

Elder, David (REPS)

From: Elder, David (REPS)
Sent: Friday, 4 February 2011 9:01 AM
To: 'GAY, Oonagh'
Subject: RE: Response to

Oonagh

Thank you very much for putting this information together and passing it on. It will be very helpful for the Committee. Should there be a need to obtain any further information, I will be in contact.

Regards

David

David Elder
Deputy Clerk
HOUSE OF REPRESENTATIVES
RG39 Parliament House, Canberra ACT 2600
C 02 6277 4111 | F 02 6277 2006
E David.Elder.Reps@aph.gov.au

-----Original Message-----

From: GAY, Oonagh [<mailto:GayO@parliament.uk>]
Sent: Friday, 4 February 2011 4:00 AM
To: Elder, David (REPS)
Subject: Response to

Liam Laurence Smyth suggested that I send this to you direct. I have carried out research on codes of conduct and enforcement mechanisms for some years for Members and their staff in the UK Parliament

...
Oonagh Gay
Head of Parliament and Constitution Centre
House of Commons Library
1 Derby Gate London SW1 2DG
0207 219 0252

UK Parliament Disclaimer:

This e-mail is confidential to the intended recipient. If you have received it in error, please notify the sender and delete it from your system. Any unauthorised use, disclosure, or copying is not permitted. This e-mail has been checked for viruses, but no liability is accepted for any damage caused by any virus transmitted by this e-mail.



Subject: **Codes of Conduct**
To: Liam Laurence Smyth, Journal Office
From: Oonagh Gay
Reference: 2010/1/32-PCC
Date: 12 January 2011

You are consulting on the following letter from the Standing Committee of Privileges and Members' Interests in the Australian Parliament:

The Committee wishes to seek the views of other jurisdictions on their experiences with their code of conduct. I am writing to invite you make a submission to the Committee. The Committee would welcome your views on:

- the nature of an appropriate code of conduct for Members of Parliament having regard to your own experience;
- any comments on processes for making and investigating complaints;
- the role that an individual person such as a proposed Parliamentary Integrity Commissioner can play in upholding codes of conduct;
- the role a relevant parliamentary committee can play in relation to a code of conduct; and
- how a code of conduct might be enforced and what sanctions should be available.

Background

The Commons first developed a Code in 1996, following a critical report from the newly established non-statutory, non-parliamentary Committee on Standards in Public Life. It has been revised since then and the most recent dates from 2005. It is enforced by an independent Parliamentary Commissioner for Standards who reports to the Standards and Privileges Committee of the House under SO 150.

In general the Committee receives a report from the Commissioner for Standards, following a complaint. The Commissioner's report is as an annex to the Committee's report. The Committee generally agree with the Commissioner's assessment, but there are occasional differences of opinion. Following concern expressed in a report from the Committee on Standards in Public Life in 2002,¹ it was agreed that the committee would be chaired by an Opposition Member and that parliamentary private secretaries would no longer serve on the committee.² The Commissioner follows an inquisitorial approach in investigations, and there is a distinct preference to use informal methods, rather than using solicitors and holding formal hearings. However, legal assistance may be brought in, if the case is complex and the Member denies the allegations. The Committee has the power to re-hear the evidence and in effect act as the point of appeal, but this happens only very rarely.

Nature of Code

¹ http://www.public-standards.gov.uk/publications/8th_report.aspx

² PPSs are MPs who serve as unpaid assistants to Ministers. It is seen as the first step to a ministerial career.

It would seem advisable to consider the nature of the code first. Most parliamentary codes contain a mixture of aspirational and prescriptive paragraphs and the Commons is no exception. But there can be difficulties in enforcing aspirational principles. John Uhr, an Australian academic (and former clerk in the Senate) questions the usefulness of imposing standards of selfless public service and exemplary personal virtue, which are unattainable for most elected politicians.³ The Commons Code has a clear distinction between the Seven Principles of Public Life and Guide to the Rules for Members

Statutory or non statutory?

The question as to whether to make the Code statutory or enforceable by parliamentary resolution is key. The issue was discussed in the Commons in 2009 during the passage of the Parliamentary Standards Act 2009. A Library Standard Note summarises the debate at

<http://www.parliament.uk/commons/lib/research/briefings/snpc-05121.pdf>

During the debate on Clause 8 at Commons committee stage, many Members made the point that the current system of investigation of complaint- the Commissioner and the Standards and Privileges Committee- worked satisfactorily, but that legislation would subject the Committee to judicial review and create tension with the courts.

