Members of Parliament: law and ethics

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Part III

Standards of Conduct
members of parliament: law and ethics
Part III reviews the standards which presently guide or ought to guide members in the performance of their parliamentary duties. They may conveniently be divided into criminal and civil standards. Accordingly, Chapter 8 examines corruption offences in relation to members, while the chapters following deal with the duty of confidentiality, conflict of interest and other standards. The standards outlined in these chapters range from criminal offences to good ethical practice. Most have evolved under the general law or as rules or customs of Parliament. Others, particularly those discussed in Chapter 11, are based on no more than basic ethical values. Together they support the integrity of key players in the democratic process.

Although it is not possible here to comprehensively cover all of the rules and standards applicable to members, an attempt has been made to refer to those which are most prominent. Nor is it possible to survey all the relevant incidents which have arisen in political practice; the emphasis in this Part is on those clearly established standards recognised by the general law and parliamentary practice.

A surprising feature to emerge from an analysis of these standards is the lack of correlation in some instances between their philosophical foundation and political reality. This is particularly so in relation to those standards recognised by the general law which are based on the premise that each member bears the responsibility to act always in the public interest and never out of self-interest. To describe the fundamental obligation of members in such absolute terms clearly fails to accommodate the modern party system, where most members of Parliament owe duties and loyalties to a political party and where many policy issues are resolved within the parliamentary party room before being debated in their Houses. As many of those standards derive from the 19th and early 20th century in the absence of a sophisticated party system, they need to be reassessed in the light of that system. Most will remain relevant to the modern state but their application will need to accommodate the realities of the political process.
Purpose and rationale of standards

Although the immediate purpose of these civil and criminal standards is to support members of parliament in their role as the people's representatives, their ultimate purpose is to protect the institution and functions of parliament itself. The intimate connection between both purposes is obvious. Nor is their purpose confined to the practical exercise of these functions; equally important is their effect in maintaining public confidence in the capacity of each member and of parliament as a whole to perform their respective functions in the public interest. Given their special responsibility to vote the supply of money to the executive and their privilege of freedom of speech, it is not surprising that very high standards are expected of members of parliament.

The principal role of a member of parliament is to represent the interests of his or her constituents in the law-making function of the parliament. In particular, members are the first sentinels of the rights and interests of the people. Of almost equal importance is their role in forming and reviewing the executive government. In both these roles, the traditional view is that a member must always act in the public interest. This obligation is based on the fundamental premise that all power of government derives from the people for whom it serves. In other words, there is a trusteeship created between the people and those who serve in the three branches of government: the legislature, the executive and the judiciary. Members and officers of each of those branches exercise an ever increasing power over the rights and liberties of individuals, the economy and the commercial system.

This duty to exercise governmental power in the public interest has been recognised for centuries by such political philosophers as Plato, Cicero, Rousseau, Wang An Shih, Abdul Rahman Ibn Khaldun and Edmund Burke. Nowhere is it so

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1 The High Court has recognised the importance of the sovereignty of the people in a number of recent cases: see Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at 70 per Deane and Toohey JJ, and Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106 at 137-8 per Mason CJ.
4 Cicero, Die officiiis (translation by W Miller) Harvard University Press London 1975, Book I at XXV.
comprehensively stated than in the US Senate Code of Official Conduct which contains the following declaration of Senate policy:

The ideal concept of public office, expressed by the words, 'A public office is a public trust', signifies that the officer has been entrusted with public power by the people; that the officer holds this power in trust to be used only for their benefit and never for the benefit of himself or of a few; and that the officer must never conduct his own affairs so as to infringe on the public trust. All official conduct of Members of the Senate should be guided by this paramount concept of public office.9

In Australia, this paramount obligation of members to act only in the public interest was recognised by three High Court decisions early in the 20th century. In two cases, contracts were held to be void as against public policy because they created a conflict of interest which tendered to interfere with the duties of a member of Parliament: Wilkinson v Osborne10 and Horne v Barber.11 The third case found a particular agreement with a member to constitute a criminal conspiracy: R v Boston.12

