

# CHAPTER TWO

## BACKGROUND TO THE BILLS

We cannot say conclusively that standards of behaviour in public life have declined. We can say that conduct in public life is more rigorously scrutinised than it was in the past, that the standards which the public demand remain high, and that the great majority of people in public life meet those high standards. But there are weaknesses in the procedures for maintaining and enforcing those standards. As a result people in public life are not always as clear as they should be about where the boundaries of acceptable conduct lie. This we regard as the principal reason for public disquiet. It calls for urgent remedial action.

Committee on Standards in Public Life, United Kingdom Parliament, 1995<sup>1</sup>

### Introduction

2.1 In recent years, the conduct of parliamentarians in the performance of their official responsibilities has attracted widespread attention and criticism.<sup>2</sup> The public controversy has been fuelled by a perceived increase in, and greater public exposure of, incidents of alleged misconduct by parliamentarians.<sup>3</sup> According to Dr Noel Preston, the issue of parliamentary ethics has received more public debate in the past decade because of concern at the conduct of members of parliament with respect to allowances, conflicts of interest, official corruption and duplicity in public office.<sup>4</sup> Equivalently, public concern about the apparent misuse of public monies by governments to advance party political interests, such as through government advertising campaigns, has intensified.

2.2 Dr John Uhr, Senior Fellow at the Research School of Social Sciences, ANU, captured that growing sense of unease with the conduct of parliamentarians in their official business:

In the past it has always been a matter of trust. The community elects the Parliament and trusts it to get on and do its job. The Parliament chooses the Ministry and trusts it to do the same. This traditional reliance on public trust is beyond its use-by-date.<sup>5</sup>

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1 Quote taken from Noel Preston, 'Codifying Ethical Conduct for Australian Parliamentarians 1990–99', *Australian Journal of Political Science*, vol. 36, no. 1, p. 46.

2 See for example E. J. Lockett, submission no. 12; Dr Andrew Brien, *A Code of Conduct for Parliamentarians?*, Research Paper 2 1998–99, Parliament of Australia, Parliamentary Library, pp. 4–7, <http://www.aph.gov.au/library/pubs/rp/1998-99rp02.htm> (6 February 2002).

3 The literature on this matter is extensive and continues to attract widespread media comment. See for example the debate generated in the first week of February 2002 by reports of the Government's intention to introduce legislation to tighten unauthorised release of official information. Andrew West and Brian Toohey, 'Whistleblowers face jail as Libs use spy laws to plug leaks', and Fia Cumming, 'Why little polliies go to market', the *Sun-Herald*, 3 February 2002, pp. 4, 21 and 28. See also footnote above.

4 Dr Noel Preston, Adjunct Professor in the Key Centre for Ethics, Law, Justice and Governance, Griffith University, submission no. 21, part A.

5 Quote in Leigh Baker, 'New ministerial code of conduct', *ANU Reporter*, vol. 32, no. 6, 27 April 2001.

2.3 The bills before the Committee address this problem of actual or perceived unethical behaviour which has given rise to public cynicism about the system of government. Thus, the overarching concern of this legislation is to introduce mechanisms that will promote and be seen to foster ethical behaviour in parliamentarians and their staff in carrying out official business and also with safeguarding the integrity of the political process. Taken as a package, the main objects of the four bills considered in this report are:

- to develop and implement a code of conduct for members of parliament and for ministers;
- to introduce a code of practice to ensure public appointments are made on a merit basis in the public interest and are not party political;
- to establish mechanisms for articulating and policing minimum standards for parliamentarians in the use of entitlements and allowances, on conflict of interest issues and on other matters which may have ethical implications;
- to establish mechanisms to advise parliamentarians on these matters;
- to prohibit false or misleading advertising in the media in the lead up to elections; and
- to prevent the party political use of government information campaigns and ensure they focus on informing the public fully and fairly about the effects and objectives of new policy initiatives.

2.4 To convey an understanding of the evolution of ethics regimes and as a point of comparison for the proposals put forward in the bills, this chapter considers:

- the political environment in Australia as a backdrop to the introduction of the bills;
- ethics regimes in the United States of America, Canada and the United Kingdom;
- ethics regimes in the various States of Australia; and
- the development of ethics regulation in the federal sphere.

### **The political context—a disenchanted electorate**

2.5 The Committee notes that Senator Murray, Senator Faulkner and Mr Beazley made explicit reference to the fact that the proposed legislation aims to address a growing lack of public trust in politicians and the political system in Australia.<sup>6</sup>

2.6 In addressing this concern, Senator Murray stated:

It is not enough for Australian politicians to protest their own integrity. Systemic distrust and electoral cynicism born of experience must be met with legislative solutions. The time has come for Australian politicians to require political honesty to be made a matter of law.<sup>7</sup>

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6 Senator Andrew Murray, Electoral Amendment (Political Honesty) Bill 2000 and the Charter of Political Honesty Bill 2000, Second Reading Speech, 10 October 2000, Senate *Hansard* p. 18198; Senator John Faulkner, Auditor of Parliamentary Allowances and Entitlements Bill 2000, Second Reading Speech, Senate *Hansard*, 1 November 2000, p. 18848; and Mr Kim Beazley, Government Advertising (Objectivity, Fairness and Accountability) Bill 2001, First Reading Speech, House of Representatives *Hansard*, 6 August 2001, p. 29102.

