

## **CHAPTER THREE**

### **CHARTER OF POLITICAL HONESTY BILL—PART 3 MINISTERIAL AND PARLIAMENTARY ETHICS**

#### **Introduction**

3.1 As noted in the previous chapter, the object of the bills considered in this report is to promote probity in the behaviour of parliamentarians and members of the executive government. They are in response to the public perception that the conduct of parliamentarians and the political system in which they conduct their affairs is falling short of appropriate standards and failing to measure up to people's expectations. To encourage high ethical standards of official behaviour, the bills intend to fill gaps in the present legislative framework by introducing stronger accountability and transparency measures into the political and administrative processes and to provide guidance and advice for parliamentarians on standards of behaviour.

3.2 After presenting an overview of Part 3 of the Charter of Political Honesty Bill 2000 [2002], which deals specifically with ministerial and parliamentary ethics, this chapter considers the following aspects of this part of the Bill:

- the proposed Parliamentary Joint Committee on a Code of Conduct for Ministers and Other Members of Parliament—its establishment and composition;
- the contents of the proposed code of conduct;
- the Commissioner for Ministerial and Parliamentary Ethics, including his or her functions, independence and suitability to enforce the code of conduct;
- the review provisions for decisions made by the Commissioner;
- a code of conduct for ministers;
- appointments by ministers on merit;
- the compatibility of Part 2 of the Bill—Government Advertising with Part 3 of the Bill—Ministerial and Parliamentary Ethics; and
- miscellaneous matters.

#### **Overview of Part 3 the Bill**

3.3 In this chapter the report examines Part 3 of the Bill which sets out mechanisms for developing, monitoring and enforcing a code of conduct for members of parliament and for ministers. The code is to be formulated by a parliamentary committee for adoption by both Houses of Parliament and enforced by a Commissioner for Ministerial and Parliamentary Ethics who is to be established under the proposed legislation. The Bill also provides for a code of practice covering the making of appointments by ministers. This matter will be considered later in the chapter. Part 2 of the Bill, covering government advertising campaigns, is considered separately in chapter six.

### ***Parliamentary Joint Committee on a Code of Conduct for Ministers and Other Members of Parliament—its establishment and composition***

3.4 As the first step toward implementing its proposed ethics regime for Commonwealth parliamentarians, the Bill proposes the establishment of a parliamentary joint committee to develop a code of conduct for ministers and other members of parliament for adoption by resolution of both Houses of the Parliament.<sup>1</sup>

3.5 The committee, to be known as the Parliamentary Joint Committee on a Code of Conduct for Ministers and Other Members of Parliament, is to comprise six members, three of whom will be senators and three members of the House of Representatives. The appointment of committee members is to be in accordance with House practice for appointment of joint committees. The Leader of the Government and the Leader of the Opposition in the Senate would each nominate a senator, while the minority groups and independents would nominate one senator. The Prime Minister would nominate two members from the House of Representatives, and the Leader of the Opposition would nominate one member.<sup>2</sup>

3.6 This provision to set up a parliamentary committee is in keeping with the view that an organisation should take responsibility for determining and managing its own conduct. The Bowen Report asserted that:

...if a group of officeholders is incapable of ensuring that its members adhere to a set of prescribed or clearly understood standards of right conduct, there is little likelihood that an alien authority can successfully impose those standards on them.<sup>3</sup>

3.7 More recently, Lord Nolan, Chairman of the United Kingdom Committee on Standards in Public Life, made a similar observation:

What is essential is that each body should draw up and adopt its own code, using a general model if necessary, and should be committed to it. The code should be the written expression of an ethos which forms part of the corporate culture of the organization.<sup>4</sup>

3.8 The proposed composition of this committee addresses one major criticism, raised in *Odgers' Australian Senate Practice*, of joint committees established under a bicameral legislature. It notes that under such a legislature in Australia, the House of Representatives is controlled by the ministry which tends to thwart the Senate's review and second opinion function, thereby subverting the concept of bicameralism.<sup>5</sup> The proposed equal representation of government and non-government members on this committee goes some way to resolve the problem of government domination of the membership. The legislation, however, does

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1 Clause 12, Charter of Political Honesty Bill 2000 [2002].

2 Clause 12, Charter of Political Honesty Bill 2000 [2002].

3 Report of the Committee of Inquiry established by the Prime Minister on 15 February 1978, *Public Duty and Private Interest*, AGPS, Canberra 1979, p. 20.

4 Rt. Hon The Lord Nolan, Lord of Appeal in Ordinary, Chairman of the United Kingdom Committee on Standards in Public Life, 'Private Interest and Public Duty: An International Perspective', The Thirtieth Alfred Deakin Lecture, 8 August 1996, p. 7.

5 *Odgers' Australian Senate Practice*, p. 390. The *Public Accounts and Audit Committee Act 1951*, section 7 sets down a number of provisions covering quorum and voting procedures.

not stipulate a number of important provisions such as what constitutes a quorum, and whether the chair has a deliberative or casting vote.<sup>6</sup>

### ***Committee view—the parliamentary joint committee to frame a code of conduct***

3.9 The Committee agrees with the principle that the Parliament should take responsibility for setting its own standards of conduct and that the proposed joint parliamentary committee is a suitable body to take on the responsibility for drafting a code of conduct for members of parliament. It also accepts that the procedures for the establishment and the proposed make-up of the membership of the joint committee are appropriate but suggests that more detail be provided about matters such as the procedures governing committee decisions and voting.

### ***Contents of the code of conduct***

3.10 The code of conduct is the centrepiece of the legislation which, according to Senator Murray in his second reading speech, is intended to:

clarify what is required of parliamentarians in the exercise of their duties. It will also act as a public statement of the minimum standards of behaviour that the public and the media can and should insist upon.<sup>7</sup>

3.11 The shape and content of the code, however, are not specified or described in the Bill, as the code is proposed to be developed by a parliamentary joint committee.

3.12 One of the main criticisms of Part 3 of the Bill centres on the code of conduct itself. Most witnesses and commentators place great value on the introduction of such a code for members of parliament.<sup>8</sup> Opinion differs, however, on the contents of such a code.

3.13 The Prime Minister's Committee on Local Government Rules of Conduct in Britain captured succinctly the *raison d'être* for a code of conduct:

Rules of conduct cannot create honesty; nor can they prevent deliberate dishonest or corrupt behaviour. Rather, they are a framework of reference embodying uniform minimum standards. Their special value is in situations which are intrinsically complicated, or are new to the individual concerned, where they provide a substitute for working out the right course of action from first principles on each occasion.<sup>9</sup>

3.14 A code of conduct, however, can range from a highly aspirational document which sets out abstract principles and agreed values to a prescriptive code which specifies rules and

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6 For example, see The *Public Accounts and Audit Committee Act 1951* (as compiled on 15 October 2001) sets out a number of provisions governing the procedures for the Joint Committee of Public Accounts in relation to meetings such as quorum and voting and procedures for accepting or rejecting the recommendation for the Auditor-General or independent auditor. See sections 7 and 8A.

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

8 See for example, E. J. Lockett, submission no. 12; Dale Boucher, 'An Ethical Code...Not a Code of Conduct', *Canberra Bulletin of Public Administration*, no. 79, February 1996, p. 3.

9 Cited in *Public Duty and Private Interest*, p. 29.

standards of behaviour.<sup>10</sup> Moreover, a code of conduct for members of parliament must take account of the nature of politics as an ‘ethical practice’. Dr Noel Preston, Adjunct Professor, Griffith University, maintains that such a code, ‘must be grounded in the practicalities and realities of political practice and be consistent with the multiple, and conflicting roles, of Members of Parliament’.<sup>11</sup>

3.15 A member of the 1995 parliamentary working group established to formulate a framework of ethics for Commonwealth parliamentarians, Senator Jim McKiernan, highlighted the difficulty experienced by the committee in reaching agreement on the contents of the code.<sup>12</sup> He told the Senate that there were a number of barriers and hurdles tossed up during the committee’s discussions on the framework because of the different understandings of what a code of conduct should be.<sup>13</sup> In tabling the draft framework, the Speaker of the House of Representatives also spoke of the range of opinions held by committee members. He explained that the principal difference within the group concerned the nature of the code. That is, whether it should consist of a very detailed set of rules and procedures governing all aspects of parliamentarians’ behaviour, or whether it should be an aspirational set of principles or values on which each member could draw to make appropriate decisions concerning his or her own behaviour. In the end the committee opted for the latter.<sup>14</sup>

3.16 Thus the framework of ethical principles for senators and members produced by this working group and tabled in 1995 contains general statements such as:

Members and Senators must have due regard for the rights and obligations of all Australians. They must respect the privacy of others and avoid unjustifiable or illegal discrimination. They must safeguard information obtained in confidence in the course of their duties and exercise responsibly their rights and privileges as Members and Senators.

