THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

FINANCE AND PUBLIC ADMINISTRATION

LEGISLATION COMMITTEE

Charter of Political Honesty Bill 2000 [2002]

Electoral Amendment (Political Honesty) Bill 2000 [2002]

Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000

Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2]

August 2002

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Referral of Bills

In its 20th report of 2000, the Selection of Bills Committee recommended that the following Bills be referred to the Senate Finance and Public Administration Legislation Committee:

- Charter of Political Honesty Bill 2000 [2002]; and
- Electoral Amendment (Political Honesty) Bill 2000 [2002].

The principal reasons for referral were to examine the effectiveness of the bills in meeting community expectations for the monitoring and enforcement of electoral and parliamentary standards; and to consider whether the bills meet international standards of accountability; and the practicality of the proposed mechanisms.

On 20 November 2000, the Senate referred the above Bills to the Finance and Public Administration Legislation Committee for inquiry and report by 24 May 2001.

On 5 December 2000, the Senate also referred the following Bills to the Committee for inquiry and report by 24 May 2001 in conjunction with the Committee's inquiry into the above two bills:

- Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2]; and
- Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000.

A number of extensions to the reporting date were sought by the Committee and approved by the Senate. The Bills lapsed with the issue of writs on 8 October 2001 for a federal election to be held on 10 November. On 13 February 2002, the first two bills were restored to the notice paper while the latter two bills were not. However, the Senate re-referred the four bills to the Committee with a reporting date of 25 June 2002. The chronology is as follows:

- referred 29 November and 5 December 2000;
- readopted 21 March 2002; and
- reporting date varied: 28 February 2002, 25 June 2002 and (current) 29 August 2002.

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EXECUTIVE SUMMARY

Introduction

1. In this inquiry, the Committee examines four individual pieces of proposed legislation—three Private Senators' Bills, two introduced by Senator Andrew Murray and one by Senator the Hon John Faulkner, and the provisions of a Private Member's Bill introduced by the Hon Mr Kim Beazley MP. Although this report examines four separate bills, there is considerable overlap in the matters they cover. The bills cluster around the core themes of probity in public affairs and public confidence in the institutions of government. As a package they propose to ensure that parliamentarians, ministers and, in some instances, their staff comply with expected standards in exercising their official duties, in accessing their parliamentary benefits and in conducting advertising campaigns.

The Charter of Political Honesty Bill 2000 [2002]—Part 3, Ministerial and Parliamentary Ethics

2. The Charter of Political Honesty Bill 2000 [2002] sets out mechanisms for developing, monitoring and enforcing a code of conduct. 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 Bill. The Bill also provides for a code of practice covering the making of appointments by ministers.

3. The Committee fully endorses the broad object of the Bill that the Commonwealth Parliament should take responsibility for establishing its own standards of conduct and adopt an ethics regime for members and ministers that would have as its cornerstone a workable and enforceable code of conduct.

4. It further supports the object of the legislation in establishing a joint parliamentary committee, to be known as the Parliamentary Joint Committee on a Code of Conduct for Ministers and Other Members of Parliament, to develop a code of conduct and to establish mechanisms to set and monitor standards of behaviour. It believes, however, that the Bill as now drafted is unsatisfactory because of a number of flaws in the underlying principles and in its proposed practical application that leave many matters in need of clarification.

5. 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 code of conduct, but also that they will commit themselves to it. In addition, the Bill suggests mechanisms for enforcement without knowledge of the details of the code of conduct.

6. 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.

Formulating a code of conduct

7. 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.

8. The Committee accepts that the proposed joint parliamentary 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.

9. 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.

10. 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

11. Once the code is adopted by both Houses, the joint parliamentary committee would be far better placed to investigate and 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 effective enforcement mechanisms, and consider and recommend whether statutory requirements were necessary or even appropriate to ensure observance of the codes.

12. In turning to the proposed Commissioner for Ministerial and Parliamentary Ethics who would be responsible for enforcing the code of conduct, the Committee fully appreciates the contribution that he or she 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.

13. 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 system of government.

14. 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 based on its findings believes that the proposed legislation in its current form should not proceed.

15. 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 conduct is best achieved through legislation.

16. Based on the provisions in the Bill as currently drafted, the Committee recommends that the Parliament establish a parliamentary joint committee to conduct a thorough inquiry into the composition and content of a code of conduct for all members of parliament. Following this inquiry, the committee would then develop a code of conduct for members of parliament for adoption by both Houses of Parliament. This Committee would also draft a separate code of conduct for ministers which takes account of the position held by the executive in the Commonwealth parliamentary system of government. The code would also include a code of practice for the making of government appointments by ministers.

17. The Committee believes that such a measure will go some way towards achieving the object of the Bill but without the need initially for legislation.

The Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2]

18. The Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2] proposes to establish the position of Auditor of Parliamentary Allowances and Entitlements as an independent office-holder. The Auditor would have powers to receive and investigate complaints about possible misuse of parliamentary entitlements and allowances, and to undertake sample audits of the use of such benefits. The Auditor would also have the authority to provide advice to individual members of parliament on ethical issues connected with the use of parliamentary allowances and entitlements.

19. The Committee supports the intention of the Bill to put in place measures that would promote openness and accountability in the use of parliamentary entitlements and allowances. During the course of the inquiry, however, a number of fundamental and serious flaws were identified in the Bill. They include:

- the proposal to confer the advisory and investigative functions on the proposed Auditor;
- the entry and search provisions in the Bill and their potential to impact on personal rights and liberties;
- the adequacy of review provisions;
- the definition of the boundaries of the Auditor's function; and
- the need for penalties and their adequacy.

20. The Committee is convinced that the use of parliamentarians' entitlements and allowances should be adequately monitored and scrutinised. An office-holder dedicated solely to auditing the use of parliamentarians' entitlements and allowances would offer assurances that the use of such benefits was being properly and regularly audited and that parliamentarians were being held accountable for their expenditure of public funds.

21. The Committee is not convinced, however, that such an appointment is the best approach. In particular, it believes that the potential of the Auditor-General to be involved more closely with the auditing of the use of parliamentary benefits has not been given due consideration.

22. The Committee considers that the accountability regime for the use of parliamentary entitlements should be addressed first, by improving and simplifying guidelines, by clarifying information available to members of parliament, and by publishing more comprehensive statistics on expenditure.[1] Such procedures would not only assist members of parliament observe the rules governing the use of their benefits but it would also provide the public with information on the nature of the entitlements, on how they are used and for what purposes.

23. The Committee appreciates that the Auditor was proposed with a view to contributing to increased accountability in the use of parliamentary entitlements. But it considers that the creation of this new office is unnecessary at this time. Evidence to this inquiry suggests that less expensive but potentially equally effective means of ensuring compliance with the rules and regulations governing the use of parliamentary entitlements have not been adequately considered.

24. Based on its findings the Committee believes that the Bill in its current form should not proceed.

25. The Committee considers that there are opportunities within the current framework to improve accountability in the use of parliamentary entitlements. The Auditor-General could be given a more active role in auditing the use of parliamentary entitlements. The Government could also introduce a number of measures including the development and promulgation of clear guidelines on entitlements and their use, greater levels of disclosure such as public reporting of the cost and expenditure patterns of parliamentary entitlements, and regular internal audit and review of the system administering parliamentary entitlements.

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1 For example, see ANAO Audit Report no. 5 2001-2002, Performance Report, *Parliamentarians' Entitlements*: 1999-2000, p. 130.

26. The role of the Government might also include reporting back to Parliament on progress made in implementing measures identified in ANAO reports on parliamentary entitlements. Although it may be regarded as an unwarranted intrusion by some, the Committee considers that there may be merit in giving the Auditor-General the power to conduct audits of financial expenditure by senators and members.

The Electoral Amendment (Political Honesty) Bill 2000 [2002]

27. The Electoral Amendment (Political Honesty) Bill 2000 [2002] proposes to amend the *Commonwealth Electoral Act 1918* (the Electoral Act) to prohibit the printing, publication or distribution of any electoral advertisement containing a statement, purporting to be a statement of fact, that is 'inaccurate or misleading to a material extent'. Penalties of $5,000 for individuals and $50,000 for bodies corporate are to apply to contraventions of this provision.

28. The Committee considers it irrefutable that statements made to voters should, as far as possible, be accurate and not misleading, in order that voters can make informed decisions when casting their votes. Whether and how this should be subject to formal regulation rather than relying on the political process is, however, more controversial.

29. The history of consideration of this issue by the Joint Standing Committee on Electoral Matters (JSCEM) over the last decade, as well as by the Queensland Legal, Constitutional and Administrative Review Committee, and the fact that concerns about electoral advertising continue to be raised show that careful and detailed consideration needs to be given to this issue.

30. The Committee considers there is clear evidence that the short-lived Commonwealth provision that sought to ensure 'truth' in political advertising in 1984 had serious flaws. However, the more limited provision that prohibits statements of fact that are inaccurate and misleading to a material extent has been in place for a considerable period in South Australia, seemingly without embroiling the Electoral Commissioner in that State in overwhelming controversy or undermining the perceived impartiality of that office. The Committee notes that the Australian Electoral Commission (AEC), despite its opposition to the regulation of political advertising, would support the South Australian provisions in preference to the wider model. Those provisions are very similar to the current Bill.

31. The Committee is mindful of the evidence given by the former South Australian Electoral Commissioner, now the Australian Electoral Commissioner, that there have been two prosecutions under the South Australian Act; that the legislation in his opinion has not changed the political culture of that State to any great extent; and that in his view the legislation offers the opportunity for political parties to disrupt the electoral process.

32. The Committee has also considered the purpose of the Bill, namely to apply the same standards to political advertising as apply to commercial advertising under the Trade Practices Act. Clearly some parallels can be drawn between commercial advertising and political advertising. Not to be ignored is the contention that the proposal to regulate commercial advertising initially met with significant opposition on the grounds that the consumer was the final arbiter and that the marketplace was sufficiently self-regulatory.

33. However, some distinctions must be made between the trade practices model and proposals to regulate political advertising by legislation:

- There is an implied guarantee in the Constitution of freedom of discussion on political matters. While the South Australian Supreme Court's finding that the equivalent South Australian provisions are valid is highly persuasive, it must also be remembered that the High Court has not had the opportunity to finally determine this matter.
- Political advertising is different from commercial advertising in that it is only one of a wide range of strategies by which political parties seek to persuade voters to support them. Speeches, rallies, talkback radio, the promotion of party membership, newspaper and journal articles are only some of the means by which political parties seek to convey their message to the public. It is somewhat artificial to seek only to regulate political advertising in an election period while leaving untouched the other means of communication which may have equally significant effects on voters and which no-one has suggested could or should be subject to similar constraints. By contrast, sellers of products and services rely almost exclusively on advertising for that purpose, so that regulation of commercial advertising can significantly affect the conduct of corporations.
- Regulation of misleading advertising under the Trade Practices Act is by way of civil remedies only, such as damages and injunctions, whereas criminal offences are proposed to regulate political advertising.
- The timeframe in which action may be taken to remedy misleading corporate advertising is usually much longer than an election period, when remedial action must be available very quickly in order to make the laws effective.

34. The Committee notes concerns expressed by the AEC about its proposed role under such legislation, particularly in relation to its perceived neutrality and the pressure on its resources. However, the Committee also notes that the JSCEM concluded in 1997 that the South Australian experience suggested that the AEC's concerns were 'overstated', and that it had never been suggested that the South Australian Electoral Office was incapable of carrying out its statutory responsibilities or had been compromised in doing so.[2] Nor does the Committee consider that the AEC's concerns about pressure on its scarce resources during an election period are in themselves sufficient argument against the introduction of such legislation: additional resources can be made available if necessary.

35. However, on balance the Committee does not consider that legislation in the form of the current Bill should be enacted because of its concerns about the practical implications of such legislation. In particular the Committee is concerned about the difficulties in ensuring a prompt response to complaints and preventing misuse of the legislation to score political advantage. The Committee is also uncertain about the extent to which it is appropriate to seek to regulate political discussion.

36. Nonetheless, it believes that some mechanism should be in place to address concerns about improper practices during election campaigns. The Committee considers that the JSCEM could take a more active role in scrutinising this particular aspect of the election phase. While no penalty as such would result from this process, the resultant public exposure of impropriety in the JSCEM's report may have the effect of changing undesirable practices.

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2 JSCEM, *The 1996 Federal Election: Report of the Inquiry into the Conduct of the 1996 Federal Election and Matters Related Thereto*, June 1997, para 7.18.

37. If the Bill were to proceed or to be reintroduced in an amended form, amendment of various aspects should be considered. The most important of the changes that the Committee believes should be considered are outlined as follows:

- amendment of proposed subsection 329(1A) to refer to a statement of fact that is 'inaccurate *and* misleading to a material extent' rather than 'inaccurate *or* misleading to a material extent';
- further consideration of the proposed penalties in light of the current review of penalties in the *Commonwealth Electoral Act 1918*, with particular reference to the general rule that maximum penalties for corporations are five times the penalties for individuals and that statutory penalties are usually expressed in terms of penalty units;
- definition of the term 'advertiser' in proposed subsections 329(5A) and 329(5B);
- deletion of proposed section 329A concerning the heading to electoral advertisements, unless further explanation is offered about its purpose and its relationship with existing section 331; and
- amendment of the error in proposed subsection 329(5A)(b) to refer to an offence against subsection (1A).

Part 2 of the Charter of Political Honesty Bill 2000 [2002] and the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000

38. The Committee considers it an integral part of a properly accountable system of government that government advertising is not used as a vehicle for promoting party political interests. However, whether it is possible to legislate effectively against such conduct is a difficult issue, as evidenced by submissions to the inquiry.

39. Part 2 of the Charter of Political Honesty Bill 2000 [2002] proposes to establish a Government Publicity Committee to monitor and enforce compliance by public authorities with statutory guidelines for government advertising campaigns. The proposed Government Publicity Committee is to comprise the Auditor–General, the Ombudsman and 'a person with knowledge and experience in advertising' to be appointed by the Auditor–General.

40. The Bill provides that if the Government Publicity Committee considers that an advertising campaign does not comply with the guidelines, it may direct that the campaign be withdrawn or modified. The guidelines are set out in the Schedule to the Bill. The committee can also determine whether the objective of a campaign is legitimate, and whether a campaign is likely to achieve its stated objective. If not, the committee can order that the campaign be withdrawn.

41. Under the Bill, the Government Publicity Committee would be able to institute proceedings in the Federal Court if a Commonwealth agency or employee fails to comply with its directions. The Federal Court may grant an injunction, including an interim injunction, against the person or agency and make an order (not defined) in relation to the contravention.

42. The Committee's chief concern with the Charter of Political Honesty Bill 2000 [2002] is the role and function of the proposed Government Publicity Committee. As members of that committee, the Auditor–General and the Ombudsman would be required to act in ways

that are inconsistent with their establishing legislation, particularly in relation to investigating the actions of ministers and initiating enforcement procedures against government agencies. The Auditor-General and the Ombudsman as members of the committee may be called upon to direct management of government programs and dictate to responsible ministers. Such functions represent a substantial departure from their current roles.

43. The Committee heard strong evidence that, in carrying out their duties as committee members, the Offices of the Auditor–General and the Commonwealth Ombudsman may become embroiled in political controversy. Public confidence in their roles as independent regulators and reviewers of government agencies, as well as the confidence of Parliament, may be damaged. There is also a risk that future appointments to these offices may become politicised, or that their funding may be detrimentally affected by their activities on the proposed Government Publicity Committee.

44. The Committee also heard evidence of other serious flaws in the proposed committee. Giving the Auditor-General the responsibility for appointing and, in effect, removing the third committee member is undesirable. The Ombudsman's uncertain jurisdiction in relation to Commonwealth contractors may prove an obstacle where an external body is to manage an advertising campaign. The unlimited power of delegation proposed for the Ombudsman and Auditor-General makes exercise of the committee's powers uncertain, and the lack of any mechanism to review committee decisions is undesirable. Some serious constitutional issues about the proper role of the courts in relation to the proposed committee's decisions were also raised.

45. The Committee therefore believes that while the appointment of these two office-holders to the proposed Government Publicity Committee on the basis of their impartiality and integrity may have seemed attractive, in practice the system would present major difficulties.

46. The Committee therefore does not support the introduction of Part 2 of the Charter of Political Honesty Bill 2000 [2002].

47. In relation to the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, the Committee heard different but even more serious concerns. Most submissions expressed severe reservations about the proposed creation of a serious criminal offence defined by reference to vague and uncertain guidelines.

48. As several legal experts pointed out, it is a fundamental principle of our criminal law that offences should be clearly defined. The Bill as drafted would put the courts in the untenable position of trying to determine whether a crime had been committed by reference to vague criteria and policy statements. The Committee also heard reservations about the appropriateness of the courts traversing matters which were essentially political in nature, particularly in light of their traditional reluctance to interfere in such issues.

49. For these reasons, the Committee does not support the introduction of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000.

Summary on the proposed legislation to regulate government advertising

50. The Committee nevertheless considers that there is strong evidence to support the argument that the current arrangements for the regulation of the political content of government advertising need to be improved in the face of public criticism.

51. As the Committee's examination of current arrangements has revealed, the present guidelines on government advertising offer no guidance to departments or ministers on the avoidance of political content in government advertising campaigns. The process is administered by the Government Communication Unit in the Department of the Prime Minister and Cabinet, and decisions about the appropriateness of any major or 'sensitive' campaign are made by the Ministerial Committee on Government Communications.

52. Under this system, it is the ministry itself which determines what constitutes responsible use of the ministerial office in relation to government advertising. The fact that there are no rules or guidelines preventing the party political use of government advertising means that decisions about content and presentation style are wholly in the power of the Executive.

53. It is widely acknowledged, as evidenced by the submissions that the Committee received, that the distinction between what is party political and what is not is difficult to codify. However, as a minimum the Committee considers that the *Guidelines for Australian Government Information Activities: Principles and Procedures* should include a clear statement of the fundamental principle: that government information programs should not be, or be liable to misrepresentation as being, party political.

54. While guidelines for government agencies are important, the Committee is not persuaded that this amendment alone will provide sufficient safeguards against the expenditure of public funds on advertising that promotes party political interests.

55. During this inquiry the Committee heard various suggestions as to the appropriate mechanism for ensuring proper scrutiny of expenditure on government advertising. The Committee considers highly persuasive the arguments that these are essentially political matters and that consequently it is for Parliament as a whole to examine, decide and issue detailed guidelines on what is appropriate.

56. Because of flaws in the two bills, the Committee believes that more detailed consideration of the regulation of government advertising is essential. The Committee considers it would be appropriate for this matter to be referred to the proposed Parliamentary Joint Standing Committee on a Code of Conduct for Ministers and Other Members of Parliament, as outlined in recommendation 2, for further consideration and development of appropriate guidelines. The guidelines proposed by the Auditor-General and the JCPAA, in combination with evidence received during this inquiry, should be used as a basis for developing a detailed set of standards.

RECOMMENDATIONS

Recommendation No. 1 para 3.121

The Committee recommends that Part 3 of the Charter of Political Honesty Bill 2000 [2002] 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.

Recommendation No. 2 para 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. The functions of the Parliamentary Joint Standing Committee should 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 standards of conduct expected of members,
  - existing obligations on members;
- once the code has been adopted, to inquire into and determine how best to enforce the 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;
- 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.

Recommendation No. 3 para 4.117

The Committee recommends that the Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2] not proceed because of significant flaws in the proposed legislation and because other options for ensuring compliance with the rules and regulations governing the use of parliamentary entitlements have not been fully considered.

Recommendation No. 4 para 5.84

The Committee recommends that the Electoral Amendment (Political Honesty) Bill 2000 [2002] not proceed because in its current form it does not present an effective or workable solution to prevent dishonest electoral advertising.

Recommendation No. 5 para 5.110

The Committee recommends that if the Electoral Amendment (Political Honesty) Bill 2000 [2002] were to proceed, the following matters should be addressed:

- amendment of proposed subsection 329(1A) to refer to a statement of fact that is 'inaccurate *and* misleading to a material extent' rather than 'inaccurate *or* misleading to a material extent';
- further consideration of the proposed penalties in light of the current review of penalties in the *Commonwealth Electoral Act 1918*, with particular reference to the general rule that maximum penalties for corporations are five times the maximum penalties for individuals and that statutory penalties are usually expressed in terms of penalty units;
- definition of the term 'advertiser' in proposed subsections 329(5A) and 329(5B);
- deletion of proposed section 329A concerning the heading to electoral advertisements, unless further explanation is offered about its purpose and its relationship with existing section 331; and
- amendment of the error in proposed subsection 329(5A)(b) to refer to an offence against subsection (1A).

Recommendation No. 6 para 6.115

The Committee recommends that Part 2 of the Charter of Political Honesty Bill 2000 [2002] relating to government advertising and the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 should not proceed because of fundamental flaws in both bills.

Recommendation No. 7 para 6.120

The Committee recommends that the *Guidelines for Australian Government Information Activities: Principles and Procedures* issued by the Government Communications Unit in the Department of the Prime Minister and Cabinet be amended to refer explicitly to the fundamental principle that government information programs should not be, or be liable to misrepresentation as being, party political, and should provide guidance as to how that principle is to be applied in practice.

Recommendation No. 8 para 6.126

The Committee recommends that the issue of appropriate guidelines for government advertising campaigns be referred to the proposed Parliamentary Joint Standing Committee on a Code of Conduct for Ministers and Other Members of Parliament for further consideration.

CHAPTER ONE

The Committee's Inquiry

Establishment of the inquiry

1.1 In this inquiry, the Committee examined four individual pieces of proposed legislation—three Private Senators' Bills, two introduced by Senator Andrew Murray and one by Senator the Hon John Faulkner, and the provisions of a Private Member's Bill introduced by the Hon Mr Kim Beazley MP. Although this report examines four separate bills, there is considerable overlap in the matters they cover. The bills cluster around the core themes of probity in public affairs and public confidence in the institutions of government. As a package they propose to ensure that parliamentarians, ministers and, in some instances, their staff comply with expected standards in exercising their official duties, in accessing their parliamentary benefits and in conducting advertising campaigns.

1.2 The Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 was introduced into the House of Representatives by the Hon Mr Kim Beazley, MP, the then Leader of the Opposition, on 26 June 2000. The bill was amended and read again by Mr Beazley on 6 August 2001. It deals specifically with the use of government advertising and seeks to set down minimum standards to regulate such advertising to prevent its use for party political purposes. It includes a schedule articulating 'guidelines and principles' for the use of government advertising. It proposes that any individual designer of a campaign that breaches the standards prescribed in the schedule could be subject to a court injunction, with certain exemptions, and could also be subject to specified penalties.