7 Senator Andrew Murray, Senate *Hansard*, 10 October 2000, p. 18198.

2.7 Likewise, Senator Faulkner stated, in regard to the Auditor of Parliamentary Allowances and Entitlements Bill, that ‘It is time for us the take action to restore...public trust, to enhance our credibility, and to improve our effectiveness as parliamentarians’.<sup>8</sup>

2.8 During the inquiry, Dr Noel Preston told the Committee that the electorate’s growing disenchantment with politicians and the political system has been well documented in polls and media surveys conducted over the last decade.<sup>9</sup> Drawing on such surveys, Senator Murray, in his submission to the inquiry, reported the findings of the 1996 Australian Electoral Study which found that only 27 per cent of respondents felt that federal politicians had a high personal moral code, while 78 per cent felt that federal politicians will lie if they feel that the truth will hurt them politically.<sup>10</sup> On 1 November 2000, Senator Faulkner told the Senate that a recent poll had recorded that 54 per cent of voters believed that politicians often make improper use of their entitlements, and 42 per cent sometimes misuse them.<sup>11</sup> Such views are not recent. In November 1995, during a speech on a draft code of conduct, former Senator Cheryl Kernot cited a Morgan poll that, in her words, ‘revealed the depth of cynicism within the Australian electorate towards representatives’. It showed that 24 per cent of those polled thought that politicians were usually truthful, 79 per cent said that politicians could not be trusted to keep election promises and 84 per cent believed that politicians lie at election time to win votes.<sup>12</sup>

2.9 Popular response to the inquiry also supported the general view that Australians hold politicians in low esteem.<sup>13</sup> The Committee heard that this trend to cynicism had been exacerbated by a perceived increase in the incidence of impropriety by parliamentarians and, in particular, misconduct by ministers involving the misuse of entitlements or public funds for personal gain or political purposes over the last decade.<sup>14</sup>

2.10 While such incidents reported in the media feed public disillusionment with politicians, they also highlight the lack of effective and coherent mechanisms to advise parliamentarians and their staff about expected standards of conduct, and to monitor and report on compliance with such standards.

2.11 The bills are a response to the growing public concern about the need to promote high ethical standards in the federal parliament and in the conduct of official business. They are designed to set up regulatory regimes that, in their different approaches, would encourage political honesty and integrity. Senators Murray and Faulkner emphasised that the proposed regimes are not intended to be optional. Instead they aim to establish minimum standards to

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8 Senator John Faulkner, Auditor of Parliamentary Allowances and Entitlements Bill 2000, Second Reading Speech, Senate *Hansard*, 1 November 2000, p. 18848.

9 Dr Noel Preston, submission no. 21, p. [3].

10 Senator Andrew Murray, submission no. 13, p. 2.

11 Senator John Faulkner, Second Reading Speech, Senate *Hansard*, 1 November 2000, p. 18848.

12 Senator Cheryl Kernot, Senate *Hansard*, 16 November 1995, p. 3236.

13 Mr E. J. Lockett, an elected delegate to the 1998 Constitutional Convention, wrote that this was brought home to him by the delegates’ response when the Federal Treasurer told them they were all now, in effect, politicians. Submission no. 12, covering letter. See also, Parry Jones, submission no. 3 and Mr Richard Czupryna submission no. 9. Ms Betty Moore expressed the view that politicians did not evidently have the people’s interests at heart, submission no. 2. Mr Arnold Sandell saw that the behaviour of politicians in parliamentary debates, as revealed by the media, did nothing to recommend them or the institution they represent. Submission no. 6. See also Dr Noel Preston, submission no. 12.

14 See footnote above.

compel parliamentarians to behave more ethically, and to improve the scrutiny of their official conduct and make them more accountable to parliament and the electorate.<sup>15</sup>

2.12 This concern with improving the perceived performance of parliamentarians and how they conduct their public affairs has attracted widespread debate in Australia and overseas. The following section looks at developments in the area of ethics in public administration.

## **Ethics regimes in other countries**

2.13 A number of countries, such as the United States of America, Canada and the United Kingdom, have adopted different ethical frameworks to address public dissatisfaction with the conduct of parliamentarians.<sup>16</sup>

### ***The American model***

2.14 The ethics regime adopted by the United States of America provides for three-tiered scrutiny of members, senators, candidates and parliamentary staff. It provides for codes and for committees in both the Senate and the House of Representatives to monitor, investigate and advise on ethical issues arising from the codes. The framework also provides for candidates and newly elected members and senators to receive detailed advice on the requirements before taking up appointment, with assistance from a nationwide network of ethics advisers overseen by the Office of Government Ethics.