All three cases involved a scheme whereby a member agreed, in return for a financial benefit, to influence the executive to confer a benefit on certain parties. These schemes were held void or illegal because they interfered with the duty of a member to act only in the public interest when supervising the activities of the executive. This fundamental obligation of a member of parliament was forcefully put by Knox CJ in R v Boston in referring to the agreement in that case:

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.13

9 First version of the code in 1968; revised in 1977. Now in Senate Rules 34-43. The Manual of Standards of Ethical Conduct for Employees of the Executive Branch from the US Office of Government Ethics begins at p. 3. "That "public office is a public trust" has long been a guiding principle of government' and cites in footnote 1: 'This creed, the motto of the Grover Cleveland administration, has been voiced by such notables as Edmund Burke (Reflections on the Revolution in France 1790), Henry Clay (speech at Ashland, Kentucky, March 1829), John C Calhoun (speech, Feb 23, 1835), and Charles Sumner (speech, US Senate, May 31, 1872). See also C Fatina, 'Keeping Faith: Government Ethics & Government Ethics Regulation, Report of the American Bar Association Committee on Government Standards' 45 Admin L Rev 287 (Summer 1993).'
10 (1915) 21 CLR 89.
11 (1920) 27 CLR 494.
12 (1923) 33 CLR 386.
13 At 393.
Isaacs and Rich JJ in their joint judgment expressed ‘the fundamental obligation’ of a member of parliament as ‘the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community’ (their emphasis).14 Also in Horne v Barber,15 Rich J expressed most clearly the concept of the public trust in referring to the ‘obligations and the responsibility of the trust towards the public implied by the position of representatives of the people’.16 His Honour’s description of the obligation of members reflects that given by Knox CJ:

Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit. So much is required by the policy of the law. Any transaction which has a tendency to injure this trust, a tendency to interfere with this duty, is invalid (cf Hamilton v Wright [9 Cl & Fin, at p 123]).17

The ‘public interest’ in this context is in effect the purpose which those who exercise power conscientiously believe to be most appropriate for the general welfare of that society. Since minds differ on whether a policy will enhance society’s welfare, the public interest is a flexible concept to accommodate a range of views.

Public confidence

Central to the standards of a member of parliament is their concern with maintaining public confidence in the integrity of members and hence with the parliamentary process. The reason for this is that the people are entitled to feel confident that their power or sovereignty is being exercised for their benefit. As the famous American counsel Archibald Cox noted, the stability of government rests on the maintenance of public confidence:

Both a free society and a democratic government require a high degree of public confidence in the integrity of those chosen to govern.18

This confidence can be easily eroded by the appearance of a conflict of interest. For this reason, the fundamental ethical requirement for members is to avoid actual, potential and apparent conflicts of interest.19

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14 At 400.
15 (1920) 27 CLR 494.
16 At 502.
17 (1920) 27 CLR 494 at 501.
19 See for example Tanzania’s Public Leadership Code of Ethics Act 1995 which refers in the Code of Ethics to the obligation of public leaders to arrange their affairs to ‘prevent real, potential or apparent conflicts of interest from arising’ (s 6).
At times, the requirement to avoid apparent conflicts of interest appears unfair and harsh, especially when abused by political opponents. Yet a member who creates the appearance of a conflict of interest is simply inviting the closer inspection of his or her motives — it is a self-imposed vulnerability. Unless the appearance can be dispelled by the member, the political consequence is likely to be the assumption of unethical behaviour. The appearance of a conflict of interest is one of the hazards of the game of politics. Nonetheless, it is a hazard which ought not to be capitalised on, for as Dr Noel Preston has warned, ‘[t]he politicisation of ethics is deplorable inasmuch as it disables both moral and political judgment’. 20

Political process: the party system

In assessing whether a member has betrayed the public trust, it is essential to have regard to the nature of the political process in Australia. A member faces a barrage of pressures: from their constituents, political party, colleagues and the media. How are these pressures to be resolved? To suggest that they must always act in the ‘public interest’ substitutes one conundrum for another. They cannot be expected to have ‘the powers of detachment of anchorites’! 21 Yet to determine what is in the public interest is their function and responsibility; hence, these pressures must be handled in a manner which allows for a fair and honest determination of the issues. As s I of the Code of Conduct for Members of the United Kingdom House of Commons declares, standards of conduct guide them in handling those pressures:

The purpose of the Code of Conduct is to assist Members in the discharge of their obligations to the House, their constituents and the public at large. 22

Yet by far the greatest pressure, if not obligation, comes from the member’s own political party and its rules of party discipline. Although the strictness of these rules varies between political parties, members are usually bound to follow the decisions made in the party room or caucus. Hence, the critical debates within each parliamentary party occur in the privacy of the party room rather than in the public arena of parliament. It is imperative, though, that these party room meetings not stifle the capacity of members to decide issues in the public interest. No doubt they will take into account electoral consequences — for few members would deny that it was in the public interest for their party to be re-elected! — but there is obviously a limit on how far this factor can influence a decision. Again, the overriding concern must be with the public interest.

21 Adopted from the judgment of Gleeson CJ in Greiner v ICAC (1992) 28 NSWLR 125 at 145.
22 The Code of Conduct for Members of Parliament, approved by resolution of the UK House of Commons on 24 July 1995 (see Appendix A).
Provided issues have been fairly and ethically decided in the party room, the rules of party discipline can legitimately demand either obedience to the decision reached or else resignation from the party. At times, controversial issues are not resolved in the party room so that members are given a ‘conscience vote’ in Parliament. Here, members must also decide the issue as best they can in the public interest. But where a member is unhappy with his or her party room decision, difficult choices may have to be made, as the Bowen Report recognised:

Notwithstanding the constraints of party, in the last resort the Member of Parliament must retain his own judgment, and his duty to exercise that judgment independently. If he cannot in conscience follow the dictates of his party in a particular matter, he must decide whether it is better, perhaps for other reasons, for him to remain in the party and endeavour to effect changes in party attitude from within, whether to vote against party policy in the Parliament, to resign from the party to allow himself freedom of action in the matter or even, in the extreme case, whether to resign from the Parliament.23

Clearly, the party system has a profound impact on the process by which issues are decided in accordance with the public interest, as well as on the determination which is made. But the ethical framework within which members must act within this system should remain intact. Indeed, it is imperative that the party system respect and reinforce that ethical framework. Unfortunately, this complex accommodation of the party system with the public interest is not sufficiently understood by the electorate, and this has no doubt contributed to the increasing level of public cynicism of politicians and the political process.

Indeed, what lies at the heart of this cynicism in Australia is public ignorance of the nature of the political, governmental and constitutional systems. In particular, it is not well appreciated that the political process inherently involves the balancing of competing interests by negotiation and compromise, whether in the party room or in the chambers of Parliament. Bargaining is often necessary to achieve the resolution of difficult public issues. Certain interests are likely to be preferred over other interests — but this should occur not because the members wish to favour one group over another, but because they believe the final outcome to be in the best interests of the community as a whole. This process must be explained to the people. And, yes, it is often difficult to assess whether it has been faithfully followed. Accordingly, every effort needs to be made to assure the people that this is so. Consequently, there needs to be at times an adjustment of standards of ethical behaviour to take account of political expediency and compromise. This can be seen in relation to the prescription and application of bribery and corruption offences. It also renders tricky any attempt to convert ethical rules into rules of law:

Questions of law are ultimately able to be resolved by the courts. Matters of ethics

are, almost by definition, unable to be resolved by resort to rules or laws. Ethics questions are matters for judgment about competing values, and therefore matters about which there may be continuing disagreement, ambiguity, or uncertainty. 24

It is essential that any discussion of safeguarding the integrity of members occurs in a positive atmosphere which recognises the privilege and honour of those vested with the public trust. No assumption is made that those who occupy public office lack integrity. Rather, the desire is to assist those in public office vested with that awesome responsibility to act always in the public interest. That is the essential purpose of these standards.

Source and nature of standards

The standards to which members are subject derive from morality, parliamentary custom and standing orders, as well as the general law. As they range from mere ethical principles to positive legal obligations, the sanctions for infringing these standards varies as widely as their foundation.