...

Members and Senators must at all times act honestly, strive to maintain the public trust placed in them, and advance the common good of the people of Australia.

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10 See for example, Dr Meredith Burgmann MLC, ‘Towards a code of conduct for NSW Parliamentarians’, *Legislative Studies*, vol. 12, no. 2, Autumn 1998, p. 15; Dale Boucher, ‘An Ethical Code...Not a Code of Conduct’, *Canberra Bulletin of Public Administration*, no. 79, February 1996, p. 3.

11 Noel Preston, ‘Codifying Ethical Conduct for Australian Parliamentarians 1990–99’, *Australian Journal of Political Science*, vol. 36, no. 1, p. 46. See also comments by Dr Noel Preston, submission no. 21, para. 4.5; Peter Kyle, ‘Contents of a Code of Conduct’, Making Parliament Work, Australasian Study of Parliament Group, 19<sup>th</sup> Annual Conference 1–11 October 1997. He argued that ‘The conflict between the requirements of loyalty to the party and their obligation to the people creates a need for rules of conduct for Members of Parliament, not so much in their individual capacity, but more in their activities as Members of political parties’. Also refer to Legislative Assembly of Queensland, Members’ Ethics and Parliamentary Privileges Committee, *Report on a Draft Code of Conduct for Members of the Queensland Legislative Assembly*, Report no. 21, 1989, p. 18.

12 For more information on this working group see chapter 2, paras 2.50–2.55.

13 Senator McKiernan, Senate *Hansard*, 16 November 1995, p. 3243.

14 Stephen Martin, House of Representatives *Hansard*, 21 June 1995, p. 1983.

Members and Senators must ensure that their personal conduct is consistent with the dignity and integrity of the Parliament.<sup>15</sup>

3.17 More recently, Dr Andrew Brien argued that for a code of conduct to be credible it must not only be aspirational but also contain clear guidelines and injunctions, prescriptions and prohibitions.<sup>16</sup> But he noted:

...it is a criticism of many of the codes that have been proposed and implemented that they have been narrowly focused on financial conflicts of interest, gifts, and similar such matters, when major areas of misconduct encompass broader activities and legislative functions.<sup>17</sup>

3.18 He went on to explain:

The reason that narrowly focused codes are misconceived while broadly cast codes are appropriate, is that one point of any code of conduct is to fortify the democratic process. It will do so by fostering accountability and transparency and by doing that, promote a higher standard of behaviour amongst parliamentarians while also fostering trust in the system of government.<sup>18</sup>

3.19 Others interested in ethics systems placed a heavy emphasis on rigour in setting down standards and rules.<sup>19</sup> The Clerk of the Senate emphasised the need for precise prescription in a code of conduct. He went on to state:

I do not think vague and general statements such as ‘members will be honest in their dealings’ and so on are very helpful, particularly when you combine them with some enforcement mechanism whereby some, as I have put it, inquisitor-general, is going to say whether a member has breached such a guideline.<sup>20</sup>

3.20 In his submission, Senator Murray asserted that the code should not be a purely aspirational code that sets out vague ethical principles such as integrity and fairness. He envisaged that the code drawn up by the joint committee would prescribe clear standards capable of enforcement. According to him ‘It would regulate conduct in relation to such matters as the acceptance of gifts, conflicts of interest, the use of public resources, the acceptance of political donations, and so on’.<sup>21</sup> There is, however, no guarantee that the code would accord with Senator Murray’s expectations.

3.21 Indeed, the Clerk of the Senate warned that the first trap in drawing up a code of conduct is in:

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15 See paras 2, 3 and 7 in ‘A Framework of Ethical Principles for Members and Senators’ reproduced at Appendix 4.

16 Dr Andrew Brien, *A Code of Conduct for Parliamentarians?*, Research Paper 2 1998–99, Parliament of Australia, Parliamentary Library, p. 3. <http://www.aph.gov.au/library/pubs/rp/1998-99rp02.htm> (6 February 2002)

17 Dr Andrew Brien, *A Code of Conduct for Parliamentarians?*, Research Paper 2 1998–99, Parliament of Australia, Parliamentary Library, p. 3. <http://www.aph.gov.au/library/pubs/rp/1998-99rp02.htm> (6 February 2002).

18 *ibid.*

19 See for example, Dr Meredith Burgmann MLC, ‘Towards a code of conduct for NSW Parliamentarians’, *Legislative Studies*, vol. 12, no. 2, Autumn 1998, p. 15.

20 Harry Evans, *Committee Hansard*, 6 April 2001, p. 6.

21 Senator Andrew Murray, submission no. 13, p. 8.

prescribing rules of insufficient precision—vague, imprecise rules and what are usually called motherhood statements—and then attempting to enforce them, with a great deal of room for dispute about their meaning and application.<sup>22</sup>

3.22 The current code of conduct under the *Public Service Act 1999* has been criticised for this very reason. It stipulates, *inter alia*, that an APS employee:

must behave honestly and with integrity in the course of APS employment;

must act with care and diligence in the course of APS employment; and

when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.<sup>23</sup>

3.23 Clearly, this code, while identifying values and ethical principles, leaves their practical application and enforcement open to wide interpretation. Dr Uhr notes that to ‘venture beyond a comforting values statement to a more challenging code of ethics is a rarer achievement.’<sup>24</sup>

3.24 The Queensland Legislative Assembly’s *Code of Ethical Standards* is a synthesis of the aspirational aspect of a code of conduct with the more prescriptive.<sup>25</sup> It contains a Statement of Fundamental Principles as well as a section that draws together resolutions and orders that relate to the conduct of members which ‘would be workable and useful to members and the community’.<sup>26</sup> The *Statement of Fundamental Principles*, adopted by the Assembly in 2001, represents the culmination of many years of extensive research and debate that reaches back to the EARC recommendation of 1992.<sup>27</sup> Without doubt, the task of drafting a code of conduct that will have the support of all those to whom it applies will take time and require commitment.

3.25 Indeed, based on the experiences of other legislatures, a number of witnesses anticipated difficulties for members of the Commonwealth Parliament in reaching agreement on the standards by which their behaviour could be assessed. Mr Arnold Sandell stated bluntly that ‘No code of conduct could expect to be tabled in both Houses and not be

22 Harry Evans, *Committee Hansard*, 6 April 2001, p. 1.

23 Section 13—the APS Code of Conduct, *Public Service Act 1999*. See comments by Denis Ives, ‘Benchmarking the Issues’, *Canberra Bulletin of Public Administration*, no. 97, September 2000, pp. 33–4.

24 Dr John Uhr, ‘Core Values or Core Business’, *Canberra Bulletin of Public Administration*, no. 79, February 1996, p. 5. See also comments by Dr Meredith Burgmann, ‘Towards a Code of Conduct for NSW Parliamentarians’, *Legislative Studies*, vol. 12, no. 2 Autumn 1998, p. 15.

25 Legislative Assembly of Queensland, *Code of Ethical Standards*, 50<sup>th</sup> Parliament, 2001. *The Statement of Fundamental Principles* was adopted by the Legislative Assembly on 17 May 2001 and *The Procedures for Raising and Considering Matters of Privilege or Contempt and the Definition of Contempt* contained in the *Code of Ethical Standards* were adopted by the Assembly on 8 August 2001.

26 Members’ Ethics and Parliamentary Privileges Committee, *Report on a Code of Ethical Standards for Members of the Queensland Legislative Assembly*, Report no. 44, pp. 5–6. See also footnote above.