2.15 The House of Representatives Committee on Standards of Official Conduct was established by the *Ethics in Government Act 1978*. It is the ‘supervising ethics office’ for the House and investigates violations of the Code of Official Conduct in accordance with committee rules. After completing an investigation process into alleged breaches of the code, the committee considers and votes on a motion to recommend to the House of Representatives whether the House take disciplinary action against a member of that House. Under rule 25, with respect to any proved counts against a member of the House of Representatives, the committee may recommend to the House that sanctions such as expulsion from the House of Representatives, censure, reprimand or a fine be imposed. The committee also advises members and staff regarding House rules and standards of conduct, and produces an ethics manual.<sup>17</sup>

2.16 The Senate Select Committee on Ethics, originally established as the Select Committee on Standards and Conduct in 1964, has powers to receive complaints, to investigate allegations of improper conduct which may reflect upon the Senate, and to recommend, when appropriate, disciplinary action. In addition, the committee may act on violations of the law, or of the Senate Code of Conduct and other regulations and rules of the Senate. On completing an investigation, the committee may recommend to the Senate or

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15 Senator Andrew Murray, Electoral Amendment (Political Honesty) Bill 2000 and the Charter of Political Honesty Bill 2000, Second Reading Speech, Senate *Hansard*, 10 October 2000, p. 18198; Senator John Faulkner, Auditor of Parliamentary Allowances and Entitlements Bill 2000, Second Reading Speech, Senate *Hansard*, 1 November 2000, p. 18848.

16 See for example, Howard R. Wilson, ‘Ethics and Government: the Canadian Experience’, in *Australia and Parliamentary Orthodoxy*, Department of the Senate, Papers on Parliament, no. 35, June 2000, p. 2.

17 United States House of Representatives, Rules, Committee on Standards of Official Conduct. Jurisdiction of the Committee on Standards of Official Conduct, United States House of Representatives, House Government Ethics [http://www.house.gov/ethics/Rules\\_107th.htm](http://www.house.gov/ethics/Rules_107th.htm) (7 March 2002).

party conference an appropriate sanction for a violation or improper conduct which may include for senators ‘censure, expulsion or party discipline’, and for staff members, ‘termination of employment’. The Select Committee also produces and publishes a *Senate Ethics Manual* that provides further guidance on these issues.<sup>18</sup>

### ***The Canadian model***

2.17 In 1994, Canada’s Prime Minister, Mr Jean Chrétien, appointed Canada’s first Ethics Counsellor to ‘strengthen and broaden the advisory, oversight and investigatory capacity within the Government of Canada on all ethical issues’. The two main areas of surveillance are conflict of interests among public office-holders and lobbying.<sup>19</sup> Canada is yet to introduce a conflict of interest regime for backbenchers and senators.<sup>20</sup>

2.18 The Office of the Ethics Counsellor administers the Prime Minister’s *Conflict of Interest Code*—the Conflict of Interest and Post Employment Code for Public Office Holders. In this role, the Counsellor, a public servant, acts on the Prime Minister’s request to investigate allegations against ministers and senior officials involving conflict of interest. The Counsellor then reports back to the Prime Minister, but not to Parliament. Mr Howard Wilson, the first Ethics Counsellor to the Canadian Government, explained his role:

My office deals with potential conflicts of interest and other ethical issues for the people most likely to be able to influence critical decisions in our federal government. My office is also responsible for the *Lobbyists Registration Act* and the *Lobbyists’ Code of Conduct*. Those are designed to bring a level of openness to lobbying activities and to the people involved in that work.

...

I deal with the grey areas of potential or real conflict of interest. In practice, these are issues that may seem broadly wrong in the eyes of citizens, without ever actually being illegal.<sup>21</sup>

2.19 He made the point that Canada’s approach to an ethics structure is on avoiding the likelihood for conflicts of interest ‘well before they even become possible’. According to Mr Wilson the ethics regime is based on a clear set of principles which forms the basis for a ‘few select rules and procedures’.<sup>22</sup>

### ***The United Kingdom model***

2.20 The United Kingdom has a code of conduct for members of parliament which is administered by the Parliamentary Commissioner for Standards. Both the code and the

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18 Chapter 1, ‘History, Jurisdiction, Procedures, and Role of the Committee, and Sources of Senate Standards of Conduct’, *Senate Ethics Manual* at Senate Select Committee on Ethics <http://ethics.senate.gov/ethics1.html> (5 November 2001).

19 Except where indicated, information in this section is largely drawn from the Office of the Ethics Counsellor, Canada Government website: <http://strategis.gc.ca> (7 November 2001).

20 Howard R. Wilson, ‘Ethics and Government: the Canadian Experience’, *Australia and Parliamentary Orthodoxy*, Department of the Senate, Papers on Parliament, no. 35.

21 Howard R. Wilson, ‘Ethics and Government: the Canadian Experience’, *Australia and Parliamentary Orthodoxy*, Papers on Parliament, no. 35, p. 3.

22 Howard R. Wilson, ‘Ethics and Government: the Canadian Experience’, *Australia and Parliamentary Orthodoxy*, Papers on Parliament, no. 35, pp. 2–3.

commissioner are established by the *Standing Orders* of the House of Commons. The code was approved by the House of Commons in 1996 and is enforced by the Committee on Standards and Privileges. The functions of this committee include the oversight of the Parliamentary Commissioner for Standards; the consideration of any matter relating to the conduct of members, including complaints in relation to alleged breaches of the code which the commissioner has drawn attention to; and the recommendation of any modifications to the code of conduct. The committee reports to the legislature.<sup>23</sup> The Parliamentary Commissioner for Standards was created to keep the Register of Members' Interests, advise members of parliament on their conduct and to investigate complaints.

