The Centre for Public Integrity

Committee Secretary
Senate Finance and Public Administration References Committee
By email

20 September 2021

Dear Secretary,

Inquiry into the administration and expenditure of funding under the Urban Congestion Fund (UCF)

Thank you for the opportunity to make a submission to this Committee.

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Tony Fitzgerald AC QC, the Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham and Geoffrey Watson SC.

If you have any questions relating to the submission, or if we can be of further assistance, please do not hesitate to contact us.

Yours sincerely,

Dr Catherine Williams
Research Director
The Centre for Public Integrity

"the position is not that of a person proposing to expend moneys of his own. It is public moneys that are involved"

Dixon C.J., Williams, Webb, Fullagar and Kitto JJ
Australian Woollen Mills Pty Ltd v The Commonwealth (1954) 92 CLR 424 at 37

Executive summary

Ensuring that public funds are used for proper purposes is an issue in which Australians have a significant and undeniable interest: the funds do, after all, belong to them.

The spending of public funds through Commonwealth grants programs is becoming increasingly contentious, in light of successive reports of misuse of funds for political gain – a form of corruption otherwise known as 'pork-barrelling' – in cases like the Safer Communities Fund and Sports Grants. Most recently, the ANAO's audit of the Commuter Car Parks Project (part of the Urban Congestion Fund [***UCF***]) has provided valuable insight into the way in which the Commonwealth manages the distribution of public funds.

With a significant proportion of the federal budget being allocated via grants programs, the need for adequate scrutiny and accountability mechanisms in relation to grants administration is self-evident. Further impetus for strengthening scrutiny and accountability is found in the work of the Australian National Audit Office on Commonwealth grant administration: since 2019, 100% of audits by the Australian National Audit Office in respect of the administration of grants programs allocating more than $5.5 billion in public funds (with the potential to allocate significantly more than that) have identified flaws ranging from minor areas for improvement to serious deficiencies.[1]

Recommendations

Addressing the current, flawed system of Commonwealth grant expenditure sees the convergence of multiple, urgent institutional reforms: improved parliamentary oversight of Commonwealth spending, a strengthened legislative framework and an independently enforced Code of Conduct, and a fit-for-purpose National Integrity Commission.

i. Improved parliamentary oversight

One critical way of achieving improved accountability and transparency is bolstering Parliament's oversight function in respect of grant administration. The Commonwealth Parliamentary Association recommends that in order for parliaments to be able to undertake financial scrutiny in an effective way, they be given access to adequate

[1] The relevant audits (all of which are available at the website of the Australian National Audit Office at https://www.anao.gov.au/pubs) include the following: *Award of a $443.3 Million Grant to the Great Barrier Reef Foundation, Award of Funding under the Community Sport Infrastructure Program, Award of Funding under the Supporting Reliable Energy Infrastructure Program, Administration of Commuter Car Park Projects within the Urban Congestion Fund, Award of Funding Under the Regional Jobs and Investment Packages, Implementation of the Great Barrier Reef Foundation Partnership, Indigenous Advancement Strategy — Children and Schooling Program and Safety and Wellbeing, Australian Research Council's Administration of the National Competitive Grants Program*, and *Grant Program Management by the Australian Renewable Energy Agency*.

financial scrutiny resources;[2] currently, the Commonwealth Parliament's ability to perform its scrutiny function is circumscribed by the inadequacy of mechanisms in place to support that function. In order to remedy this, and promote transparency and accountability, the Centre for Public Integrity calls for the following reforms in respect of grant programs worth more than $100 million:

1. Grant approval criteria, including merit selection criteria and program guidelines, be set out in primary legislation.
2. Departments be required to periodically table in Parliament documentation pertaining to grant administration.
3. A joint standing committee be established in order to oversee grant administration and report to the Parliament.

These proposed reforms are elaborated upon in our briefing paper "Scrutinizing grant administration: key reforms" (Appendix A).

ii. Improved applicability and enforceability of existing mechanisms

It is essential to extend the application of the Commonwealth Grants Rules and Guidelines beyond non-corporate Commonwealth entities to a broader category of cases, in order to make them applicable to corporate Commonwealth entities, like Sport Australia, as well as to grants made to the States via s 96 of the Constitution and the *Federal Financial Relations Act 2009* (Cth), and to local government under the *Local Government (Financial Assistance) Act 1995* (Cth).

There is also a clear case for an appropriate, independently enforced Code of Conduct applicable to all parliamentarians and political staffers (Appendix B).

Finally, in the same way that ordinary citizens are liable to the imposition of a penalty for breaching laws applicable to them, consequences must exist for Ministers and officials who breach the requirements of the existing legislative framework applicable to them. This in turn requires the long-overdue establishment of a National Integrity Commission with the requisite powers and resources to investigate and report on cases which may involve broadly-defined corrupt conduct.

The case for reform

Since 2019, 100% of audits by the Australian National Audit Office (***ANAO***) in respect of the administration of grants programs allocating more than $5.5 billion in public funds have identified flaws ranging from minor areas for improvement to serious deficiencies.[3]

In the case of the Regional Jobs and Investments Packages, for example, the ANAO concluded that "*Applications were not soundly assessed in accordance with the program*

[2] Commonwealth Parliamentary Association, "*Recommended benchmarks for democratic legislatures*", https://www.cpahq.org/media/l0jjk2nh/recommended-benchmarks-for-democratic-legislatures-updated-2018-final-online-version-single.pdf accessed 6 July 2021 at para 2.6.

[3] The relevant audits (all of which are available at the website of the Australian National Audit Office at https://www.anao.gov.au/pubs) include the following: *Award of a $443.3 Million Grant to the Great Barrier Reef Foundation, Award of Funding under the Community Sport Infrastructure Program, Award of Funding under the Supporting Reliable Energy Infrastructure Program, Administration of Commuter Car Park Projects within the Urban Congestion Fund, Award of Funding Under the Regional Jobs and Investment Packages, Implementation of the Great Barrier Reef Foundation Partnership, Indigenous Advancement Strategy — Children and Schooling Program and Safety and Wellbeing, Australian Research Council's Administration of the National Competitive Grants Program*, and *Grant Program Management by the Australian Renewable Energy Agency*.

guidelines".[4] In respect of the award of a $433.4 million grant to the Great Barrier Reef Foundation, it reported that there was "*insufficient scrutiny of the foundation's proposal in three key areas examined*".[5] The agency's report into the administration of sports grants concluded that "*the award of grant funding was not informed by an appropriate assessment process and sound advice"*, [6] and, in respect of the Supporting Reliable Energy Infrastructure Program the ANAO found that the award of funding "*was not fully informed by an appropriate assessment process and sound advice on the award of grant funding. Aspects of the approach did not comply with the Commonwealth Grant Rules and Guidelines"*.[7]

Most recently, the ANAO's audit of the Commuter Car Parks Project within the UCF has given rise to grave concerns about the way in which the Commonwealth manages public funds.