27 In his submission Arnold Sandell referred to the work of the Queensland Members’ Ethics and Parliamentary Privileges Committee which highlights ‘the major difficulties facing the Committee in its endeavours to produce a Code of Conduct in simple language and at the same time assume a measure of responsibility the can and will bind the Members of Parliament to observe the Code in the heat of healthy vigorous debate’. Submission no. 6, p. 2.

subjected to vigorous and lengthy debate and quite possibly some amendments'.<sup>28</sup> Mr Clem Campbell noted the reluctance by parliamentarians to introduce a code.<sup>29</sup> The Clerk of the Senate remarked that if the code of conduct followed models already suggested it would likely 'contain matters involving a great deal of subjective judgement'. He submitted:

Changes to the code of conduct would have to be made as the Commissioner made unexpected or unduly restrictive determinations. A public perception of 'shifting the goal posts' would result. In framing the code of conduct, on the other hand, the parliamentary committee might be duly influenced by the fact that unappealable decisions would be made on a highly subjective basis by the Commissioner. This could lead to a very narrowly drafted code of conduct, giving the Commissioner little room to manoeuvre.<sup>30</sup>

3.26 The Committee acknowledges that the drafting of a code of conduct for members of parliament would require serious deliberation drawing on the knowledge and experience of those who have worked in this area and on studies of relevant legislation and procedures either in force or contemplated in Australia and elsewhere. The code would need to outline in broad terms the principles expected to inform parliamentarians' conduct yet be drafted with clarity and precision to avoid creating doubts about its interpretation. At the moment, however, the Committee can only speculate on the final form that the code will take.

3.27 This lack of certainty about the contents of the code of conduct makes it difficult for the Committee to form any firm opinions on the likelihood of its effectiveness. Dr John Uhr drew attention to this problem when commenting on the features of the Bill which he only touched on briefly because 'the Bill presents a formal process of ethics regulation but without any specification of the desirable standards the scheme is meant to promote. The content is left to the discovery of the proposed joint parliamentary committee at some future date'.<sup>31</sup>

### ***Committee view—the content of the code of conduct***

3.28 The Committee accepts that a detailed and prescriptive code of conduct presents fewer difficulties for its implementation but may be difficult to codify. Unlike an aspirational code, which is open to wide interpretation, a prescriptive and tightly framed code provides a more practical and useful guide for both parliamentarians and members of the public for clarifying what is appropriate in areas of uncertainty. Thus, the Committee believes that a code of conduct while providing a clear statement of principles should also contain specific provisions that provide members of parliament with clear guidance relating to ethical behaviour.

3.29 The Bill, however, is built around the assumption that the proposed joint committee will reach common agreement on a code of conduct; that both Houses of Parliament will adopt the code; and that the code will be sufficiently detailed and specific to be enforceable. The Committee believes that placing such a heavy reliance on an expectation that a workable and enforceable code will be framed and adopted by both Houses is risky. While the legislation would enable a joint parliamentary committee to develop a code of conduct for adoption by parliament, it cannot guarantee that the committee will even move beyond its

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28 Arnold Sandell, submission no. 6, p. 2.

29 Clem Campbell, attachment to submission no. 10, pp. 2–3 of 6.

30 Harry Evans, submission no. 4, p. 5.

31 Dr John Uhr, submission no. 16, p. 5.

first phase in reaching agreement on such a code. This shortcoming is a major stumbling block to the progress of the Bill.

3.30 Without a clear understanding of the likely form of the code of conduct, the Committee is not well placed to assess effectively the merits of the proposed mechanisms provided in the Bill for the code's implementation and enforcement. Mindful of this limitation, the Committee nonetheless proceeded to examine the enforcement regime proposed under the Bill.

## **The Commissioner for Ministerial and Parliamentary Ethics**

3.31 The intention of the legislation is not simply to ensure that a code of conduct is in place but to make certain that it is also enforceable. Senator Murray made this point in his submission:

This Bill is a comprehensive proposal laying down effective strategies for the development, implementation, administration and enforcement of a workable code of conduct.<sup>32</sup>

3.32 Division two of the Bill proposes to establish an Office of Commissioner for Ministerial and Parliamentary Ethics to enforce the code. The Bill takes a two pronged approach to enforcement by making the Commissioner responsible for:

- implementing an education program and providing advice; and
- investigating alleged violations of the code of conduct and reporting on such breaches.

3.33 The specific functions of the Commissioner as set down in clause 16 of the Bill are:

- a) to review the codes of conduct at least every two years;
- b) to implement an education program and give advice on ethical standards;
- c) to give advice on ethical standards if requested to do so by either House of Parliament;
- d) to recommend guidelines for the interpretation of the codes; and
- e) to investigate complaints about breaches of the codes and to report to the relevant House.

3.34 That is, in addition to (i) providing education and advice, and (ii) investigating and reporting on violations of the code, the Commissioner is also to carry out other functions in relation to parliamentary ethics and standards as determined by resolution of either or both Houses of Parliament.

### ***Education and advice***

3.35 The Bill recognises that, although a code of conduct sets the standards, education and training have an important place in an ethics regime. As noted above, the Commissioner



will be responsible not only for implementing an education program but also providing advice for parliamentarians.

3.36 This responsibility focuses on preventing breaches of the code of conduct by ensuring that parliamentarians are well informed about the code and its accompanying expectations. The Bill's intention is to put in place an ethical framework that would support and assist parliamentarians to observe the standards set down in the code of conduct. In the view of Mr Clem Campbell, the education of parliamentarians about ethics is most important to help them resolve real and potential conflicts of interest. He stated:

The development of a Code of Conduct will only be beneficial if members are provided with the skills and knowledge to act appropriately as leaders and elected representatives.<sup>33</sup>

3.37 The Key Centre for Ethics, Law, Justice and Governance (KCELJAG) endorsed this view. It argued that prior advice 'is greatly preferable to relying on subsequent investigation alone'.<sup>34</sup> Clearly education and prior advice are an integral part of an ethics regime. The Committee recognises the merit in making the ethics commissioner responsible for providing education and advice to parliamentarians.

3.38 Ms Enid Jenkins and KCELJAG drew attention to the wording of subsections 16(b) and (c) which require the Commissioner to implement an education program for ministers and members on ethical standards and to provide advice on ethical standards to both Houses, but make no mention of providing advice to individual members.<sup>35</sup> The Committee believes that this provision should leave no doubt that one of the Commissioner's functions is to provide advice on the code of conduct if requested to do so by individual members of parliament and ministers.

### ***Committee view—education and advisory role of the Commissioner***

3.39 The Committee fully appreciates the contribution that the proposed Commissioner for Ministerial and Parliamentary Ethics could make to improving parliamentarians' understanding of what is expected of them as members of parliament and to assist them to set and maintain high standards in carrying out their public duties. The Committee supports in principle the appointment of an ethics commissioner to implement an education program on ethics for members of parliament and to advise them on related matters.

### ***Investigation and reporting***

3.40 The second approach to enforcement, while still preventive in the sense that it acts as a deterrent, nonetheless concentrates on breaches of the code. KCELJAG submitted to the Committee:

A 'bare' code of ethics unless supported by laws imposing penalties against the worst breaches, will be simply a 'knaves' charter—a superfluous guide for the good, but a useless dead letter for the bad.<sup>36</sup>

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33 Clem Campbell, submission no. 10, p. 4.

34 KCELJAG, submission no. 22, p. 2, para 1.3. See also Dr Noel Preston, submission no. 21, p. [5].

35 Enid Jenkins, submission no. 8, p. 4; KCELJAG, submission no. 22, p. 24.

36 KCELJAG, submission no. 22, p. 4.

3.41 The Bill contains a number of provisions to encourage compliance with the code, starting with measures for investigating breaches. According to the provisions of the Bill, the Commissioner would investigate an allegation of misconduct by a parliamentarian, including ministers, and report back to Parliament. Presumably, the judgement would then be left for Parliament to determine.

3.42 The Bowen Inquiry into public duty and private interest noted that:

Because the ultimate sanction against elected officeholders lies in the hands of the electorate, it is necessary to require public disclosure of any proved transgression to allow the electors to have the final say.<sup>37</sup>

3.43 Senator Murray clearly appreciated that public exposure would be a powerful incentive to ensure compliance with the code of conduct. In presenting his Private Senator's Bill, he explained the effectiveness of the enforcement provisions:

...parliamentarians know that if they transgress those standards they will be investigated by an independent and impartial officer and then brought to account through proper parliamentary procedures.<sup>38</sup>

3.44 Dr Gerard Carney noted that while clause 3(c) stipulates that the Act is to establish an enforceable code of conduct for ministers and other members of Parliament the proposed legislation offers no guidance 'as to what mechanisms of enforcement [are] contemplated'.<sup>39</sup> There are no sanctions stipulated in the Bill, nor any penalty attached to breaches of the code except for public disclosure of the wrongdoing in Parliament.

### ***Committee view—investigation and reporting***

3.45 The Committee notes that the Bill is silent on matters such as sanctions for breaches of the code of conduct. Nonetheless, it believes that investigation followed by public disclosure of wrongdoing would be a potent tool in enforcing a code of conduct.

