

Should there be a code of conduct?

Introduction

- 3.1 Although the terms of reference presume, and the various reform agreements commit most political parties and individual members to, the implementation of a code of conduct, introducing a code would be a very significant development for all members. The Committee considered that it should assess the reasons for and against adopting a code of conduct for members.
- 3.2 There are already a number of 'rules' in place which govern various aspects of the conduct of Members of the House of Representatives. These rules can be found in the Constitution, civil and criminal law, *Commonwealth Electoral Act 1918*, *Parliamentary Privileges Act 1987*, standing and sessional orders of the House, resolutions of the House, Register of Members' Interests and various guidelines and conventions associated with them.¹ In addition, there is the complex meld of rules which comprise the parliamentary entitlements regime.² However, there is no framework which collates these rules as a structured set of obligations on members, and it is uncertain whether the area of members' conduct is sufficiently covered.
- 3.3 In some jurisdictions, the introduction of codes of conduct for parliamentarians has been precipitated by events of misconduct. The

1 Most of these are well canvassed in *House of Representatives Practice*, ed. I C Harris, Fifth Edition, Canberra, 2005.

2 The major components of this regime have been drawn together in Committee for the Review of Parliamentary Entitlements, *Review of Parliamentary Entitlements*, Australian Government, Committee Report, April 2010, see Figure 3-1 at p. 41.

genesis of the current review in an environment of reform rather than one of crisis, provides the House with an opportunity to take the initiative, and members, a valuable time for measured self reflection. This is a far more favourable situation in which to devise a code of conduct than responding during the heightened sensitivity of a misconduct scandal, when there could be significant pressure on political leaders to impose a code of conduct and enforcement regime with little or no involvement of the members themselves.

- 3.4 Codes of conduct are increasingly common in professions and fields of endeavour throughout Australian society. The federal and state parliaments have given force of law to a number of professional or industry codes, by including or referring to them in legislation. In addition, many professions have responded to stakeholder expectations of high standards of professional conduct by devising and adopting through self regulation, voluntary codes of conduct.
- 3.5 On a daily basis, there are stories in the media critical of the conduct of persons in one field or another. Parliamentarians are not exempt from this media scrutiny, although the publication of reports on such matters are rightly characterised as of a recurring nature rather than sustained. Nevertheless, there seems to be a trend of increasing public scrutiny of parliamentarians. Community expectations, as reflected in the media, indicate that behaviour of a very high standard, higher than for others in the community is expected of members of parliament. When members merely access approved allowances and entitlements in proper ways, this can generate media stories about whether those expenditures are somehow inappropriate, even though there is no evidence that the individual members acted outside the relevant rules or guidelines.
- 3.6 It is against this background that the Committee assessed arguments in favour of and against a code of conduct.

Arguments in favour of a code

- 3.7 Arguments in favour of implementing a code of conduct could be categorised broadly as strengthening the overall ethical framework to guide members in their behaviour and improving public perceptions of Parliament and parliamentarians.

Guidance on ethical issues and an improved framework

- 3.8 Members are elected to office with little formal guidance about what might be expected of them as members. A code of conduct provides a consistent frame of reference for all members about their conduct while in office. In circumstances where rules related to individual measures affecting members do not provide sufficient guidance, or for those aspects of their duties that are not otherwise covered by formal rules, a code would provide specific guidance on ethical issues.
- 3.9 This aspect of a code was commented on by Mr Neil Laurie, Clerk of the Queensland Parliament, in his submission: 'To a large extent the great value of the Code is that it sets a standard that a Member's conduct might be viewed against. The mere fact that a Code is in place means that members may be challenged by their peers, the media, or members of the public; as to whether their conduct complies with the standards as set out in the code'.³
- 3.10 As referred above, there are already many rules which apply to the various aspects of a Member's life as a parliamentarian, which could at best be described as a collection. An express code of conduct could overcome any gaps there may be in the existing ethical requirements, put principles in place and consolidate the rules, thereby providing a useful, structured statement in relation to members' conduct.
- 3.11 Two recent incidents provide support for the view that ethical guidance is required. The first illustration was the reference by the Speaker in the 42nd Parliament about the conduct of the Member for Dawson in the parliamentary precincts. The Speaker considered that incident might fall for consideration under a code of conduct, although it did not seem to fit within the existing formal rules applying to parliamentarians.⁴ The second illustration, also in the 42nd Parliament, was the exchange between the Member for Robertson and the Member for Indi in the Main Committee, which this Committee received as a reference. The Committee concluded that the incident had more to do with appropriate standards of behaviour and conduct of members rather than with any matter of privilege.⁵