1.3 The Charter of Political Honesty Bill 2000 [2002] was introduced into the Senate by the Australian Democrat Senator Andrew Murray on 10 October 2000. The bill proposes to introduce an integrated ethics regime which seeks to discourage the use of government information campaigns for party political purposes, establish a code for parliamentary and ministerial conduct, and appoint an Ethics Commissioner to update and interpret the code. A Schedule attached to the bill outlines proposed guidelines for government advertising campaigns and is similar in content to the schedule in Mr Beazley's bill. The bill also seeks to establish a legislative framework to ensure that public appointments by ministers are merit-based, and not party political.

1.4 Senator Murray's other bill, the Electoral Amendment (Political Honesty) Bill 2000 [2002], was introduced as companion legislation on 10 October 2000. This bill seeks to amend the *Commonwealth Electoral Act 1918* to prohibit political advertising that is misleading to a material extent.

1.5 On 1 November 2000, Senator John Faulkner, Leader of the Opposition in the Senate, introduced the Auditor of Parliamentary Allowances and Entitlements Bill 2000. Mr Kim Beazley introduced the same bill with the same name in the House of Representatives on 27 November 2000. The bill's objective is to tighten the scrutiny of the expenditure of public monies by elected representatives and officers employed under the *Members of Parliament (Staff) Act 1984* by appointing an independent auditor who would monitor and investigate the use of parliamentary entitlements and allowances. The auditor is also intended to have an advisory function.

1.6 In its 20th Report of 2000, the Senate Selection of Bills Committee recommended that Senator Murray's bills be referred to the Senate Finance and Public Administration Legislation Committee to examine their effectiveness in meeting community expectations for the monitoring and enforcement of electoral and parliamentary standards. It also recommended that consideration be given to whether the bills meet international standards of accountability; and the practicality of the proposed mechanisms.[1] The two bills were referred on 29 November 2000 for inquiry and report by 24 May 2001.

1.7 On 5 December 2000, the Senate also referred the Auditor of Parliamentary Allowances and Entitlements Bill 2000 and the provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 to the Committee for inquiry and report by 24 May 2001, in conjunction with its inquiry into the two other bills.[2] The Committee subsequently sought and was granted an extension of time in which to report to 28 February 2002.

1.8 The bills, however, lapsed on the dissolution of Parliament. On 13 February 2002, after the commencement of the 40th Parliament, Senator Murray's bills were restored to the Notice Paper. The bills proposed by Senator Faulkner and Mr Beazley have not been restored to the Notice Paper. Senator Faulkner advised the Committee that it was not proposed to reintroduce these bills in their current form.

1.9 Although not all bills have been restored to the Notice Paper, the Committee resolved to recommend to the Senate that the reference into the package of four bills be re-adopted. On 21 March 2002, the matter was re-referred to the Committee with a reporting date of 25 June 2002. An extension of time to respond was granted by the Senate to 29 August 2002.

Conduct of the inquiry

1.10 The inquiry was advertised in the press on 16 December 2000 seeking written submissions. In addition the Committee wrote to a number of individuals and organisations with an interest in this area of public administration drawing their attention to the inquiry and inviting them to make a submission. Twenty-four submissions were received and published by the Committee. A list of submissions is at Appendix 1. The submissions can be viewed on the homepage of the Committee at www.aph.gov.au/senate_fpa.

1.11 A public hearing was held in Canberra on 6 April 2001. At the hearing, the Committee received evidence from officials and organisations that would have key roles in implementing the changes proposed. These included representatives from the Australian Electoral Commission (AEC), the Australian National Audit Office (ANAO) and the Office of the Commonwealth Ombudsman. The Committee also heard from the Clerk of the Senate and from other expert witnesses in the fields of public administration and governance. A full list of witnesses appears at Appendix 2. The Hansard transcript of evidence is also available electronically via the Committee's website.

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1 Selection of Bills Committee, Appendix 1, *Report no. 20 of 2000*, Senate *Hansard*, 29 November 2000, p. 20139.

2 Referral to Senate Finance and Public Administration Legislation Committee—Reference, *Senate Journal*, no. 163, item 13, p. 20672.

1.12 Apart from the material contained in written submissions and in oral evidence presented to it, the Committee drew on information contained in reports from various committees of inquiry, from comments and articles by people directly involved with similar or related legislation, and from studies on ethics regimes.

1.13 The proponent of two of the bills, Senator Andrew Murray, has emphasised that referring private senators' or members' bills to committees is an important step, not only for reviewing the bills, but also for improving and refining them.

Structure of the report

1.14 The report is divided into three distinct sections. Part 1 provides background to the bills and considers the political context of their introduction. It surveys briefly models of ethics regimes set up to regulate ministerial and parliamentary conduct in the United States, Canada and the United Kingdom before examining Australian state and federal government initiatives in this area.

1.15 Part II of the report begins by considering the more general proposal to establish a code of ministerial and parliamentary conduct as provided for in Part 3 of the Charter of Political Honesty Bill 2000 [2002]. It also considers the bill's provisions for a code of practice for the making of appointments by ministers. Part II of the report then concentrates on the provisions of the Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2] and its proposal to introduce mechanisms to provide greater transparency in the use of parliamentary entitlements and allowances.

1.16 Part III of the report is concerned with advertising. It looks first at the content of electoral advertisements. It considers the provisions of A Bill for an Act to Amend the *Commonwealth Electoral Act 1918* to provide for truth in electoral advertising. The second section deals with government advertising campaigns and examines the provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 and Part 2 of the Charter of Political Honesty Bill 2000 [2002] which are concerned specifically with preventing the use of government advertising campaigns to promote party political interests.

Acknowledgments

1.17 The Committee would like to thank all those who made submissions to the inquiry and particularly those witnesses who appeared before the Committee at its public hearing on 6 April 2001.

PART I

THE DEVELOPMENT OF ETHICS REGIMES OVERSEAS AND IN AUSTRALIA

Part I of the report is about probity in public affairs. It provides a brief outline of the political environment in Australia as a backdrop to the introduction of the four bills. It notes the growing concern over recent years about the conduct of members of parliament and ministers in their official lives and how such conduct is falling short of public expectations. The report then looks at some of the measures taken to promote ethical behaviour in elected officials and to strengthen public confidence in the institutions of government. In doing so, the report traces the development of ethics regimes overseas and in Australia as a point of comparison for the examination of the proposed legislation before this inquiry.

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[1]

Introduction

2.1 In recent years, the conduct of parliamentarians in the performance of their official responsibilities has attracted widespread attention and criticism.[2] The public controversy has been fuelled by a perceived increase in, and greater public exposure of, incidents of alleged misconduct by parliamentarians.[3] 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.[4] 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.[5]

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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 pollies 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.[6]

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.[7]

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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'.[8]

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.[9] 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.[10] 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.[11] 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.[12]

2.9 Popular response to the inquiry also supported the general view that Australians hold politicians in low esteem.[13] 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.[14]

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.[15]

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.[16]

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.[17]

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 (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.[18]

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.[19] Canada is yet to introduce a conflict of interest regime for backbenchers and senators.[20]

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.[21]

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'.[22]

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.[23] 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.[24]

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

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.[27]

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://ww.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.[28]

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.[29]

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.[30] 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.[31] He has released a code of conduct for ministers.[32]

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.[33]

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.[34] 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.[35]

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.[36] 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.[37]

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

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.[38]

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.[39]

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.[40]

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.[41]

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.[42] It was chaired by the Hon Sir Nigel Bowen, Chief Judge

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.[43]

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.[44]

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.[45] 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.[46]

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.[47]

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.[48,49]

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.[50] It would investigate allegations referred to it by the Parliament of major breaches of the proposed code by ministers and members.[51]

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.[52]

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'. [53]

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.[54]

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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.[55]

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.[56]

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.[57]

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.[58]

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.[59] 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.[60] 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.[61]

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.[62]

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58 *Odgers' Australian Senate Practice,* 10th 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.'[63] 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.[64] 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.[65]

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.[66]

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.[67] 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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> …

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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.[68]

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.[69]

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.[70] 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.[71]

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.

PART II

MINISTERIAL AND PARLIAMENTARY ETHICS

Part II of the report deals with two bills that intend to put in place measures that would assist members of parliament and ministers observe appropriate standards of behaviour in their official capacities. It examines the following bills:

- Part 3 of the Charter of Political Honesty Bill 2000 [2002]. This Bill proposes to establish a parliamentary joint committee to develop a code of conduct for members of parliament and for ministers. It also proposes to establish a Commissioner for Ministerial and Parliamentary Ethics who would implement an education program on the codes, review the codes and offer advice on them as well as investigate complaints of breaches of the codes.
- The Auditor of Parliamentary Entitlements and Allowances Bill 2000 [No. 2]. This Bill proposes to establish an Auditor of Parliamentary Entitlements and Allowances whose functions would be to receive, investigate and report on complaints about the possible misuse of parliamentary entitlements and allowances. The Auditor would also undertake sample audits on the use of such benefits and provide advice to individual members of parliament or to persons employed under the *Members of Parliament (Staff) Act 1984* on ethical issues connected with the use of that person's parliamentary entitlements.

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.[1]

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.[2]

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.[3]

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.[4]

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.[5] 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.[6]

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.[7]

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.[8] 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'etre* 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.[9]

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.[10] 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'.[11]

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.[12] 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.[13] 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.[14]

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, 19th 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.[15]

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.[16] 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.[17]

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.[18]

3.19 Others interested in ethics systems placed a heavy emphasis on rigour in setting down standards and rules.[19] 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.[20]

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'.[21] 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.Australia/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.Australia/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.[22]

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.[23]

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.'[24]

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.[25] 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'.[26] 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.[27] 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

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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,* 50th 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'.[28] Mr Clem Campbell noted the reluctance by parliamentarians to introduce a code.[29] 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.[30]

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'.[31]

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.[32]

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

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

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.[33]

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'.[34] 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.[35] 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.[36]

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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.[37]

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.[38]

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'.[39] 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.[40]

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.[41]

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.[42]

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.[43]

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.[44]

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'.[45]

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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.[46]

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.[47]

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"'.[48]

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.[49] 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.[50] 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.[51]

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'.[52] 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.[53] 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'.[54]

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.[55] 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.[56]

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.[57]

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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.[58] 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.[59]

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.[60]

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.[61]

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'.[62] 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.[63]

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.[64]

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.[65]

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.[66]

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.[67] 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.[68]

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.[69]

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.[70]

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.[71] 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.[72]

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.[73]

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.[74]

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 implemention 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.[75]

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.[76]

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'.[77] 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.[78]

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.[79] 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'.[80] 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.[81]

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.[82] 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.[83] Dr Gerard Carney, Associate Professor at Law, Bond University, and Dr Noel Preston also preferred this approach.[84] 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.[85]

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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.[86]

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.[87]

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.[88] 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

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

CHAPTER FOUR

THE AUDITOR OF PARLIAMENTARY ALLOWANCES AND ENTITLEMENTS BILL

Introduction

4.1 The Committee now looks at the Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2]. This proposed legislation is also intended to put in place measures that will assist parliamentarians to observe appropriate standards of behaviour. Again the overriding purpose is to enhance transparency and accountability. Whereas the Charter of Political Honesty Bill was concerned firstly with developing a code of conduct and then providing for its enforcement, the Auditor of Parliamentary Allowances and Entitlements Bill has a different starting point. Its purpose is not to create new codes or modify the rules and regulations determining allowances and entitlements. It focuses tightly on compliance with existing rules and regulations.

4.2 The Bill proposes to establish a position of Auditor of Parliamentary Allowances and Entitlements as an independent office-holder. The Auditor would have powers to receive and investigate complaints about possible misuse of parliamentary entitlements and allowances, and to undertake sample audits on the use of such benefits. The Auditor would also have the authority to provide advice to individual members of parliament on ethical issues connected with the use of parliamentary allowances and entitlements.

4.3 Although the proposed auditor would assume a range of functions, the Bill places a 'heavy emphasis' on the auditing and investigative task. As explained by Senator Faulkner, the proposer of the Bill, the principle underlying this approach is that:

> Transparency is a powerful incentive to do the right thing. If details of all entitlements are placed regularly on the public record and thus made available for public scrutiny, members of parliament will be truly accountable for their expenditure of taxpayer funds. Expenditure can be compared. Excessive use will have to be justified and irregularities explained.[1]

4.4 This chapter presents an overview of parliamentary entitlements and allowances and the role of auditing in an effective accountability system. It then considers the following aspects of the Bill:

- views on the Bill;
- the Auditor of Parliamentary Allowances and Entitlements—procedures for appointment, conditions of service, independence and functions;
- the role of the Auditor as adviser and investigator;
- entry and search provisions;
- the Auditor as auditor or ethics standard bearer

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

- adequacy of the review mechanisms;
- penalties for various offences set down in the Bill;
- ministerial entitlements and allowances;
- the need for this legislation; and
- alternatives to the proposed Bill.

Parliamentarians' remuneration—entitlements and allowances

4.5 Under section 48 of the Constitution, the Parliament is empowered to determine the allowances of parliamentarians.[2] The *Parliamentary Allowances Act 1952,* the *Remuneration and Allowances Act 1990,* and determinations issued by the Remuneration Tribunal under the *Remuneration Tribunal Act 1973,* set the remuneration, allowances and entitlements of federal parliamentarians.

4.6 One of the Tribunal's main functions is to report on and determine the remuneration, including entitlements and allowances, of members of the federal Parliament. Remuneration of members of parliament comprises two components —the basic salary and a non-salary range of allowances and entitlements for parliamentary and electoral purposes. The Bill is concerned only with non-salary allowances and entitlements.

4.7 The Remuneration Tribunal recognises that to serve the public, parliamentarians require adequate support both in terms of resources and services. In its 1999/01 report it stated:

> Parliamentarians, in order to serve their electorates properly must attend to legislative duties and be actively involved in the life of their electorates and in political party activities. These activities, only some of which are resourced by the Commonwealth, are nevertheless part and parcel of the life of Senators and Members. They affect the focus of their energies and the way in which they work.[3]

4.8 The *Parliamentary Entitlements Act 1990* provides a statutory framework for the provisions of such benefits which include items such as the cost of postage in relation to parliamentary or electorate business; personalised letterhead stationery; and travel for purposes related to parliamentary or electorate business. The Minister for Finance and Administration also determines and provides certain entitlements to senators and members such as office accommodation in their electorates together with equipment and facilities necessary to operate the office.[4]

4.9 There are, however, certain obligations attached to the use of these entitlements and allowances and parliamentarians are expected to abide by the rules and regulations governing

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2 The section reads: 'Until Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat'.

3 Remuneration Tribunal, Report 1999/01, http://www.remtribunal.gov.au/Home/dets/report_1999_01.html p. 3 of 18, (22 February 2002). See also comments in Australian National Audit Office, Audit Report no. 5 2001–2002 Performance Report, *Parliamentarians' Entitlements: 1999–2000,* p. 16.

4 See for example, *Odgers' Australian Senate Practice,* 10th edition, 2001, pp. 165–6; *House of Representatives Practice,* fourth edition, I. Harris (ed.), Canberra 2001, p. 151; Schedule 1 the *Parliamentary Entitlements Act 1990.*

the use of such benefits.[5] The Bill, while acknowledging that parliamentarians need a range of resources and support services to enable them to carry out their public duties effectively, recognises that they should be accountable for use of these resources. The Bill looks to improve the compliance regime to ensure that minimum standards are not breached.

Misuse of entitlements

4.10 In large measure, this Bill, which is intended to improve the overall accountability for the use of parliamentary entitlements, is a response to a perceived need to strengthen public trust and confidence in parliamentarians.[6] Over the years, a number of parliamentarians, in particular ministers, have drawn public disapproval for the perceived improper use of their entitlements.[7] In 1997, following well-publicised cases of inappropriate conduct in regard to the use of entitlements and allowances, the Minister for Administrative Services, Mr David Jull, told the House of Representatives that members and senators required better information to assist them to manage their entitlements and 'to enable us to detect any problems in the use of entitlements'.[8]

4.11 The then Department of Administrative Services engaged a consultant to assist with examining the reporting system dealing with parliamentarians' entitlements and allowances with the aim of removing any weaknesses. Consultants KPMG under Mr Ken Baxter reviewed the administration of entitlements giving special consideration to improving accountability processes. According to Mr Jull, KPMG made recommendations that 'new systems be provided to provide effective internal audits, in-built checks and balances and continuing peer pressure to maximise full disclose and the integrity of the system'.[9]

4.12 The Government acted on a number of the findings from the review, in particular the requirement that a report setting out expenditure on air and car transport and related travelling allowances for all senators and members, including ministers and opposition office-holders, should be tabled in Parliament on a six-monthly basis.[10]

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5 See for example Dr Noel Preston, submission no. 21, p. [3]; Senator Judith Troeth, Senate *Hansard*, 9 November 2000, p. 19593. Senator Troeth stated in the Senate, 'I would be the first to agree that we would always have to be watchful that we as members of parliament do not abuse the entitlements we are given, courtesy of the taxpayer'.

6 See for example, Senator John Faulkner, Second Reading Speech, Senate *Hansard*, 1 November 2000, p. 18848.

7 The literature on this matter is extensive. For example see, Jack Waterford, 'Ministerial Responsibility for Personal Staff', *Senate Occasional Lecture Series,* Friday, 3 May 1996; Debate on Code of Conduct, Senate *Hansard*, 24 August 1995, pp. 383–90; Matter of Public Importance: Members of Parliament: Entitlements, House of Representatives *Hansard*, 31 October 2000, pp. 21702–21708; and second reading speech, Auditor of Parliamentary Allowances and Entitlements Bill 2000, Senate *Hansard*, 1 November 2000, p. 18848; Auditor of Parliamentary Allowances and Entitlements Bill 2000, Senate *Hansard*, 9 November 2000, pp. 19574–19595.

8 Answer to question without notice, David Jull, House of Representatives *Hansard*, 5 March 1997, p. 2015.

9 Answer to Question without Notice, David Jull, House of Representatives *Hansard*, 16 June 1997, p. 5220.

10 Answer to Question without Notice, David Jull, House of Representatives *Hansard*, 16 June 1997, p. 5220. See also Senator Jeannie Ferris, Senate *Hansard*, 9 November 2000, p. 19588 who outlined a number of areas where the accountability of the use of parliamentary entitlements have been tightened in recent years.

4.13 Despite this, those supporting this Bill argue that more could be done to improve the transparency and accountability of the processes surrounding the use of parliamentarians' entitlements and allowances. They argue, in particular, that auditing would provide a strong incentive for ensuring that parliamentarians comply with the rules and regulations.

Auditing

4.14 The Australian National Audit Office (ANAO) recognised auditing as essential to a workable accountability system. It maintained that:

> Auditing is a key component of an effective compliance strategy in a self-assessment/self-regulation environment. Compliance audits are a verification process that seek to ascertain whether a Parliamentarian has complied with his or her obligations. They can be conducted as part of a series of audits that aims to address identified high risk categories of entitlements or Parliamentarians, or may be initiated where there has been an indication of some potentially material irregularity for an individual Parliamentarian.[11]

4.15 The Auditor of Parliamentary Allowances and Entitlements Bill would strengthen the current auditing regime by providing for the appointment of a statutory office-holder to audit the use of parliamentarians' allowances and entitlements. In introducing this legislation in the Senate, Senator Faulkner told the chamber:

> This Auditor is no toothless tiger. The office will constitute a very powerful deterrent against abuse of taxpayer-funded entitlements and will have a salutary effect on the administration of entitlements by Government departments and members of parliament.[12]

4.16 Those opposing the introduction of the Bill saw the proposal for a standing auditor of parliamentary entitlements to be 'unworkable, intrusive and unwarranted.' Senator Judith Troeth, Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry, maintained that the Bill 'reaches a level of scrutiny that simply makes it impossible for any government to function. To institute another office, another officer and another level of bureaucracy to deal with this problem is simply beyond belief.'[13]

4.17 Nonetheless, there exists among some sections of the community a strongly held viewpoint that the use of parliamentary entitlements must come under closer scrutiny if the integrity of the system is to be upheld. The ANAO in its performance report on Parliamentarians' Entitlements: 1999–2000 commented at length on the importance of the effective auditing of parliamentarians' entitlements. It stated:

> ANAO considers that the detailed checking of each entitlements transaction is not a practical, cost-effective approach. Nor should it be necessary if there is an effective audit program in place to periodically test the effectiveness of the existing system, supported by sensible risk management. In this context, it would be prudent for Finance to include, within its payments control framework, a program of risk-based

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11 Australian National Audit Office, Audit Report no. 5 2001–2002, Performance Report, *Parliamentarians' Entitlements: 1999–2000,* p. 130.

12 Senator John Faulkner, Senate *Hansard,* 1 November 2000, p. 18848.

13 See for example Senator Judith Troeth, Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry, Senate *Hansard*, 9 November 2000, p. 19593.

> audits of payments made in respect of Parliamentarians' entitlements. This would provide enhanced assurance as to the validity and correctness of those payments.[14]

4.18 This view builds on a body of opinion that favours the implementation of an effective auditing regime for the use of parliamentary entitlements. The ANAO noted that the need for such a program was identified in the 1997 Baxter Review of the administration of parliamentarians' entitlements. According to the ANAO, the Government subsequently agreed to a recommendation by the Department of Finance and Administration (DOFA) that an auditor be appointed to undertake regular audits of the use parliamentary entitlements. DOFA informed ANAO that, in agreeing to the appointment of an auditor, the then minister did not see this initiative as a priority. The minister also made the comment that Finance's Internal Auditor had a role of undertaking audits, including audits of parliamentarians' entitlements. Based on information in the ANAO's report on parliamentarians' entitlements, the Committee understands that a period of more than four years has elapsed since the recommendation was made and that there is still no regular program of audits of entitlements payments.[15]

Views on the Bill

4.19 The Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2] received considerable support in submissions from the pubic. For example, Mr Arnold Sandell submitted that the Bill could be one of the 'most important piece of legislation passed during the term of the current Parliament'. He saw it as addressing concern about politicians' misuse of entitlements, and as a means of improving public opinion of politicians.[16]

4.20 The Bill was also welcomed by those working in the field of ethics and public administration. Dr Gerard Carney applauded the Bill as essential for both the protection of members and for public confidence in the parliamentary system.[17] Dr John Uhr considered the legislation to be the 'most urgent Bill'.[18] Dr Noel Preston saw 'a lot of merit' in the Bill, and supported the possible integration of 'reforms of parliamentary entitlement procedure with enhanced overall ethical accountability for Parliamentarians'.[19]

4.21 While general opinion favoured the overall object of the proposed legislation, some witnesses held strong reservations about key provisions in the Bill. These provisions deal with the following matters:

- the independent status of the Auditor;
- the advisory and investigatory functions of the Auditor;
- the powers conferred on the Auditor, especially powers to enter and search premises;
- the adequacy of review mechanisms;

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14 Australian National Audit Office, Audit Report no. 5 2001–2002, Performance Report, *Parliamentarians' Entitlements: 1999–2000,* p. 131, para 3.81.