### ***Independence of the Commissioner—appointment and dismissal***

3.46 If the ethics framework proposed in the Bill is to carry conviction in the minds of colleagues and the public, the investigation process must be seen to be even handed and fair. Senator Murray placed great store on having 'an independent and impartial officer' to investigate allegations of breaches of the code of conduct. Dr Noel Preston highlighted the importance he placed on this independence:

...the minimal, essential characteristic of a legislative ethics regime should be that there is independent (i.e. removed from the immediate pressure of politics) advice available to Members of Parliament on matters of ethics and integrity, in conjunction with a capacity by such sources of advice to report directly to the Parliament. Furthermore, inasmuch as these measures involve investigations of

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37 Report of the Committee of Inquiry established by the Prime Minister on 15 February 1978, *Public Duty and Private Interest*, AGPS, Canberra 1979, p. 22.

38 Senator Andrew Murray, submission no. 13, p. 8.

39 Dr Gerard Carney, Associate Professor at Law, submission no. 11, p. 3.

alleged breaches and possible sanctions, the emphasis should be on ‘exposure’ as the major deterring penalty.<sup>40</sup>

3.47 The Bill seeks to appoint the Commissioner as an independent office-holder and lays down the process and criteria for the appointment. It specifies that the Commissioner would be appointed ‘as soon as practicable’ after the code of conduct developed by the joint committee had been adopted by both Houses of Parliament. It requires the Presiding Officers, before appointing the Commissioner, to consult with the Leader of each recognised political party represented in either House of the Parliament and with any independent or minority group senators or members of the House of Representatives. Conditions of employment are also specified. The position is to be full-time for a five-year period only, and remuneration and allowances are to be determined by the Remuneration Tribunal.<sup>41</sup>

3.48 To provide greater accountability to the appointment process, the Bill stipulates that the Presiding Officers in making the appointment must base their decision on merit, declare any personal interest, comply with any relevant laws relating to discrimination and publish reasons for their selection of a particular candidate.<sup>42</sup>

3.49 Although many witnesses agree with the intention of the Bill to appoint an independent office-holder, the independence of the Commissioner, however, came under question during the inquiry.

3.50 KCELJAG underlined the importance of the independence of the Commissioner if he or she is to retain the function to investigate and report on breaches of the code. It drew attention to the possible erosion of the independent status of office-holders appointed by a process that the Government ultimately controls.<sup>43</sup>

3.51 Professor Charles Sampford, Director, KCELJAG expanded on this view:

It is crucial that the counsellor/commissioner has bipartisan respect. The best way to achieve this is if the process actively involves all major political parties in the first place. An appointment that is made by one side alone is always subject to subsequent criticism if the counsellor’s advice seems too lenient for the government. Indeed, it may be perceived that the only cases that are likely to come to light are those in which the counsellor has given the action a clear bill of health. But if the Opposition take part in the appointment, they are committed to supporting both the process and the appointee.<sup>44</sup>

3.52 Put bluntly by the Clerk of the Senate:

Once you give some officer the power to declare whether a member of parliament has acted improperly, there would be a serious danger of someone trying to get the right person ‘into the job’.<sup>45</sup>

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40 Dr Noel Preston, submission no. 21, p. 1.

41 See clause 15.

42 Clause 15(4).

43 The Key Centre for Ethics, Law, Justice and Governance (KCELJAG), submission no. 22, p. 23.

44 Professor Charles Sampford, attachment to KCELJAG, submission no. 22, ‘Prior Advice is Better than Subsequent Investigation’, p. 32 of 49.

45 Harry Evans, *Committee Hansard*, 6 April 2001, p. 5.

3.53 Some witnesses favoured an approach that distanced this office holder from the influence of government by involving a formal parliamentary process in the appointment.<sup>46</sup>

3.54 Dr Noel Preston suggested a process whereby the government would present a nominee to a parliamentary committee which must reach agreement on his or her appointment by a majority that included a member of the opposition.<sup>47</sup>

3.55 Along similar lines, KCELJAG proposed a model whereby the Commissioner for Ministerial and Parliamentary Ethics would be appointed or at least confirmed by a parliamentary committee, with the vote required to include at least one Government and one Opposition committee member. According to KCELJAG, this requirement for cross-party committee vetting would inspire more public confidence in the outcome since a formal procedure had been followed. It concluded that this model would ‘provide a solid institutional mechanism for ensuring (and satisfying sceptical voters) that nominees were not “reliable party hacks”’.<sup>48</sup>

### ***Committee view—the independence of the Commissioner***

3.56 The Committee accepts that if the Commissioner for Ministerial and Parliamentary Ethics, were appointed by the President of the Senate and the Speaker of the House of Representatives, both of whom are members of the government party, the process may be seen to be susceptible to government influence. It appreciates that the involvement of a parliamentary committee, as happens with the appointment of the Auditor-General, opens up the process of appointment to greater scrutiny and debate.<sup>49</sup> Schedule 1 of the *Auditor-General Act 1997* stipulates that the Minister must not make a recommendation on the appointment of the Auditor-General to the Governor-General unless the Minister has referred the proposed recommendation to the Joint Committee of Public Accounts and Audit for approval, and the committee has approved the proposal.

3.57 In the Committee’s opinion, this mode of appointment, which involves a parliamentary committee in the approval process, offers a greater degree of transparency which would strengthen the independent status of the office-holder. The Committee suggests that, to enhance the independent status of the Commissioner, a similar method of appointment should be considered whereby a parliamentary committee must approve the nomination of the Commissioner before his or her appointment can be finalised. The proposed Parliamentary Joint Committee on a Code of Conduct for Ministers and Other Members of Parliament could be an appropriate committee for this task.

### ***Removal from Office***

3.58 The Clerk of the Senate drew the Committee’s attention to possible problems with the procedures contained in the Bill for dismissing the Commissioner. The Bill proposes that Presiding Officers could remove the Commissioner from office if each House of Parliament, in the same session of the Parliament, requests that the Commissioner be removed on grounds

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46 See for example, Harry Evans, *Committee Hansard*, 6 April 2001, p. 6 and The Key Centre for Ethics, Law, Justice and Governance (KCELJAG), submission no. 22, p. 23.

47 Dr Noel Preston, *Committee Hansard*, 6 April 2001, p. 49.

48 The Key Centre for Ethics, Law, Justice and Governance (KCELJAG), submission no. 22, p. 23, paras. 10.28, 10.30.

49 Clause 1 and 2, Schedule 1, the *Auditor-General Act 1997*.

of misbehaviour or physical or mental incapacity.<sup>50</sup> The Clerk observed that an address to the Presiding Officers is not an appropriate mechanism for removal of the Commissioner. He explained further:

The Presiding Officers are subject to direction by their respective Houses, addresses are used only for the head of the executive government, the Governor-General, who is of course not subject to parliamentary direction. Removal should be effected by joint resolution alone.<sup>51</sup>

3.59 The Committee notes this advice and suggests that clause 25 be amended to read that the Commissioner may be removed from office on a resolution passed by both Houses, in the same session of Parliament, to remove the Commissioner from office on grounds of misbehaviour or physical or mental incapacity.

### ***The Commissioner—*independent and impartial but an outsider****

3.60 The Committee appreciates that the role of an unbiased umpire is crucial to the credibility of the investigation process. The suggestion by the Committee to have a joint parliamentary committee involved in the appointment process of the Commissioner strengthens the independent status of the office. Despite the independent status of the Commissioner, a number of witnesses questioned the wisdom of bringing in an outside authority to investigate and pass judgement on the behaviour of parliamentarians.

3.61 Dr Uhr recognised that on many occasions Parliament appropriately delegates an outside body or a public authority, such as the Auditor-General, to do some of its work. He held strong reservations, however, that such a body could adjudicate on the far broader and subjective area of standards of conduct. He maintained that, because the matters would be essentially political, ‘it would be unwise to hand over political evaluation of the merits of conduct by elected representatives to a non-elected official’.<sup>52</sup> Dr Preston agreed. He thought that there were risks in conferring investigative powers on the Commissioner—‘at least the final responsibility for it’. He believed it would be better for the proposed committee to make the ultimate judgement.<sup>53</sup> The Clerk of the Senate also saw danger in appointing an office-holder, which he termed ‘the inquisitor general’ with the power ‘to try in secret and condemn a member of Parliament before the bar of public opinion’.<sup>54</sup>

### ***Committee view—who should pass judgement on breaches of the code of conduct***

3.62 The Committee considered whether an external body such as the proposed Commissioner is an appropriate body to monitor and pass judgement on the behavioural standards of parliamentarians.

