Members of Parliament: law and ethics

Gerard Carney
This book is dedicated to
V.G.C. & L.M.C.
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
contents

Foreword .................................................................................................................... iii
Preface ...................................................................................................................... ix
Chapter 1 Introduction .............................................................................................. 1

Part I: Qualifications and disqualifications

Chapter 2 Qualifications and disqualifications ...................................................... 9
  Introduction ........................................................................................................... 9
  Qualifications of members ............................................................................... 11
  Grounds of disqualification .......................................................................... 15
  When is disqualification determined? ............................................................. 18
  Membership of another House ..................................................................... 23
  Foreign allegiance .......................................................................................... 28
  Criminal conviction ....................................................................................... 38
  Bankruptcy ...................................................................................................... 51

Chapter 3 Disqualifications: public offices and pensions .................................... 57
  Public offices ....................................................................................................... 57
  Pensions .............................................................................................................. 91
  Conclusion .......................................................................................................... 93

Chapter 4 Further disqualifications; consequences of disqualification ............ 95
  Government contractors ................................................................................ 95
  Receipt of fees and honoraria ........................................................................ 133
  Absence from Parliament ............................................................................... 140
  Mental illness .................................................................................................... 141
  Consequences and enforcement of disqualification ................................... 143
  Conclusion .......................................................................................................... 155
contents

Part II: Parliamentary privilege

Chapter 5 Parliamentary privilege ................................................................. 159

  Introduction .............................................................................................. 159
  Historical origins of parliamentary privilege ............................................ 161
  Parliamentary privilege in Australia ......................................................... 166
  Judicial review of parliamentary privilege .............................................. 170
  Powers and immunities ......................................................................... 177
  Impact of the implied freedom of political communication .................. 197
  Abrogation of parliamentary privilege ................................................... 199
  Conclusion .............................................................................................. 205

Chapter 6 Freedom of speech ........................................................................ 207

  Introduction ............................................................................................ 207
  Scope of freedom of speech: nature of activities .................................... 210
  Effect of freedom of speech: admissibility of evidence
  concerning parliamentary proceedings ...................................................... 220
  Effect of freedom of speech in defamation proceedings ....................... 232
  Conclusion ............................................................................................... 241

Part III: Standards of conduct

Chapter 7 Introduction to standards of conduct ........................................ 247

  Purpose and rationale of standards ........................................................ 248
  Source and nature of standards ............................................................... 253
  Codes of conduct .................................................................................... 255
  Oath of allegiance .................................................................................... 262
  Conclusion ............................................................................................... 263
# contents

<table>
<thead>
<tr>
<th>Chapter 8 Abuse of public trust — corruption offences</th>
<th>265</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>265</td>
</tr>
<tr>
<td>Bribery</td>
<td>266</td>
</tr>
<tr>
<td>Extortion</td>
<td>291</td>
</tr>
<tr>
<td>Official misconduct</td>
<td>299</td>
</tr>
<tr>
<td>The scope and effect of the privilege of freedom of speech</td>
<td>303</td>
</tr>
<tr>
<td>Conclusions and recommendations</td>
<td>314</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 9 Duty of confidentiality</th>
<th>317</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>317</td>
</tr>
<tr>
<td>The common law duty of confidentiality</td>
<td>318</td>
</tr>
<tr>
<td>Standing orders and parliamentary practice</td>
<td>324</td>
</tr>
<tr>
<td>Codes of conduct</td>
<td>327</td>
</tr>
<tr>
<td>Statute</td>
<td>328</td>
</tr>
<tr>
<td>Misuse of information</td>
<td>328</td>
</tr>
<tr>
<td>Freedom of speech and confidentiality</td>
<td>331</td>
</tr>
<tr>
<td>Conclusion — recommended standards of confidentiality</td>
<td>332</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 10 Conflict of interest</th>
<th>335</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>335</td>
</tr>
<tr>
<td>Nature of a conflict of interest</td>
<td>336</td>
</tr>
<tr>
<td>Mechanisms dealing with a conflict of interest</td>
<td>338</td>
</tr>
<tr>
<td>Ad hoc declarations</td>
<td>340</td>
</tr>
<tr>
<td>Register of public interests</td>
<td>358</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 11 Other standards</th>
<th>369</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptance of gifts and hospitality</td>
<td>369</td>
</tr>
<tr>
<td>Use of public resources</td>
<td>371</td>
</tr>
<tr>
<td>On leaving public office</td>
<td>373</td>
</tr>
<tr>
<td>Personal conduct</td>
<td>375</td>
</tr>
</tbody>
</table>
contents

Compensation for services rendered as a member .................................. 376
Improper use of influence ....................................................................... 382
Acceptance of political donations ............................................................ 385
Conduct of members in the House .......................................................... 385

Chapter 12 Enforcement of standards ......................................................... 389
Current regime ...................................................................................... 390
Overseas experience ............................................................................. 393
Recommendations for Australia .............................................................. 394
Conclusion .............................................................................................. 395

Appendices

Appendix 1 List of reports on disqualification ............................................ 397
Appendix 2 Disqualification provisions of the Commonwealth Constitution .......................................................... 398
Appendix 3 Recommendations of the 1981 Senate Report on s 44(iv) (para 5.83) .................................................... 399
Appendix 4 List of Parliamentary Privileges .............................................. 400
Appendix 5 Part I Code of Conduct in Members of Parliament
(Register of Interests) Act 1978 (Vic) .................................................. 401
Appendix 6 State Codes of Conduct for Members .................................. 403
Appendix 7 The UK Code of Conduct for Members of the House of Commons .... 406

Table of legislation .................................................................................... 409
Table of cases ........................................................................................... 421
Index .......................................................................................................... 427
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 these 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 indispensible. 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 Boulle.

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