15 Australian National Audit Office, Audit Report no. 5 2001–2002 Performance Report, *Parliamentarians' Entitlements: 1999–2000,* p. 131.

16 Submission no. 6, p. 3.

17 Submission no. 11, p. 3.

18 Submission no. 16, p. 1.

19 *Committee Hansard*, p. 45 and submission no. 21, para, 5.4, p. [8].

- the blurring of the auditing role with matters concerned with ethics; and
- penalties.

The Auditor of Parliamentary Allowances and Entitlements

4.22 As noted earlier, the intention of the Bill is to appoint an independent office-holder with the power to determine whether a parliamentarian has failed to comply with the rules and regulations governing the use of his or her entitlements. The Auditor is intended to be an 'independent, objective umpire'.[20] Clause 7(4) confers on the Auditor discretionary powers in the performance or exercise of his or her functions. It stipulates, in particular, that the Auditor is not subject to direction from anyone in relation to:

> a) whether or not a particular complaint is to be investigated; or
>
> b) the way in which a particular inquiry is to be conducted; or
>
> c) the priority to be given to any particular matter.

4.23 The process for appointing the Auditor of Parliamentary Allowances and Entitlements is meant to enhance further the independent status of the office and follows the model for the appointment of the Auditor-General under the *Auditor-General Act 1997*.[21]

4.24 In the previous chapter of this report, the Committee raised concerns about possible undue executive influence on the selection of the Commissioner for Ministerial and Parliamentary Ethics whom the Bill proposes would be appointed by the Presiding Officers. This is not the case with the proposed appointment of the auditor where strong parliamentary involvement is anticipated in the appointment process through the role of the Joint Committee of Public Accounts and Audit (JCPAA).

4.25 The Bill proposes appointment of the Auditor for a term of ten years by the Governor-General on the recommendation of the minister. Before a recommendation can be made for the appointment, the minister must have referred the proposal to the JCPAA and that committee must have approved the proposal.[22]

4.26 The JCPAA comprises 16 members—six members of the House of Representatives nominated by the Government Whip, four members of the House of Representatives by the Opposition Whip, three Senators by the Leader of the Government in the Senate, two senators by the Leader of the Opposition in the Senate and one senator by any minority group or groups or independent senators.[23] The decision to approve or reject a proposal would be by the majority of the members of the committee holding office at the time.[24]

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20 See Lindsay Tanner MP, House of Representatives *Hansard*, 31 October 2000, p. 21708.

21 See chapter 3, para, 3.54. As noted there 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.

22 Clause 9. See also *Explanatory Memorandum* circulated by the Hon. Kim Beazley, Auditor of Parliamentary Allowances and Entitlements Bill 2000, p. 4.

23 Section 5—Joint Committee of Public Accounts, *Public Accounts and Audit Committee Act 1951.*

24 Subsection 8A (3), *Public Accounts and Audit Committee Act 1951.*

4.27 With regard to the appointment of the proposed Auditor of Parliamentary Allowances and Entitlements, the Clerk of the Senate noted that, as the Auditor would play a parliamentary role, it may be more appropriate for Parliament rather than the Executive to make the selection.[25] He also questioned why the JCPAA would be required to examine the proposed appointment[26] given that its role is to scrutinise the performance of all Commonwealth agencies in spending funds appropriated to them by Parliament.

4.28 Dr Noel Preston, in his submission, suggested that, as the appointment is to assist and monitor the entitlements and allowances of members and senators across Parliament, it should have the support (across Party lines) of an appropriate parliamentary committee.[27]

4.29 Some witnesses were also concerned about a potential conflict of interest arising from the provision allowing the Auditor to be appointed on a full or part-time basis. The ANAO advised the Committee that it was important to ensure that any additional activities undertaken by a part-time Auditor would not result in an actual or perceived conflict of interest.[28]

4.30 The provisions governing the Auditor's removal from office serve as another safeguard to preserve the Auditor's independence. The Bill provides that the Governor-General could remove the Auditor from office if each House of the Parliament, in the same session of Parliament, requests that the Governor-General remove the Auditor on grounds of misbehaviour or physical or mental capacity.[29]

Committee views—independence of the Auditor

4.31 The Committee notes the observations made on the role of the JCPAA in the appointment of the proposed Auditor but recognises that the provisions for his or her appointment are identical to the procedures now adopted for the appointment of the Auditor-General. Although the membership of the JCPAA is skewed in favour of the Government, the Committee believes that the JCPAA's process of approving the appointment of the Auditor would provide a forum for open debate and transparency. The Committee believes that the provisions for the appointment of the Auditor provide adequate transparency and allow an appropriate level of parliamentary involvement in the process.

4.32 The Committee notes the criticism levelled at the proposed appointment process of the Auditor but is satisfied that the provisions in the Bill governing the appointment and removal of the Auditor, and the discretionary powers conferred on him or her are adequate.

Other concerns about the Auditor

4.33 Other concerns were raised about the conditions of the Auditor's appointment. The Bill provides that the new Auditor be appointed for a term of ten years. During the Second Reading Debate on the Bill, Senator Susan Knowles noted that the standard term for public service appointments was five years and questioned the need for the proposed ten year term. The Committee notes, however, that the Auditor-General and other parliamentary officers,

25 Submission no. 4, p. 6.

26 Submission no. 4, p. 6.

27 Submission no. 21, Part B, para. 1.6.

28 Submission no. 15, para. 9, p. 3.

29 Clause 13—Removal from office.

such as the Clerk of the Senate and the Clerk of the House of Representatives, are also appointed for a ten-year term. The Commonwealth Ombudsman's tenure may not exceed seven years.[30]

4.34 The Committee also notes that the Bill proposes that the Remuneration Tribunal set the level of remuneration and other conditions for the Auditor. On this point, Senator Knowles expressed the view that a conflict of interest may arise if, in exercising the investigative and advisory role proposed under the Bill, the Auditor makes critical comment about the determinations of the Tribunal governing entitlements of parliamentarians.[31]

Committee views—other concerns about the Auditor

4.35 The Committee accepts that a ten-year term is a relatively long appointment but has no strong views on whether the Auditor's time in office should be restricted to a seven or five-year tenure.

4.36 The Committee notes that one of the functions of the Auditor is to make recommendations to the Minister or to either House of the Parliament for changes 'to the system of parliamentary allowances and entitlements.' It notes Senator Knowles' concern about possible friction between the Remuneration Tribunal and the Auditor but believes that such an eventuality is unlikely.

4.37 Nonetheless, to facilitate a good working relationship, the Committee believes that the Bill should stipulate that a copy of any report containing recommendations that may touch on the jurisdiction of the Tribunal in regard to parliamentary entitlements and allowances should be provided first to the President of the Commonwealth Remuneration Tribunal.[32] Further, if the President provides written comments in response to any report, the Auditor should consider them before preparing a final report.[33] In the Committee's view, the requirement that the Remuneration Tribunal determine the Auditor's remuneration enhances the independency of the Auditor by distancing the office from the influence of government.

The role of the Auditor

Conflict between advisory and investigative roles

4.38 While the Committee is satisfied that there are no significant difficulties with the appointment of the Auditor, some witnesses perceived a fundamental problem with the combination of functions proposed for the Auditor. Under Part 3 of the Bill, the Auditor is:

- to receive and investigate complaints about the possible misuse of entitlements and allowances;

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30 Section 22, *Ombudsman Act 1976.*

31 Senator Susan Knowles, Senate *Hansard*, 9 November 2000, p. 19577.

32 Arnold Sandell, submission no. 6, p. 4. Mr Sandell drew attention to the function to make recommendations to the Minister or to either House of the Parliament for changes to the system of parliamentary allowances and entitlements. He suggested that the Auditor may be encroaching on the domain of the Remuneration Tribunal and that as an alternative the Auditor should first approach the Tribunal.

33 These suggestions are based on provisions contained in the *Auditor-General Act 1997.* See section 19—Comments on proposed report.

- to inquire into and report on any matter referred to it in writing by a minister or by resolution of either House of Parliament;
- to undertake sample audits of the use of entitlements and allowances by individual members or groups of members of either House of Parliament or by persons employed or engaged under the *Members of Parliament (Staff) Act 1984* (MOPS Act);
- to undertake inquiries on his or her own initiative in relation to any matter relevant to this Act;
- to report all matters relevant to the Act to the Minister and to each House of Parliament;
- to make recommendations to the Minister or either House of Parliament for changes to the system of parliamentary allowances and entitlements; and
- to provide advice to individual members of parliament, or to persons employed under the MOPS Act, on ethical issues connected with the use of parliamentary entitlements and allowances.

4.39 Clause 35 reinforces the advisory role of the Auditor as stipulated above. This provision allows a senator, a member of the House of Representatives or a person employed or engaged under the MOPS Act to request the Auditor to provide advice on ethical issues connected with the use of that person's parliamentary allowances or entitlements.

4.40 These provisions are significantly broader than the range or type of advice provided by the Auditor-General. Under section 23 of the *Auditor-General Act 1997,* the Auditor-General may provide advice or information relating to the Auditor-General's responsibilities to a person or body if, in the Auditor-General's opinion, it is in the Commonwealth's interests to provide the information or advice.

4.41 Some witnesses feared that the proposal that the Auditor provide advice on ethical issues confers a power on him or her that is incompatible with an auditing role. Dr John Uhr had no difficulty in accepting that the Auditor should have a scrutiny role and considered that this was an important example of an appropriate role for appointed officials.[34] He expressed concern, however, that the Auditor would be ill-prepared to offer ethical advice on the proper or 'ethical' use of publicly provided resources, since the Auditor himself does not have a role in determining or approving appropriate standards.[35]

4.42 A number of submissions also drew attention to the potential for tension in relation to the Auditor's proposed roles. They considered that public confidence in the impartiality and independence of the Auditor might be undermined if he or she had dual advisory and investigative roles. Professor Charles Sampford of KCELJAG considered the proposed combination of advisory and investigative roles as a central failing of the Bill.

4.43 As an example, the Clerk of the Senate referred to the difficulty that might arise if the Auditor provided advice on acceptable or ethical conduct that later became the subject of an investigation by the Auditor. He pointed out that a perception could arise that the Auditor had compromised his or her decision-making capacity.[36]

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

35 Submission no. 16, p. 2.

36 Submission no. 4, p. 3.

4.44 Elaborating on the problems inherent in entrusting both advisory and investigative functions to the auditor, Mr Evans stated:

> There is a built-in conflict in combining the two roles. If a member goes to the auditor and gets advice on a particular course of conduct, and the auditor gives advice that the conduct is acceptable under whatever guidelines they are operating, but then subsequently somebody raises a complaint, that immediately puts the auditor in a very difficult situation. The auditor is being asked, in effect, to overturn his or her original advice, and that is a very awkward position in which to put a supposedly independent person. But if the auditor upholds the complaint, the member might then say, 'I had this cleared by the auditor; the auditor obviously does not know what he or she is doing.'[37]

4.45 The Deputy Auditor-General, Mr Ian McPhee, also expressed concern about the appropriateness of advisory and investigative functions for the Auditor. He suggested that advice giving functions were more usually located with administrative ones, such as in the Australian Taxation Office, and that this should be the case for the purposes of this Bill.[38]:

> I think if you have an audit function, you should maintain it clearly as an audit function without necessarily adding on almost executive type roles to that role.[39]

Committee view—the role of the Auditor

4.46 In chapter three, the Committee dealt with the potential for conflict created by the Charter of Political Honesty Bill which proposes that one authority, the Commissioner for Ministerial and Parliamentary Ethics, perform both advisory and investigative functions. In that case, the Committee favoured maintenance of the advisory role by the Commissioner with the investigative role allocated to a different authority.

4.47 In the case of the Auditor of Parliamentary Allowances and Entitlements Bill, the Committee has more definite views on the appropriate role for the Auditor. The Committee believes that the Auditor should not assume both the advisory and the investigative functions. It considers that an auditor has a special and distinct role to investigate complaints of the misuse of parliamentary entitlements. Indeed, it considers that the Auditor would have the experience and expertise needed to carry out that investigative function. It also considers that the authority responsible for administrating the scheme for parliamentary entitlements would be better placed to undertake the advisory role. In that case, DOFA would have the main responsibility for providing advice on parliamentary entitlements, although the parliamentary departments would also have a role.

Entry and search provisions

4.48 If enacted, the Bill would confer on the Auditor or an authorised person a wide range of powers similar to those of the Auditor-General and the Ombudsman. Most notable are the powers to enter and remain on premises, and powers providing access to and examination of

37 *Committee Hansard*, p. 10.

38 *Committee Hansard*, p. 30.

39 Ian McPhee, Deputy Auditor General, *Committee Hansard*, 6 April 2001, p. 28.

documents, including provision for copying documents, for the purposes of gathering information.[40]

4.49 In its Fourth Report of 1999, the Senate Standing Committee for the Scrutiny of Bills dealt at length with entry and search provisions in Commonwealth legislation. It underlined the importance of common law rights regarding private property:

> At common law, every unauthorised entry onto private property is a trespass. The modern authority to enter and search premises is essentially a creation of statute. As such, it should always be regarded as an exceptional power, not a power granted as a matter of course, and any statutory provisions which authorise search and entry should conform with a set of principles.[41]

4.50 The committee outlined the principles that govern the granting of powers of entry and search. Among the most relevant for the purposes of this inquiry are:

- people have a fundamental right to their dignity, to their privacy, to the integrity of their person, to their reputation, to the security of their residence and any other premises, and to respect as a member of a civil society;
- such intrusion is warranted only in specific circumstances where the public interest is objectively served and, even where warranted, no intrusion should take place without due process;
- powers to enter and search are clearly intrusive, and those who seek such powers should demonstrate the need for them before they are granted, and must remain in a position to justify their retention; and
- a power to enter and search should be granted only where the matter in issue is of sufficient seriousness to justify its grant, but no greater power should be conferred than is necessary to achieve the result required.[42]

4.51 With these principles in mind, the Committee considered the entry and search provisions of the Bill. Under Subdivision A, which applies to members of parliament and their staff, the Auditor can request information, documents and answers to questions from members of parliament and their staff. The Bill also provides that the Auditor may enter and remain on any premises officially occupied by the senator or member, and have full access to documents and make copies of those documents. The Bill requires, however, that the consent of the senator or member must first be obtained. It also provides that the Auditor's requests for access and information must be made in writing. A person who refuses to comply with such a request must be given the opportunity to provide the Auditor with written reasons for not complying. After considering the response, the Auditor may report to the relevant House the nature of the request, the reasons given for not complying and whether the Auditor recommends that the relevant House exercise its powers in relation to the member.[43]

4.52 Subdivision B, which applies to any other person not covered under Subdivision A, contains similar provisions but with some significant differences. The Auditor would have

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40 Clause 21.

41 Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2000,* Entry and Search Provisions in Commonwealth legislation, 6 April 2000, Executive Summary p. 49.

42 ibid.

43 Clause 17, Subdivision A—Members of Parliament and their staff.

the power to direct a person not only to provide information and to produce documents, but also to attend and give evidence under oath or affirmation before the Auditor or an authorised person.[44]

4.53 Furthermore, in order to exercise his powers, under clause 21 the Auditor does not require consent to enter and remain on premises, nor to access, examine and copy documents or extracts of documents. Indeed, the occupier of the said premises 'must provide the authorised person with all reasonable facilities for the effective exercise of his or her powers under this section of the bill'. Failing to do so carries a maximum penalty of 10 penalty units.[45]

4.54 As well as not requiring consent for entry and search, this provision uses the term 'any premise' without further qualification except that 'premises' includes any land or place. The Bill makes no provision for obtaining a warrant for entry and search from a judicial officer. Thus it differs markedly from Subdivision A, which stipulates first, that consent is required before the Auditor may enter and remain on the premises, and second, that entry is only available for the purposes of the inquiry to premises occupied in an official capacity by the senator or member.

4.55 Clause 21 drew particular comment from the Senate Standing Committee for the Scrutiny of Bills. It considered that:

> Legislation should authorise entry on to, and search of, premises only with the occupier's genuine and informed consent, or under warrant or equivalent statutory instrument, or by providing for a penalty determined by a court for a failure to comply.[46]

4.56 The Committee for the Scrutiny of Bills sought advice from Senator Faulkner, sponsor of the Bill, as to why this section did not require the Auditor to obtain a warrant if he or she was not granted consent for entry and search purposes.

4.57 In response, Senator Faulkner stated that clause 21 of the Bill was based on section 33 of the *Auditor-General Act 1997*, although it differed from section 33 in not being confined to Commonwealth property.[47] He further stated that, while the clause conferred wide powers on the Auditor, his actions would be overseen by, and were closely accountable to, Parliament and that this would act as a safeguard against any misuse of the Auditor's powers.[48]

4.58 The Scrutiny of Bills Committee remained unconvinced. It found that 'notwithstanding the other accountability mechanisms in the bill, the Committee continues to draw Senators' attention to this provision'.[49] It considered that 'the restriction to Commonwealth property in the Auditor-General's Act represented a substantial limitation

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44 Clause 20, Subdivision B—Other persons.

45 Clause 21, Subdivision B—Other persons.

46 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 16 of 2000*, November 2000, p. 5.

47 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2000*, 29 November 2000, p. 515.

48 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2000*, 29 November 2000, p. 515.

49 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2000*, 29 November 2000, p. 515.

which had not been included in clause 21'. It repeated its concern that the provision could be considered to trespass unduly on personal rights and liberties.[50]

4.59 The Attorney–General's Department's submission also referred to the provisions of entry and search in the Bill and noted that the Senate Standing Committee for the Scrutiny of Bills had taken the view that 'entry without consent of judicial warrant should only be allowed in limited circumstances'.[51]

Committee view—entry and search provisions

4.60 The Committee considers that clause 21, by not stipulating, as does the *Auditor-General Act 1997,* that the premises to be entered and searched are restricted to Commonwealth properties, leaves the occupiers unnecessarily vulnerable to unwarranted intrusion on his or her privacy.

4.61 Although not raised by the Scrutiny of Bills Committee in relation to this legislation, the principles governing the provision of information to occupiers were a focus of its comprehensive report on the general matter of entry and search.[52] The Committee notes that these principles included the right of occupiers of the premises to be informed of their rights and responsibilities under the relevant legislation, and their right to be given a genuine opportunity to have an independent third party, legal adviser or friend present throughout the search. The Committee also notes that no such provisions are spelt out in this Bill.

4.62 In light of the concerns about the entry and search provisions in the Bill, the Committee believes that clause 21 requires closer consideration to ensure that legislation does not trespass unduly on personal rights and liberties. The Committee notes that the Fourth Report of 1999 by the Committee for the Scrutiny of Bills provides a valuable reference for the principles governing entry and search.

Adequacy of review mechanisms

4.63 Under the proposed legislation the Auditor has authority to prepare a public report that has the potential to harm the reputation of a member of parliament or a member of his or her staff. The Bill contains a number of provisions that are intended to safeguard the rights of a person who has undergone an investigation by the Auditor.

4.64 Before commencing an investigation, the Auditor must inform the person subject to a complaint that a complaint has been made. The Bill also stipulates that an investigation must be conducted in private. Furthermore, the Auditor must not make a report in respect of an investigation in which he or she sets out opinions that are, either expressly or impliedly, critical of a person, before informing that person of the findings of the investigation. The Bill requires the Auditor, before completing an investigation into the use of parliamentary entitlements and allowances, to afford the person who is the subject of the investigation an opportunity to appear before him or her to make submissions in relation to the investigation.[53]

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50 ibid, and Senate Standing Committee for the Scrutiny of Bills, *Alert Digest,* no. 18 of 2000, 6 December 2000, pp. 10–11.

51 Submission no. 17, p. 2.

52 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2000*, 29 November 2000.

53 Clause 29.

4.65 In respect of conducting sample audits, the Auditor must not disclose the identity of those who were the subject of audits or information that may lead to the identification of those who were the subject of audits.[54]

4.66 Despite the precautions taken in the Bill to protect the privacy of individuals and to afford them the opportunity to respond to adverse comments, some witnesses were still concerned about the inadequacy of provisions to safeguard the rights and liberties of persons subject to investigation by the Auditor.

4.67 In his submission, the Clerk of the Senate noted that the Auditor would report his findings after an investigation but that the Bill did not propose the power to enforce those findings, nor did it include proposals for regular mechanisms for review. According to the Clerk:

> A finding by the Auditor that a member had misused an entitlement or allowance would be virtually a condemnation with no right of appeal. The making of such a finding would condemn the member in the court of public opinion, with the Auditor no doubt described in the media as the 'independent umpire'. The finding would immediately impose a heavy political penalty on a member which could not be removed or reversed if the finding is subsequently discovered to be wrong or defective.[55]

4.68 He urged Parliament to consider carefully 'whether it would be wise to establish such an office-holder as a sort of grand inquisitor with the de facto power to try in secret and condemn a member of Parliament before the bar of public opinion with no possibility of appeal or redress in case of error'.[56]

4.69 Mr Evans also noted that the proposed model had been applied in the British House of Commons, with the appointment of the Parliamentary Standards Commissioner. In the UK, the decisions of the Commissioner are reviewed by the Standards and Privileges Committee. Mr Evans noted that this committee had rejected the Commissioner's findings against the conduct of some British parliamentarians in cases where the committee 'regarded the findings as wrong or defective'. However, he did not consider that an equivalent Australian committee would have the courage to take the same course of action in Australia, given the likely media treatment of the event.[57]

Committee view—the right of review

4.70 The Committee is aware that a senator's or member's reputation could be damaged by the public disclosure of his or her misuse of parliamentary entitlements, and that he or she would have no right of review of the Auditor's findings. It notes, however, the provisions to protect the privacy of any person subject to a sample audit and the requirement for persons who are the subject of audits to be given an opportunity to make submissions to the inquiry before the investigation is completed. Parliament would then provide an open forum for considering the Auditor's report along with the submission from the person who is the subject

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54 Clause 34(4).