Case study: Commuter Car Parks Project

The Commonwealth's administration of the $660 million Commuter Car Parks Project within the Urban Congestion Fund has attracted significant criticism. In its audit of the project, the ANAO concluded that "*Project distribution reflected the geographic and political profile of those given the opportunity to identify candidate projects for funding consideration*".[8]

It further concluded that electorates held by the Coalition were "*twice as successful in attracting funding as those held by the ALP at the time of selection",*[9] and that *"the geographic distribution of projects did not reflect the distribution of key factors relevant to the achievement of the policy objectives"*.[10]

Of the Department's role in the process, the ANAO had the following to say:

> *Insufficient assessment work has been undertaken by the department to satisfy itself that projects are eligible for funding under the National Land Transport Act 2014. In relation to the merits of projects, the department did not seek to establish assessment criteria, and the assessment work has not adequately demonstrated that approved projects will provide value for money.*[11]

4 Australian National Audit Office, "*Award of Funding Under the Regional Jobs and Investment Packages*", https://www.anao.gov.au/work/performance-audit/award-funding-under-the-regional-jobs-and-investment-packages accessed 6 July 2021, at para 13.
5 Australian National Audit Office, "*Award of a $443.3 Million Grant to the Great Barrier Reef Foundation*", https://www.anao.gov.au/work/performance-audit/award-4433-million-grant-to-the-great-barrier-reef-foundation accessed 6 July 2021, at para 13.
6 Australian National Audit Office, "*Award of Funding under the Community Sport Infrastructure Program*", https://www.anao.gov.au/work/performance-audit/award-funding-under-the-community-sport-infrastructure-program accessed 6 July 2021, at para 7.
7 Australian National Audit Office, "*Award of Funding under the Supporting Reliable Energy Infrastructure Program*", https://www.anao.gov.au/work/performance-audit/award-funding-under-the-supporting-reliable-energy-infrastructure-program accessed 6 July 2021, at para 8.
8 Australian National Audit Office, "*Administration of Commuter Car Park Projects within the Urban Congestion Fund*", https://www.anao.gov.au/work/performance-audit/administration-commuter-car-park-projects-within-the-urban-congestion-fund accessed 17 September 2021 at para 2.2.
9 Ibid at para 3.68.
10 Ibid at para 3.69.
11 Ibid at para 12.

It is verging on incomprehensible that upwards of $660 million of public money could be expended without any published guidelines, eligibility criteria or merit criteria, and via a process that was not competitive.[12]

It has also been confirmed by the Deputy Auditor-General that in the process of determining how to allocate funds, a "marginal electorate list" was shared between the offices of Prime Minister Scott Morrison and then-Infrastructure Minister Allan Tudge.[13] Presumably, such a document was shared as part of the fund-allocation process because an electorate's status as marginal or otherwise was a relevant consideration: this is, clearly, a startlingly problematic proposition.

In response to an ANAO request for evidence of authority to select one of the car park sites, the Prime Minister's office provided a copy of a press release and advised that "*There is precedent established by the Department for the Prime Minister and Cabinet that a media announcement by the Prime Minister constitutes relevant authority to progress a project*".[14] So-called 'precedent' as authority for what seems to be an inappropriately casual attitude to the allocation of taxpayers' money is alarming. Moreover, the authorisation of the commitment of taxpayers' money via press release should be abandoned in favour of more formally documented practices (we note that the ANAO also found the record of authority for the selection of the Gosford site to be incomplete).[15]

The Commuter Car Park Fund also highlights a broader difficulty associated with the Commonwealth's approach to the use of public funds: its reliance on s 96 of the Constitution to make grants in areas where it would otherwise lack a constitutional head of power.

As Dr Brendan Gogarty has observed, the Commonwealth has been permitted to "*construct increasingly liberal s 96 schemes, which treat the states largely as conduits of Commonwealth spending on matters lying outside the limits of its legislative power*".[16]

While we recognise that it is overwhelmingly unlikely (nigh impossible) that the Commonwealth will abandon this practice – which benefits it by permitting it to appeal to voters via spending commitments in areas where it is otherwise precluded from spending – in the absence of a judicial decision requiring it do so, we nonetheless exhort it to respect the constitutional bounds of its powers and act accordingly.

Existing constraints on grant expenditure

Various constraints exist upon grant expenditure: these include the Constitution; the requirement that there be legislative authority to spend; the Statement of Ministerial Standards; the requirements of administrative law; and the grant administration framework established by the *Public Governance, Performance and Accountability Act 2013* (Cth) (***PGPA Act***), the *Public Governance, Performance and Accountability Rule 2014* (Cth) (***PGPA Rule***), and the Commonwealth Grant Rules and Guidelines (***CGRGs***).

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[12] Ibid at para 1.12.
[13] Shane Wright and Katina Curtis, "Railway station plans parked in ministers' offices" in *The Sydney Morning Herald*, https://www.smh.com.au/politics/federal/railway-station-plans-parked-in-ministers-offices-20210912-p58qxd.html accessed 17 September 2021.
[14] Above n 8 at para 3.9.
[15] Above n 8 at 3.8.
[16] Brendan Gogarty, "*Making sense of s 96: Tied Grants, Contextualism and the Limits of Federal Fiscal Power*", Melbourne University Law Review Vol 42(2):455 at 458.

Yet spite of the existence of these constraints, there continue to be reports of significant maladministration of grants programs. It is instructive to examine the constraints in detail, in order to identify areas for improvement (though not all are directly relevant to the UCF case).

Constitution

The prime constraint on ministerial spending is, at least theoretically, the Constitution: as the High Court held in *Pape v Commissioner of Taxation* (2009) 238 CLR 1, Commonwealth spending must be supported by a constitutional head of legislative or executive power in order to be valid. In reality, as Professor Anne Twomey AO has explained, the Commonwealth funds many programs lacking a clear constitutional head of power – a practice that has continued in the wake of *Pape* because of the low 'constitutional risk' associated with it ('constitutional risk' refers to the likelihood that someone with standing will bring a challenge).[17] That the executive persists with this approach is both intolerable and indefensible.

Legislative authority

The High Court held in *Williams v Commonwealth* (2012) 248 CLR 156 *(Williams (No 1))* that parliamentary authorisation – beyond the mere appropriation of funds – is a precursor to the expenditure of public money (except for where the spending is for the ordinary administration of the functions of government, or in support of prerogative powers).

The various legislative bases available include specific legislation, s 23 of the PGPA Act, and, in the wake of Williams (No 1), s 32B of the *Financial Framework (Supplementary Powers) 1997 Act* (Cth). Under the latter section, all grants and programs enumerated in the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) purportedly have legislative authority; Professor Twomey has made the following critique of the provision:

> *The use of regulations to identify these programs meant that more could be added by the Commonwealth at any time without the need for direct parliamentary scrutiny that would otherwise have been required for the passage of legislation. Further, the descriptions of the listed programs were often so broad that almost anything could be included within them. Examples include expenditure of public money for "Regulatory Policy", "Diversity and Social Cohesion" and "Regional Development". Many of the listed programs had no apparent constitutional head of power to support them. Again, reliance was placed upon the fact that it was unlikely that anyone would challenge them. The 'constitutional risk' was again regarded as low."*[18]

Statement of Ministerial Standards

Australia's Statement of Ministerial Standards, which is enforceable by the Prime Minister alone rather than an independent authority, sets out principles with which Ministers must comply in carrying out their duties.[19]

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[17] Anne Twomey, *"Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay*, Canadian Journal of Comparative and Contemporary Law, 7, 293-341 at 293.
[18] Ibid at 304.
[19] Paragraph 7.2 states that Ministers "will be required to stand aside […] if the Prime Minister regards their conduct as constituting a prima face breach of these Standards".