Ethical standards derived from society’s morality, while taken for granted in the past, are often included as aspirational principles in modern codes of conduct. For example, in Tasmania, the Code of Ethical Conduct for Members of the House of Assembly, begins with a ‘Statement of Commitment’ which acknowledges the ethical duties owed to the people of the State, to the constituents, and to the members’ colleagues:

To the people of this State, we owe the responsible execution of our official duties, in order to promote human and environmental welfare.

To our constituents, we owe honesty, accessibility, accountability, courtesy and understanding.

To our colleagues in this Assembly, we owe loyalty to shared principles, respect for differences, and fairness in political dealings.

More prescriptive standards have, of course, been developed by the Houses in exercise of their supervisory role over their members. This role was considered in Chapter 5 as one of the powers of each House within the scope of parliamentary privilege. Most prominent are the rules in relation to conduct occurring during the proceedings of parliament and the requirements of ad hoc disclosure considered in Chapter 10 on conflict of interest.

At the top of the hierarchy of standards are those prescribed by the general law and statute. These impose both criminal and civil obligations on members. The criminal standards are considered in the following chapter on the abuse of public trust. The civil standards are discussed in later chapters on the duty of confidentiality and conflict of interest. Significant in relation to the criminal standards and to a lesser

extent to the civil standards is the status of a member as a ‘public officer’ which renders the member liable to various common law offences and equitable remedies for official misconduct.26

The 1999 Report of the UK Joint Committee on Parliamentary Privilege recognised the spectrum of conduct which these standards encompass:

It is perhaps worth stressing the appreciable gap between corruption and disciplinary matters which Parliament normally considers. Carelessness, forgetfulness, misinterpretation of the rules of registration and declaration, or even flagrant disregard of them, is usually a long way from corruption.27

Standard setting

The trend to adopt mechanisms such as a register of interests or a code of conduct to support the integrity of members of parliament is simply part of a wider phenomenon of government accountability which is affecting all three branches of government. The executive has been made more accountable by freedom of information legislation, the wider application of the rules of procedural fairness, and the enhanced processes of parliamentary and judicial review. The judiciary similarly come under greater public scrutiny. So with members of parliament, concern with their integrity is simply the torch of public accountability being shone on another level of government. It is another example of the checks and balances so eloquently explained by Thomas Madison in The Federalist no 51:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.28

One of the reasons often given for adopting these mechanisms is to improve the low level of public confidence in the integrity of politicians and public officials. This view reflects the fact that mechanisms are generally adopted only in response to significant public scandals, such as Watergate in the United States.29 Public

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25 R v White (1875) 12 SCR (NSW) (L) 322; affirmed by a majority of the High Court in R v Boston (1923) 33 CLR 386 at 392-393, 401-402 and 408. Compare the United Kingdom where ministers but not members are regarded as ‘public officers’: Report of the Royal Commission on Standards of Conduct in Public Life 1976 (the Salmon Report), Cmd 6524, paras 307 and 308.

26 See P D Finn, ‘Public Officers: some Personal Liabilities’ (1977) 51 ALJ 313.

27 At para 184.


confidence depends ultimately, however, on the performance of those entrusted to govern. These mechanisms only support and assist members in the performance of their onerous duties and responsibilities. Their efficacy cannot be assessed simply in terms of any change in the level of public confidence, nor is it possible to determine whether public confidence is enhanced by these measures. Their primary achievement must be the extent to which they have assisted members to serve the public interest better.

It should be noted, however, that increased levels of public scrutiny of government, especially by an active media, renders public confidence in government more vulnerable now than in the past. Yet at the same time, there is unlikely to have been any significant change in the nature of a conflict of interest and its prevalence. So what has rendered public confidence more vulnerable is not necessarily a decline in the observance of ethical standards but the increased likelihood that infringements of those standards will be detected. (Indeed, it could also be argued that public expectation in recent times has caused those standards to be raised.) Consequently, greater interest has been aroused in the range of mechanisms available to protect and enforce these standards. Although they cannot eradicate corrupt or unethical conduct, they may deter such conduct, assist in its detection and impose appropriate safeguards.