55 Submission no. 4, pp. 2–3.

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

57 Submission no. 4, p. 3.

of the inquiry. Ultimately, the fate of the person named in the report would rest with his or her party colleagues and the electorate.

4.71 As noted by the Clerk of the Senate, the Bill includes an option requiring the Auditor to report to a parliamentary committee. The Committee believes that this option deserves further consideration.

Auditor or ethics standard bearer

4.72 The likelihood of a member of parliament being tried in secret and unfairly condemned by public opinion depends, in large part, on the extent to which the Auditor becomes, in the words of the Clerk, an 'ethics policeperson'.[58]

4.73 The Committee understands the term 'auditor' to suggest a narrow and specific role, that is, examination of accounts to see that they are in order. As applied to the proposed legislation, the Auditor would be required to establish whether or not an infringement of the rules or regulations governing the use of parliamentary entitlements had occurred. The Bill, however, in requiring the Auditor to investigate complaints about the misuse of entitlements and to inquire and report on any matter referred to him or her by the minister or parliament, suggests a role wider than a traditional Auditor's role for this office. The Clerk of the Senate submitted that 'it is not clear whether the concept of misuse embraces only questions of illegality or also questions of impropriety'.[59]

4.74 Dr Noel Preston was certain in his view that the Auditor 'cannot be expected to give general ethics advice'. He drew attention to Senator Faulkner's Second Reading Speech in which the senator stated :

> It is our intention that the Auditor will become a reliable, independent and authoritative source of advice to members of parliament in the varied ethical dilemmas they face in the discharge of their responsibilities.[60]

4.75 Dr Preston rejected this notion outright and maintained that advice from the Auditor 'must be limited to allowances and entitlements issues as stipulated in clause 16 (h)'. This clause states that the Auditor's advisory function is to provide advice on ethical issues connected with a person's parliamentary allowances and entitlements. The Committee notes, however, the use of the word 'ethical' in this clause.

4.76 Dr Uhr also commented on the lack of clarity concerning the auditing function. He stated:

> Under the proposed scheme, the Auditor's role is of *public* accountability and not simply government efficiency. Accordingly, community confidence in the performance of the Auditor will be affected by the standards that he brings to bear in his investigations. It would help sustain community confidence if Parliament had a public process for confirming and legitimating these auditing standards. The Bill as it stands lacks this feature, making it an open question whether the Auditor is meant to adopt the standards implicit in the Remuneration Tribunal guidelines,

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

59 Submission no. 4, p. 3.

60 Noel Preston, submission no. 21, para 1.4. p. [8]. Section underlined by Dr Preston.

> devise his own standards or wait for Parliament to come forward with more recent and more appropriate standards.[61]

Committee view—auditing or ethics keeping

4.77 The Committee believes that the Bill needs to be explicit in defining the boundaries of the auditor's function. It considers that the Bill needs to establish the extent to which the Auditor might make judgements concerning standards of conduct.

Penalties

4.78 In its submission, the Attorney-General's Department noted that the Bill introduces a number of offences that would attract penalties. The department raised a number of issues warranting consideration, notably the adequacy and proportion of the penalty in relation to the nature of the crime. It submitted that penalties should be proportionate to the degree of proven intention or culpability establishing liability, and that it was desirable that penalties reflected the relative seriousness of the offence within the context of the Act. Penalties should also be comparable to analogous offences in other Commonwealth legislation.[62]

4.79 The Committee notes that the maximum penalty for refusing, without reasonable excuse, either to provide information to or appear before the Auditor, or to be sworn or make affirmation to, or to produce a document for or answer a question by, the Auditor, is 10 penalty points.[63] The pecuniary penalty equates with that in the *Ombudsman Act 1976* although this Act also has the option of imposing a penalty of 3 months imprisonment.[64] For a similar offence under the Auditor-General's Act the penalty is set at a maximum of 30 penalty points.[65]

4.80 The penalty for wilfully obstructing, hindering or resisting the Auditor in the exercise of his or her functions without reasonable excuse is also set at a maximum 10 penalty points.[66] The Trade Practices Act sets a maximum penalty at 20 penalty points for a similar offence. Ms Enid Jenkins submitted that the penalties were too light.[67] The Committee agrees that the maximum penalty appears lenient. For knowingly making a false or misleading complaint in a material particular, the Bill proposes a maximum penalty of 50 penalty points to reflect the more serious nature of the offence.

4.81 The Committee is also concerned with an apparent discrepancy between the penalty determined under clause 20(4)(b) and that determined under clause 22(1) and (2). Both clauses deal with knowingly providing information or making statements to the Auditor that are false and misleading in a material particular. The maximum penalties set by the clauses differ, being 10 and 20 penalty points, respectively. The Bill offers no explanation for this anomaly. The penalty for similar offences under the *Criminal Code Act 1995* is imprisonment

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61 Dr John Uhr, submission no. 16, p. 3.

62 Attorney General's Department, submission no. 17, p. 2.

63 Under Section 4AA of the *Crimes Act 1914,* (compilation of the Act prepared on 7 January 2002) a Penalty unit means $110.

64 Section 36, *Ombudsman Act 1976.*

65 Section 32, *Auditor-General Act 1997.*

66 Section 155 *Trade Practices Act 1974.*

67 Enid Jenkins, submission no. 8, p. 8.

for 12 months, and those for like offences under the *Trade Practices Act 1974* can be 20 penalty points. [68]

Committee view—penalties

4.82 The Committee notes that the penalties in the Bill relating to making false or misleading complaints appear to be lenient, except for the penalty for making a false or misleading complaint in a material particular (maximum 50 penalty points). It also draws attention to the apparent anomaly in the penalties for providing false or misleading information in respect of clauses 20 and 22.

Ministerial entitlements and allowances under the Bill

4.83 Although the Bill proposes to establish a scheme that will cover all parliamentary allowances and entitlements, it does not specifically provide for the scrutiny of ministerial entitlements. Dr Uhr expressed concerns about the potential for ministers to escape scrutiny under the Bill. His submission observed:

> It would be regrettable if this Bill was limited to allowances and entitlements available to parliamentarians, short of those additional facilities available to ministers. I suspect that this Bill falls short of providing the community with assurances that ministers, as the most powerful of members of parliament, are complying with due standards.[69]

4.84 Dr Uhr further noted that the Bill makes no mention of whether the proposed Auditor has any authority to investigate breaches of a ministerial code of conduct, such as breaches of the current Prime Minister's *Guide to the Key Elements of Ministerial Responsibility*.[70] He added in evidence:

> The two ALP bills, if I can call them that, might be unduly modest—despite the praise that I have just given for the tone—to the extent that ministers escape any regulatory loops that are being established here. I think that would be a shame, because I think there is a responsibility and an opportunity for parliament to come forward and, as the elected forum for the community, to establish standards that ministers can live up to, and not just leave that to the Prime Minister of the day.[71]

4.85 In acknowledging the failure of the Bill to capture ministerial entitlements and allowances, Senator the Hon Robert Ray stated at the public hearing into the Bill that this had been an oversight and that he would ensure that the issue was addressed at some stage.[72] The Committee notes Senator Ray's assurances.

Committee view—auditing the use of ministerial entitlements

4.86 The Committee believes that if an Auditor is created as proposed under the Bill, it is appropriate that his or her jurisdiction extend to the use of ministerial entitlements and

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68 Division 137—False or misleading information or documents, *Criminal Code Act 1995.* See section 75AY (4), *Trade Practices Act 1974.*

69 Submission no. 16, p. 2.

70 Submission no. 16, p. 2.

71 *Committee Hansard*, p. 12.

72 *Committee Hansard*, p. 17.

allowances. It disagrees strongly, however, with the suggestion that the Auditor should have a role in assessing whether a minister has breached the Prime Minister's *A Guide on Key Elements of Ministerial Responsibility*, because this would require the Auditor to take on the role of an 'ethics policeperson'.

Is a new auditor necessary?

4.87 So far, the Committee has looked at specific provisions in the Bill and has noted a number of concerns. Although some can be addressed by amending the relevant provisions, the Committee believes that others cannot be so easily remedied. In particular, the Committee questions the allocation of advisory and investigative functions to the proposed Auditor, and extension of his role to include judgement about the ethics of a member of parliament's conduct.

4.88 Despite serious reservations about particular provisions in the Bill and also about the policy that informs the proposed legislation, the Committee now turns to the question of the need for such legislation. The Committee recognises that the Bill intends to strengthen accountability in the use of parliamentary entitlements and allowances by appointing an independent auditor. Those who support thes proposed legislation see a definite need for the appointment of an auditor dedicated to the specific role of scrutinising the use of parliamentary entitlements. Mr Beazley, the then Leader of the Opposition, recognised the heavy workload already borne by the Auditor-General. He told Parliament:

> The Commonwealth Auditor-General cannot do this task. The Commonwealth Auditor-General is responsible for the full $150 billion-plus worth of outlays that the Commonwealth has under his purview and is obliged to run across all departments, with a very limited staff and often in very difficult circumstances.[73]

4.89 Dr John Uhr agreed. He stated that one notable benefit of the Bill was that it would relieve the Auditor-General of many difficult tasks that had fallen to his office in recent times. In his opinion, Parliament had been expecting too much of the Auditor-General in requesting him to inquire into matters relating to the improper use of political office.

4.90 Expanding on this matter, Dr Uhr told the Committee:

> We know the way auditors do their work, and it cannot be too difficult to establish another stream of auditing that can report back to parliament on parliament's own compliance with those regulations. Included within that I would like to see the standard setting and the regulations coming out of bodies like the Remuneration Tribunal and whatever guidelines are now being devised within the Department of Finance and Administration being subject to greater scrutiny as well. The auditor would supervise the entitlements aspect.[74]

4.91 Dr Preston believed that the functions of the Auditor proposed in the Bill required the creation of a new position and that the responsibility should not fall to the

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73 Mr Kim Beazley MP, Matters of Public Importance: Members of Parliament: Entitlements, House of Representatives *Hansard*, 31 October 2000, p. 21702.

74 Dr John Uhr, *Committee Hansard*, 6 April 2001, p. 19.

Auditor-General. He maintained that 'this special auditor needs to work closely with Members of Parliament'.[75]

4.92 Although referring specifically to ministerial entitlements, Mr John Wanna and Mr Alexander Gash, after examining the possible role of the Auditor-General in scrutinising ministerial ethics, concluded that there were some 'substantial risks' in relying on the Auditor-General to investigate incidences of ministerial breaches of accountability. They suggested a better solution might be to establish a dedicated Ministerial and Parliamentary Auditor.[76]

4.93 While Dr Uhr advocated the appointment of an auditor dedicated specifically to monitoring and scrutinising the use of parliamentary entitlements, he recognised that additional resources would be needed to support this new office. Clause 15 of the Bill stipulates that the staff necessary to assist the independent Auditor be made available by the Auditor-General. Allowances, therefore, must be made to accommodate the additional demands on ANAO staff.[77] The Explanatory Memorandum to the Bill conceded that funding would be required for the office but concluded that the financial impact would be somewhat reduced and that additional funding would be less than might otherwise be the case, since staff would be provided from the Auditor-General's Office.[78] Dr Uhr submitted:

> The Committee should satisfy itself that the relevant Minister will take to the parliamentary Public Accounts and Audit Committee an adequate budget supplementation and that this parliamentary Committee will itself determine exactly how adequate this supplementary budget will be. This is consistent with the role of this Committee in approving the government's recommended appointee. The fact that the new Auditor's staff must 'be made available by the Auditor-General will only work if the overall financial and staffing budget for the Australian National Audit Office is expanded to cover the additional responsibilities.[79]

4.94 Some witnesses saw no need for the proposed Auditor and submitted that the Auditor-General was a more suitable authority to audit the use of parliamentary entitlements and allowances. They believed that the creation of a new auditor would be both wasteful and unnecessary. Mr Clem Campbell maintained that establishing an Auditor of Parliamentary Allowances and Entitlements would be 'a costly and bureaucratic way to determine, investigate and report on the use of allowances and entitlements by members of parliament'. He believed that the Auditor-General could fulfil this function.[80] Further, Mr Campbell contended that establishment of the proposed Auditor would not reduce the number of complaints concerning misuse of entitlements, nor improve the use of entitlements, because of the many 'grey areas' of parliamentary duties and private benefits.[81]

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75 Dr Noel Preston, submission no. 21, p. [8].

76 'The Role of the Auditor-General in Scrutinising Ministerial Ethics', submission no. 22, attachment no. 2, pp. 41 and 48 of 49 pages.

77 See for example, Dr John Uhr, submission no. 16, p. 3.

78 *Explanatory Memorandum* circulated by Hon Kim Beazley, Auditor of Parliamentary Allowances and Entitlements Bill 2000, p. 2.

79 Dr John Uhr, submission no. 16, p. 3.

80 Clem Campbell, submission no. 10, para 3.

81 Submission no. 10, pp. 1–3.

4.95 Similarly, Mr E. J. Lockett, considered that the proposed Auditor would duplicate the functions performed by the Auditor-General and that the audit of parliamentary entitlements should be undertaken by that office.[82]

4.96 Senator Murray noted that the Auditor-General is 'the most experienced, most capable and best resourced auditor to do the job'. [83] The Deputy Auditor-General, Mr Ian McPhee, noted that the work of the proposed auditor may duplicate that of his office and that there could be uncertainty about the roles of both auditors. He stated further that there were existing mechanisms whereby audit coverage of the administration of parliamentary entitlements could be included in the ANAO's annual work schedule. [84] Mr McPhee told the Committee:

> We are suggesting that there are some avenues within the existing framework for Audit, including the arrangements we have with the Joint Committee of Public Accounts and Audit where the parliament or the committee can request the Auditor-General to do particular audits. Obviously the Senate can request the Auditor-General to do more coverage in this area. So there are avenues in the existing framework to respond to not all but many of the matters covered by this bill. Our view is that the committee might explore the existing mechanisms in the first place before moving to legislation.[85]

4.97 Mr McPhee emphasised, however, that constraints placed on the ANAO would limit its ability to fully satisfy the objects of the Bill. In relation to parliamentary entitlements, he explained that the ANAO's work concentrated on the systems that agencies have in place for administering parliamentary entitlements. For example, the ANAO could investigate the systems of the Department of Finance and Administration to ensure that expenditure was in accordance with Remuneration Tribunal arrangements and the rules for members' entitlements.

4.98 He pointed to regulations that restricted ANAO access to staff employed under the *Members of Parliament (Staff) Act 1984* (MOPS Act) and to individual members of parliament. He informed the Committee that although ANAO could look at the level of expenditure incurred by an individual, the extent of its authority to obtain details about individuals was unclear.[86]Mr McPhee informed the Committee that:

> Where we believe we probably run short of authority is looking at individual members. If someone said, 'Member X or member Y, can you investigate what they have been up to in terms of entitlements and their exercise of them,' we believe we may be inhibited in that area.[87]

4.99 He accepted that government could restrict the investigative powers of the Auditor-General, but considered that, as a general principle, it would be sound practice for ANAO to have a review function of members of parliament.[88]

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82 E. J. Lockett, submission no. 12, p. 1.

83 Senator Andrew Murray, submission no. 13, p. 11.

84 Ian McPhee, Deputy Auditor General, Australian National Audit Office, submission no. 15, pp. 3–4.

85 Ian McPhee, Deputy Auditor General, ANAO, *Committee Hansard*, 6 April 2001, p. 30.

86 Ian McPhee, Deputy Auditor General, ANAO, *Committee Hansard*, 6 April 2001, p. 32.

87 Ian McPhee, Deputy Auditor General, ANAO, *Committee Hansard*, 6 April 2001, p. 31.

88 Ian McPhee, Deputy Auditor General, ANAO, *Committee Hansard*, 6 April 2001, pp. 32–3.

Committee view—the need for an auditor dedicated solely to scrutinise the use parliamentary entitlements

4.100 The Committee is convinced that the use of parliamentary entitlements and allowances should be adequately monitored and scrutinised. It notes the findings of the Auditor-General's recent report on parliamentarians' entitlements that, although it had been recommended in the Baxter report of 1997, the use of parliamentary entitlements has not yet been subject to audit. An office-holder dedicated solely to auditing the use of parliamentary entitlements and allowances would offer assurances that parliamentarians were being held accountable for their expenditure of public funds.

4.101 The Committee appreciates that the appointment of a new auditor would enhance the transparency and scrutiny of the use of parliamentary entitlements. It is not convinced, however, that such an appointment is the best approach. In particular, it believes that the potential for the Auditor-General to be involved more closely in the auditing of the use of parliamentary benefits has not been given adequate consideration.

4.102 The Committee accepts that the current Auditor-General's Act would have to be amended if the Auditor-General were to facilitate the regular audit regime anticipated by the Bill. For example, the Bill provides that the new Auditor would have the power to conduct audits on individual members of the Houses of Parliament and staff employed under the MOPS Act. The Auditor-General is explicitly prohibited from this under the *Auditor-General Act 1997*.

Other options

4.103 The Committee has acknowledged in this report the importance of auditing as an accountability tool but it considers that it is not the only accountability mechanism. The Committee now discusses whether the desired level of accountability could be achieved in another way.

4.104 The Bowen report concluded that parliamentarians required more information before improved compliance and standards of conduct could be expected.[89] As noted earlier, the former Minister for Administrative Services told Parliament in 1997 that members and senators needed better information to help them manage their entitlements.[90] Moreover, the recent ANAO report, *Parliamentarians' Entitlements: 1999–2000*, found that there are no comprehensive guidelines or codes to enable members of parliament to determine required standards in a number of areas.

4.105 The Clerk of the Senate commented on the different types of information available to senators at the present time. He told the Committee:

> You have statutory provisions; there are provisions in the Crimes Act about bribery of members of parliament; you have parliamentary prescriptions and one of the Senate's privileges resolutions has a rule about members accepting considerations in return for performing their parliamentary duties. There would be some value in

89 *Public Duty and Private Interest*, pp. 32–3.

90 Answer to Question without Notice, David Jull, House of Representatives *Hansard*, 5 March 1997, p. 2015. See also para 4.10 of this chapter.

> simply getting all those things together and putting them in a convenient form for members to look at.[91]

4.106 The Deputy Auditor-General agreed that the existing system needed to be improved before the appointment of an auditor of parliamentary entitlements was considered. He pointed out that a range of agencies are responsible for different aspects of administering parliamentary entitlements including DOFA and the parliamentary departments, and that several authorities had developed guidelines or rules in this area, for example, the Remuneration Tribunal. In his view, it was 'difficult for members of parliament to clearly understand their entitlements.' He suggested that a simplified system might allay concerns that have given rise to the proposed legislation. [92]

4.107 As noted above, the August 2001 ANAO report on parliamentarians' entitlements confirmed that the current system of administering parliamentary entitlements was complicated and needed to be simplified. The report concluded that, as a starting point:

> clear and specific rules are fundamental to providing effective support to Parliamentarians to carry out their duties, while ensuring that effective accountability is provided for the public monies involved.[93]

4.108 The report then commented on the disjointed and difficult system currently in place:

> The complexity of the existing entitlements structure has given rise to a number of areas of difficulty for both relevant departments and Parliamentarians in efficiently and effectively managing those entitlements. For example, determining the eligibility of activities under the entitlements, and the extent of the entitlement that arises where there is eligibility, has presented difficulties.
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> …
>
> The difficulty in effectively administering this system is exacerbated by the absence of a compendium of all relevant legislation, Remuneration Tribunal Determinations, ministerial determinations, Ministerial guidelines and conventions which apply to Parliamentarians' entitlements that is centrally maintained and available to all departments responsible for the public money expended under those entitlements.[94]

4.109 The report observed that there was much scope for enhancing accountability and transparency concerning the use of parliamentary entitlements, ranging from providing better guidance to assist parliamentarians to ensure they maintain adequate documentation regarding their use of entitlements, to more comprehensive reporting requirements. Additional internal checks to provide assurance that the existing system is working effectively would be another means of ensuring that payments made by the departments were valid and complied with all requirements.

4.110 In addressing concerns about the transparency of parliamentarians' use of entitlements, the report focused on administrative and practical concerns, such as improving

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91 Harry Evans, *Committee Hansard*, 6 April 2001, p. 11.

92 Ian McPhee, Deputy Auditor General, ANAO, *Committee Hansard*, 6 April 2001, pp. 28–9.

93 *Parliamentarians' Entitlements: 1999–2000*, p. 20.

94 ibid, p. 71.

electoral office management, record keeping and archiving.[95] The report also asked for a clearer definition of key terms such as 'parliamentary business', 'electorate business' and 'party business' and surveyed the feasibility of alternative budgeting measures, such as introducing a global budget which could provide for an enhanced system of capped entitlements and allowances.[96] The Committee notes that the report identified the following areas as examples of possible improvement:

- the clarity of definition of the conditions of entitlements;
- record-keeping by both parliamentarians and departments;
- the quality and comprehensiveness of the management reports provided to parliamentarians on their use of entitlements, and the certifications sought from them in respect of that use;
- the establishment and maintenance by the responsible departments of an effective control environment, including the introduction of techniques such as benchmarking analysis and regular risk-based auditing of claims against entitlements; and
- the extent of public reporting of parliamentarians' expenditure on entitlements.[97]

4.111 The Committee notes the recent constructive approach taken by the Special Minister of State, Senator the Hon Eric Abetz, in agreeing to the preparation of a discussion paper by his department to clarify guidelines for members of parliament on the use of parliamentarians' communication allowance.[98] He acknowledged the confusion arising from ill-defined terms including 'electoral business', 'parliamentary duties' and 'parliamentary business'[99] and advised an Additional Estimates hearing on 19 February 2002 that:

> Everybody wants somebody else to define these terms because there are some real difficulties…No matter what definition we provide, it is my view that there will always be a grey area, but the extent of the greyness of the area could be limited.[100]

Committee view—alternatives to the creation of a new Auditor

4.112 The Committee appreciates that the Auditor was proposed with a view to contributing to increased accountability in the use of parliamentary entitlements. But it considers that the creation of this new office is unnecessary at this time. Evidence to this inquiry suggests that less expensive but potentially equally effective means for ensuring compliance with the rules and regulations governing the use of parliamentary entitlements have not been adequately considered.

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95 *Parliamentarians' Entitlements: 1999–2000*, p. 95.

96 *Parliamentarians' Entitlements: 1999–2000*, p. 97. See also Gary Johns, 'Desirability of Regulating Political Parties', *Agenda,* vol. 8, no. 4, 2001, p, 294.

