

Members of
Parliament:
law and ethics

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Chapter 12

Enforcement of standards

The general approach in Australia to the enforcement of the ethical standards of members is to follow the self-regulatory tradition of the House of Commons, and otherwise rely on the ballot box. The latter is clearly of limited effect in relation to the violation of standards by individual members. Greater reliance has therefore been placed on self-regulation which naturally follows from the privileges of each House to discipline its own members and to determine their qualifications. Even in those few instances where these standards have been prescribed by statute, such as in Victoria, responsibility for their enforcement may still remain with the member's House.

Consideration has already been given in previous chapters to the enforcement procedure and sanctions currently in place in relation to the range of criminal and civil standards of members. There are those which are enforced by the general law, such as the offences of corruption and bribery, and the duty of confidentiality. The other standards, including those concerned with conflicts of interest, are enforced by each House. A significant departure from this traditional position is the role accorded in NSW to the Independent Commission Against Corruption (ICAC) and in Queensland to the Criminal Justice Commission (CJC), both of which bodies have the power to investigate members for official misconduct.

The central issue is whether this largely self-regulatory approach is the most desirable enforcement model or whether an official external monitor is needed. This debate raises sensitive issues which go to the heart of the privileges of parliament and its independence from the other two branches of government. It also must take account of the difficulty faced when formulating members' standards, particularly within a political system which subjects members to inevitable conflicts of interest. Additionally, and most importantly, it must assess the most appropriate way of maintaining public confidence in the parliamentary system.

There appear to be at least two prominent criticisms of the present self-regulatory enforcement regime in Australian legislatures. The first is the lack of safeguards against political partisanship when a House or committee judges violations of standards. The second is the punitive powers of each House to punish members and

others by fine or imprisonment. The former concern could be remedied by the adoption of an independent external body such as ICAC in NSW. The latter concern has been partly addressed in relation to the Commonwealth, Queensland and Western Australian parliaments, where the power to commit for contempt is now subject to restrictions.

At a more practical level, avenues of complaint against the conduct of members are obscure and precarious. Understandably, there has been little encouragement from members to establish new complaint procedures. Certainly, there is a risk that they could be abused to mount political attacks against members. Whether this risk outweighs the potential benefit of greater accountability is difficult to assess. Probably the absence of clear complaint procedures has contributed to the lack of public confidence in politicians. The challenge is to construct avenues of communication which will ensure members are called to account by their House for infringements of standards, while at the same protecting them from scurrilous attacks. Whatever is created must accommodate art 9 freedom of speech and respect the responsibility of each House to discipline its own members.

With this challenge in mind, it is proposed here to review the present enforcement regime with a view to considering how this might be improved. Overseas approaches provide a useful comparison for this assessment. The conclusion is reached that the best solution is to appoint an independent parliamentary official and a standing ethics committee.

Current regime

The enforcement regime in relation to the specific criminal and civil standards of members has already been outlined in previous chapters. The following summarises that regime in general terms.

Criminal conduct of a member is a matter for the courts except in those very limited circumstances when art 9 freedom of speech denies the courts jurisdiction (see Chapter 8). The jurisdiction of the courts in relation to the civil standards of members is of very limited scope. Of course, members are subject to the same legal obligations as any other individual, but in respect of their special obligations as members of parliament, they are primarily accountable to their House. However, the general law impacts on members in relation to their duty of confidentiality outlined in Chapter 9 and their liability as public officers, especially in cases where they fail to declare a conflict of interest. Apart from these particular instances, the courts generally play no role in reviewing the conduct of members. This responsibility lies primarily with their own Houses, although it is shared to a degree with their electorates and political parties.

Each House monitors the ethical performance of its members in terms of their various standards in several ways. The first is in determining whether any have incurred disqualification from parliament on any of the grounds considered in Part I of this work. The second way is to exercise its power to discipline members for disorderly conduct, usually pursuant to standing orders, by reprimanding, censoring or suspending them. Serious cases of misconduct will constitute contempt of parliament for which a member may be suspended for a longer period of time,

expelled, fined or imprisoned. The power to punish for contempt and the restrictions on that power were considered in Chapter 5.