Codes of conduct

A fairly recent phenomenon in the field of public integrity is the adoption of a code of conduct. These codes range from those which prescribe general standards of ethical conduct incapable of specific enforcement (aspirational), to those with quite specific standards subject to a rigorous enforcement regime (prescriptive). Many codes fall between these two extremes. Some are devised as true 'codes' by consolidating all the standards and mechanisms concerned with the maintenance of members' integrity, such as the obligations of ad hoc disclosure and the requirements of a register of interests. Few codes of conduct, however, have been adopted for members of parliament in Australia. This is due in part to the difficulty in reaching any consensus among members as to their appropriate ethical standards.

31 This view is supported by former President of the Senate and ALP Senator, Michael Beahan, ‘Parliamentary Ethics, Political Realities’ in Preston and Sampford (eds), above note 20, p 128.
32 See the First Report of the Committee on Standards in Public Life (UK House of Commons, May 1995) (the Nolan Committee) at 3.
33 Most notable are the respective codes of the two Houses of the United States Congress: The Code of Official Conduct of the House of Representatives (House Rule XLIII) and The Senate Code of Official Conduct (rules 34 to 43 of the Standing Rules of the Senate).
On the other hand, different perceptions of ethical conduct must surely encourage the formation of codes of conduct to resolve these differences.\textsuperscript{34}

**Australian codes of conduct**

Relatively few codes of conduct have been adopted in Australia for members of parliament. The first parliamentary code of conduct was adopted in Victoria and it remains the only one prescribed by statute: Pt I of the *Members of Parliament (Register of Interests) Act 1978* (Vic). This code is reproduced in Appendix 5. Entitled ‘Code of Conduct’, Pt I contains only s 3 which declares that members of the Victorian Parliament are bound to observe a range of standards in paras (a) to (f) relating to confidential information, receipt of financial benefits, avoidance of conflict of interest, ad hoc disclosure and obligations as ministers. Infringement of the code constitutes contempt for which the member may be fined by his or her House up to $2000, non-payment of which renders the member’s seat vacant (ss 9 and 10).

Codes of conduct have also been adopted by the Tasmanian House of Assembly\textsuperscript{35} in 1996 and by both Houses in NSW\textsuperscript{36} in 1998 (see Appendix 6). These codes include statements of general ethical principles as well as additional standards relating, for example, to the use of public property and on leaving public office. The Tasmanian House of Assembly also adopted a Code of Race Ethics\textsuperscript{37} which promotes, inter alia, respect for the rights of minorities and reconciliation with indigenous Australians.

None of these codes of conduct is statutory. The Tasmanian code is prescribed by SO 2A. In NSW, both Houses adopted essentially the same code by resolution.\textsuperscript{38} Enforcement of each of these codes is ultimately the responsibility of the appropriate House where any infringement constitutes contempt. However, both Houses in NSW are assisted by the jurisdiction of the Independent Commission Against Corruption (ICAC) to make a finding of ‘corrupt conduct’ against a member.

The role of ICAC in relation to members of the NSW Parliament has had an interesting history. When the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act) was enacted, ICAC was empowered to investigate the conduct of any public official in NSW to determine whether a finding of ‘corrupt conduct’ should be made. A public official was defined to include a minister and a member of parliament. To constitute corrupt conduct, it had to fall within the very wide


\textsuperscript{35} Code of Ethical Conduct for Members of the House of Assembly.

\textsuperscript{36} The Legislative Assembly on 5 May 1998 and the Legislative Council on 1 July 1998.

\textsuperscript{37} A Federal Parliamentarians’ Code of Race Ethics was also proposed.

\textsuperscript{38} Resolution of the Legislative Council of 26 May 1999; resolution of the Legislative Assembly of 5 May 1998.
definition of s 8 as well as amount to a criminal offence, a disciplinary offence, or
reasonable grounds for dismissal. How these provisions applied to a minister arose
for determination in what became known as the 'Metherell Affair'.