2.21 The House of Lords was due to introduce its own code of conduct on 31 March 2002 but a Standards Commissioner was not to be appointed.<sup>24</sup>

2.22 A code for 'Ministerial Conduct' was introduced in 1997 and has been subsequently revised.<sup>25</sup> Enforcement of the code rests solely in the hands of the Prime Minister.<sup>26</sup>

### ***Overview of overseas models***

2.23 Of the three models, the American and Canadian models focus on the regulation of conflict of interest issues, and have comprehensive systems for avoiding conflict of interest situations by providing prior advice. All of the models include codes of conduct which have support mechanisms. The United Kingdom has a committee and commissioner established within Parliament. The United States has committees in each House of Parliament and a separate executive agency responsible for advice and compliance. Canada has an independent office, separate from Parliament, with a strong advisory but also an investigative function.

2.24 The models fall into two categories: regimes that establish bodies which can supervise government at arms length from politics; and, those that rely on self-regulation, where parliamentarians themselves monitor their own behaviour.<sup>27</sup>

### **Ethics regulation in Australia—State precedents**

2.25 Australian initiatives to introduce legislative ethics regimes have followed international patterns. It is notable, for example, that in the three models cited above, the regaining or strengthening of voter confidence in politicians or the political process is a stated objective. This indicates that, as ethics experts told the Committee, the introduction of ethics regimes is most often a response to allegations of political misconduct. In turn, the type of

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23 The Code of Conduct together with the Guide to the Rules Relating the Conduct of Members, Approved by the House of Commons on 24 July 1996, House of Commons: <http://www.parliament.thestationery-office.co.uk/pa/cm199697/cmselect/cmstand/688/guide.htm> (1 November 2001), p. 1. See also Select Committee on Standards and Privileges, *Seventh Report*, <http://www.parliament.thestationery-office.co.uk/parliament/cm200102/cmselect/cmstnprv/62> (7 March 2002).

24 UK Parliament, *Standards in Public Life*, <http://www.parliament.uk/parliament/guide/stand.htm> (7 March 2002).

25 The code was previously in existence as 'Questions of Procedures for Ministers', see Sixth Report of the Committee on Standards in Public Life, January 2000: *Reinforcing Standards in Public Life*, p. 41.

26 'Sixth Report of the Committee on Standards in Public Life', Chapter 4, pp. 52–53.

27 Harry Evans, *Committee Hansard*, p. 7.

mechanisms introduced generally result from recommendations made during inquiries investigating those allegations.<sup>28</sup>

2.26 In Australia, inquiries examining the abuse of public trust in Western Australia, Queensland, Tasmania, the Australian Capital Territory and New South Wales have led to proposals for the introduction of codes of conduct, not only for parliamentarians but also for public servants.<sup>29</sup>

2.27 Most Australian legislatures have registers of pecuniary interests, while other accountability mechanisms are widespread. New South Wales and Queensland have standing ethics committees. New South Wales, Queensland, South Australia, the Australian Capital Territory and Victoria have whistle blower statutes. Anti-corruption bodies exist in New South Wales, Western Australia and Queensland. To date, however, only Victoria, Tasmania, New South Wales and Queensland have adopted codes of conduct for members of parliament, and Queensland is alone in having established an Integrity Commissioner.<sup>30</sup> The Premier of Western Australia has drafted a code of conduct for members of parliament which is to be considered by the Standing Committee on Procedure and Privileges.<sup>31</sup> He has released a code of conduct for ministers.<sup>32</sup>

2.28 The evolution of Queensland's code of conduct for members of parliament, shows how it has broadened its approach to the development of an ethics regime by going beyond a register of interests and the requirement to disclose pecuniary and other interests. In 1989 the Commission into Possible Illegal Activities and Associated Police Misconduct, (the Fitzgerald Inquiry) recommended that the Electoral and Administrative Review Commission (EARC) implement and supervise the formulation of codes of conduct for public officials. The EARC reviewed this matter and decided that some form of code of conduct for members of parliament was needed. In its 1992 report, the Commission found:

To the Commission it seems inescapable that if the system of elected government is to work effectively, the ethical standards of elected officials need to be declared publicly, and a continuing effective process for disciplining breaches of those standards needs to be developed and implemented.

Recourse to the ballot box every two or three years has been shown to be largely ineffective as a process for achieving such discipline.<sup>33</sup>

2.29 The Queensland Members' Ethics and Parliamentary Privileges Committee produced a Code of Ethical Standards in 2000. It comprised three parts: a statement of

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28 See Clem Campbell, submission no.10, p. 1 and Dr Noel Preston, submission no. 21, p. 6.

29 Inquiries such as the Western Australian Royal Commission Investigations, G. E. Fitzgerald, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of a Commission of Inquiry Pursuant to Orders in Council*, July 1989 and the New South Wales inquiry into ICAC. See, for example, submission no. 10 and Dr Andrew Brien, 'A Code for Parliamentarians?' *Research Paper 2 1998-99*, Politics and Public Administration Group, Department of the Parliamentary Library, 14 September 1998, p. 7.

30 This information is largely drawn from Dr Noel Preston, 'Codifying Ethical Conduct for Australian Parliamentarians 1990-99', *Australian Journal of Political Science*, vol. 36, no. 1, *passim*, as cited in submission no. 21.

31 Western Australia, Legislative Assembly, *Hansard*, 21 February 2002, p. 7854.

32 Governor's Speech, Legislative Council, *Hansard*, 1 May 2001, p. 3.

33 Quote in Report no. 21—Part A—*Report on a Draft Code of Conduct for Members of the Queensland Legislative Assembly*, 1998, p. 1.

fundamental principles; the obligations of members, which is a consolidation of the specific obligations on members regarding their behaviour and duties and is intended as an educational resource; and a procedure for complaints. The statement of fundamental principles and the complaints procedure were adopted by the Assembly in 2001.