3.63 The Committee accepts the view that Parliament should take responsibility for setting its own standards and also for judging whether those standards are being met. The difficulty for the Committee is that reliance on self-regulation has to date not been able to win

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50 Clause 25—Removal from office.

51 Harry Evans, Clerk of the Senate, submission no. 4, p. 6.

52 Dr John Uhr, *Committee Hansard*, 6 April 2001, p. 16.

53 Dr Noel Preston, *Committee Hansard*, 6 April 2001, p. 48.

54 Harry Evans, submission no. 4, p. 3.

public confidence and the perception remains that the conduct of members of parliament does not fulfill public expectations. An outside independent authority with the power to investigate and report breaches of a code of conduct would certainly lend credibility to the ethics regime and help preserve its integrity. But it would also mean that Parliament must surrender its right and privilege to pass judgement on the propriety of its own members' conduct to an outsider.

3.64 The Committee is in favour of Parliament retaining its prerogative to determine its own standards of conduct. It is reluctant to comment with authority on whether the proposed Commissioner or indeed the proposed parliamentary joint committee would be the more appropriate body to investigate breaches of the code of conduct, partly because the contents of the code of conduct and the standards against which members of parliament would be assessed are still unknown. It believes that this matter is of such importance that it warrants greater attention and debate but that this could be done effectively only after the details of the code were known.

### ***Conflict of roles***

3.65 One of the major concerns expressed during the inquiry concerned the allocation of both advisory and investigative functions to the one body. The Clerk of the Senate expressed strong misgivings about allocating both of these functions to the Commissioner. He held that the tension created would set up an in-built conflict of roles for the Commissioner.<sup>55</sup> The Committee notes that, in relation to ministers, the Prime Minister has both an executive and judicial function – see paragraph 3.76.

3.66 KCELJAG shared this concern. It recommended that the function of investigating alleged breaches of the code be assigned to a separate authority from that which provided advice on conduct. It submitted:

It is important not to deter Ministers and other MPs from voluntarily approaching the advisory body to seek rulings in cases that they foresee might be contentious. They should also be assured that anything they disclose while seeking advice will be kept confidential (if they wish) and not subsequently used against them by the authority investigating or adjudicating a complaint.<sup>56</sup>

3.67 Dr Noel Preston was more concerned with clarifying who would have responsibility for the different functions, preferring that the Commissioner assumed the role of adviser. He found the Bill unsatisfactory in its description of the relationship between the joint Committee and the Commissioner and submitted:

As the Bill now reads it is possible (and likely) that the Committee and the Commissioner's roles will conflict—especially on any inquiries or investigations that are established by either party. It is preferable that the Parliamentary Committee and the Commissioner have complementary functions. Essentially, the Commissioner would be a resource for the Committee and individual MPs. I suggest that investigations be the prerogative of the Parliamentary Committee assisted by the Commissioner.<sup>57</sup>

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55 Harry Evans, submission no. 4, p. 4.

56 KCELJAG, submission no. 22, p. 24.

57 Dr Noel Preston, Adjunct Professor in the Key Centre for Ethics Law Justice and Governance, Griffith University, submission no. 21, Part B, p. [9].

### ***Committee view—conflicting roles: advising and investigating***

3.68 The Committee is fully aware of the potential for conflict that would exist where an authority, such as the Commissioner, offered advice on a matter and was subsequently required to investigate that matter. It agreed that to avoid any such situation which threatened to compromise the independence and integrity of the Commissioner, the advisory and investigative functions should be placed with separate authorities.

3.69 For the purposes of the Bill, such a conflict could be resolved by removing the investigative role from the Commissioner and allocating it to the Parliamentary Joint Committee on a Code of Conduct for Ministers and Other Members of Parliament or to another authority appointed specifically to investigate allegations and report breaches. This issue, however, is only one of those that deserve closer attention before the Bill proceeds. The problem of conflicting roles also arises in relation to the Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2] and it will be examined in greater detail later in the following chapter.

### **Review or appeal provisions**

3.70 Some witnesses pointed out the absence of any provision in the Bill for appeal or review of decisions.<sup>58</sup> The Clerk of the Senate explained:

The second trap is to appoint some person or body as an ethics policeperson, with no proper opportunity for review of their decisions, and putting such a person—whom I referred to in the submissions as an ‘inquisitor-general’—in the position of being able to say that member X did wrong or is guilty and therefore imposing a heavy political penalty on that member, with no opportunity to correct defects and wrong decisions in the process.<sup>59</sup>

3.71 Senator Murray acknowledged this weakness in the Bill and indicated that he would propose an amendment to the Charter that ‘the Commissioner would observe natural justice in conducting his investigation’. He explained:

This would draw on a large body of administrative law dealing with the making of adverse findings against individuals by public officials. It would give any person who may have adverse findings made against him or her to a fair and unbiased hearing prior to any such findings being made.<sup>60</sup>

3.72 The Committee notes Senator Murray’s intention to insert a provision in the Bill to ensure that the principles underpinning natural justice are observed. It believes that the matter of a review process would need to be thoroughly explored before the Bill proceeds.

### **Code of conduct for ministers**

3.73 Although not mentioned in the Constitution, the Prime Minister, through advice to the Governor-General, in effect appoints ministers, establishes departments and allocates executive responsibility among ministers. Under Australia’s system of government, ministers, or those responsible for exercising executive power, belong to the party or coalition of parties

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58 See for example Harry Evans, *Committee Hansard*, 6 April 2001, pp. 1–2.

59 Harry Evans, *Committee Hansard*, 6 April 2001, pp. 1–2.

60 Senator Andrew Murray, submission no. 13, p. 9.

with a majority in the House of Representatives but may be a member of either House. The executive remains in power while they hold the confidence of that House. This system ensures that the executive as a whole is responsible to Parliament for its policies and performance, and that ministers as individuals are answerable and accountable to Parliament for the conduct of the departments over which they have control.<sup>61</sup>

3.74 As noted earlier, the Bill also requires the parliamentary joint committee to develop a code of conduct for ministers. The Bowen report made the point that the highest standards of conduct are demanded of ministers, even beyond those that apply to them as members of parliament. It pointed out ‘these higher standards are a consequence of the unique role of Ministers as members of Cabinet, as the officeholders ultimately responsible for administering departments, and as the holders of various statutory powers’.<sup>62</sup> Mr Charles Sampford also drew attention to the differences between members of parliament and the added responsibilities of being a minister. He stated:

Ordinary members exercise very general, legislative, power collectively and in open session. Ministers exercise—individually and in private—significant executive power with the capacity to benefit or harm individual citizens and large corporations.<sup>63</sup>

3.75 Dr Gerard Carney held similar views. He submitted:

While there is an overlap in their ethical responsibilities, the peculiar position of ministers as officers of the Crown with significant executive powers raises in some areas different ethical standards to those applicable to members per se. For instance, ministers usually need to dispose of any shareholdings which are likely to raise a conflict of interest within their portfolio. On the other hand, members usually do not suffer from the range of potential conflicts of interest of ministers and hence are not required to dispose of personal assets. One can go on.<sup>64</sup>

3.76 The preamble to the Prime Minister’s *A Guide on Key Elements of Ministerial Responsibility* recognises the distinct position held by ministers in the federal parliament. It contains the following explanation:

Under the Australian system of representative government, ministers are responsible to Parliament. This does not involve ministers in individual liability for every action of public servants or even personal staff. It does however imply that ministers accept two major responsibilities: first for the overall administration of

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61 See Dr the Hon. Ken Coghill, ‘Updating Ministerial Responsibility’, *The Parliamentarian*, April 1999, p. 199. Jack Waterford, ‘Ministerial Responsibility for Personal Staff’, *Senate Occasional Lecture Series*, 3 May 1996; Matthew Flinders, ‘The Enduring Centrality of Individual Ministerial Responsibility within the British Constitution’, *The Journal of Legislative Studies*, vol. 6, no. 3, Autumn 2000, pp. 73–92. See also Sixth Report of the Committee on Standards in Public Life, *Reinforcing Standards: Review of the First Report of the Committee on Standards in Public Life*, vol. 1: Report, Presented to Parliament by the Prime Minister by Command of Her Majesty, January 2000, pp. 41–2.

62 Report of the Committee of Inquiry established by the Prime Minister on 15 February 1978, *Public Duty and Private Interest*, AGPS, Canberra 1979, p. 67.