Specifically, they must act with integrity, observe fairness in decision-making, accept accountability and accept "*the full implications of the principle of ministerial responsibility*" (paragraph 1.3). Furthermore, they must act in a way consistent with advancing the public interest when making decisions or in connection with their official capacity (paragraph 1.4).

The Statement describes the requirement that Ministers act with integrity as involving "*the lawful and **disinterested** [emphasis added] exercise of the statutory and other powers available to their office, [and] appropriate use of the resources available to their office for public purposes, in a manner which is appropriate to the responsibilities of the Minister*" (paragraph 1.3(i)). The requirement to observe fairness in making official decisions is expressed as requiring that Ministers "*act honestly and reasonably, with consultation as appropriate to the matter at issue, taking proper account of the merits of the matter, and giving due consideration to the rights and interests of the persons involved, and the interests of Australia*" (paragraph 1.3(ii)).

It is our submission that the reported sharing between the Prime Minister and then-Infrastructure Minister of a marginal electorate spreadsheet as part of the UCF funds-allocation process raises doubts about – amongst other things – whether the exercise of powers in this case was disinterested, or reasonable, or took proper account of the merits of the matter.

The potential involvement of the Prime Minister in such conduct also reveals the futility of having a Statement that is enforceable by the Prime Minister alone: if circumstances required it, would he enforce it against himself?

Administrative law requirements

Ministerial decision-making that does not comply with the requirements of administrative law is vulnerable to challenge. Some of these requirements include the need for ministerial decision-making to uphold natural justice, to observe the procedures required by law to be observed, to be based on evidence or other material, and to not involve an improper exercise of the relevant power.

Specific legislative framework

The specific legislative framework governing Commonwealth grant expenditure consists of the *Public Governance, Performance and Accountability Act 2013* (Cth), the *Public Governance, Performance and Accountability Rule 2014* (Cth), and the Commonwealth Grant Rules and Guidelines.

Public Governance, Performance and Accountability Act 2013 (Cth)

The *Public Governance, Performance and Accountability Act 2013* (Cth) (***PGPA Act***) provides for the use and management of public resources by the Commonwealth and Commonwealth entities.

Division 9 of Part 2-4 of that Act sets out provisions relating only to Ministers. These include s 71(1), which requires that a Minister "*must not approve a proposed expenditure of relevant money unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money*"; "proper" is defined in s 8 of the Act to mean "*efficient, effective, economical and ethical*". Division 9 also includes s 71(3)(b), which requires that Ministers must "*comply with any other requirements prescribed by the rules in relation to the approval*", and s 71(2), which requires that where a Minister

approves a proposed expenditure, they must record the terms of the approval and comply with any other relevant requirements established by the rules.

Commonwealth Grant Rules and Guidelines

Section 105C of the PGPA Act enables the Finance Minister to make provision about grants by the Commonwealth.

The Minister has done so in the form of the Commonwealth Grants Rules and Guidelines (***CGRGs***), which **"***establish the overarching Commonwealth grants policy framework and articulate the expectations for all non-corporate Commonwealth entities in relation to grants administration*".[20]

It must be acknowledged at the outset that by virtue of paragraph 2.6 of the CGRGs, which enumerates certain kinds of financial arrangements that are taken not be grants, payments made under the UCF are not grants for the purposes of the CGRGs because they are made to the States, pursuant to the *Federal Financial Relations Act 2009* (Cth). However, as the ANAO concluded, payments made under the UCF share many of the characteristics of grants:[21] indeed, we can see no persuasive reason for not extending the application of the CGRGs to cover payments such as those made under the UCF (and indeed those made to State and Territory governments under s 96 of the Constitution, and to local governments under the *Local Government (Financial Assistance) Act 1995* (Cth)). There is every reason to do so if integrity is to be achieved.

The administration of payments under the UCF would have benefitted from a number of accountability and transparency mechanisms for which the CGRGs provide.[22]

Paragraph 3.4 of the CGRGs requires that, in undertaking grants administration, accountable authorities and officials consider their obligations under the PGPA Act and Rule; it further requires that internal guidelines, operational guidance and grant opportunity guidelines are consistent with the requirements of the PGPA Act and Rule.

Paragraph 4.4 requires that officials must – amongst other things – develop grant opportunity guidelines for all new grant opportunities, and where a Minister is considering proposed expenditure of relevant money for a grant, officials must provide the Minister with advice in respect of the applicable requirements of the PGPA Act, the Rule, and the CGRGs.

Furthermore, a Minister must not approve proposed expenditure in relation to a grant or group of grants "*without first receiving written advice from officials on the merits of the proposed grant or group of grants*": paragraph 4.10. In addition, the Minister must record in writing the basis for approval "*relative to the grant opportunity guidelines and the key principle of achieving value with relevant money*": paragraph 4.10 (this is precisely what did not happen in the administration of Sports Grants).

[20] CGRGs paragraph 1.2.
[21] Above n 8, footnote 10.
[22] Part 2 of the Rules contains guidance on the key principles for grants administration: insofar as it is not mandatory in application, it has not been examined here.

Enforcement

Neither the PGPA nor the CGRGs impose any penalties for breach of their provisions; while there may be consequences for breach by officials via the Australian Public Service Code of Conduct, the Statement of Ministerial Standards is not independently enforceable and the political reality that a Prime Minister has a strong incentive to minimise any ministerial wrongdoing militates against current enforcement arrangements being effective.

Enforcement of the constitutionality of Commonwealth expenditure of public funds, as well as the requirements that it have legislative authority and comply with the specific framework created by the PGPA Act, PGPA Rule and CGRGs, is effectively left to whoever has the motivation, standing and resources to pursue such matters. This is evinced by the cases of *Pape* (in which Bryan Pape, a constitutional law academic who found himself with standing to challenge unlawful executive spending when the Rudd Government in 2009 paid a tax bonus to all Australian residents who met specific requirements for the 2007-08 financial year), the two *Williams* cases (in which Toowoomba father Ron Williams challenged executive spending on the chaplaincy program at his children's school), and the challenges currently on foot in the Federal Court, brought by the Beechworth Lawn Tennis Club and NT Environment Centre (in relation to the administration of sports grants and the Beetaloo Basin fracking program, respectively).

Conclusion

There is much to be done in order to improve transparency and accountability in respect of the expenditure of public funds, and a clear impetus to do so.

Recommendations

i. Improved parliamentary oversight

One critical way of achieving improved accountability and transparency is bolstering Parliament's oversight function. This could be facilitated by implementing the following reforms in respect of programs worth more than $100 million:

1. Grant approval criteria, including merit selection criteria and program guidelines, be set out in primary legislation.
2. Departments be required to periodically table in Parliament documentation pertaining to grant administration.
3. A joint standing committee be established in order to oversee grant administration and report to the Parliament.

ii. Improved applicability and enforceability of existing mechanisms

There is also a need to extend the application of the Commonwealth Grants Rules and Guidelines beyond non-corporate Commonwealth entities, to grants made by corporate Commonwealth entities, by the States via s 96 of the Constitution and the *Federal Financial Relations Act 2009* (Cth), and by local government under the *Local Government (Financial Assistance) Act 1995* (Cth).

There is also a clear case for the adoption of an appropriate and independently enforced Code of Conduct for parliamentarians and political staffers.

Finally, consequences must exist for Ministers and officials who breach the requirements of the existing legislative framework applicable to them, and a fit-for-purpose National Integrity Commission with the requisite powers and resources to investigate and report on cases which may involve broadly-defined corrupt conduct must be established.

