

Members of
Parliament:
law and ethics

Gerard Carney

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Members of Parliament: law and ethics

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This book is dedicated to

V.G.C. & L.M.C.

foreword

In a democracy, political institutions depend ultimately on public confidence in their efficiency and integrity. Confidence in these institutions is not maintained solely by the ballot box. The discipline of the party system, control over the selection of candidates and the ephemeral nature of electoral issues and promises place a limit on the effective accountability of political institutions to the general public.

The efficiency and integrity of political institutions are functions of the qualifications and character of those in whom political power is reposed and of the manner in which that power is exercised. The public expects that certain standards will be maintained and, provided those standards are maintained, accepts and peacefully submits to the exercise of political power. The maintenance of proper standards underpins the peace, order and good government of society. This book is about the maintenance of those standards. It is also about the means of protecting democratic debate inside and outside the Parliament.

The standards of political conduct are defined and buttressed by a number of institutional mechanisms which themselves command public support, albeit their content is not fully known to the public nor fully appreciated by those who are expected to observe the relevant standards. Constitutions, laws, conventions, guidelines and practices all have an effect — sometimes coercive, sometimes persuasive, sometimes by providing a touchstone of desirable propriety. These are the subject of Professor Carney's treatise.

The author has covered the standards applicable to practically every aspect of public conduct on the part of those vested with political authority. But the value of this treatise lies not so much in its breadth as in its depth and insights. Parliamentary history and contemporary practice, constitutional imperatives and Speakers' rulings, statute and the common law, promulgated guidelines, committee reports and the lessons of notorious 'affairs' are examined and expounded to show the way in which political power should be exercised on behalf of the community which entrusts that power to their political representatives.

The book is not a mere anthology of ethical *desiderata*. This is a practical handbook for those engaged in politics and for their advisers and an authoritative textbook for

lawyers and public administrators. It is at once a work of scholarship and a lucid roadmap of political propriety. When an issue has not hitherto been clarified by law or practice, the author says so. When existing law or practice is arguably defective, the author proposes reform.

The book contains a long overdue exposition of the relationship between, on the one hand, constitutional imperatives, the general law (including the relevant principles of tort and equity) and the law and custom of parliament, and, on the other, the ethics, practices and problems of parliamentary and political life. The division of this book into three Parts — Qualifications and disqualifications, Parliamentary privilege and freedom of speech, and Standards of conduct — helpfully focuses on elements of a general subject few parts of which can be considered in isolation.

Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament and the Practice Books of the Australian Senate and House of Representatives do not provide the same depth of analysis covering the field of law and ethics affecting members of Parliament. Yet there are some issues — including the difficult topic of art 9 of the Bill of Rights 1689 and disclosure of Parliamentary proceedings in court — which require not only an examination of diverse authorities but the skill of precise legal analysis.

By the publication of this book, Professor Carney has made a considerable contribution to public law and public administration in Australia. The scholarship with which for a time he assisted me in the judicial branch of government is now directed to a wider audience and to the service of parliaments of the Commonwealth — the institutions which are at the heart of our democracy.

Gerard Brennan

Chambers, Sydney NSW
2 June 2000

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preface

While libraries are overflowing with political biographies and works on political philosophy and politics, little has been written on the principles which guide members of parliament in the performance of their representative responsibilities. This work hopefully provides some guidance in the three areas it explores: qualifications and disqualifications; parliamentary privilege; and standards of conduct. Linking these three areas is the primary duty of members to act in the public interest rather than in their own personal interest. While the focus is particularly on the position of members of all Australian parliaments and legislatures, the principles examined are relevant to all Westminster parliaments throughout the Commonwealth.

While no attempt is made to give an exhaustive account of all the legal and ethical obligations of members, this work endeavours to deal with many of their principal obligations. Particular emphasis is given to their legal obligations, which permeate all three parts of the book. The division into those three parts might perplex some who would correctly assert that all three address the standards of conduct of members, rather than just Part III. Nevertheless, each remains a distinct topic despite their inter-relationship in terms of standards of conduct.

This work is intended primarily as a detailed reference work, particularly in relation to Part I on qualifications and disqualifications and Part II on parliamentary privilege. These are both technical topics which cannot be adequately explained by a generalised work — such a work would fail to provide the guidance needed to give accurate advice in particular cases. Part III, on the other hand, focuses more on the ethical obligations of members, especially in relation to the disclosure of interests and codes of conduct. It is therefore a more generalised discussion.

It is hoped that this work becomes a useful reference work for members of parliament, lawyers, parliamentary officers and staff, political scientists, political journalists, and others who are involved in or are interested observers of the parliamentary process.

The origins of this work began in 1988 when I was asked by the Legal Division of the Commonwealth Secretariat in London to undertake a comparative study of the various regimes developed within the Commonwealth concerned with conflict of

interest and members of parliament. That study, completed in 1989, was subsequently published by the Commonwealth Secretariat as *Conflict of Interest: A Commonwealth Study of Members of Parliament*. I returned to Australia eager to examine the position in Australia in more depth. Since the publication of my Commonwealth study, there has been increased public focus on the accountability of all who exercise governmental power. Consequently, codes of conduct and registers of interests have become a common feature of the political landscape. How effective they are is unclear in the absence of empirical research, but their proliferation within Australia and overseas sends a message to their respective constituencies that members understand the need for accountability and transparency in the performance of their parliamentary functions.

So many people have provided me with assistance of various kinds for which I am very grateful. Several are specifically acknowledged here despite my fear of omitting others who should be mentioned. Particular thanks must go to Emeritus Professor Enid Campbell, Associate Professor Noel Preston, and Emeritus Professor Colin Hughes who reviewed parts of the manuscript. I especially thank Mr Neil Laurie, Deputy Clerk of the Legislative Assembly of Queensland, for reviewing the whole manuscript. My sincere thanks must also go to the Hon Justice Paul Finn for including me for a time in his *Integrity in Government Project*.

I have also been grateful for the assistance provided by various officers of all Australian parliaments, in particular, Laurie Marquet (WA), Peter Alcock (Tas), Gareth Griffith (NSW), Velia Mignacca (NSW) and Paul Venosta (Vic) who answered my many queries and provided copies of many relevant publications. Special thanks must also be given to Mr Paul Dacey of the Australian Electoral Commission who arranged for Part I to be reviewed by all the Electoral Commissions and Offices in Australia. Their comments were indispensable. Thanks must also be extended to Professor Malcolm Cope, Dean of the QUT Law School for the provision of research facilities at QUT in 1999 and to Geoff Barlow at the Bond Law Library for his unfailing assistance.

Finally, I am very grateful for the encouragement, patience and tolerance shown by my family and friends, as well as by my colleagues at Bond University Law School, in particular, Professor Laurence Boule.

This was an ambitious project to cover the position of members of the Commonwealth and all six State Parliaments, as well as of the Legislative Assemblies of the Australian Capital Territory and the Northern Territory. I seek the reader's indulgence for any inaccuracies in particular respects. With that qualification, the position is stated as at 1 May 2000.

Gerard Carney
Bond University Law School
June 2000