

Members of
Parliament:
law and ethics

Gerard Carney

Published by
Prospect Media Pty Ltd
Level 1
71-73 Lithgow Street
St Leonards NSW 2065
Australia
© Prospect Media Pty Ltd

National Library of Australia Cataloguing-in-Publication entry:

Carney, Gerard
Members of parliament: law and ethics

Includes index.
ISBN 1 86316 158 9.

1. Australian Parliament — Officials and employees.
 2. Legislators — Legal status, laws, etc. — Australia.
 3. Legislators — Professional ethics — Australia.
 4. Parliamentary practice — Australia
- I. Title.

342.94055

All rights reserved. This publication is copyright. Other than for purposes of and subject to the conditions prescribed under the Copyright Act, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be produced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publishers.

Typeset by Prospect Media Pty Ltd

Printed by:
McPherson's Print Group
62 Sutton Road Maryborough
Vic 3465

Introduction

This work considers the principal features of the legal and ethical status of members of parliament. While the primary focus is on the members of all Australian legislatures, reference is made to the members of the United Kingdom House of Commons, the mother of Westminster parliaments, from which many of the relevant principles were adopted. Hence, this analysis of the position in Australia reflects to a substantial degree the position found in many Westminster parliaments of the British Commonwealth.

The legal and ethical status of members has been divided into three parts:

- Part I deals with the grounds of qualification and disqualification;
- Part II deals with parliamentary privilege; and
- Part III deals with standards of conduct.

The role of a member of parliament is predominantly to represent the interests of his or her electorate. The nature of that role is therefore dependent on the nature of the franchise, the electoral system and the parliamentary system. Obviously, as those systems evolved to form a democratic representative system of government with a universal adult franchise, the role of a member responded to that constitutional development. Equally significant was the evolution of responsible government, whereby those who form the ministry must have the support of the members of the lower house of parliament. This means that members of parliament possess two principal functions: to represent the interests of their constituents in the parliament; and to review the activities of the government. In addition, the members of the lower house decide who forms government.

Although the phrase 'member of parliament' refers in the United Kingdom only to a member of the House of Commons and not to a member of the House of Lords, it is a description which is elsewhere used to describe a member of either house of parliament. In referring to the 'parliament' the description is somewhat misleading, since it is membership of a 'House' rather than parliament as a whole which determines the role and status of members. Parliamentary privileges are enjoyed by each House, including the power to discipline its own members.

The Houses of Parliament through their respective members perform a range of important functions. They:

- (1) enact legislation;
- (2) approve appropriation or supply for the government;
- (3) review government policy and action (the accountability role);
- (4) review proposed legislation;
- (5) investigate matters which appear to require investigation or reform by investigatory committees; and
- (6) provide a forum by which matters of public interest may be raised before the government and the general public.

The functions of members of parliament include all of the above, of which the last four provide the greatest opportunity for individual participation. Other important functions of an extra-parliamentary kind performed by members include:

- (1) providing advice to constituents and other persons; and
- (2) making representations on their behalf to government (often through a Minister) or to other organisations.

What pervades these functions and the parliamentary process itself is the political party system which has effectively deprived members other than independents of their freedom to perform those functions as they see fit. Party discipline has substantially subsumed the independence of members for the sake of stability of voting blocks in the parliament. Potentially, this places members in an invidious position, with conflicting loyalties to their party, their constituents, the government or the opposition, and to the nation. How are these conflicts to be resolved? To start with, the universally accepted primary obligation of members is to act in the public interest and never in their own personal interest. This at least highlights the public trust vested in members to act in the public interest and not profit from that role. So far the focus has been on avoiding pecuniary benefits, since these are usually easily identified as unethical, if not illegal. As for non-pecuniary benefits, such as the promotion of a relative or oneself, these are not so easily detected and may at times involve delicate questions as to whether or not they are acceptable as part of the political process of compromise and bargaining.¹

Members, however, face other potential conflicts which do not necessarily involve a personal interest, such as when their own conscience conflicts with party policy. Although on rare occasions members are given a 'conscience vote' on issues on which the party has no policy, they are normally expected to follow the party line in the House. This means that conflicts of this nature are tackled by the individual member within the parliamentary party room rather than in the House. To follow the party line is not necessarily unethical provided this is done after due consideration of the competing interests at stake.