APPENDIX A

The Centre for Public Integrity

Scrutinizing grant administration: key reforms

Briefing paper **July 2021**

Executive summary

Over the past two years, reports from the Australian National Audit Office (***ANAO***) in respect of Commonwealth grant administration have revealed substantial deficiencies. Specifically, since 2019 100% of ANAO audits in respect of grant administration have found the relevant programs – which distribute more than $5.5 billion of public money, with capacity to distribute vastly more than that – to be flawed, with problems identified ranging from minor areas for improvement to serious maladministration.

These findings make a strong case for bolstering transparency and accountability, and Parliament's oversight function in respect of grant administration. The Commonwealth Parliamentary Association recommends that in order for parliaments to be able to undertake financial scrutiny in an effective way, they be given access to adequate financial scrutiny resources;[23] currently, the Commonwealth Parliament's ability to perform its scrutiny function is circumscribed by the inadequacy of mechanisms in place to support that function. In order to remedy this, and promote transparency and accountability, the Centre for Public Integrity calls for the following reforms in respect of grants worth more than $100 million:

4. Grant approval criteria, including merit selection criteria and program guidelines, be set out in primary legislation.
5. Departments be required to periodically table in Parliament documentation pertaining to grant administration.
6. A joint standing committee be established in order to oversee grant administration and report to the Parliament.

The need for change

The urgent need to reform oversight of government grant programs is clear from multiple ANAO Reports: since 2019, 100% of audits in respect of the administration of grants programs allocating more than $5.5 billion in public funds have identified flaws ranging from minor areas for improvement to serious deficiencies.[24]

[23] Commonwealth Parliamentary Association, "*Recommended benchmarks for democratic legislatures*", https://www.cpahq.org/media/l0jjk2nh/recommended-benchmarks-for-democratic-legislatures-updated-2018-final-online-version-single.pdf accessed 6 July 2021 at para 2.6.

[24] The relevant audits (all of which are available at the website of the Australian National Audit Office at https://www.anao.gov.au/pubs) include the following: *Award of a $443.3 Million Grant to the Great Barrier Reef Foundation, Award of Funding under the Community Sport Infrastructure Program, Award of Funding under the Supporting Reliable Energy Infrastructure Program, Administration of Commuter Car Park Projects within the Urban Congestion Fund, Award of Funding Under the Regional Jobs and Investment Packages, Implementation of the Great Barrier Reef Foundation Partnership, Indigenous Advancement Strategy — Children and Schooling Program and Safety and Wellbeing, Australian Research Council's Administration of the National Competitive Grants Program*, and *Grant Program Management by the Australian Renewable Energy Agency*.

In the case of the Regional Jobs and Investments Packages, the ANAO concluded that "*Applications were not soundly assessed in accordance with the program guidelines*";[25] in respect of the award of a $433.4 million grant to the Great Barrier Reef Foundation, it reported that there was "*insufficient scrutiny of the foundation's proposal in three key areas examined*".[26]

The agency's report into the administration of sports grants concluded that "*the award of grant funding was not informed by an appropriate assessment process and sound advice"*, [27] and, in respect of the Supporting Reliable Energy Infrastructure Program the ANAO found that the award of funding "*was not fully informed by an appropriate assessment process and sound advice on the award of grant funding. Aspects of the approach did not comply with the Commonwealth Grant Rules and Guidelines"*.[28]

Most recently, an audit of the Commuter Car Parks Project within the Urban Congestion Fund reported that "*Project distribution reflected the geographic and political profile of those given the opportunity to identify candidate projects for funding consideration*",[29] and the ANAO is set to report on administration of the Safer Communities Fund in February 2022 (following allegations that government ministers redirected monies from the Fund to applicants not supported by their own Department, and frequently to applicants in safe Coalition or marginal Labor seats). [30]

It has been alleged that the manner in which some of these programs have been administered constitutes 'pork-barrelling',[31] the consequences of which have been described in the following terms by Professor Anne Twomey AO:

> *'Pork-barrelling' undermines the fairness of elections and aids democratic decay by heightening public distrust of politicians and the efficacy of the system of government. Making grants on the basis of political advantage, rather than merit and needs, results in the unfair distribution of public funds, the funding of unworthy or unviable projects,*

25 Australian National Audit Office, "*Award of Funding Under the Regional Jobs and Investment Packages*", https://www.anao.gov.au/work/performance-audit/award-funding-under-the-regional-jobs-and-investment-packages accessed 6 July 2021, at para 13.
26 Australian National Audit Office, "*Award of a $443.3 Million Grant to the Great Barrier Reef Foundation*", https://www.anao.gov.au/work/performance-audit/award-4433-million-grant-to-the-great-barrier-reef-foundation accessed 6 July 2021, at para 13.
27 Australian National Audit Office, "*Award of Funding under the Community Sport Infrastructure Program*", https://www.anao.gov.au/work/performance-audit/award-funding-under-the-community-sport-infrastructure-program accessed 6 July 2021, at para 7.
28 Australian National Audit Office, "*Award of Funding under the Supporting Reliable Energy Infrastructure Program*", https://www.anao.gov.au/work/performance-audit/award-funding-under-the-supporting-reliable-energy-infrastructure-program accessed 6 July 2021, at para 8.
[29] Australian National Audit Office, "*Administration of Commuter Car Park Projects within the Urban Congestion Fund*", https://www.anao.gov.au/work/performance-audit/administration-commuter-car-park-projects-within-the-urban-congestion-fund accessed 6 July 2021, at para 22.
[30] David Crowe, "*Government diverted cash from $31m safer communities grants to ineligible projects*", The Age https://www.theage.com.au/politics/federal/government-diverted-cash-from-31m-safer-communities-grants-to-ineligible-projects-20210503-p57oem.html?utm_medium=Social&utm_source=Twitter#Echobox=1620299708 accessed 6 July 2021; Katina Curtis, "*Dutton diverted grant money to handpicked safety upgrades in marginal seats*", The Age https://www.smh.com.au/politics/federal/dutton-diverted-grant-money-to-handpicked-safety-upgrades-in-marginal-seats-20210211-p571lu.html accessed 6 July 2021.
[31] Richard Willingham, "*Allegations of pork barrelling as car parks promised in 2019 federal election lead-up ditched"* https://www.abc.net.au/news/2021-05-18/victoria-car-park-projects-pork-barrelling-allegations/100146922, ABC news accessed 6 July 2021; Matthew Doran, "'*Sports rorts' inquiry says federal government tried to avoid handing over evidence*", ABC news accessed 6 July 2021.

the inefficient allocation of scarce resources, poor planning and a lack of coordination with other levels of government in providing appropriate local facilities.[32]

Key reforms

Central to improving the administration of government grant programs is bolstering transparency, accountability and the Parliament's ability to perform its oversight function in respect of the expenditure of public funds**.** Parliament's ability to fulfil this function depends on it being able to access sufficient financial information, which would be facilitated by the following key reforms. In order to avoid excessive administration burden, these reforms are proposed to apply to grant programs worth more than $100 million.

1. Grant approval criteria established in primary legislation

Primary legislation should include grant merit selection criteria and program guidelines, in order to enhance transparency and accountability and enable the Parliament to perform a real and meaningful role in respect of the use of public funds. In the case of the Commuter Car Parks Project, there were no established merit selection criteria or program guidelines. Rather, the ANAO reports that a series of investment principles were agreed by government: these were not released publicly.[33]

This measure would also help avoid scenarios like that encountered in respect of the administration of sports grants, where the ANAO concluded that the legal authority for the Minister's approval role in the process was unclear;[34] furthermore, it would ensure that there is legislative authority for government grant-making.

