

N D T P

STRENGTHENING GOVERNMENT INTEGRITY

11th February, 2020

Senate Finance and Public Administration Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: +61 2 6277 3846
Fax: +61 2 6277 5809
Email: fpa.sen@aph.gov.au

Dear Committee,

Attached is the Accountability Round Table submission to your Committee's inquiry into the National Integrity (Parliamentary Standards) Bill 2019.

We would be pleased to elaborate on this submission or to offer further comment should the Committee desire.

Yours sincerely,

Fiona McLeod AO SC
Chair, Accountability Round Table
<https://www.accountabilityrt.org>

Submission to Inquiry: National Integrity (Parliamentary Standards) Bill 2019

by Adjunct Professor the Hon Dr Ken Coghill BVSc, PhD;¹ Hon Kevin Rozzoli AM, Dip. Law, D.Litt (Honoris Causa);² Professor Charles Sampford LLB Hons, BA, Hons 1 (Melb), DPhil (Oxon).³

This submission draws on the extensive experience of the authors as a parliamentarians (including as Speaker) (Coghill & Rozzoli) and research as university scholars (all three). The Accountability Round Table, of which we all are active members, is a non-partisan organisation that has been active for over a decade in advocating higher standards of parliamentary integrity and accountability < <http://www.accountabilityrt.org/>>.

1. Overview

We **recommend** that the overall structure of the Bill be supported, but that the Bill be amended as argued in the following text.

The structure would help create and enhance a culture of ethical conduct within each House among its Members/Senators, in which discussions of ethical issues and dilemmas are everyday, unexceptional occurrences rather than indications of concern.

¹ Dr Coghill is

- Adjunct Professor, Swinburne University
- Civil society member, Australian Government Open Government Forum
- Board member & Treasurer, Accountability Round Table
- Chair, Australian Open Government Partnership Network
- Former MLA & Speaker, Parliament of Victoria

² Dr Rozzoli is

- Member, Accountability Round Table
- Former MLA & Speaker, Parliament of New South Wales

³ Prof Sampford is

- Board member, Accountability Round Table
- Foundation Dean of Law, Griffith University
- Director, Institute for Ethics, Governance and Law, Griffith University
- Former Foundation Director, ARC Key Centre for Ethics, Law, Justice and Governance
- Leader of joint research on National Integrity Systems with Transparency International (1998-2006)
- Lead researcher on review of the Fitzgerald reforms which recommended the establishment of Queensland's Integrity Commissioner (see "Prior Advice is Better than Subsequent Investigation" in Fleming and Holland *Motivating Ministers to Morality*, Ashgate, London, 2001)

Accountability Round Table Submission to Inquiry: National Integrity (Parliamentary Standards) Bill 2019

The Bill does this through provisions for:

- Values to be reflected in standards of conduct observed and practiced by all Members and Senators;
- An ethics adviser who will be available to provide advice to any Member or Senator on any dilemma or other ethical issue;
- A standards commissioner authorised to investigate alleged breaches;
- Penalties that may be imposed where breaches are proven;
- Statutory registers of Members and Senators interests.

2. Why have standards?

It is widely accepted that organisations produce superior outcomes if the behaviour of their members is according to shared standards of conduct and is orientated to the organisation's performance. As Sampford puts it, "prior advice is better than subsequent investigation".⁴

These standards operate within the context of an integrity system – in Parliament's case, a national integrity system. Most organisations are subject to standards imposed by external rule-making entities but a House of Parliament is a sovereign body that has a high degree of autonomy within its authority entrusted in them by the Constitution and the sovereign power of the people from which is it derived.

It follows that the House should develop its own standards, that those standards should seek to enhance the House's performance of its functions and that those standards must be enforced by the House itself or under authority created by the House.

In-so-far as there are external standards, these are guides only and are not enforceable in themselves though the guides do recommend some measures that should be legislated⁵, as described below.

⁴ Sampford, C. "Prior Advice Is Better Than Subsequent Investigation." In Fleming and Holland *Motivating Ministers to Morality*, Ashgate, London, 2001.