97 *Parliamentarians' Entitlements: 1999–2000*, p. 95.

98 Senator Eric Abetz, Senate Finance and Public Administration Legislation Committee, Estimates hearings, *Hansard*, 19 February 2002, pp. 179, 182. At a Budget Estimates hearing on 30 May 2002, Senator Abetz advised that the discussion paper was expected to be released by 30 June 2002, *Hansard*, 30 May 2002, p. 385.

99 For example see *Parliamentarians' Entitlements: 1999–2000*, p. 97; Gary Johns, 'Desirability of Regulating Political Parties', *Agenda,* vol. 8, no. 4, 2001, p, 294.

100 Senator Eric Abetz, Senate Finance and Public Administration Legislation Committee, Estimates hearings, *Hansard*, 19 February 2002, p. 179.

4.113 The Committee considers that the accountability regime for the use of parliamentary entitlements should be addressed first, by improving and simplifying guidelines, by clarifying information available to members of parliament, and by publishing more comprehensive statistics on expenditure. Such procedures would not only assist members of parliament to observe the rules governing the use of their benefits but it would also provide the public with information on the nature of the entitlements, on how they are used and for what purposes.

Conclusions and recommendations

4.114 Overall, the Committee supports the object of the Bill to assist members of parliament to observe the rules and regulations governing the use of parliamentary entitlements and allowances. During the course of the inquiry, however, a number of fundamental and serious flaws concerning the proposed legislation were identified that have not been resolved to the satisfaction of the Committee. They include:

- the proposal to confer advisory and investigative functions on the proposed Auditor;
- the entry and search provisions in the Bill and their potential to impact on personal rights and liberties;
- the adequacy of review provisions;
- the definition of the boundaries of the Auditor's function; and
- the need for penalties and their adequacy.

4.115 The Committee considers that there are opportunities within the current framework to improve accountability in the use of parliamentary entitlements. The Auditor-General could be given a more active role in auditing the use of parliamentary entitlements. The Government could also introduce a number of measures including the development and promulgation of clear guidelines on entitlements and their use, greater levels of disclosure such as public reporting of the cost and expenditure patterns of parliamentary entitlements, and regular internal audit and review of the system administering these entitlements.

4.116 The role of the Government might also include reporting back to Parliament on progress made in implementing measures identified in ANAO reports on parliamentary entitlements. Although it may be regarded as an unwarranted intrusion by some, the Committee considers that there may be merit in giving the Auditor-General the power to conduct audits of financial expenditure by senators and members.

Recommendation No. 3

4.117 The Committee recommends that the Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2] not proceed because of significant flaws in the proposed legislation and because other options for ensuring compliance with the rules and regulations governing the use of parliamentary entitlements have not been fully considered.

PART III

ELECTORAL AND GOVERNMENT ADVERTISING

Part III of the report looks at proposed legislation that deals expressly with advertising. Consideration of this legislation takes place against the background of concerns about the role that electoral advertising and government advertising can and does have in influencing an electoral outcome. More specifically, the proposed legislation attempts to ensure that electoral or government advertising is not used improperly to manipulate public opinion for political gain.

Although the issues of political advertising and government advertising share some common ground, they are quite distinct matters and for the purposes of this inquiry are treated separately. This Part examines the following Bills:

Electoral advertising

- The Electoral Amendment (Political Honesty) Bill 2000 [2002]. This Bill is concerned with promoting truth in political and electoral advertising, that is in any advertisement used for election purposes. The fundamental objective of the proposed legislation is to ensure that members of the public are not misled or deceived by information disseminated in relation to elections. It proposes to amend the *Commonwealth Electoral Act 1918* to prohibit the printing, publication or distribution of any electoral advertisement containing a statement, purporting to be a statement of fact, that is 'inaccurate or misleading to a material extent'. Under the proposed Bill, the Electoral Commissioner would have the power to request an offending advertisement to be withdrawn or to have a retraction published.

Government advertising

The following two bills deal with preventing the use of government advertising for party political purposes. The content of the advertisements need not be false or misleading to create problems. The main concern of the proposed legislation is to ensure that public money is used for the legitimate purposes of government and not for political advantage.

- Part 2 of the Charter of Political Honesty Bill 2000 [2002] proposes a Government Publicity Committee to monitor and enforce compliance by public authorities with statutory guidelines for government advertising campaigns.
- The Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 adopts a different approach from the Charter of Political Honesty Bill by proposing enforcement through the court system.

Both bills put forward guidelines to be observed in conducting government advertising campaigns.

CHAPTER FIVE

TRUTH IN ELECTORAL ADVERTISING

Introduction

5.1 This chapter considers the Electoral Amendment (Political Honesty) Bill 2000 [2002] introduced by Senator Murray. The Bill is the most recent of several attempts by the Australian Democrats over the last decade to introduce legislation to promote truth in electoral advertising. It was introduced as companion legislation to the Charter of Political Honesty Bill.

5.2 This chapter briefly describes the main provisions in the Bill and then looks at the following matters:

- current regulation of federal electoral advertising;
- previous consideration of truth in electoral advertising;
- evidence to this inquiry; and
- other issues—the definition of material to be prohibited under the Bill, reversal of onus of proof, appropriateness of penalties, orders to publish and headings to electoral advertisements.

5.3 The Bill proposes amendments to the *Commonwealth Electoral Act 1918* (the Electoral Act) to prohibit the printing, publication or distribution of any electoral advertisement containing a statement, purporting to be a statement of fact, that is 'inaccurate or misleading to a material extent'. Penalties of $5,000 for individuals and $50,000 for bodies corporate are to apply to contraventions of this provision. The Bill also applies these penalties for the existing offence in the Electoral Act of misleading a voter in the act of voting (discussed below at paragraph 5.8). The new penalties represent a significant increase over the current penalties for that offence.[1]

5.4 The Bill provides that it is a defence to prosecution if the person can prove that he or she took no part in determining the content of the advertisement, and could not reasonably be expected to have known that the content was inaccurate or misleading or likely to mislead a voter in casting a vote.

5.5 The Electoral Commissioner is given added powers under the Bill. If the Commissioner is satisfied an advertisement is inaccurate or misleading to a material extent, he or she can request the advertiser to withdraw it from further publication and/or to publish a retraction in specified terms and format. The Bill provides that the advertiser's response to such a request is to be taken into account in assessing any penalty for which the advertiser is liable if prosecuted. The Electoral Commissioner may also apply to the Federal Court for an order that the advertiser withdraw the advertisement and/or publish a retraction.

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1 Sections 329(1) and (4) of the *Commonwealth Electoral Act 1918,* (compilation prepared on 6 November 2001) which prohibits the publication of material that would be likely to mislead or deceive voters in relation to casting their votes, currently attracts penalties of $1,000 or imprisonment for a period not exceeding 6 months, or both for individuals and $5,000 for bodies corporate.

5.6 The Bill also specifies requirements for the publication of electoral matter in newspapers where payment is or will be made. The newspaper proprietor must print the word 'advertisement' as a headline above each article or paragraph containing electoral matter in letters not smaller than 10 point. The penalties for failure to meet those requirements are $1,000 for an individual and $5,000 for a body corporate.[2]

Current regulation of federal electoral advertising

5.7 There is currently only limited regulation of electoral advertising under the Electoral Act.[3] Apart from setting out certain requirements as to the publication of details of the person who authorises an advertisement and prohibiting the publication of any false and defamatory statement about a candidate's personal character and conduct,[4] the Act prohibits the misleading of voters only in the act of casting their votes.[5] Section 329(1) of the Act states that:

> A person shall not, during the relevant period in relation to an election under this Act, print, publish or distribute, or cause, permit or authorize to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote.

5.8 The High Court has determined that the words 'in or in relation to the casting of a vote' refer to 'the act of recording or expressing the elector's political judgment' rather than to the formation of that judgment.[6] Thus the section only prohibits advertising that misleads voters in the procedural aspects of voting, such as filling out their voting forms and depositing them in the ballot box.

Previous consideration of truth in electoral advertising

5.9 Over the last two decades, the effectiveness of the law in dealing with misleading advertising in the lead up to elections has been considered by parliamentary committees at both Commonwealth and State level. Relevant legislation was briefly in place in 1984 for federal elections and is currently in place in South Australia.

5.10 This section briefly outlines those developments in order to provide a background for consideration of the provisions of the current Bill. The section considers:

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2 Clause 329(A).

3 There is also limited regulation of the broadcast of electoral advertisements under the *Broadcasting Services Act 1992* (Schedule 2), including the imposition of a 'blackout period' for two days prior to an election, a requirement for broadcasters who broadcast election matter to give reasonable opportunities to all political parties and a requirement that broadcasters keep identifying particulars of the authorisation of the broadcast of political matters. However, none of those requirements are concerned with the accuracy or otherwise of such matter.

4 Section 350(1). The penalty for an offence is $1,000 and/or imprisonment for six months for an individual and $5,000 for a body corporate. Aggrieved candidates have a right under section 350(2) to seek an injunction restraining repetition of the statement or any similar false and defamatory statement.

5 There are similar provisions in most Australian States and Territories, such as the *Parliamentary Electorates and Elections Act 1912* (NSW) s. 151A, the *Electoral Act 1992* (Qld) s. 163(1) and the *Electoral Act 1985* (Tas) s. 209.

6 *Evans v Crichton-Browne* (1981) 147 CLR 169. The Australian Electoral Commission (AEC) submission no. 14, provides a detailed explanation of the court's findings, attachments 1, p. [2 and 4], attachment 7, p. [1].

- previous amendments to the Electoral Act in 1984;
- subsequent Commonwealth parliamentary inquiries;
- the Trade Practices Act model;
- constitutional constraints on the regulation of political advertising; and
- the South Australian legislation.

Previous amendments to the Electoral Act

5.11 In 1983 the Commonwealth Parliament appointed a Joint Select Committee on Electoral Reform (JSCER) to inquire into all aspects of the conduct of federal elections. While the JSCER's first report in 1983 only briefly touched on political advertising, the Parliament in implementing recommendations from that report also amended the Electoral Act to prohibit 'untrue' electoral advertising. The amendment that came into force in early 1984 provided that:

> A person shall not, during the relevant period in relation to an election under this Act, print, publish, or distribute, or cause, permit or authorize to be printed, published or distributed, any electoral advertisement containing a statement—
>
> (a) that is untrue; and
>
> (b) that is, or is likely to be, misleading or deceptive.[7]

5.12 However, the subsection was repealed in October, the same year after the JSCER's second report found it to be fundamentally flawed on several grounds:

- Publishers might need to seek legal advice prior to publication in order to ensure that they were not exposed to prosecution. This could create undesirably long lead times when political parties were seeking to respond to particular issues.[8]
- A determination as to whether a political statement is 'true' 'seems necessarily to involve a political judgement, based upon political premises', and it was undesirable 'to require the courts to enter the political arena in this way'.[9]
- Political advertising should be distinguished from other types of advertising on the basis that 'it promotes intangibles, ideas, policies and images'.[10] It was not possible to control political advertising through legislation.[11]

5.13 The JSCER concluded that the provision was unworkable and that 'any amendments to it would either be ineffective, or would reduce its scope to such an extent that it would not prevent dishonest advertising'.[12] The provision was subsequently repealed.

5.14 However, in a dissenting report Australian Democrat Senator Macklin, while acknowledging that some amendment to the existing provision was needed to protect

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7 AEC, submission no. 14, attachment 1, p. [5].

8 Joint Select Committee on Electoral Reform, *Second Report*, 1984, p. 26, para 2.41.

9 ibid, para 2.62.

10 ibid, para 2.79.

11 ibid, para 2.81.

12 ibid, para 2.81.

publishers, maintained that there were good reasons to retain legislative controls on electoral advertising. Senator Macklin argued that there was no evidence to support the assertion that fact was less distinguishable in the political arena than elsewhere, and that courts dealt daily with matters that concerned expressions of opinion rather than fact. In 1990 Senator Macklin introduced a Bill to reinstate a similar provision in the Electoral Act, but it was not successful.[13]

5.15 In agreeing with the findings of the 1984 report of the JSCER that subsection 329(2) was unsatisfactory, Senator Walsh, Minister for Resources and Energy, told the Senate:

> The Government shares the Committee's view that, while fair advertising of political parties' election promises, and of their rivals' counter-arguments, is a desirable objective, it is not one that can be obtained through legislation. Political advertising quite often needs to deal with the abstract and, for that reason, it assumes a different form from that of other advertising on radio, on television, and in the newspapers.
>
> Sub-section 329(2) of the Commonwealth Electoral Act, as it stands, prohibits untrue, misleading or deceptive political advertising. Those honourable senators who have witnessed the realities of past elections will know that the provision is unworkable.
>
> The Government accepts the conclusion of the Joint Select Committee that any amendment would either still be ineffective or would reduce its scope to such a degree that it would not prevent dishonest advertising.
>
> … In the final analysis, if deemed necessary, the law of defamation provides an avenue for those concerned enough or having good reason, to pursue the issues in the courts.[14]

Subsequent Commonwealth parliamentary inquiries

5.16 In 1994, the subsequent Joint Standing Committee on Electoral Matters (JSCEM) inquired into the conduct of the 1993 federal election. The majority report concluded that the Committee had heard no evidence to persuade it that 'truth in political advertising' legislation would be more workable than when the former provision was repealed in 1984.[15] However, a dissenting report by non-government committee members recommended the reinstatement of the former provision.[16] A separate dissenting report by Australian Democrat Senator Meg Lees contended that some political advertising was 'clearly dishonest' and had 'no basis in fact', and that the perceived problems in achieving 'truth' in political advertising had been over-emphasised.[17]

5.17 In 1995 the Australian Democrats moved an amendment to the Electoral and Referendum Amendment Bill 1995 to reintroduce a 'truth in advertising' provision that was

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13 Commonwealth Electoral (Printing, Publishing and Distribution of Electoral Matter) Amendment Bill 1990.

14 Senator Walsh, Senate *Hansard*, 8 October 1984, p. 1410.

15 JSCEM, *The 1993 Federal Election: Report of the Inquiry into the Conduct of the 1993 Federal Election and Matters Related Thereto,* November 1994, para 8.1.5.

16 ibid, p. 164.

17 Senator Lees referred to examples of advertisements asserting that a parliamentarian had voted for a particular measure when the public record proved otherwise: ibid, p. 169.

very similar to the repealed provision. Although the amendment was passed by the Senate, it was rejected by the House of Representatives and the Bill lapsed when Parliament was dissolved in 1996.[18]

5.18 In 1997 the JSCEM's inquiry into the conduct of the 1996 federal election considered the issues again. While finding that the repealed provision was not appropriate because of the shortcomings that had been previously identified,[19] the JSCEM supported the introduction of legislation to prohibit 'misleading statements of fact', stating:

> While it is not feasible to regulate assertions about the impact of a party's policies, this does not excuse deliberate misrepresentations of what a candidate's or party's stated policies actually are, or other distortions of straightforward matters of fact. If some of the misleading statements made during elections were instead made in private enterprise, the perpetrators would most likely find themselves prosecuted under the Trade Practices Act. There is no valid reason for not applying similar principles to the factual content of election advertising.[20]

5.19 The Government response to the JSCEM's report, however, rejected the recommendation. While confirming its commitment to truthfulness in political advertising, the Government stated that legislation would be too 'difficult to enforce and could be open to challenge'. It therefore emphasised the primacy of the ballot box as the final and most effective regulator of the content of pre-election advertising.[21]

5.20 In its subsequent report on the 1998 federal election, the JSCEM noted that concerns had again been raised about the issue of truth in electoral advertising, but made no recommendation.[22] In a dissenting report, Australian Democrat Senators Bartlett and Murray argued that the Electoral Act should be amended to prohibit inaccurate or misleading statements of fact which are likely to deceive or mislead.[23] The Government response, however, noted that it was 'not convinced that this proposal could be satisfactorily implemented'.[24]

The Trade Practices Act model

5.21 As noted above, the 1997 JSCEM report considered that the approach taken in the trade practices legislation was appropriate to regulate political advertising. This is similar to the approach of the current Bill, whose intent was described by Senator Murray as

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18 See Australian Electoral Commission, submission no. 14, attachment 5, p. [2].

19 JSCEM, *The 1996 Federal Election: Report of the Inquiry into the Conduct of the 1996 Federal Election and Matters Related Thereto*, June 1997, para 7.9. The Committee also noted that the cases on the implied constitutional freedom of political discussion added to the limitations that had been identified in 1984.

20 ibid, para 7.10 and Recommendation 47.

21 Government Response, Senate *Hansard*, 8 April 1998, p. 1664.

22 JSCEM, *The 1998 Federal Election: Report of the inquiry into the conduct of the 1998 federal election and matters related thereto,* June 2000, pp. 42-43.

23 ibid, pp. 167-168.

24 *Government Response to the Joint Standing Committee on Electoral Matters (JSCEM) Report 'The 1998 Federal Election',* p. 23.

'requir[ing] political advertising to meet similar standards of probity and honesty as commercial advertising must meet under the Trade Practices Act.'[25]

5.22 Under the Trade Practices Act, advertising, like other conduct in trade and commerce, can be challenged if it is misleading or deceptive, or likely to mislead or deceive.[26] Whether particular conduct is misleading or deceptive is a question of fact to be determined in light of the surrounding circumstances. The intention of the advertiser (that is, whether he or she intended to mislead the public) is irrelevant.

5.23 In considering advertising cases, the courts have allowed for the fact that the nature of advertising is to place the product or service in a favourable light. Essentially, what must be considered is the sense in which the ordinary reasonable reader would understand the advertisement. 'Puffs', that is, obvious exaggerations which are unlikely to mislead anyone, are not caught by the legislation.[27]

5.24 In 1996, the Queensland Parliament's Legal, Constitutional and Administrative Review Committee examined the issue of truth in political advertising in some detail and made some key findings on the applicability of the trade practices legislation.[28] The Committee concluded that there was 'insufficient difference' between political and commercial advertising to rule out legislation in the political sphere.[29] In particular, the Committee found:

- the argument that the electorate is the most appropriate body to determine the truth of political claims was undermined by the fact that it was once also claimed that the market would operate to allow consumers to ascertain the truth about products; and
- the assertion that political statements promote intangibles, ideas and policies which cannot be regulated by legislation was countered with evidence that the trade practices legislation has been successfully interpreted to regulate vague and complex subject matter.[30]

5.25 The committee's conclusions were not unanimous, however. Three of the six committee members issued a dissenting statement to the report, opposing the introduction of legislation on truth in political advertising on the grounds that it would be unworkable and open to abuse for political purposes.[31]

5.26 The committee's recommendations in support of legislation for truth in political advertising have not been implemented.[32] A more recent report in 2000 by the subsequent

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25 Senator Murray, Charter of Political Honesty Bill 2000 and Electoral Amendment (Political Honesty) Bill 2000, Second Reading Speech, Senate *Hansard,* 10 October 2000, p. 18198.

26 Section 52. There are complementary provisions in State fair trading legislation to deal with conduct that occurs wholly within a State's borders.

27 *Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 53 FLR 307.

28 Queensland Legislative Assembly Legal, Constitutional and Administrative Review Committee *Report on Truth in Political Advertising*, Report No 4, December 1996.

29 ibid, p. 28.

30 ibid, pp. 20-22.

31 ibid, pp. 58-62.

32 A Private Member's Bill on this matter was introduced in 1999.

Queensland Legal, Constitutional and Administrative Review Committee has concluded that formulating an effective and appropriate law 'appears difficult' in practice.[33]

Constitutional constraints on the regulation of political advertising

5.27 The 1996 Queensland parliamentary committee report noted that political advertising differed from commercial advertising in one key respect. Freedom of political communication is protected by the Constitution, as enunciated by the High Court in a series of landmark decisions in the 1990s, whereas commercial advertising is not.[34]

5.28 However, the freedom of political discussion is not absolute. A law that restricts that freedom may still be valid if it is appropriate and adapted to serve a legitimate interest that is compatible with the system of government.[35] The Queensland parliamentary committee report concluded that legislation preventing misleading and inaccurate statements of fact in political advertising 'would be an acceptable and proportional intrusion' on freedom of speech.[36] Regulation of expression of opinion or prediction, on the other hand, would be inappropriate.

5.29 The High Court has not had the opportunity to consider whether such legislation is valid, although this issue has been considered by the South Australian Supreme Court (as is discussed below).

The South Australian model

5.30 South Australia is the only Australian jurisdiction that has legislation governing truth in political advertising. The laws are similar, but not identical, to those in the Bill under consideration.

5.31 Section 113 of the South Australian *Electoral Act 1985* provides that it is an offence for a person to authorise, cause or permit the publication of an electoral advertisement which contains a statement purporting to be statement of fact, but which is inaccurate and misleading to a material extent.[37] Thus the South Australian provision is narrower than the repealed Commonwealth provision because the South Australian provision is limited to statements of fact, rather than any statements (including expressions of opinion) which are 'untrue'. The South Australian provision also differs from the current Bill in that it prohibits statements of fact which are both inaccurate and misleading, whereas the Bill seeks to prohibit statements of fact which are either inaccurate or misleading. The implications of this difference are discussed further at paragraphs 5.86 – 5.88.

5.32 The South Australian legislation includes a statutory defence which is very similar to that in the current Bill, in that the defendant must prove that he or she took no part in

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33 Queensland Legislative Assembly Legal, Constitutional and Administrative Review Committee *The Electoral Amendment Bill 1999*, April 2000, p. 14.

34 The provisions of the *Political Broadcasts and Political Disclosures Act 1991* (Cwlth), which banned the broadcast of political advertising on radio and television during an election period, were held to be invalid as they were contrary to that implied freedom: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 108 ALR 577. See also *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681.

35 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

36 Queensland Legislative Assembly Legal, Constitutional and Administrative Review Committee *Report on Truth in Political Advertising*, December 1996, p. 29.

37 Penalties of $1,000 for an individual and $10,000 for a body corporate apply.

determining the content of the advertisement and could not reasonably be expected to have known that the statement was inaccurate and misleading.

5.33 The South Australian Act also contains provisions that allow the Electoral Commissioner to request an advertiser to withdraw an advertisement and/or to publish a retraction, and to apply to the Supreme Court for an order to that effect. With the exception of a reference to the Federal Court instead of the Supreme Court, the provisions of the current Bill are identical.