2. Departments table in Parliament documentation pertaining to grant administration

Parliamentary oversight of grant administration would be assisted by a requirement that Departments to table in Parliament documentation pertaining to grant administration at specific points of the grant making process. Such points could include tender, selection and delivery.

This would also encourage appropriate departmental record-keeping, which was found to be deficient in the Commuter Car Parks Project audit[35] and capable of being improved in the sports grants audit.[36]

3. A joint standing committee oversee grant administration and report to Parliament

Committees can play a valuable information and transparency role – both of which are currently lacking in relation to government grant administration.

A committee whose sole functions are to oversee grant administration in relation to all portfolios, and report to the Parliament, is an essential element of any framework aiming to scrutinize expenditure of public funds. Such a committee could report on a quarterly

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[32] Anne Twomey, "*Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay*" in *Canadian Journal of Comparative and Contemporary Law*, 2021, vol 7, 293-341.
[33] Above n 7, at 3.32.
[34] Above n 5, at para 8.
[35] Above n 7, at para 10.
[36] Above n 5, at para 3.

basis throughout the administration of any grant worth in excess of $100 million, with a discretion to report more frequently if necessary.

Any such committee must be multi-party, in order to give effect to the Commonwealth Parliamentary Association's recommendation that scrutiny committees should ensure "*meaningful opportunities for minority or opposition parties and independent MPs to engage in effective oversight of government expenditures*".[37]

Conclusion

The need to enhance oversight of government grant administration is clear.

In order to facilitate transparency, accountability and promote Parliament's ability to effectively scrutinize executive spending, it is essential that grant selection criteria and program guidelines be set out in primary legislation, and Parliament be enabled to access adequate financial information – via a tabling requirement and dedicated parliamentary committee – at defined points in the administration of grants.

About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Tony Fitzgerald AC QC, the Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham and Geoffrey Watson SC. More information at www.publicintegrity.org.au.

[37] Above n 1 at para 7.2.3.

APPENDIX B

Code of Conduct

The Centre for Public Integrity

Discussion paper **June 2021**

"Good conduct is crucial as it can help uncover and deter unethical behaviour and corruption. Good conduct is also crucial because it builds trust - when there are trusting relationships between the people, parliament and other institutions, democracy works at its best. When people trust that their elected representatives are acting in their best interests, this helps legitimise our parliaments and our democratic systems. Good conduct is also crucial because it is fundamental to the effectiveness of parliament in fulfilling its essential roles of legislating, approving budgets, scrutinising Executive Government and representing the public interest."[38]

Executive Summary

As far back as 1975 and as recently as 2020, the issue of whether Australia requires a parliamentary code of conduct has arisen for consideration.

In its 1975 *Report on declaration of interests,* the Joint Committee on Pecuniary Interests of Members of Parliament concluded that "a precise and meaningful code of conduct should exist";[39] it suggested that this code should apply to conflict of interest situations, and specify a set of basic principles which Members of Parliament should observe.[40]

Yet in 2021 such a code remains to be implemented. With ongoing allegations of MP misconduct met with no real consequence, Australia's weak parliamentary ethical standards framework must be strengthened.

This paper analyses and compares approaches taken in the UK, Canada and New Zealand and finds that Australia has weakest regime for holding parliamentarians and political staffers to account. Based on international experience, the Centre for Public Integrity recommends a series of design principles to guide the creation of an appropriate code:

- Any code should combine broad principles with specific rules, enabling breach and the imposition of consequences to occur;
- Any code should be enforceable by an independent authority, modelled on Canada's Conflict of Interest and Ethics Commissioner and the UK's Commissioners for Standards; and

[38] Commonwealth Parliamentary Association and Monash University, "*Recommended Benchmarks for Codes of Conduct applying to Members of Parliament",* February 2016.
[39] Joint Committee on Pecuniary Interests of Members of Parliament, *Report on declaration of interests*, Commonwealth of Australia, Canberra, 30 September 1975, p. 12.
[40] Ibid.

- Any code should be of appropriate scope and applicability: in circumstances where certain provisions of the Australian Public Service Code of Conduct apply to public servants' personal conduct, codes applicable to parliamentarians and political staffers should be of the same scope. Any code should extend to bullying and sexual misconduct.

The case for a parliamentary code of conduct

Both the Inter-Parliamentary Union and the Commonwealth Parliamentary Association endorse the adoption of an enforceable code of conduct,[41] and amongst comparable jurisdictions – namely, the United Kingdom, New Zealand and Canada – Australia is singular for its failure to enact either a code of conduct applicable to all parliamentarians, or a code applicable to political staffers (see Figure 1): both the UK and Canada have independently-enforced codes applicable to parliamentarians,[42] and New Zealand joins them in having a code applicable to political staffers.

In the Inter-Parliamentary Union's (***IPU***) 2006 "'*Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice*", the implementation of standards and an enforceable code of conduct are identified as some of the procedural means via which accountability of a parliament can be realised (accountability is described by the IPU as one of the key characteristics of a democratic parliament).[43]

The Commonwealth Parliamentary Association's "*Recommended Benchmarks for Democratic Legislatures*" recommends that legislatures "approve and enforce codes of conduct, including rules on conflicts of interest and the acceptance of gifts". [44]

At a broader societal level, articulation by a legislature of the ethical standards its members are expected to uphold is inherently valuable: as Grattet and Jenness have acknowledged, "Promoting powerful symbols of what should be valued and what should be derided in society is no small thing".[45]

The below analysis reveals the weakness of the Australian approach to regulating parliamentary standards relative to the approaches taken in the United Kingdom, Canada and New Zealand, and makes recommendations designed to redress the dearth of appropriate regulation at a federal parliamentary level.

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[41] Inter-Parliamentary Union , "*Parliament and democracy in the twenty-first century: A guide to good practice*", 2006 accessed at < https://www.ipu.org/resources/publications/handbooks/2016-07/parliament-and-democracy-in-twenty-first-century-guide-good-practice> 10 May 2021, at 7 and 10; Commonwealth Parliamentary Association, "*Recommended Benchmarks for Democratic Legislatures*" 2006 (revised and updated 2018), accessed at https://www.cpahq.org/media/l0jjk2nh/recommended-benchmarks-for-democratic-legislatures-updated-2018-final-online-version-single.pdf> 10 May 2021, at 5.4.4 and 11.1.2.
[42] In Canada this is limited to the House of Commons.
[43] Commonwealth Parliamentary Association, above n 4.
[44] Inter-Parliamentary Union, above n 4.
[45] Ryken Grattet and Valerie Jenness. "*Transforming Symbolic Law into Organizational Action: Hate Crime Policy and Law Enforcement Practice*." Social Forces 87, no. 1 (2008): 501-28, at 502.