2.30 The ethics models developed in these jurisdictions have influenced the structure and content of the present bills, as have a number of significant inquiries and reports on the issues surrounding ministerial accountability. The following account surveys initiatives in ethics regulation of Commonwealth parliamentarians.

## **Federal ethics developments**

2.31 The development of ethics regulation in the federal sphere has made halting progress.<sup>34</sup> In his submission to the inquiry, Mr Clem Campbell, the first Chairman of Queensland Members Ethics and Privileges Committee, cited two main reasons for resistance to the implementation of codes of conduct:

- The first is that the code would be used as a measure of punishment not advice, bringing about the natural fear of and resultant electoral and or career damage. An underlying concern is that a code would catch more inadvertent offenders while more sophisticated and determined rorters of the system would escape detection.
- The second reason is the loss of Executive control. That is, government leaders would no longer be the prime agency in determining whether, and how, an offending member might be disciplined and how publicly.<sup>35</sup>

2.32 Some experts on ethics and public administration contend that political loyalties are behind the reluctance of governments to implement accountability legislation. Mr Campbell saw that the tradition of rewarding party ‘number crunchers’ and ‘power brokers’ with an elected parliamentary position did not support the development of respect for ethical parliamentary behaviour, nor executive support for parliamentary codes.<sup>36</sup> Further, Dr Andrew Brien, in a paper for the Department of the Parliamentary Library, considered that existing regulatory approaches are often ineffective because parliamentarians are reluctant to participate in the established processes, and are unwilling to impose sanctions when clear examples of misconduct occur.<sup>37</sup>

2.33 Experts on ethics and public administration therefore generally conclude that the major parties baulk at the introduction of a transparency measure such as a code of conduct. In support of this view, Mr Campbell noted that the push for the introduction of accountability measures has been left to Independents and minor political parties, for

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34 See Noel Preston, ‘Codifying Ethical Conduct for Australian Parliamentarians 1990–99’, *Australian Journal of Political Science*, vol. 36, no. 1, p. 56.

35 Submission no. 10, pp. 1–2. Mr Campbell went on to explain: ‘Political reality is that while a Code of Conduct may be an election policy of a party, it is not a government agenda priority after an election. The government is not interested in the public respect of parliament—an objective of a Code of Conduct—but rather a damage minimisation strategy for the government.’

36 Submission no. 10, p. 3.

37 Andrew Brien, ‘A Code of Conduct for Parliamentarians’, Research Paper 2 1998–99, Politics and Public Administration Group, Department of the Parliamentary Library, 14 September 1998, p. 10.



example, in New South Wales, and by the Australian Democrats in their federal election campaign in 1998.<sup>38</sup>

2.34 Nevertheless, developments towards a comprehensive and integrated ethics regime in the federal sphere, while slow, have been supported by both Coalition and Labor-led Governments.

### ***Joint Committee on Pecuniary Interests of Members of Parliament—1975***

2.35 In 1974, the Senate and the House of Representatives agreed to the appointment of a Joint Committee on Pecuniary Interests of Members of Parliament. It was to consider whether arrangements should be made for the declaration of interests of members of parliament. If so, it was to determine what classes of pecuniary interest or other benefit should be disclosed, how the register should be compiled and maintained and whether arrangements should be made for public access.<sup>39</sup>

2.36 The committee, which tabled its report in September 1975, reached unanimous agreement that the usefulness of a register of interest lies not in its ability to detect fraud or impropriety but as a way of reassuring the public that the decisions taken by parliamentarians are made in the public interest. It also considered whether a code of conduct was desirable. Although its main interest was in the specific area of conflict of interest, it nonetheless recognised that a code of conduct ‘would be an essential adjunct to its recommendation to institute a declaration of interests system in which it was compulsory that certain interests be declared.’ It explained:

Such a code should be concerned with the elimination of conflict of interest situations. By specifying a set of basic principles which Members of Parliament should observe, Members would be reminded that their ethical obligations to the community do not cease merely by declaring their interests.<sup>40</sup>

The committee further recommended that its proposal for a joint standing committee to deal with the declaration of interests should also be entrusted to draft a code of conduct.<sup>41</sup>

### ***The Bowen Report 1979—a ‘major revolution’***

2.37 A committee established by the then Prime Minister, Mr Malcolm Fraser, in 1978 to devise a better framework for the regulation of conflict of interest situations among members of parliament marks the next significant milestone in the evolution of an ethics regime for Commonwealth parliamentarians.<sup>42</sup> It was chaired by the Hon Sir Nigel Bowen, Chief Judge

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38 Submission no. 10, pp. 3–4.

39 *Senate Journals*, Pecuniary Interests of Members of Parliament—Joint Committee, no. 20, 1974, p. 208 and no. 23, 1974, p. 236.

40 Joint Committee on Pecuniary Interests of Members of Parliament, *Report on Declaration of Interests*, Parliamentary Paper no. 182, the Parliament of the Commonwealth of Australia, 1975, p. 45.