The procedure by which public complaints against members are dealt with is fairly primitive. Usually, there is no prescribed procedure by which public complaints can be made to the relevant House. Allegations of a breach of privilege can be raised with the presiding officer who decides whether they are sufficiently serious to warrant referral of the matter to the House or more usually to a privileges committee. The committee investigates the matter and reports to the House on its findings.¹ Except in South Australia, all Australian Houses have a Privileges Committee.² Otherwise, complaints against a member will only be raised in the House if another member is prepared to raise the matter. The House then decides whether the complaint is referred to the Privileges Committee or what other action is to be taken. The procedure of that committee usually follows the rules of natural justice (that is, procedural fairness) to protect the rights of witnesses, such as provided for by Resolution 2 of the Senate's Privilege Resolutions of 1988.

However, a recent innovation is the citizen's right of reply which enables persons who have been adversely referred to by a member under parliamentary privilege to seek to have a response published in Hansard. This right has been conferred in relation to both Houses of the Commonwealth and NSW Parliaments and as well as in the lower Houses of Victoria and Western Australia and in the upper houses of South Australia and Tasmania (and also in Queensland and the ACT) (see Chapter 6).

The introduction of codes of conduct, registers of interest and in some cases obligations of ad hoc disclosure has provided the opportunity to prescribe new avenues of public complaint, new processes of monitoring, or even to vest jurisdiction in external bodies other than the member's House or one of its committees — yet few Houses have responded to this opportunity.

Members of those Houses with codes of conduct are liable only for contempt of parliament if they infringe their code of conduct.³ The exception is in NSW where both codes provide ICAC with the jurisdiction to investigate whether a member has incurred a substantial breach of a code in respect of which a finding of corrupt conduct could be made. Even then, unless that breach constitutes a criminal offence which is referred to the Director of Public Prosecutions, the decision rests with the member's House as to whether any sanction should be imposed.

A similar position exists in relation to registers of interests and obligations of ad hoc disclosure. In most Houses, failure to observe their requirements constitutes contempt of parliament. Additionally, in NSW, the member's seat may be declared

1 See the proposed procedures for the consideration of complaints of a breach of privilege by the Queensland Members' Ethics and Parliamentary Privileges Committee Report No 36, Attachment A.

2 For the procedure: see L M Barlin (ed), *House of Representatives Practice* (3rd ed) AGPS Canberra 1997, pp 719-723; Harry Evans (ed), *Odgers' Australian Senate Practice* (9th ed) Department of Senate Canberra 1997, pp 67-69.

3 New South Wales Houses, Tasmanian House of Assembly and both Victorian Houses.

vacant by the member's House,⁴ while in South Australia, contempt of parliament constitutes a summary offence with a penalty not exceeding \$5000.⁵ In Queensland, a detailed procedure is in place whereby complaints can be made to the Registrar by the public as well as by other members which are heard by the Members' Ethics and Parliamentary Privileges Committee. The Committee reports to the Legislative Assembly as to its findings and recommendations.

Also in Queensland, the CJC is empowered to investigate allegations of 'official misconduct' by members of the Queensland Parliament. The term 'official misconduct' has been interpreted by the CJC so as to confine its investigation only to criminal conduct of members. However, the CJC has suggested an extension of its jurisdiction to include non-criminal conduct.⁶

A recent innovation in NSW is the appointment by each House of a Parliamentary Ethics Adviser to advise members on ethical issues arising in the course of their official duties, including advice on their entitlements and on conflicts of interest. As this advice is given only at the request of the member, no investigatory role is conferred. In contrast is the new office of the Queensland Integrity Commissioner who is empowered to give advice on ethical issues on request to the Premier, ministers, all government employees and members of the Queensland Parliament who belong to the government party or parties.⁷ As the Premier can seek ethical advice in relation to any of these officials, members of the Legislative Assembly could be the subject of such advice.

It is evident from this brief outline of the enforcement regimes in Australian legislatures that the predominant response is to cite the member for contempt of parliament. The range of punishment for contempt is generally limited to a reprimand or suspension from the House. Expulsion rarely occurs and can only be justified in the most serious cases of misconduct. Indeed, the Commonwealth and the Northern Territory have lost this power. Further, the power to fine is not available unless statutorily conferred⁸ and even then, there is a strong case for confining to the courts the power to impose substantial fines and to commit to prison.

What then are the alternative approaches to this reliance on self-regulation and the limited sanctions which a finding of contempt of parliament provides?

4 Section 14A *Constitution Act 1902* (NSW).

5 Section 7 *Members of Parliament (Register of Interests) Act 1983* (SA).

6 See the report of 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 May 1998 Part A, at 74-76.

7 See Part 7 of the *Public Sector Ethics Act 1994* (Qld) inserted in 1999. The first appointment is yet to be made.

8 This has occurred for the Commonwealth, Queensland, Western Australia and the Northern Territory.

Overseas experience

Overseas experience provides several options: a parliamentary ethics committee, a parliamentary ethics official, an independent ethics officer or commission, or a combination of these.