⁵ See explicitly 10.1.4. Other areas may require legislation where there has been a loss of trust in parliament (generally because of past abuses)

3. International standard for parliaments

The international standard for democratic legislatures was set by the “Recommended Benchmarks for Democratic Legislatures”, published by the CPA, the UNDP and the World Bank Institute (2006). A copy accompanies this submission. It recommends:

10. ETHICAL GOVERNANCE

10.1 Transparency and Integrity

10.1.1 Legislators should maintain high standards of accountability, transparency and responsibility in the conduct of all public and parliamentary matters.

10.1.2 The Legislature shall approve and enforce a code of conduct, including rules on conflicts of interest and the acceptance of gifts.

10.1.3 Legislatures shall require legislators to fully and publicly disclose their financial assets and business interests.

10.1.4 There shall be mechanisms to prevent, detect, and bring to justice legislators and staff engaged in corrupt practices.

4. International standard for parliamentary codes of conduct

The CPA commissioned Coghill’s research team (then based at Monash University) to make specific recommendations on codes of conduct, so as to provide guidance to houses of parliament on the design and functioning of codes of conduct. These recommendations were published in 2015 (Coghill was the lead author; a copy accompanies this submission) . The recommendations were based on research drawing on practice and expert opinion from throughout the CPA’s member parliaments and other international expertise. These recommendations have already been used by a number of parliaments in drafting new or revised codes of conduct – most recently the new Victorian parliamentary code of conduct (Part 8 of the *Victorian Independent Remuneration Tribunal and Improving Parliamentary Standards Act 2019 (Vic)*).

5. International standard for integrity: Open Government Partnership

The third international standard relevant to the Australian Parliament is the Open Government Partnership, under which Australia is committed to enhancing the integrity of public institutions. Parliament is clearly a paramount public institution.

Accountability Round Table Submission to Inquiry: National Integrity (Parliamentary Standards) Bill 2019

The Australian Parliament lacks a code of conduct in either House. An attempt to adopt one failed in 2012 – it passed the House of Representatives but not the Senate. The House of Representatives did not take up the opportunity to adopt its own code of conduct which, we argue, would have been more principled than insisting on waiting until the other place had an identical code.

6. Comment on the Bill's Provisions

Title

The title reflects the intent that the legislation forms part of the integrity system, which it aims to strengthen, and that its provisions are not intended to operate stand-alone.

a. Objects

Cl.3

(1) The object of this Act is to promote public trust and confidence in the integrity of the institutions of the Parliament, and of parliamentarians ...,

The latter part of Cl.3(1) referring to “the responsibilities and obligations of parliamentarians reflect community expectations and community standards ...” is vague and difficult to apply whereas, as much as possible, the Bill must be based on identifiable quantities and qualities.

Cl.3 (1)

(c) provide for a register of pecuniary interests for parliamentarians

The adjective pecuniary may be interpreted differently to the current comprehensive provisions that reflect the general description in the Statement of Registrable Interest Explanatory Notes that the:

purpose of the Statement of Registrable Interests form is to place on the public record Members' interests which may conflict, or may be seen to conflict, with their public duty.

Pecuniary interest has a much narrower meaning. For example, it would not include membership of a sporting club which may influence a parliamentarian to act in its interests rather than in the broader public interest. Politicians are generally assumed to have wider interests than monetary ones (there are generally more effective ways of making money than entering politics) and accordingly may be swayed by non-pecuniary interests. Accordingly, we do not

Accountability Round Table Submission to Inquiry: National Integrity (Parliamentary Standards) Bill 2019

support limiting registrable interests to pecuniary interests. Rather, we **recommend** that the bill be amended to read

- (c) provide for a register of parliamentarians' interests which may conflict, or may be seen to conflict, with their public duty

b. Definitions

Cl.7 Definitions

- (1) In this Act:

applicable code of conduct means:

- (a) in the case of a Minister: ...

No case has been made for successive Prime Ministers to be empowered to amend the Ministerial Standards. The current system may leave a Prime Minister with a fundamental and irredeemable conflict of interest if a minister is alleged to have breached the standards. Sacking a minister brings into question the Prime Minister's original appointment and may weaken that PM's support within any coalition of which they are a part or within their party room. A sacked minister may be in a position to reveal facts embarrassing to the PM or even implicate the PM in the actions for which the Minister is sacked. Sacking all of those in breach of the standards may be highly principled but may lead to accusations that there is more wrongdoing in the ministry than others. The PM may be tempted to weaken the code of conduct to avoid such embarrassments. This merely highlights another fundamental and irredeemable conflict of interest – this time in their quasi-legislative role rather than their quasi-judicial role.