63 Charles Sampford, ‘Prior Advice is Better than Subsequent Investigation’, in *From Motivating Ministers to Morality*, attachment 1 to The Key Centre for Ethics, Law, Justice and Governance (KCELJAG), submission no. 22, p. 33 of 49.

64 Dr Gerard Carney, submission no. 11, p. 2.



their portfolios, both in terms of policy and management; and secondly for carriage in the Parliament of their accountability obligations to that institution.<sup>65</sup>

3.77 The Guide also makes plain the authority the Prime Minister exercises over his ministers. It states categorically that it is the Prime Minister who decides on the size of the Cabinet and who determines which ministers are to be included in the Cabinet. It also explains that the Prime Minister sets out the priorities and strategic direction for each portfolio in a letter sent to respective ministers after they are appointed.<sup>66</sup>

3.78 Moreover, the Prime Minister is active in directing ministers on certain requirements such as the requirement that they make statements of interest in accordance with arrangements outlined in letters from him to ministers. The guide advises ministers on how to ensure that their conduct is defensible, and to consult with the Prime Minister when in doubt about the propriety of any course of action.<sup>67</sup> There is a clear understanding that it is the Prime Minister's right to interpret, advise and pass judgement on the conduct of ministers. This arrangement means, however, that the Prime Minister has both an executive and judicial function in relation to ministers.

### ***Establishing a ministerial code of conduct***

3.79 The witnesses who recognised the unique position of ministers under the Commonwealth's system of government argued that the development, implementation and enforcement of a code of conduct for ministers must take account of their special status. Dr Noel Preston held the view that the government of the day should create its own standards and its own support mechanisms; and that ultimately the system rests on the Prime Minister's integrity. He stated:

Though there must always be a role for Parliamentary Committees to scrutinize the activity of Government Members, it seems to me that in the area of ethics it is desirable for the executive to exercise the autonomy of establishing its own procedures for independent scrutiny. Of course, a vigorous political debate will continue to focus on any inappropriate conduct by Ministers.<sup>68</sup>

3.80 He preferred to have an Ethics Counsellor, responsible to the Prime Minister, to provide advice on conflict of interest, post-employment issues and other integrity matters.<sup>69</sup>

3.81 Mr Clem Campbell was also concerned with the distinct status of Commonwealth ministers and noted that the establishment of the joint committee:

...fails to adequately appreciate the Westminster system of ministerial appointments. The ministers ultimately are answerable to the prime minister and it

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65 John Howard, *A Guide on Key Elements of Ministerial Responsibility*, Prime Minister, Canberra, December 1998, p. 1.

66 *Guide on Key Elements of Ministerial Responsibility*, Prime Minister, Canberra, December 1998, pp. 3, 5.

67 *Guide on Key Elements of Ministerial Responsibility*, Prime Minister, Canberra, December 1998, pp. 10–11.

68 Dr Noel Preston, submission no. 21, p. [10]. He also told the Committee 'At the end of the day, that system [code to ministerial behaviour] rests on the Prime Minister's integrity, and that is a political matter', *Committee Hansard*, 6 April 2001, p. 50.

69 Dr Noel Preston, submission no. 21, p. [10], and *Committee Hansard*, 6 April 2001, pp. 48 and 50.

is the prime minister who appoints or terminates the services of a minister. Subsequently a Commissioner for Ministerial and Parliamentary Ethics should report to the prime minister on the conduct of a minister.<sup>70</sup>

3.82 In Dr Carney's view, the Bill is unclear whether there is to be one code for both ministers and members, or whether separate codes are anticipated. He accepted that it would be possible to draft one code with separate provisions for additional or different standards applicable to ministers, but preferred separate codes.<sup>71</sup> He suggested that separate codes could take account of the peculiar position of ministers as officers of the Crown with significant executive powers, and also facilitate the adoption of appropriate monitoring and enforcement mechanisms. In particular, he considered that the nature of possible sanctions for members and ministers could differ in line with their different responsibilities as members of the legislative and executive branches, respectively.<sup>72</sup>

3.83 Dr Uhr also recognised the unique position of ministers, noting that, in his view, Parliament does not commission, 'employ' or 'hire' ministers as executive officials, and it lacks authority to de-commission, 'fire' or dismiss ministers. He, however, supported the establishment of a parliamentary code of ministerial conduct which he believed could make great progress by 'entrenching community standards of conduct expected of ministers in their capacity as peak public decision-makers and as elected representatives'. He went on to say:

But parliament can declare its lack of confidence in ministers or in a ministry, and this proposed code would allow a house of parliament to decide issues of confidence on a more publicly credible basis by reference to compliance with standards newly articulated in such a parliamentary code. As things now stand, a prime minister can dismiss a minister for a breach of a code of conduct conveying the terms and conditions expected of ministers by that prime minister. This proposed parliamentary code is more of a supplement than a replacement of such a prime ministerial code, and in ideal terms perhaps, one can envisage two overlapping spheres of ministerial regulation: one enforced by parliament and one by the prime minister.<sup>73</sup>

### ***Committee view—code of conduct for ministers***

3.84 The Committee favours the adoption of a separate code of conduct for ministers though it understands that ministers should also be bound by the more general code of conduct for parliamentarians. It accepts that such a code for ministers must take heed of the unique position of ministers under Australia's system of responsible government and that the ultimate determination of the fate of an individual minister resides with the Prime Minister. Even so, it accepts Dr Uhr's proposal that there is nothing impeding the Parliament from setting what it regards as appropriate standards for ministerial conduct. This code of conduct

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70 Clem Campbell, submission no. 10, p. [2]. See also See Sixth Report of the Committee on Standards in Public Life, *Reinforcing Standards: Review of the First Report of the Committee on Standards in Public Life*, vol. 1: Report, Presented to Parliament by the Prime Minister by Command of Her Majesty, January 2000. The Committee found 'At the heart of the matter is the power of the Prime Minister to determine the dismissal of a Minister...We think it undesirable to make a recommendation that would fetter the Prime Minister's freedom in those respects and in our view, a new office of ethics commissioner or independent investigative officer would have that effect.' p. 53.

71 Dr Gerard Carney, submission no. 11, p. 2.

72 Dr Gerard Carney, submission no. 11, p. 2, para 2.3.

73 Dr John Uhr, submission no. 16, p. 6.

may well be adopted by the Prime Minister or, if not, can stand beside the Prime Minister's code as an independent statement of what the Parliament expects of Commonwealth ministers.

3.85 The Committee, however, questions the practical value of the Parliamentary Joint Committee on a Code of Conduct for Ministers and Other Members of Parliament producing a code of conduct for ministers that does not explicitly allow for the involvement of the Prime Minister in its approval.

### ***Education and advice***

3.86 The Committee has already discussed the importance of education and the provision of prior advice on ethical matters to ministers as well as members.

3.87 In 1996, the Prime Minister issued a guide on key elements of ministerial responsibility but found that it was used as a reference point in relation to alleged breaches of guidelines by some ministers. The KCELJAG was of the opinion that:

the real problem was not that the standards had been set too high. As Weller emphasises, Howard's principles were entirely in keeping with previous unpublished standards. The problem was that the publication had highlighted and articulated a set of public norms with no means of advising Ministers on what they must do to comply, nor any means of authoritatively interpreting these norms to determine if Ministerial behaviour fell below the sanctionable minimum. In the absence of any sources of prior advice and interpretation, Ministers breached the rules without understanding them and made themselves vulnerable to subsequent political attack by press and Opposition.<sup>74</sup>

### ***Committee view—prior advice for ministers***

3.88 The importance of providing prior advice on ethical matters to members and ministers has been considered earlier in this report. Although it accepts that the proposed Commissioner for Ministerial and Parliamentary Ethics could provide advice to ministers on ethical matters relating to their public duties, the Committee strongly maintains that decisions on possible breaches of standards of conduct should rest with the Prime Minister and not the Parliament. The Committee returns here to a critical issue regarding implementation of a code of conduct for ministers, that is the central role of the Prime Minister. It considers that it should be the prerogative of the Prime Minister, and not the Parliament, to choose an ethics adviser for the executive.