The first of these has been adopted for members of the South African Parliament.⁹ A simple procedure is provided whereby all complaints are made to the Committee of Members' Interests, a joint parliamentary committee, which must investigate any alleged irregularity. The Committee is required to report to the appropriate House within 30 days of the lodging of the complaint with its full findings, supported with reasons and recommendation as to sanction. A hearing must be given to both the complainant and the member concerned.

The option of a parliamentary official was adopted in Germany where the President of the German Bundestag may investigate an 'indication' that a member has breached a requirement of the Code of Conduct (Rule 8). The member must be heard and is required to provide 'further information'. If a breach is found, the President confidentially informs the Presidium and the chairpersons of the parliamentary groups, but his final conclusion must be published. Where no breach is found the member can demand publication of that finding. Publication and consequent publicity are the only consequences of a breach.

Following the recommendations of the Nolan Committee for the appointment of an independent monitoring authority, the UK House of Commons established by two resolutions¹⁰ the office of Parliamentary Commissioner for Standards and a Select Committee on Standards and Privileges to monitor a code of conduct for its members.¹¹ The Parliamentary Commissioner is appointed by the House.¹² The functions of the office are to advise members on the Code, investigate complaints of any breaches, educate members, monitor the Code and make recommendations. The Commissioner investigates complaints received from members and the public, and advises the Committee of any *prima facie* breaches. The Committee recommends to the House what if any further action is required to be taken.

In Canada, a proposed code for federal members provides for a Jurisconsult who is appointed by Parliament to investigate complaints of infringements of the code and to report to a Standing Joint Committee. Each House then decides on the penalty. Similarly, in Ontario, an Integrity Commissioner has been established¹³ as an officer of the Legislative Assembly. The Commissioner is vested with an advisory role and the capacity to investigate whether breaches have occurred, but only when asked by the Assembly, the Executive Council or a member.

9 *Code of Conduct in Regard to Financial Interests* (1996) Rule 5 — note apart from cl 6.1 re remunerated lobbying, this code is limited to the declaration and registration of financial interests.

10 19 July 1995 and 6 November 1995.

11 By resolution on 24 July 1996.

12 Standing Order 150.

13 *Members' Integrity Act 1994* (Ont).

In the Republic of Ireland, public complaints that members failed to comply with the requirements of ad hoc disclosure or a register of interests are made to the Clerk of the House who sifts them before referring them to a Public Offices Commission. On the other hand, complaints made by other members are made directly to the Commission. The Commission may report to the Director of Public Prosecutions any matter which may warrant criminal proceedings. The Commission's determinations are reported to the House which either exonerates the member or official or imposes suspension for up to 30 days, censure or non-payment of salary. The Commission is also empowered to provide guidelines and advice. To discourage frivolous complaints, the Commission may award costs against those who had no reasonable grounds for lodging a complaint.¹⁴

In the United States, both Houses of Congress have their own Ethics Committee to monitor the Code of Official Conduct for Members and Staff of each House.¹⁵ Each Committee investigates, makes findings and recommends what action the relevant House should take against a member found to have infringed the Code.

At times, there are certain advantages in establishing an independent commission of inquiry to investigate members, rather than leaving this responsibility solely with the member's House or a committee. A good example is the investigation conducted by a special commission of inquiry in NSW in 1998 into the allegations made by Mrs Franca Arena MLC under privilege that the Premier, Opposition Leader and a judge had conspired to cover-up allegations of paedophilia. As Professor Campbell has noted, the establishment of this independent inquiry by the Legislative Council was appropriate given that it concerned the conduct of members of the other House and a judge, and needed to be resolved speedily in such a way as to maintain public confidence.¹⁶

Recommendations for Australia

A version of the model adopted by the UK House of Commons and that proposed for Canada would extend and modify the current enforcement regime of Australian parliaments in such a way as to reduce the risk of political bipartisanship and deliver a complaint procedure for both members and the public. The model suggested here entails the appointment of a parliamentary official by each House (preferably the same individual) to receive complaints from members and the public, to investigate them, and to report to the ethics committee of the appropriate House whether there is a prima facie breach of standards. The committee would be required to investigate such matters to determine whether any breach in fact occurred and to report to the House as to its findings and recommendations. The House would decide on whether a sanction is imposed and its nature.