5.34 The South Australian Supreme Court has considered whether section 113 infringed the implied right to freedom of political discussion. In *Cameron v Becker*,[38] the Full Court of the Supreme Court upheld a conviction relating to an advertisement run during the 1993 State election campaign.[39] The court noted that the limitation imposed by section 113 on freedom of political discussion was proportionate to the legitimate object of ensuring that factual material in electoral advertisements was accurate and not misleading.[40] Consequently section 113 was found to be valid.

Evidence to this inquiry

5.35 This section first considers the threshold issues of:

- whether greater control over electoral and political advertising is necessary; and
- if so, whether legislation is the best means to achieve that end.

5.36 The section then considers evidence on:

- whether enforcement through the courts is appropriate; and
- whether the role proposed for the Australian Electoral Commission is appropriate.

5.37 More detailed aspects of the Bill are considered in the following section.

Is greater control of electoral and political advertising necessary?

5.38 Senator Murray submitted that political advertising needed to be better controlled because:

> … elections are one of the key accountability mechanisms in our system of government. Advertisements disseminated during an election campaign must be

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38 (1995) 64 SASR 238.

39 The conviction related to an ALP television advertisement that stated, 'The fact is that the Brown Liberals have stated that any school with less than three hundred students will be subject to closure'. A Liberal Party spokesman in a prior radio interview had said '…we've indicated…that we're certainly not going to be closing two hundred schools in South Australia. If there are a small number of schools that have got a very small number of students, well then under both Governments I guess there will continue to be a small program of school closures, but we're not going to be looking at schools with three hundred students in them.' The court found that the advertisement was inaccurate and misleading.

40 Per Olsson J at para 46, Bollen J agreeing. Lander J expressed similar views, noting that the legislation protects an elector's 'fundamental right' to be widely informed and not to be led by deceit or misrepresentation into voting differently (para 30).

> legally required to represent the truth. Advertisements purporting to represent 'facts' must be legally required to do so accurately.
>
> Greater controls over political advertising will also help stem the public perception that politicians are not trustworthy. This perception is one of the most serious threats to the legitimacy and integrity of Australian democracy.[41]

5.39 A submission from the Key Centre for Ethics, Law, Justice and Governance at Griffith University (KCELJAG) elaborated on the fears that lie behind the support for better regulation of electoral advertising:

> False or misleading electoral advertisements, timed during the crucial 4 or 5 weeks of an election campaign, may persuade voters to vote in ways they otherwise would not and which they are likely to regret if and when they discover the true facts…Such strategies threaten the integrity of the heart of the democratic process—voters are not choosing between the policies on offer but between misrepresentations of those policies. It also threatens trust in government by the electorate.[42]

5.40 The KCELJAG noted, however, that 'the difficulty of distinguishing legitimate from illegitimate ways of campaigning or advertising, combined with the public's undisputed interest in hearing each political party's own presentation of its case' had led to a lack of support for regulation, stating:

> It might be argued that any solution is worse than the problem itself. It might be argued that the advantages gained by misleading advertising in a vigorous democracy in a skeptical media are limited and more or less evenly balanced.[43]

5.41 However, the KCELJAG submission argued that it was both 'legally possible and politically feasible' to introduce an integrated ethics regime to raise standards both in electoral advertising and government advertising.

Is legislation the best approach?

5.42 Opinions were divided on whether legislation was the appropriate vehicle for seeking to regulate electoral advertising. Senator Murray told the Committee that legislation should provide penalties for failing to represent the truth in political advertisements:

> The enforcement of such legislation would advance political standards, promote fairness, improve accountability and restore trust in politicians and the political system.[44]

5.43 He argued that other models had been shown to be successful:

> [The Trade Practices Act] was enacted despite the protestations of ardent critics that legislating for honesty is stifling and unworkable. We now have vastly better standards of commercial advertising because the Government of the day was prepared to push ahead with its reform agenda.

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41 Submission no. 13, p. 3.

42 Submission no. 22, p. 3.

43 Submission no. 22, p. 3.

44 Submission no. 13, p. 3.

> This Bill will no doubt encounter the same sort of criticism, but the success of the Trade Practices Act in the private sector and the success of the South Australian law in the political arena must surely put to rest any remaining doubt about the effectiveness and feasibility of legislating for honesty.[45]

5.44 Some submissions, including those from Dr John Uhr[46] and Mr Eric Lockett,[47] supported the Bill. Dr Uhr argued:

> Many potential reformers doubt that much can be done to regulate misleading or deceptive campaigning. There is a conventional assumption that all forms of political speech are in a special zone beyond the reach of ordinary regulation. I disagree and can point to emerging new models of appropriate regulation. One precedent is the 1998 Howard government legislation called the *Charter of Budget Honesty Act*…[48]

5.45 While pointing to the South Australian law as an example of such provisions, Dr Uhr noted that he had no knowledge of their practical operation and suggested that expert advice should be sought on their effectiveness.[49]

5.46 Not all submissions agreed that legislation was the appropriate mechanism. Dr Gerard Carney, Associate Professor of Law at Bond University, said:

> … statutory requirements of this nature seem to be incapable of being fairly enforced. Not only are there practical difficulties in determining both the *truth* and *misleading* nature of such political advertising, but there seems to be no feasible mechanism to ensure effective compliance with those standards during an election campaign.[50]

5.47 The Australian Electoral Commission (AEC) stated that it had consistently opposed the regulation of 'truth' in political advertising on the basis that:

> … it is the right and responsibility of voters, with the assistance of a vigilant media, to make their own judgements about such matters.[51]

5.48 The AEC referred to its submission to the 1993 JSCEM inquiry, where it detailed its reasons for opposing such legislation:

> … the imponderables in a volatile political environment pre-election, the difficulty of assessing 'policy' statements, and the risks of manipulation/mischief/misuse…[52]

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45 Submission no. 13, pp. 5-6.

46 Submission no. 16, p. 4

47 Submission no. 12, p. 4.

48 Submission no. 16, attachment 2, p. 18. The *Charter of Budget Honesty Act 1988* states that its purpose is to improve fiscal policy outcomes by requiring fiscal strategy to be based on principles of sound fiscal management and by facilitating public scrutiny of fiscal policy and performance. The Charter provides for such measures as fiscal strategy statements, regular fiscal reports and pre-election fiscal and economic outlook reports.

49 Submission no. 16, p. 4.

50 Submission no. 11, p. 1.

51 Submission no. 14, p. 2. This statement repeats the AEC's submission to the JSCEM inquiry in 1996 (see attachment 4, para 2.10).

52 Submission no. 14, attachment 4, para 2.4.

5.49 The AEC noted, however, that if legislation were to be introduced, the South Australian model which is confined to statements of fact should be given closer consideration rather than the broader scope of the former Commonwealth provisions.[53]

Enforcement through the courts

5.50 The basic premise of the Bill is that it is necessary to give the courts power to regulate misleading electoral advertising by creating a criminal offence and giving the courts power to order retraction and/or correction of offending advertisements.

5.51 The Australian Broadcasting Authority (ABA) argued that regard should be had to existing self-regulatory arrangements which address the nature and content of advertising. These included codes of practice for broadcasters (such as the Federation of Commercial Television Stations' Code of Practice) and the code of ethics for the advertising industry adopted by the Australian Association of National Advertisers.[54]

5.52 However, in his submission Senator Murray said the Bill proposed enforcement through the courts because self-regulation had proven ineffective. He stated:

> Experience teaches that when the competitive interests of political parties are at stake, only force of law will ensure that reasonable standards on truthfulness are upheld.[55]

5.53 During this inquiry the Committee sought views on whether enforcement through the court process would be effective in regulating electoral advertising. The Clerk of the Senate noted that, in principle, there appeared to be no difficulty with the Bill in that the courts are accustomed to determining whether a statement was a statement of fact or if material was misleading or deceptive to a material extent. He submitted that such determinations were 'reasonably free of subjective elements'.[56]

5.54 The KCELJAG submission, however, took a different view:

> The problem is that most statements which voters consider 'lies' are not really misrepresentations of fact but of future intention…(V)oters are entitled to satisfy themselves that a candidate really has no intention of carrying out a promise he or she is making; for courts to make such a judgement is too subjective.[57]

5.55 Another concern was whether the system could respond in a timely way to issues as they arose during an electoral campaign. It was acknowledged that the Federal Court would probably be restrained in ordering the withdrawal of advertisements because of their traditional reluctance to issue injunctions restraining freedom of speech.[58] In response to questioning by the Committee, the Clerk of the Senate also noted that because offences take some considerable time to prosecute:

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53 Submission no. 14, p.2.

54 Submission no. 20, p. 2. Article 7 of the Code states that advertisements shall not be misleading or deceptive, or likely to mislead or deceive.

55 Submission no. 13, p. 6.

56 Submission no. 4, p. 2.

57 Submission no. 22, pp. 12-13.

58 Harry Evans, *Committee Hansard*, pp. 8-9.

> You could not correct [the mischief] during the course of the campaign…It would only be useful for future campaigns, not the current one.[59]

5.56 He commented that it was necessary to be clear whether the aim of the Bill was to stop particular instances of conduct during a campaign, or to build up a body of law which would apply in the future and presumably act as a deterrent to future misconduct.

5.57 The KCELJAG also pointed to difficulties in enforcing offence provisions because of the time lag:

> …an allegation [that a candidate has no intention of carrying out a promise] can only be proved or disproved after time has passed—after the candidate has been elected and has either kept or broken his or her promise. Thus it may take a full parliamentary term (or several) to verify the allegation: if and once it's proved, the remedy is a political one (electoral defeat). By contrast, if a ban on 'inaccurate or misleading' statements is to have any value, it must be enforced *legally*, and enforced *immediately* (i.e. during the heat of the campaign). It is no use the High Court or Electoral Commissioner handing down a ruling six months after the polls have closed saying '*Well, actually the Opposition should really have won because the Government was lying…*'[60]

5.58 The KCELJAG submission argued that efforts needed to be directed at providing advice before advertising takes place. The submission proposed an alternative model to enforcement by the courts: the establishment of a committee to provide clearance of a political advertisement prior to its publication, with a separate committee being established to consider any objections after the event. The appropriate standards to be met should be developed by a bi-partisan group of parliamentarians. While obtaining pre-clearance would be a voluntary process, the KCELJAG argued:

> … the views of an independent, credible committee would be a serious blow to the advertisement's credibility…The sanction for not doing so [seeking pre-clearance] and being in breach of standards of veracity would not be legal, formal and imposed months after the election campaign. The sanctions would be political and immediate.[61]

The South Australian experience

5.59 Given that legislation similar to that proposed in the Bill has been in place in South Australia for some considerable time, the Committee was interested to hear about the experience in that State.

5.60 The former South Australian Electoral Commissioner, Mr Andrew Becker, who is now the Australian Electoral Commissioner, noted that there had been two prosecutions under the Act. He stated that he did not believe the South Australian legislation had had any appreciable effect on the nature of electoral advertising in the State. Instead, he considered that the legislation opened up opportunities for individual candidates to disrupt the electoral process by lodging nuisance complaints. Mr Becker referred to a particular instance where he

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59 *Committee Hansard*, p. 8.

60 Submission no. 22, pp. 12-13.

61 Submission no. 22, p. 10.

had pursued a complaint against a candidate, who then proceeded to lodge complaints about other advertisements and 'just fired off three or four a day'.[62]

5.61 A submission from the current South Australian Electoral Commissioner, Mr Stephen Tully, did not comment directly on the Bill as he considered that to be a matter of government policy. However, he welcomed measures that reinforce the probity of the electoral and political systems.[63]

The proposed role of the Australian Electoral Commissioner

5.62 The Bill proposes to give the Australian Electoral Commissioner new responsibilities in the regulation of electoral advertising. It confers the task of evaluating campaigns for misleading or inaccurate content on the Commissioner, who may request withdrawal and in the case of non-compliers, refer the matter to the Federal Court. This approach closely follows the South Australian legislation.

5.63 The AEC's submission noted that it had consistently opposed the proposal that the AEC should become responsible for administering the legislation and investigating and receiving complaints.[64] It was particularly concerned that its independent position would be politically compromised by its proposed role. In its submission to the 1996 JSCEM inquiry, the AEC had argued that:

> In deciding on whether to apply for an injunction in particular cases, the AEC would be placed in the very difficult position of assessing the truth (or factual) content of party political campaign advertising and gathering sufficient supporting evidence to convince a court, a task well beyond its present responsibilities, and would be obliged to initiate court proceedings that would undoubtedly provoke serious and possibly damaging criticism of the AEC from one or other side of politics.[65]

5.64 During the public hearing for this inquiry, the Australian Electoral Commissioner, Mr Becker, elaborated on this view:

> … it could drag the AEC into a political bunfight in the determination of whether the veracity of the statements and so on is correct. There is a lot of subjectivity in this sort of thing…[66]

5.65 The AEC also considered that the process of obtaining an injunction would allow opposing political parties to disrupt the election process.

5.66 Another worry was the impact on the AEC's resources. The Deputy Electoral Commissioner, Mr Paul Dacey, told the Committee that the diversion of resources from those needed to administer the election process prior to and on polling day was a major concern.[67] The AEC's submission also noted that the Director of Public Prosecutions, the Australian

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62 *Committee Hansard*, pp. 41-3.

63 Submission no. 7, p. 1.

64 Submission no. 14, p. 2.

65 'Implementation of Truth in Political Advertising', submission no. 109, 14 November 1996 in AEC Submission no. 14, attachment 4, p. 5.

66 *Committee Hansard*, p. 37.

67 *Committee Hansard*, p. 43.

Federal Police, the Australian Government Solicitor and the courts would also experience pressure on their resources if such laws were enacted.[68]

5.67 Mr Becker did not comment or speculate on the funding and resource implications of the legislation on the South Australian Electoral Commission. He did, however, refer to the concern about the independence of the Commissioner. He noted that during his time as the South Australian Electoral Commissioner, he did not proceed on any matter without seeking the advice of the Crown Solicitor.[69] In order to avoid any perception of bias, the South Australian Electoral Commissioner also acted only on formal written complaints. If a similar federal law were enacted, the AEC had previously advised that it would apply the 'same cautionary measures', in that the advice of the Director of Public Prosecutions would be sought before action was taken.[70]

5.68 While believing that voters should exercise their own judgement about the appropriateness of any particular electoral campaign, the AEC saw some room for refinement of the electoral process by improving regulation of how to vote cards.[71] The AEC also proposed that if regulation of truth in electoral advertising were to proceed, the function should be undertaken by a separate body established for that purpose.[72] This suggestion is discussed in more detail below.

The AEC's proposal for an independent body

5.69 The AEC's submission referred to its previous proposal to the JSCEM in 1997 for the establishment of a separate body, an independent Electoral Complaints Authority (ECA), at each federal election for a specified time.

5.70 The AEC proposed that the ECA would be created under the Electoral Act with specified functions and powers, and would have a small staff, perhaps seconded from the AEC, the ABA or the Australian Federal Police.[73] The AEC envisaged that the ECA should have 'strong coercive' investigative powers as well as the power to seek injunctions, in order to allow it to act on complaints with 'the speed necessary to enable effective regulation in the relatively short time period of an election campaign'. The AEC referred to the Canadian models as an example of such a mechanism.[74]

5.71 The AEC's submission outlined the powers of the ABA to conduct investigations, hold hearings, examine documents and consult with individuals and groups in relation to broadcasting matters, and to publish a report on any matter.[75] The AEC suggested that, with similar powers, the ECA would be well suited to dealing with electoral complaints because:

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68 Submission no. 14, attachment 4, p. 5.

69 *Committee Hansard,* p. 41.

70 See AEC, submission no. 14, attachment 4, p.11.

71 *Committee Hansard*, pp. 37–40, and AEC submission no. 14A. The Committee notes that the issue of regulation of how to vote cards has been considered by the JSCEM (*The 1998 Federal Election*, pp. 37–42).

72 Andrew Becker, *Committee Hansard,* p. 37.

73 Submission no. 14, attachment 4, pp. 6–7. In Canada a complaints investigation office has been established within Elections Canada to investigate breaches of election law. It is staffed by lawyers, investigators and support staff.

74 Submission no. 14, attachment 4, pp.4– 6.

75 Submission no. 14, attachment 4, pp. 7–9.

- its strong investigative powers and capacity to seek injunctions would allow rapid resolution of complaints within the short time frame of the election period;
- the ECA would be separate from the AEC, avoiding any allegations of political bias by the AEC; and
- the ECA would be separately resourced so that there would be no competition for scarce AEC resources.[76]

5.72 The KCELJAG agreed with the proposition that an independent body should be set up to achieve the objectives of the Bill. However, as noted above, the KCELJAG recommended the establishment of separate committees to provide pre-clearance for electoral advertisements and receive complaints.[77]

5.73 The ABA's submission to this inquiry did not address the issue of whether a new body should be established, but argued that if a choice was to be made between the ABA and the AEC, the AEC was the appropriate body to oversee political advertising legislation. This view was based on the AEC's regulatory responsibilities and functions under the *Broadcasting Services Act 1992*, which the ABA argued were distinct in nature from those the Bill proposed. The Bill's provisions were concerned with the factual and legal content of electoral advertisements, rather than the regulation of licensees in broadcasting such advertisements.[78]

Conclusions and recommendations

5.74 The Committee considers it irrefutable that statements made to voters should, as far as possible, be accurate and not misleading, in order that voters can make informed decisions when casting their votes. Whether and how this should be subject to formal regulation rather than relying on the political process is, however, more controversial.

5.75 The history of consideration of this issue by the JSCEM over the last decade, as well as by the Queensland Legal, Constitutional and Administrative Review Committee, and the fact that concerns about electoral advertising continue to be raised show that careful and detailed consideration needs to be given to this issue.

5.76 The Committee considers there is clear evidence that the short-lived Commonwealth provision that sought to ensure 'truth' in political advertising in 1984 had serious flaws. However, the more limited provision that prohibits statements of fact that are inaccurate and misleading to a material extent has been in place for a considerable period in South Australia, seemingly without embroiling the Electoral Commissioner in that State in overwhelming controversy or undermining the perceived impartiality of that office. The Committee notes that the AEC, despite its opposition to the regulation of political advertising, would support the South Australian provisions in preference to the wider model. Those provisions are very similar to the current Bill.

5.77 The Committee is mindful of the evidence given by the former South Australian Electoral Commissioner, now the Australian Electoral Commissioner, that there have been two prosecutions under the South Australian Act; that the legislation in his opinion has not

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76 Submission no. 14, attachment 4, p. 9.

77 Submission no. 22, p. 10.

78 Submission no. 20, pp. 1–2.

changed the political culture of that State to any great extent; but that in his view the legislation offers the opportunity for political parties to disrupt the electoral process.

5.78 The Committee has also considered the purpose of the Bill, namely to apply the same standards to political advertising as apply to commercial advertising under the Trade Practices Act. Clearly some parallels can be drawn between commercial advertising and political advertising, as the Queensland parliamentary committee explored in some detail in 1996. Not to be ignored is the contention that the proposal to regulate commercial advertising initially met with significant opposition on the grounds that the consumer was the final arbiter and that the marketplace was sufficiently self-regulatory.

5.79 However, some distinctions must be made between the trade practices model and proposals to regulate political advertising by legislation:

- There is an implied guarantee in the Constitution of freedom of discussion on political matters. While the South Australian Supreme Court's finding that the equivalent South Australian provisions are valid is highly persuasive, it must also be remembered that the High Court has not had the opportunity to finally determine this matter.
- Political advertising is different from commercial advertising in that it is only one of a wide range of strategies by which political parties seek to persuade voters to support them. Speeches, rallies, talkback radio, the promotion of party membership, newspaper and journal articles are only some of the means by which political parties seek to convey their message to the public. It is somewhat artificial to seek only to regulate political advertising in an election period while leaving untouched the other means of communication which may have equally significant effects on voters and which no-one has suggested could or should be subject to similar constraints. By contrast, sellers of products and services rely almost exclusively on advertising for that purpose, so that regulation of commercial advertising can significantly affect the conduct of corporations.
- Regulation of misleading advertising under the Trade Practices Act is by way of civil remedies only, such as damages and injunctions, whereas criminal offences are proposed to regulate political advertising.
- The timeframe in which action may be taken to remedy misleading corporate advertising is usually much longer than an election period, when remedial action must be available very quickly in order to make the laws effective.

5.80 The Committee notes that a subsequent Queensland parliamentary committee has referred to difficulties in drafting suitable and practical provisions to achieve truth in electoral advertising, and that no such legislation has been enacted in that State.

5.81 The Committee notes concerns expressed by the AEC about its proposed role under such legislation, particularly in relation to its perceived neutrality and the pressure on its resources. However, the Committee also notes that the JSCEM concluded in 1997 that the South Australian experience suggested that the AEC's concerns were 'overstated', and that it had never been suggested that the South Australian Electoral Office was incapable of carrying out its statutory responsibilities or had been compromised in doing so.[79] Nor does the Committee consider that the AEC's concerns about pressure on its scarce resources

79 JSCEM, *The 1996 Federal Election: Report of the Inquiry into the Conduct of the 1996 Federal Election and Matters Related Thereto*, June 1997, para 7.18.

during an election period are in themselves sufficient argument against the introduction of such legislation: additional resources can be made available if necessary.

5.82 However, on balance the Committee does not consider that legislation in the form of the current Bill should be enacted because of its concerns about the practical implications of such legislation. In particular the Committee is concerned about the difficulties in ensuring a prompt response to complaints and preventing misuse of the legislation to score political advantage. The Committee is also uncertain about the extent to which it is appropriate to seek to regulate political discussion.

5.83 Nonetheless, it believes that some mechanism should be in place to address concerns about improper practices during election campaigns. The Committee considers that the JSCEM could take a more active role in scrutinising this particular aspect of the election phase. While no penalty as such would result from this process, the resultant public exposure of impropriety in the JSCEM's report may have the effect of changing undesirable practices.

Recommendation No. 4

5.84 The Committee recommends that the Electoral Amendment (Political Honesty) Bill 2000 [2002] not proceed because in its current form it does not present an effective or workable solution to prevent dishonest electoral advertising.

Other issues

5.85 If the Bill were to proceed or to be reintroduced in an amended form, amendment of various aspects should be considered. These are:

- the definition of material to be prohibited under the Bill;
- the reversal of the onus of proof;
- the appropriateness of the penalties;
- orders to publishers;
- headings to electoral advertisements; and
- other matters.

5.86 They are discussed below.

The definition of material to be prohibited under the Bill

5.87 Some submissions to the inquiry commented on the type of the material that the Bill sought to prohibit, that is, an electoral advertisement purporting to be a statement of fact that is inaccurate or misleading to a material extent.