41 *ibid.*

42 *Public Duty and Private Interest*, Report of the Committee of Inquiry, July 1979, Parliamentary Paper no. 353/1979.

of the Federal Court of Australia, and its report *Public Duty and Private Interest* became known as the Bowen Report.<sup>43</sup>

2.38 Under its terms of reference, the committee was to recommend whether a statement of principles could be drawn up on the nature of private interests, pecuniary or otherwise, that could conflict with the public duty of persons holding positions of public trust in relation to the Commonwealth. If so, the committee was to recommend whether principles could be defined that would promote the avoidance of any conflicts of interest and further, if possible, recommend what those principles should be.<sup>44</sup>

2.39 The committee did indeed identify such principles and placed them in a draft code of conduct which it recommended be adopted for general application to all office holders.<sup>45</sup> This code of conduct is included at Appendix 3. When applying this code specifically to parliamentarians, the committee made the following recommendations:

The Senate and the House of Representatives be invited to consider:

- a) amending their Standing Orders to include new Standing Orders requiring, respectively, Senators and Members of the House of Representatives to conform to the Code of Conduct; or
- b) passing a resolution adopting the Code of Conduct; and
- c) providing that a subsequent breach of the Code of Conduct should constitute misconduct and a breach of the privileges of Parliament.<sup>46</sup>

2.40 Although the committee reached the conclusion that the adoption of a requirement for the compulsory registration of the interests of members was not warranted, it clearly acknowledged in the code of conduct the need for office holders to avoid situations in which private interest, pecuniary or otherwise, would clash with, or be seen to clash with, public duty. It also recognised the importance of officials declaring an interest which conflicts with or might reasonably be thought to conflict with their public duty.<sup>47</sup>

2.41 In turning to the enforcement machinery for the code of conduct, the committee recommended that each House be invited to:

- a) establish a Standing Ethics Committee empowered to:
  - i) report to the House, from time to time, on any changes in the Code of Conduct that it deems desirable; and

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43 At inquiry hearings, Dr John Uhr stated that the Bowen report was a ‘major revolution’ in ethics thinking in 1979, and a model of international ‘best policy practice’ on conflict of interest issues. Dr Uhr also suggested that model should be reconsidered in any examination of Federal ethics regimes *Committee Hansard*, p. 21 and see submission no. 16, attachment 1, pp. 17–18.

44 *Public Duty and Private Interest*, Report of the Committee of Inquiry, July 1979, *Parliamentary Paper No. 353/1979*, pp. 1–2.

45 See Appendix III and also *Public Duty and Private Interest*, p. 31.

46 *Public Duty and Private Interest*, p. 133.

47 See nos. 3–6 of the code of conduct.

- ii) receive, investigate and report upon any complaints of departures by Members from the Code of Conduct, and, in particular, upon allegations involving conflicts of interest; and
- b) determine the procedures for the operation of the Committee and the extent of its powers.<sup>48,49</sup>

2.42 The committee also considered procedures to be adopted following an alleged serious breach of the code of conduct. To allow for such circumstances, the committee recommended that a statutory body, to be known as the Public Integrity Commission, be created, comprising part-time members appointed by the Prime Minister after consultation with the Leader of the Opposition.<sup>50</sup> It would investigate allegations referred to it by the Parliament of major breaches of the proposed code by ministers and members.<sup>51</sup>

2.43 Ministers were also expected to honour the parliamentary code; their compliance would be secured by a letter of recognition from the Prime Minister to each of his ministers. On appointment, ministers would also be required to make a declaration of their private interests to Cabinet, as well as register particular interests on a confidential basis with the Prime Minister.<sup>52</sup>

2.44 From that time, the setting of standards for the conduct of Commonwealth members of parliament has never strayed far from public attention and debate. In 1982 during Discussion of a Matter of Public Importance, Mr Lionel Bowen told the House that, while the Bowen Committee was asked to grapple with the problems associated with the improper conduct of members of parliament, such ‘problems have grown more acute and more difficult for this Parliament to gloss over’.<sup>53</sup>

2.45 In response to this statement the Minister for Aviation, Mr Wal Fife, explained the action that the Government had taken in support of the recommendations of the Bowen report. He stated:

The Government has accepted the code of conduct (as proposed by Bowen) in principle as the basis for particular action to be taken in regard to particular categories of office holders. The code is a statement of the broad principles to which effect will be given, in the first place, in relation to Ministers, public servants and other officials. The Government accepts, as the report proposes, that every effort should be made to secure the widest possible familiarity with and observance of the code.<sup>54</sup>

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48 *Public Duty and Private Interest*, p. 107.

49 It is noted that the Bowen Committee did not, however, provide a mechanism for prior advice on the code of conduct.

50 *Public Duty and Private Interest*, p. 108.

51 *Public Duty and Private Interest*, p. 108.

52 *Public Duty and Private Interest*, p. 67. The report explained that ‘in recommending that Ministers should be subject to a compulsory system of registration with limited access, the Committee is conscious that it has come down strongly against such a requirement in the case of the ordinary Member or other officeholder. It sees no inconsistency in this.’

53 Lionel Bowen, House of Representatives *Hansard*, 21 October 1982, p. 2369.

54 Wal Fife, Minister for Aviation, Pecuniary Interest: Discussion of Matter of Public Importance, House of Representatives *Hansard*, 21 October 1982, p. 2372.