3 Submission from Mr Neil Laurie, Clerk of the Queensland Parliament, p. 3.

4 See, House of Representatives Debates (4.12.2008) p. 12725.

5 See, *Report on the issue of the exchange between the Member for Roberson and the Member for Indi on 28 May 2008 and the subsequent withdrawal and apology by the Member for Robertson on 29 May 2008*, House Standing Committee of Privileges and Members' Interests, 23 October 2008.

Satisfying community expectations and building political trust

- 3.12 The community rightly has expectations of a high standard of conduct of their elected representatives. There is no formal recorded basis on which members of the community can express any concerns or complaints they have about the conduct of members. They have no frame of reference to which they can refer to judge whether the conduct of members is within accepted standards, other than indistinct 'community expectations'. The adoption of a code would provide reassurance to the community about standards of behaviour they should be able to expect of members and provide also a distinct reference for them for any issues they might have with members' conduct. This aspect is recognised in jurisdictions where parliamentary codes of conduct are already in place. Mr Russell Grove, Clerk of the Legislative Assembly, Parliament of New South Wales, expressed this view: 'I think the code is a way of parliament saying to the public at large: "We are like everybody else in public office in the community. We are accountable and we are prepared to live by a code"'.⁶
- 3.13 There are numerous, often contradictory perceptions about parliament and its members.⁷ However, unfortunately it seems that the Australian community has deep concerns about standards in public life and the media give prominence to ethical issues in their commentary in this regard.⁸ A code of conduct could assist in building a stronger relationship of trust between elected members and their individual constituents and the community at large. A code would serve as a reminder to members of the political trust they owe to their constituents.
- 3.14 In some jurisdictions parliamentarians make an oath to uphold a code of conduct, thereby reinforcing appropriate standards through a specific formal and public commitment to good conduct.

Confidence in the institution of Parliament

- 3.15 At the federal level in Australia, staff supporting the institution of Parliament have long been subject to rules in relation to appropriate standards of behaviour in performing their duties. Currently, the Australian parliamentary service is established pursuant to the *Parliamentary Service Act 1999*, and all staff employed under the Act, from

⁶ Transcript of roundtable discussion, 21 March 2011, p. 6.

⁷ J Warhurst, 'Fifteen (contradictory) perceptions of parliament: five good, five bad and five ugly', *Australasian Parliamentary Review*, Autumn 2011, Vol. 26(1), pp. 83-87.

⁸ Bob Bennett, 'Candidates, Members and the Constitution', *Research Paper No. 18 2001-02*, Department of Parliamentary Library, 2002.

the most senior leaders to the most junior ranks of staff, are obliged to meet the standards set by the values and code of conduct provided for in the Act. This code provides a transparent standard against which the behaviour of staff who support the institution of Parliament can be judged.