If fundamental conflicts of interest prevent the PM from issuing and adjudicating the ministerial code of conduct, who should? Accordingly, Ministerial Standards should be determined by the parliament. The similarities between Ministerial Standards made by recent Prime Ministers of both major parties (i.e. irrespective of political party), suggests that a set of Ministerial Standards could be established with broad support across each House. We **recommend** that the Bill be amended to provide that the Ministerial Standards be made in a similar manner to sub-ordinate legislation, in this case, Ministerial Standards or

Accountability Round Table Submission to Inquiry: National Integrity (Parliamentary Standards) Bill 2019

amendments to them be prepared jointly by the Parliamentary Integrity Adviser and the Parliamentary Standards Commissioner and subject to disallowance by an absolute majority of the Members of the House of Representatives and an absolute majority of members of the Senate.

Accordingly, we **recommend** that the bill be amended so as to provide:-

Cl.7 Definitions

(1) In this Act:

applicable code of conduct means:

- (a) in the case of a Minister - Ministerial Standards made jointly by the Parliamentary Integrity Adviser and the Parliamentary Standards Commissioner, subject to disallowance by an absolute majority of the Members of the House of Representatives and an absolute majority of members of the Senate; or
- (b) in the case of a parliamentarian (including a Minister)—a parliamentary code of conduct adopted by a resolution of that parliamentarian’s House or jointly by both Houses.

The definition of *child*

child: without limiting who is a child of a person for the purposes of this Act, someone is the ***child*** of a person if he or she is a child of the person within the meaning of the *Family Law Act 1975*.

seems unnecessarily convoluted.

In relation to the definition of *civil penalty provision*, we **recommend** that it read:

civil penalty provision means a provision of a law of the Commonwealth or of a State or Territory in relation to a contravention which does not constitute a criminal offence.

The definition of *criminal offence*

criminal offence means an offence against a law, other than a civil penalty provision, of the Commonwealth or of a State or Territory.

should be amended as underlined to avoid the effect of every offence against any law being a criminal offence

The definition of *former parliamentarian*

former parliamentarian means person who was, but is no longer, a member of the Commonwealth Parliament.

Accountability Round Table Submission to Inquiry: National Integrity (Parliamentary Standards) Bill 2019

should be amended as underlined to avoid the unintended consequence of catching former members of state or territory parliaments.

c. Parliamentary Integrity Adviser Appointment

Cl.23 Parliamentary Integrity Adviser

See comment on Cl.71.

d. Confidential advice - gifts and benefits

S.24(1) confidential advice ...

Gifts are included but not other benefits. Accordingly, we **recommend** that

S.24(1) (v) be amended to read: a matter of propriety, including the receipt of a gift or benefit

e. Confidential advice - Involvement with a foreign power

S.24(1) confidential advice ...

Associations with foreign powers have raised ethical concerns but are not specified as a topic on which confidential advice may sought. Listing it as a topic would alert Members and Senators to the ethical risks involved. We **recommend** that they should be included among matters on which advice may be sought and accordingly that the following provision be added:

S.24(1) (vi) ‘a matter relating to involvement with a foreign power’

f. Who may seek advice about others

Clause 26.2 and 26.3 allows the Prime Minister to seek advice about Ministers and former ministers. It should be made clear that this is only with regard to Ministers and former ministers of their own party. It should also only apply to future action, not past action (investigations into which should be conducted by a different official). However, there is a problem in that the Prime Minister may not know all the relevant facts (some of which may not become clear until the Advisor starts asking questions). The Prime Minister should certainly have an interest in the prospective conduct of their ministers and ensure that their Ministers act ethically. It might be better if a Prime Minister instructs the relevant Minister to seek advice from the Advisor in writing and bring back the advice. The Minister may refuse to do so, but at the cost of their ministry.