Figure 1: Comparison of approaches to regulating the conduct of ministers, parliamentarians and political staffers in the United Kingdom, Canada, New Zealand and Australia

	Ministers[46]		**Parliamentarians**[47]	**Political staffers**
	Enforced by PM	**Independently enforced**		
United Kingdom[48]	✓ **(Ministerial Code)**		✓ **(Code of Conduct for Members of Parliament; House of Lords Code of Conduct)**	✓ **(Code of Conduct for Special Advisers; Code of Conduct for House of Lords Members' Staff)**
Canada		✓ **(captured by the *Conflict of Interest Act*)**	✓ **(Conflict of Interest Code for Members of the House of Commons;** *Code of Conduct for Members of the House of Commons: Sexual Harassment***)**	✓ **(captured by the *Conflict of Interest Act*)**
New Zealand	✓ **(Cabinet Manual)**			✓ **(Code of Conduct for Ministerial Staff)**
Australia	✓ **(Statement of Ministerial Standards)**			

[46] The relevant Canadian Act, the *Conflict of Interest Act*, is applicable to defined public office holders rather than being limited to Ministers as the relevant UK, New Zealand and Australian Codes are. These complexities are examined in detail in the below analysis.
[47] Insofar as these apply to parliamentarians generally, they also apply to ministers. They are administered by independent authorities, as discussed in the below analysis.
[48] The UK also has a Behaviour Code, Bullying and Harassment Policy, and Sexual Misconduct Policy that are applicable to the entire parliamentary community.

United Kingdom

The United Kingdom's parliamentary ethical standards framework consists of a Ministerial Code, a Code of Conduct for Members of Parliament, a House of Lords Code of Conduct, a Code of Conduct for House of Lords Members' Staff, a Code of Conduct for Special Advisers, and a Behaviour Code, Bullying and Harassment Policy, and Sexual Misconduct Policy.

While the Ministerial Code is enforced by the Prime Minister, both the House of Commons and the House of Lords have Commissioners responsible for investigating alleged contraventions of their respective Codes; these Commissioners can also recommend sanctions. Claims brought in relation to the Behaviour Code, Bullying and Harassment Policy, and Sexual Misconduct Policy are determined by an Independent Expert Panel.

The UK's framework contains both broad, aspirational principles and specific rules.

Ministerial Code

Paragraph 1.1 of the UK's Ministerial Code states that "Ministers of the Crown are expected to maintain high standards of behaviour and to behave in a way that upholds the highest standards of propriety".

The principles which ministers are expected to observe include:

- the principle of collective responsibility;
- a duty to Parliament to be accountable for their departments' and agencies' policies, decisions and actions;
- not knowingly misleading Parliament;
- being "as open as possible" with Parliament and the public, and requiring civil servants under their direction to do the same;
- avoiding conflicts of interest, or the appearance of such;
- not accepting gifts or hospitality which might, or might reasonably appear to, compromise their judgment;
- separating their roles as Minister and constituency member (applicable only to ministers in the Commons);
- not using government resources for Party political purposes; and
- upholding the political impartiality of the Civil Service.

Paragraph 1.3 states that ministers are also expected to observe the Seven Principles of Public Life set out at Annex A to the Code. Some of these are substantially similar to the values set out at paragraph 1.1 (including the values of accountability, openness and integrity); furthermore, they are identical to the General Principles of Conduct contained within the Code of Conduct for Members of Parliament. The Seven Principles include:

- selflessness (requiring that decisions should be based solely on the public interest);
- integrity (requiring that members not place themselves under a financial or other obligation that might influence them in their official duties);
- objectivity (requiring merit-based decision-making);
- accountability (requiring that members be accountable for their actions and decisions and subject themselves to appropriate scrutiny);

- openness (requiring that members be as open as possible about their decisions and actions, give reasons for decisions and restrict information only when public interest "clearly demands");
- honesty (requiring that private interests relating to public duties be declared and any conflicts resolved in such a way as to protect the public interest); and
- leadership (requiring that members should support the principles by leadership or example).

Enforceability

By operation of paragraph 1.6, it is the Prime Minister who is the "ultimate judge of the standards of behaviour expected of a minister and the appropriate consequences of a beach of those standards".

Code of Conduct for Members of Parliament

The Code of Conduct for Members of Parliament (prepared pursuant to the Resolution of the House of 19 July 1995) establishes standards and principles of conduct, and sets rules of conduct underpinning these standards and principles. It applies to all members in all aspects of their public lives, and is explicitly stated not to apply to members' personal lives.

Members' duties are expressed as requiring them to bear allegiance to the Queen, and her heirs and successors, according to law; to uphold the law; to act in the nation's interests (a general duty), and to act in their constituents' interests (a special duty); and to act on all occasions in accordance with the public trust placed in them.

The General Principles of Conduct contained within the Code are identical to the Seven Principles of Public Life contained at Annex A to the Ministerial Code of Conduct.

Rule 9 of the Code states that members are also expected to observe the principles set out in the Parliamentary Behaviour Code: these include respect, professionalism, understanding others' perspectives, courtesy, and acceptance of responsibility.

The Rules of Conduct set out at Part V of the Code contain nine specific rules:

- Members' conduct must be based on a consideration of the public interest; conflicts of interest must be avoided and where they arise, they must be resolved in favour of the public interest (Rule 11);
- No Member shall act as a paid advocate in any proceeding of the House, or accept a bribe to influence their conduct (Rules 12 and 13);
- Members shall register their interests as required, and be frank and open about those interests (Rule 14);
- Information received by Members in confidence must never be used for financial gain (Rule 15);
- Members must use public resources only in support of their parliamentary duties and comply with relevant rules in respect of this (Rule 16);
- Members must not take any action which would cause "significant damage to the reputation and integrity of the House of Commons whole, or of its members generally" (Rule 17); and
- Members must treat their staff and persons visiting or working for or with Parliament with dignity, courtesy and respect (Rule 18).

Enforceability

The application of the Code is expressed to be a matter for the House of Commons, and the Committee on Standards and the Parliamentary Commissioner for Standards in particular (Rule 19).[49] The Commissioner investigates alleged contraventions and can either rectify less serious breaches herself (via a requirement to apologise and, if appropriate, repay misused resources) or refer more serious cases to the Committee for consideration and sanction.[50]

House of Lords Code of Conduct

The House of Lords Code of Conduct mirrors that of the Commons (with the exception of the requirement to "act on their honour" enshrined at paragraph 8 of the Lords' Code).[51] As in the case of the Commons' Code, the Lords' Code is accompanied by a Guide which fleshes out the general principles enshrined in the Code itself.

Enforceability

The House of Lords Commissioner for Standards is responsible for investigating alleged breaches of the Lords' Code of Conduct. The Commissioner's Reports, which are made public, can recommend sanctions.

Code of Conduct for the House of Lords Members' Staff

The Code of Conduct for the House of Lords Members' Staff requires that members' staff should at all times conduct themselves in such a way as to maintain and strengthen public trust and confidence in the integrity of the House. They are required to uphold the Parliamentary Behaviour Code, and must not take any action which would risk undermining any member's compliance with the applicable Code. They must also comply with various provisions concerning the registration of interests (paragraphs 7-11), lobbying (paragraph 12), and not disclose confidential information (paragraph 14).

Enforceability

The House of Lords Commissioner for Standards is responsible for investigating alleged contraventions of the Code: investigations must be reported on (except where this is considered to be disproportionate to the contravention), and in cases where remedial action is not agreed upon or appropriate the Commissioner can report to the Conduct Committee for consideration and possible sanction.

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[49] UK Parliament, "*The Code of Conduct for Members of Parliament*", 10 October 2019 <https://publications.parliament.uk/pa/cm201719/cmcode/1882/188202.htm#_idTextAnchor000> accessed 10 May 2021.