14 *Ethics in Public Office Act 1994* (Eire).

15 House of Representatives Committee on Standards of Official Conduct and the Senate Select Committee on Ethics.

16 E Campbell, 'Investigating the Truth of Statements Made in Parliament: The Australian Experience' [1998] *Public Law* 125 at 133.

While the independence of the parliamentary official would need to be guaranteed, it is obviously more difficult to ensure that the ethics committee is not politicised. One suggestion to overcome this difficulty is to expand the function of the parliamentary official to decide whether a breach of standards actually occurred and to confine the role of the ethics committee to decide whether to accept or reject the findings made. In rejecting a finding, the committee would act merely as a review body, overruling the parliamentary official's findings only in cases of clear legal error.¹⁷

The nature of the sanctions imposed obviously depends on the body which imposes them and the particular standards or mechanisms concerned. Where the House retains the power to impose sanctions on its members, these may take the form of a reprimand, suspension, expulsion, a fine or imprisonment.¹⁸ There is a strong case for denying each House the powers to fine or imprison, leaving these sanctions exclusively to the courts to impose. Other sanctions may be imposed for specific mechanisms. For instance, failure to comply with the requirements of a register of interests might incur cessation of salary until compliance. Loss of an elected position has already been discussed under the grounds of disqualification detailed in earlier chapters. Restitution could be required in respect of any financial benefit obtained in breach of public trust.

It is imperative that a sense of proportion be retained both in the prescription of the penalties and their imposition. Technical or minor infringements of standards may require no more than a warning on the first occasion in view of the adverse publicity which is likely to attach to even the most lenient penalty. Disproportionately severe penalties may deter enforcement at all. The following warning from the Queensland Electoral and Administrative Review Commission (EARC) is apposite:

While the Commission recognises the need to provide sanctions for breaches or non-compliance with required ethics standards, the Commission is concerned that sanctions may be used inappropriately, for example by over-reaction to a breach in order to make an example of an offender. Ineffective use of sanctions is likely to both encourage others to breach a Code and discourage managers from enforcing the Code's provisions. Sanctions used unwisely may seriously damage the credibility and usefulness of any ethics regime.¹⁹

Conclusion

The Bowen Report concluded that self-regulation of members was the most

17 See Dr A Brien, *A Code of Conduct for Parliamentarians?* Commonwealth Department of the Parliamentary Library Research Paper No 2 1998-99, p 21.

18 For example, the South Africa Code of Conduct in Regard to Financial Interests of 1996 (note: not legislation, but rules of each House) provides in respect of members of both Houses for a reprimand, suspension for up to 15 days, or a fine or salary cut of a month's salary. The Committee of Members' Interests, a joint committee, must report its findings and recommendations on any sanction to the House within 30 days of the lodging of the complaint.

19 EARC, *Report on the Review of Codes of Conduct for Public Officials* May 1992 at para 53.

appropriate approach in Australia:

Traditionally in Australia responsibility for standards of conduct in public officeholders has been vested in those responsible for their management. The Salmon Commission, writing in the British context where the traditions of public service are similar to our own, said:

one of the main safeguards against corruption in any institution is the standard set and required by the management from the top downwards. This depends on *esprit de corps* which can be seriously damaged by systems of regulation and scrutiny so rigorous that they inhibit leadership by management and imply that people working in the organisation are unworthy to trust.²⁰

The Committee agrees, and believes that the point is valid whether the officeholders concerned are elected or appointed. It would go further and say that if a group of officeholders is incapable of ensuring that its members adhere to a set of prescribed or clearly understood standards of right conduct, there is little likelihood that an alien authority can successfully impose those standards on them.²¹

Since this report in 1979, the integrity landscape of members of parliament has changed. There has been widespread adoption of registers of interests by all Australian parliaments and significant investigation of other mechanisms designed to support the observance of ethical standards of members. Consequently, codes of conduct now exist in three States: NSW, Tasmania and Victoria. Yet the enforcement of these various mechanisms has, on the whole, been left with each House without clear avenues for public complaint. This deficiency needs to be remedied if there is to be any improvement in the level of public confidence in the integrity of the parliamentary system. ●

20 Cited from the *Report of the Royal Commission on Standards of Conduct in Public Life* (1974-1976) (the Salmon Report) Cmnd 6524, 1976 at 12.

21 Report of the Committee of Inquiry established by the Prime Minister on 15 February 1978, *Public duty and private interest* (the Bowen Report) at para 3.12.