5.88 There was clear support for the 'practical approach' taken by the South Australian Act which was confined to statements of fact, in preference to the former Commonwealth provision which dealt with 'untruths'.[80] However, Dr Carney criticised the definition in the Bill on the basis that it was broader than that applying under either the previous Commonwealth provision or the South Australian Act. Those provisions required that a statement should be both inaccurate (or untrue, in the case of the former Commonwealth

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80 Mr Andrew Becker, *Committee Hansard*, p. 37; see also previous reports of the JSCEM.

provision) *and* misleading or deceptive to a material extent, whereas the current Bill requires only that the material is either inaccurate *or* misleading to a material extent. Dr Carney noted that the Bill might, as a result of this broader definition, capture quite innocuous advertising which was wrong in some minor respect.[81] There was no explanation as to why this form of words had been chosen.

Committee view

5.89 The Committee considers that Dr Carney's suggestion that the inclusion of the words 'inaccurate or misleading' may lead to minor inaccuracies being caught is a valid criticism. In the absence of any compelling argument to the contrary, the Committee suggests that the South Australian definition of 'inaccurate *and* misleading' may be more appropriate.

Reversal of the onus of proof

5.90 The Senate Standing Committee for the Scrutiny of Bills in its review of the Bill drew attention to the proposed defence to the new offence. The committee observed that the onus of proving the defence would be imposed on the person charged with the offence, and queried whether the reversal of the onus of proof trespassed unduly on personal rights and liberties.[82]

5.91 In his response, Senator Murray noted that the onus of proof is already reversed in the Commonwealth Electoral Act in relation to the offence of misleading a voter in the act of voting (section 329(1) discussed above at paragraph 5.8). However, he advised that he would have the Bill amended to ensure that the prosecution bears the onus of proof.[83]

Committee view

5.92 The Committee notes that one of the fundamental tenets of criminal law is that the prosecution is required to prove all the elements of the offence beyond reasonable doubt, and that this generally includes negativing evidence that would support a defence.

5.93 However, provisions that require a defendant to prove a defence are not unknown where their use is considered justified. The Bill as drafted does not rule out any of the common law defences that would normally apply, but merely provides an additional defence which the defendant must prove.[84] The South Australian electoral advertising offence provision similarly places the onus of proof on the defendant. As Senator Murray noted, section 329(1) of the Electoral Act already contains a similar defence in relation to misleading a voter in relation to casting his or her vote. In addition, the Committee notes that the Trade Practices Act, on which much of the reasoning for these provisions is based, provides a defence to proceedings for misleading and deceptive advertising in which the onus is similarly cast on the defendant (even though it must be remembered that those proceedings

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81 Submission no. 11, pp. 1–2.

82 *Alert Digest No. 15 of 2000*, quoted in the Senate Standing Committee for the Scrutiny of Bills *Seventeenth Report of 2000*, p. 528.

83 Senate Standing Committee for the Scrutiny of Bills *Seventeenth Report of 2000*, p. 529.

84 In *Cameron v Becker* (1994) 64 SASR 238, the court noted that the similar South Australian provision did not preclude the common law defence of honest and reasonable mistake of fact.

are civil rather than criminal).[85] The Committee notes also that the submission from the Attorney-General's Department did not comment on the provision as drafted.

5.94 The Committee does not consider that the provision is unduly onerous. Reversing the onus of proof in the current provision would effectively require the prosecution to prove that a person who caused, permitted, authorised or carried out the printing, publication or distribution of the electoral advertisement did not take part in determining its contents and could reasonably be expected to have known that the material was inaccurate or misleading. This change would significantly narrow the ambit of the proposed offence.

5.95 For these reasons, the Committee does not consider that the onus of proof of the defence in the provision as drafted would need to be changed if the Bill were to proceed.

Appropriateness of penalties

5.96 The Bill proposes significantly increasing the penalties for the existing offence in section 329 of the Electoral Act. The penalties would rise from $1,000 to $5,000 for a natural person, and from $5,000 to $50,000 for a body corporate. The proposed new offence for misleading or deceptive electoral advertising would also attract the same penalties.[86] The Committee notes that no explanation for these penalties was offered.

5.97 It is important to ensure that penalties for an offence are proportionate to the seriousness of the offence and provide a sufficient deterrent to the proscribed conduct. This point was underlined by the Australian Electoral Commissioner in his evidence to the Committee. In South Australia, the applicable penalties for misleading political advertising are $1,250 for individuals and $10,000 for corporations. In Mr Becker's view, the penalty did not provide a significant deterrent: he advised that the person prosecuted in 1993 under the Act had told him 'that he had got his 600 bucks worth', that being the fine imposed.[87]

5.98 However, a submission from the Attorney–General's Department expressed some concerns about the proposed penalties in the Bill:

- The penalty should be in proportion to the degree of intention or culpability that must be proven, and should reflect the relative seriousness of offence, both in the context of the Act and in comparison with other Commonwealth legislation. The Department did not elaborate on this point in terms of offering a comment on whether the proposed penalties were too high.
- However, the Department did submit that there should not be a separate penalty for a body corporate, as the *Crimes Act 1914* contained a general provision that the maximum penalty for the commission of an offence by an individual is multiplied by five for a body corporate. The Department noted that the Scrutiny of Bills Committee had emphasised the need for consistency in Commonwealth penalty provisions.
- The Department also noted that fines were generally expressed in terms of penalty units rather than dollar amounts.[88]

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85 *Trade Practices Act 1974,* section 85(3). The defendant must prove that he or she is in the business of publishing advertisements and had no reason to suspect that the publication would contravene the Act.

86 Submission no. 17, p. 2.

87 *Committee Hansard*, p. 44.

88 Submission no. 17, pp. 2–3, referring to s. 4(B)(3).

Committee view

5.99 The Committee agrees with the Attorney-General's Department that the larger penalty for corporations should be in keeping with the general rule set out in the *Crimes Act 1914*, that is, five times the penalty for an individual, and that the penalties should be expressed in penalty units.

5.100 The Committee notes that the penalties under the South Australian legislation are higher than the existing penalties under section 329(1) but less than those proposed in the Bill, being $1250 for individuals and $10,000 for corporations. The Committee also notes that the JSCEM in 1997 recommended that the AEC in consultation with the Attorney-General's Department should review the penalties under the Electoral Act and the Referendum Act because they were low.[89] The Committee notes also that the Government in 2001 stated that the review should be finalised as soon as possible on the basis that adequate penalties would help to deter potential offenders.[90]

5.101 The Committee considers that the current penalties may well need to be increased and that the outcome of the current review should be closely considered if this Bill is to proceed.

Orders to publishers

5.102 The Australian Press Council raised concerns over provisions 329(5A) and 329(5B) that give the Electoral Commissioner power to request, and the Federal Court the power to order, an advertiser to publish a retraction in a specified manner and form.

5.103 The Council argued that the provisions:

> … might have the unfortunate consequence of directing the publisher of a newspaper or magazine, or the licence holder of a broadcaster, to publish or broadcast material as ordered by the commission or the court, not as agreed to by the parties. The section should be amended to ensure that the advertiser, and the advertiser alone, is responsible to the commission or the court as the result of an inaccuracy or misleading statement.[91]

Committee view

5.104 The Committee notes that the provision allows a court to direct an 'advertiser' to publish a retraction in a specified manner and form and that this term is not defined either in the Act or in the Bill. The Committee recommends that the term should be defined if the Bill proceeds, in order to avoid any confusion as to its scope.

Headings to electoral advertisements

5.105 Proposed section 329A provides that electoral matter for which payment has been given and which appears in a newspaper is to have a heading of a specified size stating

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89 JSCEM, *The 1996 Federal Election: Report of the Inquiry into the Conduct of the 1996 Federal Election and Matters Related Thereto*, June 1997, p. 90, Recommendation 51.

90 *Government Response to the Joint Standing Committee on Electoral Matters (JSCEM) Report 'The 1998 Federal Election',* p. 28.

91 Submission no. 23, p. 1.

'advertisement'. This provision appears to be drawn from the South Australian legislation.[92] 'Electoral matter' is already defined in the Act as meaning matter which is intended or likely to affect voting in an election.[93]

5.106 A submission from Mr E. J. Lockett supported the provision in principle but expressed concern that the definition of matter covered by the section might create loopholes. He did not consider that payment or the giving of other consideration was an appropriate restriction, arguing that the line between comment and advertising is becoming increasingly blurred, as exemplified by 'advertorials' or the granting of free advertisements to those who have previously advertised.[94]

Committee view

5.107 The Committee notes that there is already a similar provision in the Electoral Act (section 331) which provides that there must be headings to electoral advertisements in journals (that is, newspapers, magazines and other periodicals). Section 331(1) refers to a paragraph or article containing electoral matter, whether or not the article was inserted for payment. The penalty for an offence against the section is 5 penalty units (currently $550). Subsection 331(2) provides that where the article or paragraph spreads across two opposing pages and is either contained within lines or borders or is printed across the pages, the heading 'advertisement' must be printed.

5.108 Consequently, in the absence of any explanation as to why the existing section of the current legislation is deficient or what proposed section 329A of the Bill would achieve, the Committee does not consider that the amendment should proceed as drafted.

Other matters

5.109 The Committee also notes what appears to be an error in the drafting of proposed subsection 329(5A). Paragraph (b) of that subsection refers to an offence against subsection (2), which does not exist: it appears that the reference should have been to the new offence in subsection (1A). This error should be corrected if the Bill is to proceed.

Recommendation No. 5

5.110 The Committee recommends that if the Electoral Amendment (Political Honesty) Bill 2000 [2002] were to proceed, the following matters should be addressed:

- **amendment of proposed subsection 329(1A) to refer to a statement of fact that is 'inaccurate *and* misleading to a material extent' rather than 'inaccurate *or* misleading to a material extent';**
- **further consideration of the proposed penalties in light of the current review of penalties in the *Commonwealth Electoral Act 1918*, with particular reference to the general rule that maximum penalties for corporations are five times the maximum penalties for individuals and that statutory penalties are usually expressed in terms of penalty units;**

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92 *Electoral Act 1985* (SA), s. 114.

93 *Commonwealth Electoral Act 1918*, s.4.

94 Submission no. 12, p. [2].

- **definition of the term 'advertiser' in proposed subsections 329(5A) and 329(5B);**
- **deletion of proposed section 329A concerning the heading to electoral advertisements, unless further explanation is offered about its purpose and its relationship with existing section 331; and**
- **amendment of the error in proposed subsection 329(5A)(b) to refer to an offence against subsection (1A).**

CHAPTER 6

GOVERNMENT ADVERTISING

Introduction

6.1 This chapter considers possible regulation of government advertising to prevent misuse for party political purposes. Two of the bills address this issue:

- Part 2 of the Charter of Political Honesty Bill 2000 [2002] introduced by Senator Murray; and
- the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 introduced by the Hon Mr Kim Beazley MP.

6.2 The chapter discusses:

- the background to the issues;
- current regulation of government advertising;
- the aims of the bills;
- previous proposals for change;
- the feasibility of regulating government advertising through legislation;
- evidence on the Charter of Political Honesty Bill 2000 [2002]; and
- evidence on the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000.

Background

6.3 Government awareness or information campaigns are an accepted mechanism to familiarise target audiences with new initiatives, policies or programs and inform them about how they might benefit, or what they need to do to comply with new requirements. The Commonwealth Government has been described as 'generally one of the largest national advertisers in Australia'.[1]

6.4 One of the main criticisms levelled at government advertising is that it is open to misuse by government in order to promote its own political interests. Mr Gary Johns, a former federal minister, stated:

> While a party in government will continue to argue the right to inform the electorate of changes to the law and programs, Opposition will continue to criticise such expenditure as party-political right up until the time it is their turn to govern! Nevertheless, the opportunity for parties to sell their message at public expense

1 Government Communications Unit, 'Central Advertising System', at http://www.gcu.gov.au.

> provides a significant advantage over competitors and begs some form of regulation.[2]

6.5 In recent years there has been increased interest in possible controls over the political content of government advertising, particularly since concerns were raised about the 1998 Government information campaign on its proposed taxation reform.[3] An ANAO review of monthly expenditure on government advertising between July 1989 and August 1998 showed marked increases prior to elections, with a dramatic jump in July and August 1998.[4] The ANAO suggested that the pattern of expenditure could raise questions about the nature and purpose of government advertising, particularly in the lead up to elections.[5]

6.6 Opposition members, however, were more forthright in drawing conclusions about this expenditure. Senator Faulkner told the Senate:

> The Auditor-General was less coded then usual in his report when he quoted the principles implemented by the New Zealand Audit Office which leave no room for ambiguity:
>
>> A government should not disseminate material that…is designed to secure, or has the effect of attempting to secure, popular support for the party-political persuasions of the members of the government.
>
> There can be no doubt at all that the $20 million GST ad campaign fails this clear test. The entire campaign was consciously designed to elicit popular support for a party political policy in an election campaign.[6]

6.7 During the 2000 Budget Estimates process, members of the Finance and Public Administration Legislation Committee also questioned the substantial expenditure budgeted for government advertising in 1999–2000.[7]

Current regulation of government advertising

6.8 There are very limited restrictions on government advertising by way of legislation, although some non-reviewable guidelines have been developed.

Legislation

6.9 The *Commonwealth Electoral Act 1918* sets out certain requirements for identifying the source of authorisation of electoral advertisements.[8] The *Broadcasting Services Act 1992*

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2 G Johns 'Desirability of Regulating Political Parties', *Agenda*, vol. 8 no. 4, 2001, p. 295.

3 See for example D Light 'Selling out' *The Bulletin*, 12 September 2000, pp. 40-1; M. Price 'Propaganda then, promotion now' *The Australian*, 20 June 2001; 'The wrong message', Editorial, *The Sydney Morning Herald*, 20 June 2001.

4 ANAO *Taxation Reform: Community Education and Information Programme*, Report No. 12, October 1998, pp. 28-29. A federal election was held in October 1998.

5 ibid, p. 30.

6 Senator John Faulkner, Senate *Hansard*, 31 March 1999, p. 3555. See also, Mr David Cox MP House of Representatives *Hansard*, 8 March 1999, p. 3377.

7 Senate Finance and Public Administration Legislation Committee *Hansard*, 24 May 2000, pp. 425-453.

8 Section 328. The Act's requirements are discussed in more detail in Chapter 5 in relation to electoral advertising.

(the Broadcasting Act) imposes conditions on broadcasters with regard to broadcasts of ‘political matter at the request of another person’ or ‘matter relating to a political subject or current affairs’. What constitutes ‘political matter’ is only broadly defined in the Act.[9] The effect of the conditions is that such material must be broadcast with identifiers (for example, the name of the party, the location of the office and the person authorising the advertisement) in a format approved by the Australian Broadcasting Authority (ABA). If the requirements are not met, the broadcaster rather than the advertiser is liable.[10]

6.10 In 1998 the ABA released guidelines to assist in determining what is ‘political matter’ for the purposes of the Broadcasting Act. The guidelines state that such matter ‘must, when viewed objectively, be capable of being properly characterised as participation in the political process or an attempt to influence or comment on that process, the administration of government or those who participate in those activities’. The guidelines note that it is important to consider the content of the broadcast; the overall presentation including tone, style and emphasis; the nature and style of any accompanying audio visual material; and the context of the broadcast.[11]

6.11 In relation to government advertising, the ABA’s guidelines advise that:

> The broadcast of such matter will only constitute political matter if it goes beyond merely informing the viewer or listener…A distinction can be drawn between an advertisement which only informs and one which is likely to influence the viewer or listener.[12]

6.12 Soon after the guidelines were introduced, the Leader of the Opposition in the Senate raised concerns with the ABA about the Government’s community information and education program for taxation reform.[13] The ABA found the advertisements complied with the Broadcasting Act in relation to the required ‘authorisation tags’, but made no finding as to whether the advertisements were ‘political matter’ under the Act.[14] The ANAO subsequently found that the advertisements conformed with both broadcasting and electoral law, as discussed below at paragraphs 6.29-6.31.

Advice to government on advertising

6.13 The Government Communications Unit (GCU) in the Department of the Prime Minister and Cabinet is responsible for oversight of and advice to agencies on the design and implementation of government information campaigns. The GCU also manages a centralised government advertising system to achieve effective media planning and cost-effective advertising, keeps a register of communications consultants and maintains a ‘whole of government’ approach to communications activities.

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9 That is, ‘political matter means any political matter, including the policy launch of a political party’ (*Broadcasting Services Act 1992*, Schedule 2, clause 1).

10 ANAO *Taxation Reform: Community Education and Information Programme*, Report No. 12, October 1998, p. 22.

11 ‘Guidelines for the Broadcasting of Political Matter’, p. 3. The intent of the person requesting the broadcast is not usually relevant.

12 ibid, p. 5.

13 ANAO *Taxation Reform: Community Education and Information Programme*, Report No. 12, October 1998, p. 22.

14 ibid, p. 26. The report also noted that the ABA was not conducting any subsequent review of that issue.

6.14 Major and sensitive campaigns, whether or not they include paid advertising, are first approved by the responsible Minister and then, following discussion with the GCU, referred to the Ministerial Committee on Government Communications (MCGC) for approval. 'Sensitive' information activities are described as those which cover issues that might offend sections of the community or produce negative reactions from target groups. The MCGC also considers any market research proposal valued at $100 000 or more.

6.15 Established in 1982, the MCGC is chaired by the Special Minister of State and has three other permanent members. The Minister responsible for a particular information activity also attends during consideration of that activity. The MCGC's procedures are detailed in the *Guidelines for Australian Government Information Activities,*[15] which also set out the principles for government information programs. Those principles stress fairness and equity, efficiency and effectiveness, impartiality and clarity, and attention to the special needs of particular groups of people, such as the young, those in rural areas and people whose first language is not English.

6.16 However, the Guidelines do not address the issue of party political content. They also have no legal status, and actions taken by the MCGC are not reviewable in any formal way.

The aims of the bills

6.17 The main objectives of each bill and the processes by which they propose to regulate government advertising are briefly summarised below.

The Charter of Political Honesty Bill 2000 [2002]

6.18 Part 2 of the Charter of Political Honesty Bill 2000 [2002] proposes a Government Publicity Committee to monitor and enforce compliance by public authorities with statutory guidelines for government advertising campaigns.[16] The proposed Government Publicity Committee is to comprise the Auditor–General, the Ombudsman and 'a person with knowledge and experience in advertising' to be appointed by the Auditor–General.

6.19 Thirteen guidelines are set out in the Schedule to the Bill. The Schedule is included at Appendix 5. Guidelines 1 to 6 require that campaigns should provide objective, factual and explanatory information that can be substantiated, that facts can be clearly distinguished from opinion and that any comparisons are not misleading. Guidelines 7 to 10 direct against the use of advertising for party political purposes. Guideline 11 states that an advertising campaign should include a statement of its objective. Guidelines 12 and 13 state that no expenditure should be undertaken until the relevant legislation to implement the relevant policy, program or service has received assent, except where emergency issues of public safety or public order arise. The Bill's guidelines draw heavily on those suggested by the Auditor-General as modified by the Joint Committee on Public Accounts and Audit (discussed below at paragraphs 6.32-6.37), but are much more condensed.

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15 GCU *Guidelines for Australian Government Information Activities: Principles and Procedures*, available at http://www.gcu.gov.au.

16 Section 7.

6.20 The Bill provides that if the Government Publicity Committee considers that an advertising campaign does not comply with the guidelines, it may direct that the campaign be withdrawn or modified. The committee can also determine whether the objective of a campaign is legitimate, and whether a campaign is likely to achieve its stated objective. If not, the committee can order that the campaign be withdrawn.

6.21 The Bill provides that the Government Publicity Committee may institute proceedings in the Federal Court if a Commonwealth agency or employee fails to comply with its directions. The Federal Court may grant an injunction, including an interim injunction, against the person or agency and make an order (not defined) in relation to the contravention.

The Government Advertising (Objectivity, Fairness and Accountability) Bill 2000

6.22 The second Bill aims 'to require government advertising to meet minimum standards with respect to objectivity, fairness and accountability and to prohibit the use of taxpayers' money on advertising which promotes party political interests'.

6.23 The Bill adopts a different approach from the Charter of Political Honesty Bill by proposing enforcement through the court system. The *Financial Management and Accountability Act 1997* currently contains a criminal offence (with a maximum penalty of seven years' imprisonment) that applies where a minister or official misapplies or improperly uses or disposes of public money.[17] The Bill seeks to amend the Act to state that, without limiting the generality of those terms, it is improper to use or permit the use of public money for a 'government information program' (not defined) that does not comply with the principles and guidelines set out in the schedule to the Bill. (Accordingly, it is for the courts to evaluate whether or not there has been a breach of those principles and guidelines.)

6.24 The schedule comprises four parts which state that material:

- should be relevant to government responsibilities;
- should be presented in an objective and fair manner; and
- should not be liable to misrepresentation as party political;

and that distribution of sensitive material should be controlled.

6.25 The schedule is a copy of the ANAO's suggested principles and guidelines (discussed below at paragraphs 6.27-6.30), with only two changes.[18] The Schedule is included at Appendix 6.

Previous proposals for change

6.26 This section outlines the guidelines proposed by the ANAO and the Joint Committee on Public Accounts and Audit, on which the guidelines in the current bills, particularly the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, draw heavily.

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17 Section 14.

18 The two underlying principles and an introductory sentence in the second section are omitted from the schedule. The other provisions are identical.

Some relevant initiatives in Australian States and the United Kingdom are also canvassed briefly.

The ANAO's proposals

6.27 In 1998, following correspondence from the then Leader of the Opposition and from members of the public, the ANAO reviewed the Government's taxation reform community education and information program. During the review, the Auditor-General received advice from the Australian Government Solicitor (AGS) on some key considerations, including whether the expenditure had contravened the Constitutional requirement that appropriate moneys are spent 'for the purposes of the Commonwealth'.[19]

6.28 The AGS advised that money could legitimately be spent to explain and advertise a policy which had not been implemented, or which might not be implemented until a future term of government. The AGS also emphasised that the fact that a matter is 'political' under broadcasting or electoral law does not mean that it is not spent for the purposes of the Commonwealth:

> It needs to be recognised that the core of the Executive Government is made up of Members of Parliament in the political party or parties which command a majority of the House of Representatives. Therefore there is an intimate link between the Government and one or more political parties. Provided the policy is developed, explained and advertised for the Commonwealth Government qua Government, this link is no basis for arguing that this is not done for the purposes of the Commonwealth.[20]

6.29 The ANAO found that there had been no breach of broadcasting or electoral law. In summary it stated:

> …on the basis of the evidence available and legal advice, the ANAO concluded that the Government acted legally and officials acted ethically.[21]

6.30 However, given the limited regulation of the political content of government advertising, the ANAO also concluded that the adoption of conventions, principles and guidelines that provided more specific guidance on the use of government advertising would be helpful. A set of 'Suggested Principles and Guidelines for the Use of Government Advertising' was developed, drawing on reports from Queensland and Victoria, as well as Canada, the United Kingdom and New Zealand.[22]

6.31 The ANAO concluded that if Parliament had concerns about the use of government advertising, it was the responsibility of the Government and the Parliament to develop clear guidelines to differentiate between party political and government material on the basis that:

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19 Section 81 of the Constitution requires that funds are to be appropriated 'for the purposes of the Commonwealth'. The AGS advised that implementation of a policy at a future date or possibly not at all would not bar appropriation to 'develop, explain and advertise a policy'.