### ***Investigating and reporting breaches of the code of conduct***

3.89 The concerns raised earlier in the chapter about the potential conflict arising from the proposed dual advisory and investigative roles of the Commissioner apply equally in relation to the Commissioner's relationship with ministers. As it stands, the Commissioner could investigate and report on a breach of the code to the relevant House without undertaking any consultation with the Prime Minister. This provision, if enacted, ignores the

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74 Charles Sampford, 'Prior Advice is Better than Subsequent Investigation', in *From Motivating Ministers to Morality*, attachment 1 to The Key Centre for Ethics, Law, Justice and Governance (KCELJAG), submission no. 22, p. 30 of 49.

position of the Prime Minister and disregards his prerogative to set ministerial standards and insist on their observance.

## **Appointments by ministers**

### ***Appointments by ministers—a code of practice***

3.90 Senator Murray was concerned that ministers could make appointments of patronage which he regarded as an ‘insidious form of corruption’. He explained his disquiet with the current method of appointment by governments to public bodies:

No government, no matter how good its intentions, can deflect the public perception of such appointments as being rewards for party hacks or others who have assisted the Government to gain office. Further, this perception can damage the reputation of these bodies, as in the public eye they are seen as being controlled by persons who may lack the appropriate independence and who may not be as meritorious as they might be.<sup>75</sup>

3.91 According to Senator Murray, the intention of the Charter of Political Honesty Bill is to put in place a mechanism to ensure that the process of making appointments to the governing organs of public authorities is transparent, accountable, open and honest.<sup>76</sup>

3.92 The proposed mechanism to establish a code of practice for appointments by ministers found qualified endorsement from witnesses. Mr E. J. Lockett supported the provision to eliminate the use of ministerial appointments as rewards for services rendered to the party. He warned, however, of the risk that rather than ensuring ‘fair play, they will only create further injustices and produce nonsensical outcomes’.<sup>77</sup> He explained:

This is especially so in the case of ministerial appointments, where compatibility of the political views of the appointee and the minister would seem to be essential to an effective working relationship. Very careful drafting of the code of practice and associated guidelines would be required to protect not only the interests of potential appointees but, more importantly, the public interest.<sup>78</sup>

### ***Committee view—clarifying the term ministerial appointment***

3.93 The Committee takes note of this concern and, as a starting point, suggests that clauses 27 and 28 be re-worded to make absolutely clear that appointments refer to positions in Commonwealth authorities and not simply ‘the making of appointments by ministers’. If this were not the case, the provisions could be read as applying to appointments made by the minister to his or her personal staff.

### ***The contents of a code of practice for appointments by ministers***

3.94 The Bill requires the proposed Commissioner for Ministerial and Parliamentary Ethics to work out a code of practice for the making of appointments by ministers. It also

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75 Senator Andrew Murray, submission no. 13, p. 12.

76 Senator Andrew Murray, submission no. 13, p. 12.

77 E. J. Lockett, submission no. 12, p. [5]. See also Harry Evans, submission no. 4, p. 5.

78 E. J. Lockett, submission no. 12, p. [5].

requires the code to provide for ministers to make appointments on the basis of merit.<sup>79</sup> Again Senator Murray envisages that this code would establish ‘clear rules requiring that appointments be made on merit and providing the necessary openness and accountability in relation to ministerial appointments’.<sup>80</sup> As with the proposed code of conduct for members of parliament, this code of practice assumes that the requirements would be expressed precisely and specifically and that they would be practically enforceable.

3.95 The current Prime Minister’s guide on key elements of ministerial responsibility contains the following advice:

Subject to provisions in legislation or other formal documents relating to the establishment of government bodies or positions, government appointments are to be made on the basis of merit, taking into account the skills, qualifications, experience and any special qualities required of the person to be appointed.

...

There is a longstanding practice that ministers do not appoint close relatives to positions in their own offices. In addition, close relatives of a minister should not be appointed to any other minister’s office irrespective of the level of the position, except with the specific approval of the Prime Minister. And a minister’s close relative should not be appointed to any position in an agency in that minister’s own portfolio if the appointment is subject to the agreement of the minister or Cabinet.

Appointment proposals should identify the elements of merit, skills, qualifications, experience and special qualities on which they are based.<sup>81</sup>

3.96 This statement forms but one part of the Prime Minister’s overall guide for ministers and is in keeping with the tenor of the document.

### ***The code of practice as part of an integrated ethics regime for ministers***

3.97 The Bill, however, would divorce the code governing the making of appointments on merit from the more overall code of conduct for ministers by conferring responsibility for its development on the Commissioner for Ministerial and Parliamentary Ethics. The Committee is not convinced of the need or indeed value of adding this function to the functions of the Commissioner. Part 2 of the Bill allocated a similar function—to develop a code of conduct for ministers and other members of parliament—to the Parliamentary Joint Committee on a Code of Conduct for Ministers and Other Members of Parliament. For consistency, the Committee believes that the joint committee would be the more appropriate body to assume the task of drawing up a code of practice for appointments made by ministers. This would have the added advantage of enabling the development of one integrated ethics regime for parliamentarians, including ministers, that could also incorporate guidelines for ministerial appointments.

3.98 Division 3 of the Bill—Appointments on merit—could be deleted and a provision inserted in clause 14(a)(i) requiring the code of conduct for ministers to include guidelines for making appointments on the basis of merit.

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79 Division 3—Appointments on merit, Sub clause 27.

80 Senator Andrew Murray, submission no. 13, p. 13.

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

3.99 Transferring the responsibility for drafting the code of practice to the joint parliamentary committee answers the concern of Enid Jenkins that the responsibility to determine a code of conduct for ministerial appointments should not fall to the Commissioner alone but rather should be shared with the committee.<sup>82</sup> It does not, however, address the problem already discussed concerning the failure of the Bill to recognise the role of the executive and the Prime Minister in developing a code of conduct for ministers.

***Committee view—the code of practice for making appointments by ministers***

3.100 The Committee sees no need for separate provisions to establish a code of practice for appointments made by ministers. As with the Prime Minister's current ministerial guidelines, this area of ministerial responsibility fits comfortably within an overarching code of conduct for ministers. Thus, the Committee suggests that if the Bill or similar legislation were to proceed, provisions regarding ministerial appointments should be incorporated into the proposed code of conduct for ministers.

**Code of conduct and government advertising as separate legislation**

3.101 The Committee fully supports the intention of Part 3 of the Charter of Political Honesty Bill to introduce mechanisms to put in place a workable and credible ethics regime for parliamentarians and ministers. Part 2 of the Bill concerning Government advertising campaigns is examined in chapter 6. As drafted, Part 2 of the Bill has only a tenuous connection with Part 3. Although both deal with setting standards and monitoring and ensuring compliance with these, Part 2 introduces a totally separate framework for the enforcement of guidelines for government advertising campaigns which, unlike the proposed code of conduct, have already been formulated and are articulated in Schedule 1 of the Bill. Although these guidelines could be included in the proposed code of conduct for ministers, the Committee see no merit in incorporating Parts 2 and 3 into one piece of legislation.

3.102 Mr Sandell suggested that the section of the legislation dealing with the development of a code of conduct should be removed and used as the basis of a separate piece of legislation.<sup>83</sup> Dr Gerard Carney, Associate Professor at Law, Bond University, and Dr Noel Preston also preferred this approach.<sup>84</sup> In commenting in greater detail on the intentions of the Bill as a whole, Dr Uhr considered that it may be too ambitious. He submitted:

There is a kind of risk of congestion and it may be that each of the components parts, valuable in its own right, does not get full value once they are rolled into one particular bill.<sup>85</sup>

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82 Enid Jenkins, submission no. 8, p. 5.

83 Arnold Sandell, submission no. 6, p. [1].

84 Dr Gerard Carney, Associate Professor at Law, Bond University, submission no. 11, p. 2, para 2.1; Dr Noel Preston, Adjunct Professor in the Key Centre for Ethics Law Justice and Governance, Griffith University, submission no. 21, Part B, p. [9], para 2.1. Dr John Uhr, *Committee Hansard*, 6 April 2001, p. 12.

85 Dr John Uhr, *Committee Hansard*, 6 April 2001, p. 12.

### ***Committee view—government advertising, Part 2 of the Bill***

3.103 The Committee agrees that Part 2 of the Bill—Government Advertising Campaigns, and its accompanying Schedule 1—should be removed from the Bill and drafted as a separate bill because they deal with a distinct issue. The Committee, however, accepts that Schedule 1, which contains the guidelines for government advertising campaigns, could be included in the proposed code of conduct for ministers or used as a discussion paper in formulating guidelines on government advertising to be included in the proposed code. This matter is referred to briefly in chapter six, para 6.80.

### **Miscellaneous matters**

3.104 Should the Bill proceed or be used as the basis for subsequent legislation, the Committee notes a number of minor drafting matters for future consideration.