In 1992, Dr Terry Metherell resigned from the Legislative Assembly to accept an
appointment to a senior public service position. The appointment was arranged by
the then NSW Premier, Mr Greiner, and the Minister of the Environment, Mr Moore.
It aroused intense public criticism as a case of 'jobs for the boys'. The NSW
Parliament referred the matter to ICAC which made findings that both Mr Greiner
and Mr Moore had engaged in 'corrupt conduct' within ss 8 and 9 of the ICAC Act
on the basis that there were 'reasonable grounds' for their dismissal as ministers by
the Governor. Both these findings were overturned on appeal to the NSW Court of
Appeal on the basis that the Commission had not applied an objective test in
determining whether there were 'reasonable grounds' for their dismissal.39

In effect, the Court interpreted s 9 as requiring recognised standards of conduct for
ministers before an objective determination could be made. So the view was taken
that until codes of conduct were adopted, ICAC was unable to make any finding of
corrupt conduct against a member unless it constituted a criminal offence.40 To
prompt each House of the NSW Parliament to adopt an 'applicable code of conduct',
the definition of 'corrupt conduct' in s 9 of the Act was amended to include 'in the
case of a Minister of the Crown or a member of the NSW Parliament a
substantial breach of an applicable code of conduct'.41

Since each House adopted the same code of conduct in 1998, ICAC is now able to
make a finding of corrupt conduct against a member but only in respect of a
substantial breach of the code. Such a finding is reported to the member's House
which decides what disciplinary action it should take. As noted in the context of
parliamentary privilege, the punitive powers of the NSW Houses are limited to a
reprimand, censure, suspension and even expulsion when imposed for defensive
rather than punitive purposes. A finding of criminal conduct by a member is referred
by ICAC to the Director of Public Prosecutions for prosecution.

Both Houses in NSW also appointed a Parliamentary Ethics Adviser to advise
members, at their request, on 'ethical issues concerning the exercise of [their] role as
a Member of Parliament (including the use of entitlements and potential conflicts of
interest)'.42

Proposed codes

At the Commonwealth level and in the other States and the two Territories,
recommendations have been made for a code of conduct but they have not been implemented.

The Bowen Report recommended a code of conduct instead of a register of interests.\(^{43}\) A draft Framework of Ethical Principles for Members and Senators of the Commonwealth Parliament was proposed in 1995 by the Parliamentary Working Group although it has not been adopted by either House. As the title of the proposal indicates, these ethical principles are not prescriptive, reflecting the seven principles of the Nolan Committee. This proposed framework, however, contains eight principles:

1. loyalty to the nation and regard for its laws;
2. diligence and economy;
3. respect for dignity and privacy of others;
4. integrity;
5. primacy of the public interest;
6. proper exercise of influence;
7. personal conduct; and
8. additional responsibilities of parliamentary office holders.

In South Australia, the Legislative Council required the Joint Standing Legislative Review Committee to recommend a code of conduct for members of the Parliament. In April 1996 the Committee issued a discussion paper together with a draft code\(^{44}\) which incorporated substantially the same standards as those proposed by the federal framework.\(^{45}\) No report arose from that paper.

In Western Australia, the Commission on Government in 1996 recommended that a standing committee of each House be established to prepare a code of conduct for members and ministers. It was also proposed that each committee provide continuing ethical advice, investigate allegations of breaches of the code and make recommendations to the House.\(^{46}\) These recommendations have not been acted on.

In Queensland, two proposals for a code have been made. The first, proposed by the Electoral and Administrative Review Commission (EARC) in 1992,\(^{47}\) referred to five general obligations of a member: respect for the law and the system of government; respect for persons; integrity; diligence; and economy and efficiency. An explanation of each of these obligations was also provided. The second proposal was a draft Code of Ethical Conduct for Members of the Queensland Legislative

\(^{43}\) The Bowen Report at paras 4.9 and 6.68.

\(^{44}\) Discussion Paper concerning a Code of Conduct for Members of Parliament (10 April 1996) with the draft code in Appendix A.

\(^{45}\) Instead of ‘Diligence and economy’, the South Australian proposal includes ‘7. Assistance to constituents and others; [and] 8. Confidential information.’

\(^{46}\) Commission on Government (WA) Report No 3, April 1996, para 7.1.5. Note also the report of the Parliamentary Standards Committee (Beazley Committee) in 1989.