Clause 9 of the Bill as first printed would have introduced criminal offences for failure to register interests and for breaching the advocacy rules. There had been provision in clause 8(6) for a protocol to govern relations between the Commissioner and the DPP among others. However, the proposed offences raised concerns that parliamentary privilege might be undermined, since evidence for a prosecution might have involved proceedings, such as decisions of the Standards and Privileges Committee or investigations by the Parliamentary Standards Commissioner.

Clause 10 would have ensured that parliamentary privilege could not be used to prevent evidence being admissible in proceedings in relation to Clause 9. However, Clause 10 was deleted by 250 votes to 247 and in response Mr Straw indicated that he would accept the changes.⁴ The offence of paid advocacy and failure to register in clause 9 (which became 8) was subsequently removed following all party talks in the Lords at Lords committee stage on 16 July. The Government minister said:

We tabled the amendment to remove the offence in relation to paid advocacy on Monday, so noble Lords were already aware of it during our debates on Tuesday. We have accepted that it is an offence which would be difficult to prove without incursion into matters covered by privilege, and with the removal of the clause which would have waived privilege for the courts and prosecutors in investigating and prosecuting the offence, would have probably been unworkable. This does not mean that breach of the rules of paid advocacy is not to be taken very seriously. We have agreed not to pursue it in this Bill on the basis that the draft Bribery Bill currently receiving pre-legislative scrutiny will cover the same mischief.

I also signalled on Tuesday that I was looking further at the offence in Clause 8(2) in relation to the registration of interests. I have concluded that we should also remove this from the Bill. There would not have been the same difficulty in prosecuting the

³ 'Moderating Ministerial Ethics: Putting Political Ethics in its Place' J.Fleming and I Holland *Motivating Ministers to Morality* Ashgate 2001

⁴ HC Deb 1 July 2009 c387

offence as there would have been with paid advocacy. I remind your Lordships that this Parliament created offences of failing to declare interests and of paid advocacy for members of the devolved Administrations and for local councillors. Although it would not have been an infringement of privilege to have continued to have an offence, I recognise the strength of the feeling expressed in the House earlier in the week. I beg to move.⁵

Continuing concerns about a statutory code of conduct and a statutory Commissioner were carried over to the debates on the amendments to the *Parliamentary Standards Act 2009* made in the *Constitutional Reform and Governance Bill 2009-10*. The debate is covered in Library Research Paper 10/18. Briefly, the Act removed section 8 of the *Parliamentary Standards Act 2009* which had previously provided for a Commissioner for Parliamentary Investigations, and a statutory Code of Conduct for Members. Instead, the Act introduced a Compliance Officer for IPSA with the role of investigating complaints about the misuse of Members' allowances. Responsibility for maintaining a Code of Conduct remained with the House of Commons. There remains some potential for overlap when there are allegations on misuse of allowances, but this can be dealt with by a concordat between the interested parties.

Consistency in enforcement

There are several advantages to a non-statutory Code, most pertinently the continued protection of Article 9 of the Bill of Rights. It also means that enforcement of the Code remains within the control of the Commons. This can lead to questions of public perception. Since the advent of the Code in the Commons in 1995 there have been a number of instances where the consistency of the recommendations of the Standards and Privileges Committee have been questioned. The alternative would be to make the decisions an entirely external matter, but this may make Members uneasy lest the external adjudicator not fully understand the position of MPs and Parliament.

Investigative process

For public confidence some type of independent means of investigation appears to be essential. The system used by the UK prior to 1996 collapsed due to this. However there are advantages in referring the conclusions to a parliamentary committee to make the final recommendation. This ensures that the process is to some extent owned by the parliament. The inquisitorial approach of investigation has considerable advantages in terms of speed. An adversarial approach is much more likely to involve legal representation. Occasionally this has occurred in Westminster and is rarely helpful in reaching conclusions. The Code now requires Members to cooperate with the Standards Commissioner as this has been an occasional issue prior to the 2010 Parliament. The burden of proof is occasionally a question of controversy, whether to adopt the criminal or civil test. In general the Commissioner and Committee consider the gravity of the allegations to be relevant.

I hope this helps. The Australian parliamentary library produced a survey of codes of conduct in 2009 which provides useful context.

⁵ HL Deb 16 July 2008 c1288