- 3.16 If the House of Representatives adopted a code of conduct for its members, this would serve as further reassurance for the community, in relation to its elected representatives, that the institution of Parliament is responsive to its concerns. Mr Bernard Wright, Clerk of the House of Representatives, said to the Committee: ‘... I do think that it [adopting a code] is probably a helpful thing to do in terms of showing a bit of self-awareness on the part of a house of parliament. A house of parliament that adopts a code is perhaps showing awareness of a perception problem which can become a reality’.⁹

Codes of conduct are widespread for public officials

- 3.17 In democratic societies, codes of conduct are widely considered to be the norm for public officials in all aspects of governance, and in Australia, most public officials are subject to a code of conduct. Most state and territory legislatures have adopted codes of conduct and other prescribed measures to establish standards of conduct for members of their houses. In addition, most local councils have standards imposed, and many of these codes are prescribed by law.
- 3.18 At the federal level, the conduct of public servants and parliamentary service staff is already subject to codes of conduct and related service values, prescribed by the Parliament.¹⁰ In addition, since 1996 successive Prime Ministers have established rules to guide the conduct of those parliamentarians who are ministers in the *Guide to Key Elements of Ministerial Responsibility*.¹¹ In addition, over the same period Prime Ministers have established a register of lobbyists, thereby providing a level of transparency in negotiations in relation to government policies, programs and activities.
- 3.19 The authoritative standards worldwide, on parliamentary best practice, state that parliamentary accountability is enhanced through measures to promote good governance, including the establishment of codes of

⁹ Transcript of roundtable discussion, 21 March 2011, at p. 8.

¹⁰ See, *Public Service Act 1999* and *Parliamentary Service Act 1999*.

¹¹ See, http://www.pmc.gov.au/guidelines/docs/ministerial_responsibility.rtf

conduct for all parliamentary staff and for all parliamentarians.¹² Not to have a code of conduct is counter to the standards of what is considered to be parliamentary best practice both within Commonwealth legislatures and within national parliaments worldwide. As referred above in chapter 2, the Commonwealth Parliamentary Association (CPA) has determined in the Latimer House Principles that it is a fundamental value of the Commonwealth to establish ethical governance, with attendant appropriate guidelines for parliamentarians on ethical conduct.¹³ In addition, the Inter Parliamentary Union (IPU), the foremost association of national parliaments, has reported that it is a key characteristic of a democratic parliament that members of parliament are accountable for their performance in office and integrity of conduct. The institutional means by which this objective is realised is through the development of standards and an enforceable code of conduct.¹⁴

- 3.20 Of additional relevance in the parliamentary context, comparable national legislatures with systems of parliamentary government similar to Australia's have codes of conduct, for example, the Houses of Commons in both the United Kingdom and Canada.

Arguments against a code

- 3.21 The Committee has also explored the arguments against the implementation of a code of conduct for members.

Interference with Members' duties

- 3.22 A code of conduct might impose restrictions on members that would prevent them from freely and fully performing their duties. Therefore, the ideal of imposing a standard of behaviour for members might compete with another ideal of ensuring that members are able to pursue their duties without any impediment or restriction. This concern is perhaps more a theoretical one than a practical one. If a code is expressed in more general terms and refers to broader values and principles, then it is less likely that a code might unnecessarily impede the actions of members.

12 See, R Stapenhurst and R Pelizzo, 'Legislative Ethics and Codes of Conduct', *World Bank Institute Working Papers*, Series on contemporary Issues in Parliamentary Development, 2004.

13 See, *Commonwealth (Latimer House) Principles on the Three Branches of Government*, CPA adopted July 2009.

14 See, *Parliament and Democracy in the Twenty-First Century: a guide to good practice*, ed David Beetham, Inter-Parliamentary Union, Switzerland, 2006.

Further, if the effect of a code is to restrain conduct that is not appropriate for members and this expresses community expectations, then any 'restraint' might support rather than impede members in performing their duties in a proper manner.

Members are subject to many rules

- 3.23 It could be argued that the conduct of members is already subject to a range of guidelines and rules, therefore a separate code of conduct is not necessary. The range of rules applying to members is outlined above and is similar to the provisions applying to Senators, as referenced in one of the Senate's guides to procedure.¹⁵ While extensive rules and guidelines apply to the actions and behaviour of members, they currently do not cover broader ethical values and principles, nor are they drawn together in any structured manner.
- 3.24 Professor Carney noted that part of the value of a 'code', was in bringing those obligations together, and 'It brings a philosophical basis to these obligations that have developed through the common law, through statutory provisions and through resolutions of the houses from the United Kingdom through to Australia ...'.¹⁶ He also thought such a consolidation would be of practical benefit and educational value to members. The comments of Mr Kerry Shine, Chair of the Integrity, Ethics and Parliamentary Privileges Committee, Queensland Parliament, appear to support this view: 'The fact that all these obligations are in one document, one code, is of help as a practising member of parliament.'¹⁷