2.46 He acknowledged, however, that while the Government supported the thrust of the Bowen recommendations and had implemented most of them, the only recommendations yet to be fully dealt with were those concerning members of parliament.<sup>55</sup>

### *A registration of interest*

2.47 Within two years, the House of Representatives had adopted a standing order which provided for a Committee of Members' Interests to be appointed at the commencement of each year. Originally adopted in October 1984 as Standing Order 28A, it required the committee, *inter alia*, to inquire into and report upon arrangements made for the compilation, maintenance and accessibility of a Register of Members' Interests.

2.48 According to *House of Representatives Practice*, the substantive requirements insofar as members are concerned were established by resolutions of 9 October 1984 and modified by the House in February 1986, October 1986, November 1988 and November 1994. The principal provision is:

Within 28 days of making an oath or affirmation, each Member is required to provide to the Register of Members' Interests a statement of the Members' registrable interests and the registrable interests of which the Member is aware of the Members' spouse and any children wholly or mainly dependent on the Member for support, in accordance with resolutions adopted by the House and in a form determined by the Committee of Members' Interests from time to time.<sup>56</sup>

2.49 On 13 February 1986, the House resolved that any Member who:

- knowingly fails to provide a statement of registrable interests to the Registrar of Members' Interests by the due date;
- knowingly fails to notify any alteration of those interests to the Registrar of Members' Interests within 28 days of the change occurring; or
- knowingly provides false or misleading information to the Registrar of Members' Interests

shall be guilty of a serious contempt of the House and shall be dealt with by the House accordingly.<sup>57</sup>

2.50 A motion proposing a system for the registration of senators' interests was referred to the Senate Standing Orders Committee in October 1983 but it considered that the matter should be determined by the Senate. Although a motion relating to the registration and declaration of senator's interests and the establishment of a Committee of Senators' Interests was debated on 17 March 1987, the matter remained unresolved for many years. The Senate

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55 Wal Fife, Minister for Aviation, Pecuniary Interest: Discussion of Matter of Public Importance, House of Representatives *Hansard*, 21 October 1982, p. 2372.

56 *House of Representatives Practice*, I.C.Harris (ed.), Fourth Edition, House of Representatives, Canberra 2001, p. 147.

57 *House of Representatives Practice*, I.C.Harris (ed.), Fourth Edition, House of Representatives, Canberra 2001, pp. 148–9.

finally adopted special orders to deal with procedures for the declaration and registration of senator's pecuniary interests in 1994.<sup>58</sup>

### ***The Framework for Ethical Principles for Members and Senators—1995***

2.51 While both Houses have established procedures for the declaration of interests and for the establishment and maintenance of a register of interests they have not adopted a more comprehensive code of conduct for members. The Commonwealth Parliament made a significant step forward in developing such a code for parliamentarians and ministers in 1995 with the establishment of a special working group.

2.52 Mr Ted Mack, an independent member in the House of Representatives, was instrumental in pushing for the establishment of a code of conduct. In April 1991, he asked the Prime Minister whether the Government would initiate measures to ensure that members of parliament receive some tuition in ethics and whether a code of conduct should be developed.<sup>59</sup> Subsequently, the Prime Minister, Mr Bob Hawke, approached the Speaker and the President requesting that a working party of members of each House be appointed to examine the matter.<sup>60</sup> The initial working committee was disbanded when Parliament was prorogued in 1993 but in 1994 a new group was formed on the request of Senator Evans as part of the Senate's 'accountability package'. The working committee consisted of representatives of all parties and independent representatives.<sup>61</sup>

2.53 This group advertised for submissions and after ten meetings produced a Framework for Ethical Principles for Members and Senators which was tabled in both Houses of Parliament. The framework drew heavily on the work of the Bowen Committee in 1978 and the Queensland Electoral and Administrative Review Commission in 1992. It had a strong ethical emphasis, laying out requirements for loyalty to the nation, diligence and economy, the proper exercise of influence, and personal conduct.

2.54 The working group also saw a need to produce an additional framework to cover the circumstances of ministers. According to the Speaker of the House of Representatives, the Hon Stephen Martin MP, this second document—the Framework for Ethical Principles for Ministers and Presiding Officers—included principles such as impartiality, honesty, the appropriate use of influence, public property and services and official information.<sup>62</sup>

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58 *Odgers' Australian Senate Practice*, 10<sup>th</sup> Edition, 2001, p. 164. See Procedural orders and resolutions of the Senate of continuing effect, Registration and declaration of senators' interests, *Standing Orders and other orders of the Senate*.

59 Ted Mack, Question without Notice, 11 April 1991, House of Representatives *Hansard*, p. 2442. See also Senator Grant Tambling, Senate *Hansard*, 24 August 1995, p. 383.

60 Noel Preston, 'Codifying Ethical Conduct for Australian Parliamentarians 1990–99', *Australian Journal of Political Science*, vol. 36, no. 1, pp. 47–48. See also The Hon Stephen Martin, Speech, House of Representatives *Hansard*, 21 June 1995, pp. 1983.

61 The Hon Stephen Martin, Speech, *House Hansard*, 21 June 1995, p.1983. The Speaker explained further that 'The working group was not a formally constituted committee of the parliament and privilege did not, therefore, attach to its deliberations. Taking this into account, and wishing to test whether there were widely shared public views on the matters under consideration, the group decided to place advertisements in all metropolitan newspapers...Twenty-six people responded. These were taken into account in the group's subsequent deliberations.'