[50] On 2 May 2019, Commissioner Kathryn Stone OBE wrote to Kate Green MP, Chair of the Committee on standards, setting out sanctions she considered to be "useful and meaningful" following contravention of the Code. These range from words of advice or warning, to expulsion from the House: accessed at <https://publications.parliament.uk/pa/cm5801/cmselect/cmstandards/241/24109.htm.> accessed 10 May 2021.

[51] House of Lords, "*Code of Conduct for Members of the House of Lords , Guide to the Code of Conduct , Code of Conduct for House of Lords Members' Staff*", July 2020 <https://www.parliament.uk/globalassets/documents/lords-commissioner-for-standards/hl-code-of-conduct.pdf> accessed 10 May 2021.

Code of Conduct for Special Advisers

Section 8(1) of the Constitutional Reform and Governance Act 2010 (UK) requires the Minister for the Civil Service to publish a code of conduct for special advisers.

Enforceability

By virtue of s 8(11) of that Act, the code forms part of the terms and conditions of service of any special adviser to whom it applies**.** Ministers are responsible for ensuring that their special advisers adhere to the code.[52]

Behaviour Code, Bullying and Harassment Policy, Sexual Misconduct Policy

The Behaviour Code, the Bullying and Harassment Policy, and the Sexual Misconduct Policy apply to the entire Parliamentary Community and form part of the Parliament's Independent Complaints and Grievance Scheme.[53]

The Behaviour Code requires that everyone is respected and valued; that persons recognise their power, influence or authority; that they consider how their behaviour affects others; that they act professionally towards others; that they ensure Parliament meets the highest ethical standards of integrity, courtesy and mutual respect; and that they speak up about any unacceptable behaviour.[54] The contents of the Bullying and Harassment and Sexual Misconduct Policies are directed specifically to these issues.

Enforceability
The provisions of the Behaviour Code and associated Policies apply to all members of both House of Parliament, their staff, House Administration staff, Parliamentary Digital Services and third-party passholders.[55] An Independent Expert Panel (which is independent of MPs) determines claims brought in relation to the Code or the Policies.[56]

Canada

Canada regulates parliamentary ethical standards via a *Conflict of Interest Act*, a Conflict of Interest Code for Members of the House of Commons, *and a Code of Conduct for Members of the House of Commons: Sexual Harassment. The Conflict of Interest Act applies to certain public office holders, while the Conflict of Interest Code – which features a combination of broad principles and specific guidance – covers all members of the House of Commons: an independent Commissioner is responsible for investigations of alleged breaches as well as, in some cases, the imposition of sanctions.*
The Code of Conduct for Members of the House of Commons: Sexual Harassment is overseen by the Standing Committee on Procedure and House Affairs.

[52] Cabinet Office (UK), "*Code of Conduct for Special Advisers*", December 2016 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832599/201612_Code_of_Conduct_for_Special_Advisers.pdf> accessed 10 May 2021.
[53] UK Parliament, "*Conduct in Parliament*" < https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliaments-behaviour-code/> accessed 22 June 2021.
[54] UK Parliament, "*Behaviour Code*"< https://www.parliament.uk/globalassets/documents/conduct-in-parliament/ukparliamentbehaviourcode.pdf> accessed 10 May 2021.
[55] Independent Complaints and Grievances Scheme, *"Annual Report June 2019-June 2020"* <https://www.parliament.uk/globalassets/icgs-annual-report-2019-20.pdf> accessed 10 May 2021
[56] Above n 15.

Conflict of Interest Act

The *Conflict of Interest Act* makes provision for certain conflicts of interest that may arise for members of Canada's Parliament, and contains post-employment rules for public office holders.

The Act binds current and former public office holders – some examples of which are Ministers and parliamentary secretaries. By virtue of subsections 2(1)(b) and (c) of the Act, the Act's provisions also apply to ministerial staff and ministerial advisers.

Section 3 of the Act states that it aims to (amongst other things) set clear conflict of interest and post-employment rules for public office holders, minimise the risk that conflicts arise between public office holders' private interests and public duties, and provide for the resolution of any such conflicts in favour of the public interest.

Enforceability

The Act is administered and enforced by the Conflict of Interest and Ethics Commissioner, who is appointed pursuant to section 81 of the *Parliament of Canada Act*. The Commissioner can issue compliance orders, and impose administrative monetary penalties; the Commissioner also has the power to institute formal investigations of potential breaches, which generally lead to a report to the Prime Minister (that is made public).[57]

Conflict of Interest Code for Members of the House of Commons

Canada's Conflict of Interest Code for Members of the House of Commons, which is appended to the Standing Orders of that House, applies to all Members when they are carrying out their parliamentary duties and functions.

The purposes of the code are stated at paragraph 1 to include – amongst other things – the maintenance of public trust in members' integrity as well as in the House of Commons as an institution.

Five principles with which members are expected to comply are set out at paragraph 2: specifically, members must:

- serve the public interest and represent constituents to the best of their abilities;
- fulfil public duties with honesty, avoid real or apparent conflicts of interest, and maintain public trust in the integrity of each member and the House itself;
- perform their official duties and functions and arrange their private affairs "in a manner that bears the closest public scrutiny";
- arrange their private affairs to avoid real or apparent conflicts of interest. In the case of such a conflict arising, it must be resolved in a way that protects the public interest; and
- avoid gifts or benefits connected with their position that might reasonably be considered to compromise their personal judgment or integrity.[58]

Some 20 rules of conduct follow and apply these principles to various circumstances.

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[57] Office of the Conflict of Interest and Ethics Commissioner (Canada), "*Enforcing the Act and the Code*" <https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Enforcing-Appliquer.aspx.> accessed 10 May 2021.
[58] House of Commons (Canada), *"Appendix 1: Conflict of Interest Code for Members of the House of Commons*" <https://www.ourcommons.ca/about/standingorders/appa1-e.htm> accessed 10 May 2021.

Enforceability

The Conflict of Interest and Ethics Commissioner is responsible for investigating possible contraventions of the Code. While they are unable to impose sanctions for breach, they may recommend sanctions in investigation reports.[59]

Code of Conduct for Members of the House of Commons: Sexual Harassment

This Code applies to allegations of non-criminal sexual harassment between Members. It is appended to the Standing Orders of that House, and the Standing Committee on Procedure and House Affairs is charged with reviewing matters relating to it.

New Zealand

New Zealand has a Cabinet Manual applicable to all Ministers, and a separate Code of Conduct for Ministerial Staff. There is no code for parliamentarians, and the Cabinet Manual for Ministers is not independently enforced.

Cabinet Manual

New Zealand's Cabinet Manual actually applies to all ministers, not only those in the Cabinet (as its title might suggest),[60] Paragraph 2.53 requires ministers to "conduct themselves in a manner appropriate to their office" in order to protect integrity in executive decision-making and preserve public trust.

The Manual identifies the various capacities in which Ministers may act – ministerial, political and personal[61] – and declares that:

> *In all these roles and at all times, Ministers are expected to act lawfully and to behave in a way that upholds, and is seen to uphold, the highest ethical standards. This includes exercising a professional approach and good judgement in their interactions with the public and officials, and in all their communications, personal and professional. Ultimately, Ministers are accountable to the Prime Minister for their behaviour.* [62]

The remainder of the Manual establishes requirements in respect of disclosure of certain interests, and processes for identifying and managing potential conflicts of interest (including pecuniary and non-pecuniary, direct and indirect interests).