Code of conduct would not improve behaviour

- 3.25 It has been argued that it is not possible to improve the behaviour of individuals simply by implementing a code of conduct. It is perhaps difficult to assess the impact that the introduction of a code of conduct would have on the standards of conduct of members. The mere existence of a code does not guarantee that individuals might not behave in ways they should not. Nevertheless, the logic of this argument suggests that codes of conduct would not be implemented for any public officials at all, but codes do exist for most such officials because they are seen to have value.

15 Transcript of roundtable, 21 March 2011, p. 6, and see, 'No. 23—Provisions governing the conduct of Senators' *Brief guides to Senate procedure*, July 2008.

16 Transcript of roundtable, 21 March 2011, p. 7.

17 Transcript of roundtable, 21 March 2011, p. 5.

- 3.26 Codes have in fact been accepted widely as a guide to ethical behaviour and as communicating with the community about its expectations of the standards to be expected of public officials.

Complaints would be pursued for political purposes

- 3.27 Another argument raised in the debate is that complaints under a code of conduct would be pursued against members purely for political reasons. There could be a variety of motivations for complaints, including for political purposes. A rigorous and independent process for dealing with complaints would be required to enable those matters that are raised purely for political purposes to be dismissed as such.
- 3.28 In the political contest between government and opposition, many opportunities can be taken to seek political advantage. It is possible that an allegation of misconduct could be raised in a frivolous way to make a political point. There are examples where matters of privilege can be raised, more for political reasons than because there is a serious matter of privilege involved. While there is the potential for misuse of any formal mechanism for regulating the conduct of individuals, there would need to be built into any review or investigation of complaints raised as code of conduct matters the opportunity to filter and exclude those that are merely frivolous or vexatious. While a fair and proper investigation process might not prevent matters from being raised for purely political purposes, it should limit the opportunity for such matters to be pursued. It should also be noted, that raising such serious matters in a frivolous manner can often reflect adversely on the person who raises them.

Parliamentarians are different from other officeholders

- 3.29 A further argument that is made is that members of Parliament are unlike other officeholders in that they are subject to elections, and judgements are made about the conduct of members at elections by their individual parties and by the general body of electors. However, there can be a considerable period of time between any conduct of a member that raises concerns and the next election. Furthermore, elections are typically about a variety of issues, with the conduct of a member during a parliamentary term being only one issue to be taken into account. Conduct of a relatively minor nature may be of little significance in the broader election context. A code of conduct could enable an appropriate and more timely response to any incidents.

Observations

- 3.30 The competing arguments identified in relation to implementing a code of conduct raise serious issues which are deserving of careful consideration. The overall standing of the Parliament and parliamentarians in the community is not as strong as would be desirable, and there is a range of factors involved in those perceptions. A code of conduct for members is not a panacea for a dramatic change in the overall perceptions about parliamentarians. However, it could make a modest contribution to an improvement in perceptions.
- 3.31 Were the House to implement a code, this would be a further demonstration of its rights, in accordance with the powers granted by section 50 of the Constitution to each House, to make rules and orders with respect to the mode in which its powers, privileges and immunities might be exercised and upheld, and the order and conduct of its business and proceedings.
- 3.32 The Committee is mindful that the introduction of a code will not be a guarantee against the behaviour of members being found to fall short of the standards set by the code. The recent scandals at Westminster stand as a reminder that mistakes can be made and misconduct can occur even when a code of conduct for members is in place. The Committee notes also that the number of cases of proven misconduct was relatively small although the media reports might lead to a different impression. When these events were revealed the individual Members could be and were measured against the code and this provided certainty.