3.105 The Committee suggests that in clause 15(4)(d) the requirement that the Presiding Officers ‘publish’ their reasons for the making of the appointment of the Commissioner be reconsidered in favour of tabling the reasons in the respective Houses of Parliament.

3.106 The Clerk of the Senate raised a number of concerns with Part 4—Miscellaneous. First, he questioned the necessity for a minister to undertake a review of the statute which primarily deals with parliamentary matters. Ms Enid Jenkins also considered that the Commissioner should be responsible for reviews, and that he or she should have the discretion to call a review whenever he or she considered it necessary. Ms Jenkins also considered that reviews should be independent, with prior circulation of terms of reference, and that the initial review should be conducted sooner than five years after the commencement of the Act.<sup>86</sup>

3.107 The Clerk of the Senate also considered that it was not appropriate for the executive government to have a role in carrying out or giving effect to the Bill.<sup>87</sup>

## **Conclusions and recommendations**

### ***Overview***

3.108 The Committee accepts that the proposed legislation aims high. It fully endorses the broad object of the Bill that the Commonwealth Parliament should take responsibility for establishing its own standards of conduct and adopting an ethics regime for members and ministers that would have as its cornerstone a workable and enforceable code of conduct.

3.109 It believes, however, that the Bill as now drafted is unsatisfactory because of a number of flaws both in the underlying principles and in its proposed practical application that leaves many matters in need of clarification.

3.110 The Committee considers that the major weakness of the Bill is its reliance on assumptions that may not bear fruit, for example, it not only assumes that the Houses of Parliament will adopt the codes of conduct but also that they will commit themselves to it. In

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86 Enid Jenkins, submission no. 8, p. 5.

87 Harry Evans, submission no. 4, p. 6.

addition, the Bill suggests mechanisms for enforcement without knowledge of the details of the code of conduct.

3.111 The Committee believes that a more logical and workable approach would be to establish an ethics regime that incorporates a code of conduct and provisions for its implementation and enforcement. It suggests dividing the process into manageable stages that build sensibly on each other. The first phase would be to formulate separate codes of conduct for parliamentarians and ministers, followed by development of mechanisms for their enforcement. The Committee accepts that this process could be lengthy.

### ***Mechanisms for formulating a code of conduct***

3.112 Evidence before the Committee shows the diversity of opinion on the possible contents of a code of conduct. While most agree that it should strike a balance between prescribing standards as well as setting aspirational goals, individuals differ on just where that balance lies. Despite this difficulty, the Committee notes that the 1995 working group on ethics did succeed in producing a code of conduct. Parliament, however, has not yet adopted this code which is more aspirational in style than prescriptive.

3.113 The Committee notes the view that a code consisting of clearly prescribed rules and standards would be easier to enforce. In looking at how a code of conduct could be framed, the Committee considers that it should consist of workable and enforceable guidelines and rules so that it is precise and not subject to broad interpretation.

3.114 The Committee accepts that the proposed joint committee is an appropriate body to draft a code of conduct for adoption by both Houses of Parliament and that the procedures set out in the Bill for the establishment of such a committee are satisfactory.

3.115 The Committee, however, is not satisfied that legislation is required to complete the first stage in implementing a code of conduct. It considers, rather, that what is required is commitment from members of parliament to a code of conduct, and a willingness to see it succeed. It is only with the commitment of the Prime Minister of the day in conjunction with the Leader of the Opposition that the effective development, implementation and enforcement of a code of conduct could work. The establishment of a joint committee will facilitate dialogue and may provide the opportunity and incentive for members of parliament to move closer towards the adoption of a code of conduct.

3.116 In suggesting this path, the Committee is aware of the possibility that the proposed committee might simply retrace the well worn steps of its predecessors such as the Bowen Committee and the Working Group of 1995 in devising but not acting on a code of conduct. Nonetheless, the Committee concludes that a code of conduct must be produced and agreed upon by Parliament before any further progress can be made to implement an ethics regime for members of parliament.

### ***Enforcement mechanisms***

3.117 Once the code is adopted by both Houses, the joint parliamentary committee would be better placed to recommend how best to implement and enforce this particular code. With a full understanding of the contents of the code, it would be in a position to take expert advice on suitable enforcement mechanisms, and consider and recommend whether statutory requirements were necessary or even appropriate to ensure observance of the codes.



3.118 The Committee fully appreciates the contribution that the proposed Commissioner for Ministerial and Parliamentary Ethics could make to improving parliamentarians' understanding of what is expected of them as members of parliament and in assisting them to set and maintain high standards in carrying out their public duties. The Committee supports in principle the appointment of a Commissioner to develop and implement an education program for members of parliament about ethics in public life and to advise them on the proposed code of conduct.

3.119 While the Committee envisages no difficulties with the advisory role of the proposed Commissioner, it believes that there are a number of substantial problems in relation to the Commissioner's proposed investigative role that are not adequately addressed in the Bill and need closer consideration. They include:

- the procedures for appointment of the Commissioner and whether the process provides the degree of independence needed to engender confidence in his or her impartiality;
- the role of the Commissioner in adjudicating on the conduct of members of parliament and whether it is appropriate for an outside body to exercise such a function;
- the conflicting roles of the proposed Commissioner who would have the function to advise on the code of conduct as well as to investigate breaches of it;
- the absence of review or appeal provisions; and
- the code of conduct for ministers and whether the enforcement mechanisms give adequate recognition to the unique positions of ministers and the Prime Minister in Australia's federal system of government.

3.120 The provisions in this Bill and the discussion that they have generated offer some guidance about the effective enforcement of a code of conduct. The Committee has highlighted a number of substantial problems with the present Bill and made a number of suggestions.<sup>88</sup> Based on the above findings the Committee makes the following recommendation.

### **Recommendation No. 1**

**3.121 The Committee recommends that Part 3 of the Charter of Political Honesty Bill not proceed in its current form because of a number of fundamental concerns about the proposed legislation that need to be resolved including, *inter alia*, the actual contents of the proposed codes of conduct and the functions to be conferred on the Commissioner for Ministerial and Parliamentary Ethics. The Committee also questions the need initially for legislation to meet the object of the Bill.**

3.122 Rather than dismiss the Bill out of hand, the Committee recognises that it contains provisions that could make a valuable contribution to the establishment of an ethics regime for members of the Commonwealth Parliament. The first hurdle to overcome is for Parliament to produce, agree to and adopt a code of conduct for members of parliament. As noted above, the Committee questions whether the development and adoption of a code of

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88 See in particular paras 3.55, 3.57, 3.70, 3.91, 3.101 and 3.103–3.105.

conduct is best achieved through legislation. Based on the provisions in the Bill as currently drafted, the Committee makes the following recommendation which it believes will go some way towards achieving the object of the Bill but without the need initially for legislation.

3.123 The following recommendation also deals with a code of conduct for ministers which the Committee suggests should be a separate document and one that takes account of the position held by the executive in the Commonwealth parliamentary system of government.

### **Recommendation No. 2**

**3.124 The Committee recommends that the Parliament establish a Parliamentary Joint Standing Committee on a Code of Conduct for Ministers and Other Members of Parliament whose establishment and membership is consistent with Part 2, Division 1, of the Charter of Political Honesty Bill 2000 [2002]. The functions of the Parliamentary Joint Standing Committee be:**

- **to conduct a thorough inquiry into the composition and content of a code of conduct for all members of parliament, involving calling for public submissions and conducting public hearings;**
- **to develop a code of conduct for all members of parliament for adoption by each House of Parliament. In drafting the code, the committee should have regard to—**
  - **the desirability of combining a statement of principles with specific provisions that would provide clear guidance to members on the standard of conduct expected of members,**
  - **existing obligations on members;**
- **once the code has been adopted, to inquire into and determine how best to enforce this code taking into account the measures needed to prevent breaches, to investigate alleged breaches and to deal with breaches;**
- **to draw up the machinery for the code's implementation and enforcement for adoption by each House of Parliament;**
- **to monitor the implementation of the code of conduct and to review and report to Parliament on its operation; and**
- **to develop a code of conduct for ministers which would allow for approval by the Prime Minister and adoption by each House of Parliament. The code is to include—**
  - **a code of practice for the making of appointments which stipulates that such appointments must be based on merit.**

3.125 The Committee draws attention to the recommendation made in chapter six that the proposed parliamentary joint committee referred to above include in its drafting of a code of conduct for ministers a section that would deal with a code of conduct for government advertising.