g. Written advice

Cl. 28 Requirements relating to requests for advice

The basis on which advice on an ethical issue is given by the Ethics Adviser is a key provision of the Bill. At stake is whether advice must be requested formally, in writing, and correspondingly provided in writing in all cases. The effect of such a provision would be to discourage informal discussion of ethical issues with the Adviser and hence reduce and weaken the likelihood more general discussion of such issues. There may well be cases where an MP is unsure of whether contemplated action is ethical or not, seeks advice and the advice is 'don't do it'. If the MP takes the advice then this is an end to the matter and does not have to put on record (even a confidential record, that he was thinking of doing something dodgy). However, such MPs naturally get no protection if they go ahead and act 'do do it'

Cl.28 addresses this issue neatly by leaving a discretion with the Adviser to ask for a request to be made in writing. The Bill provides

Cl.28(1) If requested by the Parliamentary Integrity Adviser, a request for advice ... must be in writing.

and

Cl. 28(3) If the person requests advice in writing, or the Parliamentary Integrity Adviser decides that the advice should be provided in writing, then the advice must be in writing.

This provision enables and encourages discussion of ethical issues as unexceptional day-to-day occurrences which in turn facilitates the strengthening of the House's culture of ethical conduct. It protects the Adviser from finding that her/his oral advice has responded to imprecise or incorrect oral information and enables the Adviser's advice to be provided in corresponding written form. We recommend that these provisions be supported.

a. Parliamentary Standards Commissioner Appointment

Cl. 40 Parliamentary Standards Commissioner
See comment on Cl.81.

b. Referral of alleged or suspected contravention

Cl. 42 Referral of alleged or suspected contravention

In view of the seriousness of the matters involved, allowing anonymous complaints can only lead to mischief and attempts at political assassination. Putting the complaint in writing is some measure of the integrity of the complaint. An additional sub-sub clause should be added as follows:

Cl. 42(1) (d) Any such reference must be in writing and disclose all known facts regarding the allegation.

Cl.42 (2) (b) should be amended correspondingly e.g.:

Cl. 42(2) (b) the person must refer the allegation or information in writing.

c. Report of inquiry

Cl. 46 Report of inquiry

We recommend that Cl.46 be significantly strengthened as follows:

Cl.46 Report of inquiry

Report and its contents

- (1) After completing an inquiry into an alleged or suspected contravention, the Parliamentary Standards Commissioner must prepare a report on the inquiry.
- (2) The report must set out:
 - (a) whether or not there are grounds to sustain the allegation;
 - (b) The reasons for finding that a prima facie case exists to support the allegation; on the contravention; and
 - (b) the evidence and other material on which those findings are based; and
 - (c) any recommendations for further action and the reasons for those recommendations.

This subsection has effect subject to subsections (4) and (5).

- (3) Without limiting paragraph (2)(c), the Parliamentary Standards Commissioner may recommend:
 - (a) taking action to rectify or mitigate the effects of a contravention; or
 - (b) the adoption of measures to remedy deficiencies in policy, procedures or practices that facilitated a contravention; or
 - (c) such actions as the Parliamentary Standards Commissioner considers will assist to resolve a contravention.
 - (d) taking appropriate action to determine whether disciplinary proceedings should be taken against the person or persons involved; or
 - (e) taking appropriate action with a view to having a person or persons charged with a criminal offence; or
- (4) The Parliamentary Standards Commissioner may exclude information from the report if the Parliamentary Standards Commissioner is satisfied that:

Accountability Round Table Submission to Inquiry: National Integrity (Parliamentary Standards) Bill 2019

- (a) the information is sensitive information or the inclusion of the information may:
 - (i) endanger a person's life or physical safety; or
 - (ii) prejudice proceedings that may be brought as a result of an inquiry by another agency ; and
 - (b) ~~it is desirable in the circumstances to exclude the information from the report.~~
- (5) In deciding whether to exclude information from the report under subsection (4), the Parliamentary Standards Commissioner must seek to achieve an appropriate balance between:
- (a) the public interest that would be served by including the information in the report; and
 - (b) the prejudicial consequences that might result from including the information in the report.

