethics and Parliamentary Privileges Committee at 10.

65 This statement was in terms similar to those of the specific apology.

66 See Minutes of the Proceedings of the Legislative Council No 54, Wednesday 1 July 1998 at 634-635.

67 No 21 Part A (May 1998) entitled *Draft Code of Ethical Conduct for Members of the Queensland Legislative Assembly* at 43-44, para 6.5.2.

the public as well as the parliament. Such a moral obligation was recognised by Dr Noel Preston:

There are moral rules which can be applied in politics. Corruption in political office ought never be sanctioned; the deliberate use of misleading information to damage a political opponent is unjustifiable; the public declaration of conflicts of interest is a moral duty.⁶⁸ ●

68 N Preston, *Understanding Ethics* Federation Press Sydney 1997, p 157.