Assembly\textsuperscript{48} tabled by the Members' Ethics and Parliamentary Privileges Committee in 1998. This is more aspirational than the EARC proposal, commencing with a 'Statement of Ethical Principles' which are listed as: integrity of the parliament; primacy of the public interest; independence of action; appropriate use of information; transparency and scrutiny; and appropriate use of entitlements. This is followed by a summary of all the various standing orders, resolutions and customs which relate to members.

In the ACT, the Legislative Assembly Standing Committee on Administration and Procedures recommended a proposed code of conduct\textsuperscript{49} which contained standards in relation to: conflict and disclosure of interest; personal benefit; personal behaviour of members; dealing with Assembly property and corporate obligations.

**UK Code of Conduct**


The Code of Conduct declares the fundamental obligations of members 'to act on all occasions in accordance with the public trust', 'to act in the interests of the nation as a whole', and to make 'decisions solely in terms of the public interest'. More aspirational than prescriptive, it includes the following seven general principles of conduct enunciated by the Nolan Committee:

- **Selflessness**
  Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other benefits for themselves, their family, or their friends.

- **Integrity**
  Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.

- **Objectivity**
  In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

- **Accountability**
  Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.


\textsuperscript{49}Inquiry into the proposed Ethics Committee/Code of Conduct, May 1991 at para 9.6 and see draft code attached in Appendix A.
Openness
Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty
Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership
Holders of public office should promote and support these principles by leadership and example.

Also included in the Code are general standards in relation to avoiding conflicts of interest, resolving them in the public interest, preserving the dignity of the House, declaring personal interests, refusing to act as paid advocates or accepting any payment for parliamentary services, using allowances for public purposes, and observing the duty of confidentiality.

The Guide to the Code is, however, much more prescriptive, containing detailed rules in relation to the Register of Members' Interests, the ad hoc declaration of interests, the advocacy rule and the complaint procedure. These matters are considered in chapters 10-12 of this work.

Purpose of a code of conduct

Despite their popularity in both public and private arenas, few codes of conduct have been adopted in Australia for members of parliament. The ambivalence which these codes arouse in Australia is in marked contrast with the enthusiasm with which registers of interest have been embraced. The reasons for this lie in the arguments for and against the adoption of a code. Opposition to a code is based primarily on three grounds: a code only states the obvious in terms of ethical standards; it may encourage attacks on the integrity of members; and as a gimmick, it can only increase public cynicism of the political system.

On the other hand, quite substantive grounds support a code of conduct depending where along the aspirational/prescriptive spectrum it lies. An aspirational code at least reminds members of the fundamental duties and standards which they must observe. It also provides a role model for others engaged in public service. These benefits are notably enhanced with more prescriptive codes. Their specific standards provide better guidance to members in a range of ethical dilemmas. At the same time, they allow the conduct of members to be more objectively assessed. It has also been suggested that they may assist in the determination of whether particular conduct on the part of a member constitutes 'corrupt' conduct.50 While a code of conduct may bolster public confidence, an enforcement regime is usually needed to make any significant impact.

50 See the Report of the 1999 UK Joint Committee on Parliamentary Privilege at para 178.
A useful statement of the purposes of a code of conduct appears in the code proposed for federal Canadian legislators:

1. to recognise that service in Parliament is a public trust;

2. to maintain public confidence and trust in the integrity of Parliamentarians individually and the respect and confidence that society places in Parliament as an institution;

3. to reassure the public that all Parliamentarians are held to standards that place the public interest ahead of Parliamentarians' private interests and to provide a transparent system by which the public may judge this to be the case;

4. to provide for greater certainty and guidance for Parliamentarians in how to reconcile their private interests with their public duties;

5. to foster consensus among Parliamentarians by establishing common rules and by providing the means by which questions relating to proper conduct may be answered by an independent, non-partisan advisor.51

The Nolan Committee (UK) endorsed the value of a code of conduct in these terms:

A code of conduct is essential for a modern Parliament. It is essential for the respect of the institution, and it is important for the protection of the members themselves.52

That such guidance is needed is shown by surveys conducted in Australia,53 Canada,54 the United Kingdom55 and the United States56 which reveal different perceptions of corruption by their respective legislators.