Supplementary report

- (6) If the Parliamentary Standards Commissioner excludes information from a report under subsection (4), the Parliamentary Standards Commissioner must prepare a supplementary report that sets out:
- (a) the information; and
 - (b) the reasons for excluding the information from the report under subsection (4).

d. Penalties for failure to comply with parliamentary code of conduct

Cl. 52 Failure to comply with parliamentary code of conduct

Cl. 52 (3) (c) provides for fines to imposed. We believe that this is inappropriate as any penalty should relate directly to the Member's or Senator's role as a member of their House. Accordingly we **recommend** that Cl.52 (3) (c) be omitted from the Bill.

e. Appointment of Parliamentary Integrity Adviser

Cl.71 Appointment of Parliamentary Integrity Adviser

The Bill provides for the selection process to be in the hands of the Presiding Officers, subject to the advice of the respective Privileges Committees. There are many examples of selection and appointment by a parliamentary committee that includes at least one member of the government and one member of the opposition in other jurisdictions (e.g. Queensland and Victoria). The provisions of this Bill have similar effect. We **recommend** that they be supported.

f. Appointment of Parliamentary Standards Commissioner

Cl.81 Appointment of Parliamentary Standards Commissioner

The Bill provides for the selection process to be in the hands of the Presiding Officers, subject to the advice of the respective Privileges Committees. There are many examples of selection and appointment by a parliamentary committee that includes at least one member of the government and one member of the opposition in other jurisdictions (e.g. Queensland and Victoria).). The provisions of this Bill have similar effect. We **recommend** that they be supported..

g. Drafting

There are a numerous provisions that we think could be re-drafted to improve clarity. Attached is a version of the Bill with Track Changes showing suggested revisions which seek to make its intended meaning clearer.

7. Conclusion

The National Integrity (Parliamentary Standards) Bill 2019 addresses the failure of the Parliament to meet the recommended international standard which provides that democratic legislatures should have a code of conduct and the CPA's recommendations for the design and functioning of such codes.

The Bill provides for a code of conduct largely in line with the CPA's recommendations. Accordingly, we strongly urge support for the principles of this Bill, subject to amendments summarised below.

We would be pleased to elaborate on this submission or to offer further comment should the Committee desire.

Recommendations:

- That Cl.3(1) (c) be amended to provide for a register of parliamentarians' interests which may conflict, or may be seen to conflict, with their public duty
- That Cl.7 be amended to provide

Accountability Round Table Submission to Inquiry: National Integrity (Parliamentary Standards) Bill 2019

applicable code of conduct means:

(a) in the case of a Minister - Ministerial Standards made jointly by the Parliamentary Integrity Adviser and the Parliamentary Standards Commissioner, subject to disallowance by an absolute majority of the Members of the House of Representatives and an absolute majority of members of the Senate; or

(b) in the case of a parliamentarian (including a Minister)—a parliamentary code of conduct adopted by a resolution of that parliamentarian’s House or jointly by both Houses.

- That the provision in Cl.7 “**child**: without limiting who is a child of a person for the purposes of this Act, someone is the child of a person if he or she is a child of the person within the meaning of the Family Law Act 1975” be reviewed with a view to substituting a less convoluted provision.
- That Cl.7 be amended to provide that **civil penalty** provision means a provision of a law of the Commonwealth or of a State or Territory in relation to a contravention which does not constitute a criminal offence.
- That Cl.7 be amended to provide that **criminal offence** means an offence against a law, other than a civil penalty provision, of the Commonwealth or of a State or Territory.
- That Cl.7 be amended to provide that **former parliamentarian** means person who was, but is no longer, a member of the Commonwealth Parliament.
- That S.24(1) (v) be amended to provide: a matter of propriety, including the receipt of a gift or benefit
- That S.24(1) be amended to include (vi) ‘a matter relating to involvement with a foreign power’
- That Cl. 28 requirements relating to requests for advice be supported.
- That Cl. 42(2) (b) be amended to provide that the person must refer the allegation or information in writing.
- That Cl.46 be significantly strengthened (as shown above)
- That Cl.52 (3) (c) be omitted from the Bill
- That Cl.71 provisions for appointment of of the Parliamentary Integrity Adviser be supported
- That Cl.81 provisions for appointment of the Parliamentary Standards Commissioner be supported

Attachment 1: Recommended Benchmarks for Democratic Legislatures
(Commonwealth Parliamentary Association, UNDP & World Bank Institute)

Attachment 2: Recommended Benchmarks for Codes of Conduct applying to
Members of Parliament (Commonwealth Parliamentary Association)

Attachment 3: Version of the Bill with Track Changes showing suggested minor
revisions < ART Parliamentary Standards Bill (drafting revisions).docx>.