Enforceability

The Prime Minister is responsible for disciplining breaches of the Manual, although it has been suggested that the Prime Minister could in some circumstances be accountable to the House.[63]

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[59] Above n 19.
[60] Cabinet Office – Department of the Prime Minister and Cabinet, "*Cabinet Manual 2017*", Wellington New Zealand accessed at < https://dpmc.govt.nz/sites/default/files/2017-06/cabinet-manual-2017.pdf> 10 May 2021, paragraph 2.54.
[61] Ibid, paragraph 2.55.
[62] Ibid, paragraph 2.56.
[63] Catherine Rodgers, "*A comparative analysis of rights scrutiny of bills in New Zealand, Australia and the United Kingdom: Is New Zealand lagging behind its peers*?" in *Australasian Parliamentary Review*, Autumn 2012,

Code of Conduct for Ministerial Staff

New Zealand has a specific code of conduct for ministerial staff, in recognition of the fact that ministerial staff are not – by virtue of the nature of their work – subject to a political neutrality requirement and the country's State Services Standards do not apply to them.[64]

With the exception of the impartiality requirement, this code holds Ministerial staff to the same standards as those set for public service staff, and requires that they be fair (specifically, that they treat everyone fairly and with respect, and work to make government services accessible and effective), responsible (that is, that they act lawfully and ethically, and use official resources and information for proper purposes), and trustworthy (that is, that they are honest and avoid conflicts of interest and activities – work or non-work related – that may harm the reputation of Minister's offices or the State Services).[65] The code includes an additional requirement that Ministerial staff be professional (requiring that the authority of the government of the day, and the duty of the State services to be impartial, be respected). [66]

Enforceability

Insofar as ministerial staff are employed by the Department of Internal Affairs, that Department is responsible for adopting policies which give effect to the Code.[67]

Australia

Australia has a Statement of Ministerial Standards which applies to government ministers. It is not independently enforced, and does not cover non-executive parliamentarians.

Statement of Ministerial Standards

The Foreword to the Commonwealth's Statement of Ministerial Standards describes the Statement as "principles based and not a complete set of rules".

The specific principles with which Ministers must comply in carrying out their duties are enumerated at paragraph 1.3: they must act with integrity, observe fairness in decision-making, accept accountability and accept "the full implications of the principle of ministerial responsibility". Paragraph 1.4 also requires that Ministers act in a way consistent with advancing the public interest when making decisions or in connection with their official capacity.

The remainder of the Statement elaborates on these values. For example, in relation to integrity the Standards emphasise the importance of avoiding public office being used for private purpose. In relation to fairness the Standards focus on ensuring that all reasonable steps have been taken by ministers to observe relevant standards of

Vol. 27(1), 4–17 accessed at https://www.aspg.org.au/wp-content/uploads/2017/09/2shRogers.pdf 10 May 2021.

[64] Public Service Commission (New Zealand), "*Code of conduct for Ministerial staff*" https://www.publicservice.govt.nz/assets/Legacy/Code-of-conduct-for-Ministerial-staff.pdf, accessed 10 May 2021.

[65] Ibid.

[66] Ibid.

[67] Ibid.

procedural fairness and good decision making, and their official decisions must not be affected by bias or irrelevant considerations.

In respect of ministers' personal conduct, the Statement requires that ministers "ensure that their personal conduct is consistent with the dignity, reputation and integrity of the Parliament".

Enforceability

Implementation of the code is expressed to be a matter for the Prime Minister, with paragraph 7.2 stating that Ministers "will be required to stand aside […] if the Prime Minister regards their conduct as constituting a prima face breach of these Standards".

An Australian Parliamentary Code of Conduct

Any Australian parliamentary and political staffer Code of Conduct should be designed in line with the following principles:

1. **Combine broad principles with specific rules**

The Centre for Public Integrity endorses the approach taken by the UK's Codes of Conduct for both the House of Commons and the House of Lords, whereby a set of broad ethical principles – such as the UK's Seven Principles of Public Life – is enumerated and then followed by specific rules (thereby creating a way for breach to occur and enabling the imposition of consequences).

The combining of broad ethical principles with specific rules would enable the legislation to perform the important functions of what van Klink has described as "communicative legislation"[68] – in this case, communicating the values that the Australian public expects its politicians to adhere to in such a way as to bring about discussion, interpretation, and lawmaking – but at the same time also serve as what Witteveen describes as "hard" law (which in Witteveen's conception is recognisable from the fact that it seeks to achieve compliance – and relies on sanctions rather than persuasion to do so –, lacks aspirational norms and issues clear directives).[69]

2. **Be enforceable by an independent authority**

The National Democratic Institute for International Affairs (NDI) has found that "Self-regulation is often insufficient to effectively enforce ethics regulations. For this reason, many countries have tasked an independent or non-partisan entity to monitor compliance with ethical codes".[70]

This conclusion is unsurprising: where enforcement of a code is left to a prime minister (as is the case of Australia's Statement of Ministerial Standards), who has an obvious incentive to minimise allegations of ministerial wrongdoing, it risks becoming little more than a tool to be manipulated for political expediency.

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[68] Described by Witteveen as symbolic legislation in the positive sense, which is to be contrasted with symbolic legislation in the negative sense – legislation which articulates values but is not enforced: William Witteveen,"*Turning to Communication in the Study of Legislation."* In Social and Symbolic Effects of Legislation under the Rule of Law, edited by Nicolle Zeegers, William Witteveen and Bart van Klink, 17-44. Lewiston, NY: Edwin Mellen Press, 2005, at 30.
[69] Ibid, at 34-35.
[70] Above n 4, at 103.

For a code of conduct to be more than mere rhetoric, it must be independently enforced. Enforcement could be overseen by an authority similar to Canada's Conflict of Interest and Ethics Commissioner and the UK's Commissioners for Standards.

3. Be of appropriately wide application and scope

One critical question is whether any Australian parliamentary code of conduct should apply only to work-related conduct, or also capture non-work related conduct.

The Centre for Public Integrity considers that limiting the requirements of parliamentarians to behaviour in connection with their work would be difficult to justify in circumstances where subsections 13(11) and 13(12) of the *Australian Public Service Code of Conduct* require public servants to at *all times* behave in a way that upholds the APS Values and Employment Principles, as well as the APS's integrity and good reputation and Australia's good reputation.[71]

Another key question is to whom any code should apply. The Centre for Public Integrity believes that ethical standards frameworks should be implemented both for members of parliament and for political staffers, and a code could be drafted in such a way that it is applicable to both groups (otherwise, separate codes should exist). Any code should cover bullying and sexual misconduct.

The British concept of a "parliamentary community" to whom its Behaviour Code, Bullying and Harassment Policy, and Sexual Misconduct Policy apply, is meritorious insofar as all members of a workplace – no matter their status – should be subject to certain ethical standards. Of course, depending on the form any code takes, it may be the case that some standards are not universally applicable to the entire parliamentary community (for example, requirements of impartiality and neutrality should not apply to political staffers).

Conclusion

The Centre for Public Integrity urges the Parliament to take up the task of designing an appropriate ethical standards framework to ensure that the high standards Australians expect of their elected representatives are upheld.

A code of conduct which combines broad principles with specific guidance, is independently enforceable and of appropriately wide scope and application, is a vital aspect of that framework.

About The Centre for Public Integrity

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[71] In contrast to the other requirements of section 13, many of which are explicitly limited to behaviour in connection with APS employment.