The process by which a code of conduct is formulated can be critical to its acceptance both by members and the electorate. Most codes are developed by

52 Appendix 1 of the Nolan Committee’s Draft Code of Conduct for Members of Parliament and The Seven Principles of Public Life. Other support for a code given by the Riordan Committee (Commonwealth Joint Committee on Pecuniary Interests of Members of Parliament); UK Redcliffe-Maud Committee (Prime Minister’s Committee on Local Government Rules of Conduct).
54 M Atkinson and M Mancuso, ‘Do we need a code of conduct for politicians?’ (1985) 18 Canadian Journal of Political Science.
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members themselves rather than imposed from outside. The most desirable approach, however, is to include some community participation in that process.

Content

As indicated earlier, the content of a code can vary from the purely aspirational (referred to as a code of ethics) to the highly prescriptive. Most codes combine these features to maximise the benefits of their adoption. Although it is clearly impossible to prescribe detailed rules to cover every ethical dilemma, a number of prescriptive rules is feasible and desirable. Their inclusion necessitates, however, an enforcement mechanism.

Central to most codes of conduct are obligations to avoid or resolve conflicts of interest. The usual approach is to require members to declare their personal interests whenever these conflict or appear to conflict with their public duties, (conflicts of interest are considered in Chapter 10), but the range of standards in a code of conduct is usually not confined to conflict of interest. Other standards may be included in relation to:

1. the use of confidential information;
2. the acceptance of gifts and hospitality;
3. the use of public resources;
4. on leaving public office;
5. personal conduct;
6. compensation for services rendered as a member;
7. the improper use of influence;
8. the acceptance of political donations; and
9. the conduct of members in the House —
   (a) disorderly conduct
   (b) abusing freedom of speech
   (c) misleading Parliament.

Apart from (1) which is considered in Chapter 9, further consideration is given to these other standards in Chapter 11. It must be remembered that practically all of them exist, not because they may be found in a code of conduct, but as part of the general law or the customs or practices of parliament.

Oath of allegiance

Members of all Australian legislatures are required to make and subscribe an oath or affirmation before taking their seat. The oath in all jurisdictions is in terms similar to those prescribed for members of the Commonwealth Parliament:

I, A B, do swear that I will be faithful and bear true allegiance to Her Majesty Queen
Elizabeth the Second, Her heirs and successors according to law. SO HELP ME
GOD.\(^{57}\)

The affirmation similarly affirms and declares allegiance to the Queen. The form
of both the oath and affirmation could be improved to include reference to the
obligation of members ‘to serve the interests of the people’ of the Commonwealth,
State or Territory concerned, and where a members’ code of conduct exists, to
observe that code.\(^{58}\) Alternatively, a ‘statement of commitment’ to this effect could
be made in addition to the oath or affirmation.\(^{59}\)

Conclusion

Despite the difficulty in their formulation and the inevitable public cynicism they
arouse, formal recognition of the standards of conduct expected of members of
parliament is essential for protecting the institution of parliament and its members.
As there is an important role for both aspirational and prescriptive standards, a code
of conduct provides a convenient and accessible vehicle to house these standards for
the guidance of members and the electorate.

The following three chapters deal with the most important specific standards:
corruption and bribery offences (Chapter 8); the duty of confidentiality (Chapter 9);
and conflict of interest (Chapter 10). A fourth chapter (Chapter 11) covers a range of
other specific standards. ●

\(^{57}\) See the Schedule to the Commonwealth Constitution.

\(^{58}\) See rec 53 in ICAC, Investigation into Parliamentary and Electorate Travel; Second Report
(December 1998).

\(^{59}\) See the Tasmanian Code of Ethical Conduct for Members of the House of Assembly (SO
2A). The same statement of commitment was recommended by the Queensland Members’
Ethics and Parliamentary Privileges Committee in its Draft Code of Ethical Conduct for
Members of the Queensland Legislative Assembly (May 1998) at 2-3.