It is in this environment of the parliamentary system dominated by the discipline

1 J Uhr, 'Democracy and the Ethics of Representation' in N Preston and C Sampford (eds), *Ethics and Political Practice — Perspectives on Legislative Ethics* The Federation Press Sydney 1998, p 23.

of political parties that this book examines the principal features of the legal and ethical status of members of parliament. There are several themes which weave their way through all three Parts outlined earlier. All of them derive from the fundamental obligation of members to act in the public interest. While the 'public interest' defies definition, it clearly involves the balancing of competing interests to promote the common good. The pressures involved in this political process are captured by Dr Noel Preston:

[Parliamentarians and unelected public officials] assume responsibility in a significant way, for protecting the rights and interests of the public. Much of the work of public officers — elected or appointed — involves choices amongst values; indeed, it is this characteristic of their role in a liberal democracy that often makes their decisions contestable, debatable and requiring public justification. Elected and unelected officials have to make choices in an environment where they have limited resources and options, choices which will benefit some and disadvantage others. The political environment is a highly competitive and adversarial one, which by necessity is fuelled by the quest for power. Before becoming an elected official, deals of dubious kinds may be done to win pre-selections. Politicians are constantly faced with the demands of interest groups, factions, institutions, powerful individuals as well as ordinary constituents.²

Maureen Mancuso has drawn the distinction between a 'conflict of interest', which arises when a member's personal interests conflict with official duty, and a 'conflict of interests', which describes those competing interests which are resolved by the parliamentary process — these are 'inherent to Parliament, for without disagreement on important issues, no deliberative assembly would be needed'.³

The pre-eminent theme in this book is concerned with the former situation: that is, the avoidance of a conflict of interest between a member's official responsibilities and his or her personal interests. An early statutory mechanism to assist members to comply with this obligation was the disqualification from parliament of government contractors and holders of an office of profit under the Crown. In addition, members were required by early resolutions of the UK House of Commons to declare their personal interests in parliamentary proceedings.

In recent times, those mechanisms, along with the grounds of disqualification referred to, have been acknowledged as inadequate. Hence, registers of interest and codes of conduct have been adopted in the hope that they will improve the apparent low level of public confidence in the parliamentary and political process. These mechanisms are considered in Part III, while suggestions are made in Part I for updating and clarifying the grounds of disqualification. The objective of these

2 N Preston, *Understanding Ethics* The Federation Press Sydney 1996, p 154.

3 M Mancuso, *The Ethical World of British MPs* McGill-Queen's University Press Montreal 1995, p 39.

mechanisms is to *assist* members to act and be perceived as acting in the public interest. In a democracy which recognises the sovereignty of the people, public confidence is essential for the maintenance of any government institution. Members must therefore avoid both actual and apparent conflicts of interest. However, it is unfair to judge the success of these mechanisms by reference to any improvement (if any) in the level of public confidence in politicians. Where that level lies is the product of a range of factors, including the performance of the political parties and the level of public understanding of the parliamentary process. Nonetheless, members are expected to maintain high standards of conduct in the performance of their official duties. Although public expectations of members may have increased in the latter part of the 20th century, the importance of capable members to exercise legislative power has been recognised since the time of Blackstone:

So that it is a matter most essential to the liberties of this Kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge.⁴

Another common theme is the difficulty in judging whether there has been a breach of the public trust vested in a member. The range of potential misconduct extends along a spectrum from merely unethical conduct at one end to criminal conduct at the other. The grounds of disqualification considered in Part I clearly raise the issue of whether they are all sufficiently serious to warrant the drastic consequence of disqualification. Comparison with cases which merely incur suspension of a member for failing to comply with accepted standards of conduct suggests certain grounds are not warranted. It is important to ensure that the sanction imposed is an appropriate and proportionate response.

A further theme concerns the relationship between parliament (or its Houses) and the courts; that is, the capacity of the courts to exercise the power of judicial review over the activities of parliament and of its members. Here, the focus is on the predominant parliamentary privilege, freedom of speech under art 9 of the *Bill of Rights 1689*. Part II of the book examines this aspect by exploring the justification for freedom of speech.

In the end, the central objective of all the legal and ethical obligations of members is to ensure that their House, and hence Parliament as a whole, is able to translate the people's will into law and to select and call to account the executive branch. How parliament is made accountable for performing that role is answered by Dr John Uhr:

Three overlapping answers emerge: the blunt instrument of electoral accountability; the double-edged sword of parliamentary privilege; and the new and untested weapon of a parliamentary code of ethics.⁵

4 *Blackstone's Commentaries on the Laws of England*, Vol 4 (11th ed) Dublin, p 161.

5 J Uhr, *Deliberative Democracy in Australia — The Changing Place of Parliament* Cambridge University Press Cambridge 1998, p 170.

Each of these matters is covered in this book. Part I examines how the election of members is enhanced by the prescription of grounds of disqualification; Part II deals with parliamentary privilege; and Part III explores the range of criminal and civil standards which protect the public trust vested in members. It should be noted that this book does not cover the additional responsibilities of those members who are ministers. While all of the principles applicable to members apply to those who have accepted ministerial office, ministers are subject to more onerous obligations, particularly in relation to the avoidance of conflicts of interest. ●