62 The Hon Stephen Martin, Speech, House of Representatives *Hansard*, 21 June 1995, p. 1983.

2.55 In his speech in the House of Representatives on 21 June 1995, the Speaker noted that the working committee had decided not to produce detailed prescriptive documents. Instead, it sought to set out ‘fundamental principles and the minimum standards of behaviour the Australian people have a right to expect of their elected representatives.’<sup>63</sup> The framework for ethical principles for members and senators is included at Appendix 4.

2.56 On the initiative of the Australian Democrats, the Senate subsequently debated the committee’s framework of ethical principles for members and senators but with no action taken.<sup>64</sup> The impending 1996 federal election stalled any further discussion on the code, and the proposed frameworks have been gathering dust ever since.

### ***Prime Minister’s Guide on Key Elements of Ministerial Responsibility—1996***

2.57 The Bowen Report was also influential in the formulation of the present Prime Minister’s *Guide on Key Elements of Ministerial Responsibility*. These guidelines are a modification of the ministerial handbook used by the Hawke and Keating governments, based on a set of standards devised by the Fraser government.<sup>65</sup>

2.58 The Prime Minister, Mr John Howard, stated in the forward to the 1996 guide that it was introduced as a ‘quick reference’ for ministers, parliamentary secretaries and ministerial staff by setting out in summary form ‘the main principles, conventions and rules by which government at Commonwealth level is conducted’. Accordingly, the guide was not intended to provide answers to questions of detail but it did refer to other handbooks and guidebooks from which more comprehensive information could be obtained.<sup>66</sup>

2.59 The guide does not move beyond setting out the operational expectations of ministers under responsible government. The two major responsibilities for ministers are cited as: the management of portfolios; and, the meeting of ‘accountability obligations’. The guide’s measure of correct conduct for Ministers is whether any activity might weaken public confidence.<sup>67</sup> The section which deals specifically with ministerial conduct sets the overall tenor of the document:

It is vital that ministers and parliamentary secretaries do not by their conduct undermine public confidence in them or the government.

Ministers must be honest in their public dealings and should not intentionally mislead the Parliament or the public. Any misconception caused inadvertently should be corrected at the earliest opportunity.

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63 The Hon Stephen Martin, Speech, House of Representatives *Hansard*, 21 June 1995, p. 1983.

64 Senator Cheryl Kernot, Senate *Hansard*, 16 November 1995, p. 3236. Senator Kernot moved that the Senate adopt, as a Code of Conduct for Senators, the principles set out in the document entitled ‘A framework of ethical principles for Members and Senators’, tabled by the President on 21 June 1995, subject to proposed amendments.

65 Andrew Brien, ‘A Code for Parliamentarians?’, p.7.

66 *Guide on Key Elements of Ministerial Responsibility*, Prime Minister, Canberra, April 1996.

67 *Guide on Key Elements of Ministerial Responsibility*, Prime Minister, Canberra, April 1996, pp. 1, 10 reproduced in *Guide on Key Elements of Ministerial Responsibility*, Prime Minister, Canberra, December 1998, pp. 1, 10 and submission no. 16, attachment 1, p. 11.

Although their public lives encroach upon their private lives, it is important that ministers and parliamentary secretaries avoid giving any appearance of using public office for private purposes.<sup>68</sup>

2.60 The guide provides a reference point for ministers to avoid conflict of interest situations by spelling out, for example, opportunities for new appointments to divest potentially compromising shares or other business interests. In 1998, the guide was updated to better address conflict of interests issues. These included:

- an option for ministers to relinquish control of shares and similar interests by transferring control to an outside professional nominee or trust;
- reference to longstanding arrangements for the declaration of interests in the context of Cabinet discussions; and
- a new section on contact with lobbyists.<sup>69</sup>

2.61 Interpretation of the guide and its enforcement resides with the Prime Minister. Ministers are directed to consult with the Prime Minister to ensure that their conduct is ‘defensible’ and are required to provide a statement of interests in accordance with arrangements determined by the Prime Minister.<sup>70</sup> The Prime Minister in 1998 indicated that his guide on ministerial responsibility was not strictly speaking a code of conduct. He stated:

Neither the present government nor its predecessor has adopted a code of conduct and the narrow interpretations a code can encompass. The Guide on Key Elements of Ministerial Responsibility and the rules on the registration of interests by ministers do not provide definitions of ‘conflict of interest’ or ‘corruption’ but require ministers to make judgements in relation to their own situations. All ministers are expected to behave honestly and avoid giving the appearance of using public office for private purposes.<sup>71</sup>

2.62 The introduction of the four bills into the Commonwealth Parliament in 2000 represents the most recent attempt by parliamentarians themselves to promote high ethical standards in their public life and to protect the integrity of the political system. The Committee now turns to an examination of the specific provisions of the bills. It starts with an examination of Part 3 of the Charter of Public Honesty Bill which deals with the broad issue of a code of conduct for members of parliament and for ministers.

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68 *Guide on Key Elements of Ministerial Responsibility*, Prime Minister, Canberra, December 1998, p. 10.

69 Foreword, *Guide on Key Elements of Ministerial Responsibility*, Prime Minister, Canberra, December 1998.

70 *Guide on Key Elements of Ministerial Responsibility*, Prime Minister, Canberra, December 1998, p. 11.

71 Senator Robert Hill, Minister representing the Prime Minister, Answer to Question on Notice, Senate *Hansard*, 27 May 1998, p. 3297.