20 Quoted in ANAO *Taxation Reform: Community Education Information Programme*, Audit Report No. 12, October 1998, p. 25.

21 ANAO *Taxation Reform: Community Education Information Programme*, Audit Report No. 12, October 1998, p.14.

22 ibid, pp. 57-60.

> The main trade-offs in this area of accountability are basically matters for the Government and Parliament as they impact directly on their operations, processes and political advantage or disadvantage.[23]

The content of the ANAO's suggested principles and guidelines

6.32 The two underlying principles of the ANAO guidelines state that:

- all members of the public have equal rights of access to comprehensive information about government policies, programs and services which affect them, except where providing this information would be a breach of government responsibility; and
- governments may legitimately use public funds to explain their policies, programs and services and to inform the public about their obligations, rights and entitlements.

6.33 The guidelines are in four parts as summarised below:

- **Material should be relevant to government responsibilities.** A campaign must be a 'routine and integral' part of government policy development for a targeted group with needs identified by market research. Examples include: dissemination of scientific, medical or safety information; or for the purposes of Government accountability; or to inform the public of new, existing or proposed policy proposals or revisions.
- **Material should be presented in an objective and fair manner.** This means that information must be 'objective, factual and explanatory', that is, unbiased, capable of being substantiated and with fact clearly distinct from opinion. Further, any comparisons made should not be misleading.
- **Material should not be liable to misrepresentation as party political.** This means the material should not intentionally promote or be perceived as promoting party political interests; should be couched in unbiased and objective language; should not directly attack or scorn the views of others such as opposition parties; and should avoid party political slogans or images, including possible restrictions on ministerial photographs.
- **The distribution of sensitive material should be controlled.** As a general rule, material of a politically controversial nature should not be circulated unsolicited to the electorate unless specifically requested. Further, government advertising should not be used for party political purposes, and media placement should be targeted on a needs basis. Advertisements must be produced cost effectively and expenditure should be justifiable under a cost/benefit analysis. Hence 'objectives which have little prospect of being achieved, or which are likely to be achieved only at disproportionate cost, should not be pursued without good reason'. Advertisements must also comply with all relevant laws and with purchasing and procurement policies.

The Joint Committee of Public Accounts and Audit

6.34 In 2000 the Joint Committee of Public Accounts and Audit (JCPAA) reviewed the ANAO's report and recommended very similar guidelines for adoption. In his foreword to the report, the JCPAA Chairman noted that the issue of government advertising guidelines is 'highly controversial (party political)' but that the guidelines, 'while not perfect nor totally agreed by all the Committee, do represent the majority and largely consensual views of the

23 ibid, p. 30.

Committee'.[24] However, the report stated that there were different views within the Committee on whether the guidelines should be enshrined in legislation.[25]

6.35 While the JCPAA guidelines closely follow those of the Auditor–General, there are some differences:

- The underlying principles include an additional clause which states that government information campaigns should not be party political.
- Under the second sub-heading that states that 'material should be presented in an objective and fair manner', the JCPAA guidelines include three new criteria which address accessibility of information. The guidelines require particular attention to be given to communicating with identified groups, including rural communities, Aborigines, women and those whose first language is not English.
- In place of the Auditor-General's guidelines requiring that 'distribution of sensitive material should be controlled', the JCPAA guidelines include a short statement that 'distribution of unsolicited material should be carefully controlled', with no further elaboration.
- There is an additional set of criteria which require that 'material should be produced and distributed in an efficient, effective and relevant manner, with due regard to accountability.' The guidelines state, among other things, that information campaigns should be justified by a cost/benefit analysis, that there should be a clear audit trail regarding decision-making and the media placement should be determined and targeted 'on a needs basis' and 'without favour'.

6.36 The report contains no explanation for the changes made to the ANAO's guidelines. The Committee's very brief report comments only that committee members were unable to reach agreement on a full report into the issues and had chosen to 'focus on the central issue', namely a new set of draft guidelines.[26] The report noted that the Deputy Chair of the JCPAA Committee had also argued that an objective test should be incorporated in the guidelines to distinguish between expenditure of public money on legitimate information campaigns and its misuse as party political advertising. In particular he stressed that:

- no public money should be spent on mass media advertising, telephone canvassing or information services, on-line services, direct mail or other distribution of unsolicited material until legislation has been passed giving the government authority to implement the policy, program or service described in the campaign;
- where a proposed public information or education campaign covers a matter which does not require legislation, an appropriation for the specific purpose of the public information or education campaign must be obtained; and
- the only exclusions to these requirements should be where major issues of public health, public safety or public order may arise at short notice.[27]

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24 JCPAA, *Guidelines for Government Advertising,* Report No. 377, September 2000, p. iii.

25 ibid, p. 3.

26 ibid, p. 2.

27 ibid, p. 2.

6.37 The Deputy Chair's suggestions were not adopted in the JCPAA's report. However, the Committee notes that the Charter of Political Honesty Bill 2000 [2002] largely adopts those suggestions: the requirement to include a statement of the campaign's objective and the first and third of the points above have been included in the schedule (clauses 11, 12 and 13).

Other jurisdictions

6.38 Over the last decade there have also been various State reviews which have considered the regulation of government advertising.

6.39 In Queensland, following consideration of a report by the Electoral and Administrative Review Commission, the Parliamentary Committee for Electoral and Administrative Review recommended the adoption of guidelines which, amongst other things, would state that material should not be party political.[28]

6.40 In Western Australia, the Commission on Government also recommended guidelines which included a statement of principle that it is improper for governments to use public funds for publicity and advertising in order to gain a partisan political advantage.[29] However, the Commission concluded that no legislation should be introduced, but that government guidelines would be combined with the public complaints procedure through the Advertising Standards Council.[30]

6.41 In New South Wales, a private member's Bill to regulate government advertising was introduced in 1995 but lapsed on the prorogation of Parliament.[31]

6.42 In the United Kingdom, guidelines for the Government Information Service contain specific references to the convention that government information activities should not be, or be liable to misrepresentation as being, party political.[32] The guidelines note that while a publicity campaign can create political credit for the party in government, this must not be its 'primary or a significant purpose'.

Is legislation to regulate government advertising feasible?

6.43 Many submissions to the inquiry supported better regulation of government advertising, although not all agreed that legislation was the best way to achieve that end.

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28 Queensland Legislative Assembly, Parliamentary Committee for Electoral and Administrative Review, *Review of Government Media and Information Services,* April 1994.

29 Western Australia, Commission on Government *Report No. 3*, 1996, Chapter 11 and Appendix 3B.

30 ibid, para 11.6.5. The Government response to that report accepted the recommendations in principle, subject to the suggested guidelines being 'examined in detail' (*Government Response to Commission on Government Reports Nos 1-5*, October 1996, p.25).

31 Government Publicity Control Bill 1995, introduced by Mr Tink MLA. The Bill lapsed on the prorogation of Parliament in February 1999. The Bill proposed a committee similar to that proposed by the Charter of Political Honesty Bill 2000 [2002], comprising the New South Wales Auditor-General, the New South Wales Ombudsman and a part-time member selected from a list prepared by the Advertising Standards Council and appointed by the Premier (see discussion in Western Australia Commission on Government *Report No. 3*, 1996, pp. 299-300).

32 *Guidance on the work of the Government Information Service*, http://www.cabinet-office.gov.uk/central/1999/workgis/workgis.htm (14 March 2002). The guidelines provide that the rule governs not only decisions about what may be published, but also the content, style and distribution of published material, and that 'this basic rule' has been accepted under successive governments (para 4).

6.44 The KCELJAG submission prepared by Professor Charles Sampford and Mr Tom Round explained how unregulated government advertising could distort the democratic process:

> [Ministers] would find it highly useful, if they could get away with it, to have their party-political advertising (praising their own party and/or denigrating their opponents) paid from public funds, leaving more in their party's own coffers. This is objectionable because it creates an uneven 'playing field'…A party might get itself re-elected, not because it has governed in ways the voters approve, but simply because it has governed. Electoral success can easily become self-perpetuating, because the Opposition cannot match the advantage given by millions of government advertising dollars.[33]

6.45 However, the KCELJAG argued that, to establish an effective regime to deal with undesirable conduct, a three-tiered approach was required: coordinated ethical standard setting, legal regulation and institutional reform. As the submission noted:

> …legal rules not anchored in the values of the individuals these rules seek to regulate may fail for lack of ethical support.[34]

6.46 In the case of government advertising, ethical standards would need to be built into the government advertising approval process and the organisational and management structures of the political parties.[35]

6.47 Ethics expert Dr John Uhr welcomed the bills as providing an opportunity for Parliament to take greater responsibility for specifying appropriate standards for government office holders, commenting:

> Self-regulation by the political executive is a necessary but insufficient part of 'responsible parliamentary government': this Bill [the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000] can send a message that Parliament is prepared to take note of community standards and to devise means for holding government accountable to those standards.[36]

6.48 Dr Noel Preston also welcomed the bills' proposals to regulate such matters, in recognition of the fact that 'the spending of public money to support party political purposes is clearly unethical'. However, he considered that these matters would continue to be politically contested, as indicated by the difficulty Australian states have experienced in implementing constraints on government advertising.[37]

Evidence on the Charter of Political Honesty Bill 2000 [2002]

6.49 The proposals in the Charter of Political Honesty Bill 2000 [2002] for the regulation of government advertising campaigns were given in-principle support by numerous

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33 Submission no. 22, p. 13.

34 Submission no. 22, p. 4.

35 Submission no. 22, p. 4.

36 Submission no. 16, p. 4.

37 Submission no. 21, p. 10.

submissions, with several preferring its approach to that taken in the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000.

6.50 However, some significant concerns about the Bill were raised and are discussed below. They are:

- lack of precision in the guidelines;
- difficulty in determining whether campaign objectives are legitimate;
- the implications for the offices of the Auditor-General and the Ombudsman;
- enforcement of committee directions by the courts;
- lack of due process, including lack of review of committee decisions; and
- the inclusion of provisions on government advertising with other more general parliamentary issues in the Bill.

6.51 Some alternatives to the committee model were suggested and are also discussed below.

Lack of precision in the guidelines

6.52 As noted, the guidelines attached to the bill are based on the draft guidelines devised by the Auditor–General and revised by the JCPAA. The guidelines in this Bill are much condensed, amounting to only thirteen statements. Unlike the other models, no examples or factors to be considered in determining whether a particular guideline has been contravened are provided.

6.53 The Clerk of the Senate commented that the proposed Government Publicity Committee would be making 'highly subjective determinations' because of the vagueness and uncertainty of the guidelines.[38] The Deputy Auditor–General, Mr Ian McPhee expressed a similar view, noting that it would be an ongoing challenge for the committee to judge whether a campaign proposal fell outside the guidelines.[39]

6.54 The KCELJAG submission suggested that it might be preferable to separate the guidelines and principles into two groups: those standards which are legally enforceable and those which Ministers and agencies 'are directed and encouraged' to promote.[40]

Difficulty in determining whether campaign objectives are legitimate

6.55 Several submissions pointed to difficulties with the proposed power of the Government Publicity Committee to determine whether an objective of an advertising campaign was legitimate (clause 9(2)).

6.56 The Clerk of the Senate commented that the uncertainty of the guidelines would be 'greatly increased' by this proposed power.[41] Mr Lockett stated that the question of whether the objective of a campaign is legitimate:

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38 Submission no. 4, pp. 4-5.

39 *Committee Hansard*, p. 33.

40 Submission no. 22, p. 16.

> is essentially a political judgment and whether or not the campaign is likely to achieve that objective is a management decision that ultimately reflects on the competence of the government. Neither is essentially a matter of political honesty.[42]

Implications for the office of the Auditor–General and the Ombudsman

6.57 A major concern raised in submissions was the effect the Bill would have on the role and functions of the Ombudsman and the Auditor-General.

6.58 Senator Murray told the Committee that the Auditor–General and the Ombudsman were included in the proposed Government Publicity Committee because of their reputation as independent officers of integrity 'under any government'.[43]

6.59 However, their inclusion raised some serious concerns. The Clerk of the Senate succinctly explained how different in nature the new responsibilities would be compared with their existing responsibilities:

> The Auditor-General's role is to examine public expenditure and to report to the Parliament on questions of legality, control and economy. The Ombudsman investigates complaints about administrative action and reports to the Parliament on legality and fairness of administrative dealings with citizens. To add to these roles that of determining the propriety of government advertising and, in effect, making binding rulings on the propriety of advertising, would give the two officers unrelated functions likely to confuse their existing roles.[44]

6.60 The ANAO submission expressed a similar view, stating that the proposed responsibilities of monitoring and enforcing compliance by public authorities and appointing the third committee member were executive functions:

> A long-standing and generally accepted principle in our system of Government is that the role of the Auditor–General does not involve the performance of executive functions…[T]he exercise of executive functions would raise potential conflicts and tensions within the Auditor–General's audit responsibilities.[45]

6.61 Similarly, the Ombudsman noted that his membership of the committee would give him quite different powers from those he currently exercised:

> [T]he Bill would give the Committee (including me) a power to direct that particular action should be taken, with such directions to be capable of enforcement by the Federal Court. To date, the powers given to my office have been powers to recommend and, if necessary, to put a matter into the Parliamentary forum. A power to direct—in effect, to substitute the Committee's opinion for that of the relevant Ministers or agency managers—would depart from this position. It would require me to go beyond the formation of an opinion about an action that has

41 Submission no. 4, p. 2.

42 Submission no. 12, p. [3].

43 *Committee Hansard*, p. 33.

44 Submission no. 4, p. 4.

45 Submission no. 15, p. 2; Ian McPhee, *Committee Hansard*, p. 27.

> occurred and require me, as a member of the Committee, to assume a role in managing the affairs of an agency.[46]

6.62 Professor Richardson agreed, stating that the process would detract from the Ombudsman's central role and 'the persuasive nature of that role'.[47]

6.63 The Ombudsman pointed to the likelihood of controversy:

> The Bill would place the Committee and its members squarely within the political process and would bring them into conflict with Ministers and agencies in relation to subjective assessments of the intended and actual effects of advertising campaigns. The Bill would almost inevitably embroil the Auditor-General and me in political controversy and that would be likely to raise questions about the independence, public reputation and integrity of our respective offices. This could damage public confidence in our core responsibilities.[48]

6.64 This view was echoed in other submissions.[49]

6.65 More specific difficulties were also raised. Both the Ombudsman and Professor Richardson noted that legislation specifically prevents the Ombudsman from investigating the actions of ministers, but that the Committee would be able to take action against a minister under the Bill.[50] Professor Richardson suggested that if the Ombudsman were to be involved in legal proceedings, he or she should at least be an officer of parliament.[51] The Ombudsman also noted that his jurisdiction in relation to Commonwealth contractors is unclear, which could be an obstacle where a Commonwealth agency had asked an external body to manage an advertising campaign.[52]

6.66 Another concern was the proposal to give the Auditor-General the responsibility for appointing the third member of the proposed Government Publicity Committee (clause 6(1)(c)). The Auditor-General also has the power to determine whether any paid employment would or might conflict with the member's committee duties, in which case the member's appointment would cease to have effect (clauses 6(5) and 6(6)). The KCELJAG submission noted that the Bill 'would effectively give the Auditor–General two votes out of three' on the committee.[53] The Clerk of the Senate agreed that it was not appropriate to give one member of the committee the power to determine whether another member was disqualified.[54]

6.67 The KCELJAG submission raised another concern about future appointments of these statutory officers:

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46 Submission no. 5, p. 3.

47 Professor Jack Richardson, ANU, submission no. 24, p. 2.

48 Submission no. 5, p. 3.

49 See for example, Professor Jack Richardson, submission no. 24, p. 2, commenting on the inclusion of the Ombudsman on the proposed committee.

50 *Ombudsman Act 1976*, s.5.

51 The Auditor-General is an officer of Parliament under the *Auditor-General Act 1997*, s. 8, but the Ombudsman is an independent officer who may report to Parliament under the *Ombudsman Act 1976.*

52 Submission no. 5, p. 2.

53 Submission no. 22, p. 21.

54 Submission no. 4, p. 6.

> The Ombudsman and Auditor-General enjoy public trust and credibility due to the perceived independence of their offices. However, they are still appointed by processes that the Executive Government ultimately controls. If these officers were given this added responsibility of vetting government advertising, it might tempt governments to appoint those who were seen as reliable or likely to have favourable views of their message.[55]

6.68 The Ombudsman noted that any ongoing conflict with ministers could be a problem as the Ombudsman's resources are determined by the Government.[56]

6.69 Concerns were also raised about the expertise required to perform this function effectively. At the public hearing, the Acting Ombudsman, Mr Oliver Winder, told the Committee that the Ombudsman's office had no expertise in dealing with advertising. He also advised that he knew of no other ombudsman in the world with such a role.[57] The Ombudsman's submission did, however, note that there were other ombudsmen who engage in some monitoring of ministerial activity, including overseeing a leadership code or related set of standards.[58]

Enforcement of committee directions by the courts

6.70 Senator Murray stated in his submission that 'a powerful and independent' committee was 'more suited to the task of scrutinising government advertising than a reluctant and slow moving judiciary'.[59] At the public hearing, Senator Murray explained the rationale of his approach compared with the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000:

> The nub of the difference between the two bills addressing this issue is that the Labor Bill says 'Delay adjudication on this matter until it is taken to a court and let the court decide whether people have behaved improperly.' The Democrat view is that it is an immediate political issue which needs to be dealt with at an administrative level so that people can be advised if an advertisement breaches a set of guidelines, a code of conduct, or whatever.[60]

6.71 A number of submissions to the inquiry preferred the approach taken by Senator Murray's Bill to that of the other Bill. Mr Lockett considered that the former approach was likely to be more effective than relying on the courts to rule on the merits of government decisions.[61]

6.72 However, the Ombudsman expressed concerns that by giving the Government Publicity Committee the powers to refer matters to court, the Bill opened up the likelihood of 'unedifying litigation' between the Committee and Commonwealth agencies. The

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55 Submission no. 22, p. 22.

56 Submission no. 5, p. 3.

57 *Committee Hansard*, p. 17. The KCELJAG submission also noted that the skills of the Auditor-General and the Ombudsman did not necessarily make them 'the best experts available' for ruling on the propriety of government advertising (submission no. 22, p. 22).

58 Submission no. 5, p. 3.

59 Submission no. 13, p. 16.

60 *Committee Hansard*, p. 3.

61 Submission 17.

Ombudsman considered that litigation might also be a 'slow and inflexible tool to deal with a changing situation'.[62]

6.73 More significant legal issues regarding the role of the courts were also raised. The Clerk of the Senate commented that it was not appropriate to refer a matter to the courts for enforcement of committee directions:

> The court would not be given the task of determining whether a particular campaign breached the criteria in the bill…The task of the court would be limited to determining whether an agency or person failed to comply with a direction of the committee. In effect, the court would be used simply as the sheriff to enforce the directions of the committee, an entirely inappropriate role for the court to perform. The proposed arrangement may also be unconstitutional. It is similar in principle to the legislative arrangements which were found to be invalid by the High Court in the *Brandy* case, and violates criteria enunciated by the Court.[63]

6.74 Professor Richardson raised another constitutional issue:

> Some of the so-called guidelines have a heavy political content e.g. (7), (8), (9) & (10). In deciding whether to enforce a decision of the Committee under clause 10 of the Bill the Federal Court could thus be called upon to traverse essentially political issues…The Constitution embodies the separation of powers of government and questions of a political nature should not be left to a Court created under Chapter III of the Constitution to decide. [64]

Lack of due process, including review of committee decisions

6.75 The Ombudsman noted that the Bill 'contains no guarantee of fair process, including an opportunity for people subject to criticism to make submissions before action is taken'. In particular, he noted that the Bill contained no equivalent to section 8(5) of the *Ombudsman Act 1976*, which requires the Ombudsman before making a critical report to allow the relevant individual or agency to appear and make submissions. The Ombudsman submitted:

> Not only might this lead to the reputations of agencies and individuals being unfairly damaged, it may lead to the Committee issuing directions without having considered all relevant factors.[65]

6.76 The Clerk of the Senate also criticised the unlimited power of delegation the Bill gives to the Ombudsman and Auditor-General (clause 6(7)). He noted:

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62 Submission no. 5, p. 3.

63 Submission no. 4, p. 5. In *Brandy vs Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 the High Court held certain provisions of the *Racial Discrimination Act 1975* to be constitutionally invalid. The provisions allowed the Human Rights and Equal Opportunity Commission to register its determinations in the Federal Court, so that they would take effect as orders of the court. The High Court held that these provisions were invalid because they breached the constitutional separation of judicial power and executive power. Provisions allowing the Federal Court to review the determinations did not save the law from invalidity.

64 Submission no. 24, p. 2.

65 Submission no. 5, p. 3.

> As the delegation is not confined to officers in the respective offices, if the bill were passed it would not be known who would actually be exercising the extensive powers of the committee.[66]

6.77 In its review of the Bill, the Senate Standing Committee for the Scrutiny of Bills expressed concerns about the powers of the proposed committee in determining whether a government advertising campaign complied with the guidelines and whether the objective of such a campaign was likely to achieve its stated objective. The Scrutiny of Bills Committee sought advice from Senator Murray about why no provision had been made to involve a judicial officer in either the determination or review of these matters.[67]

6.78 Senator Murray responded that he had not intended to exclude judicial review of committee decisions. He advised that the process of natural justice would apply to those decisions, and if:

> … the Committee were to abuse its powers by, for example, acting in pursuit of an improper purpose, basing its decision on irrelevant considerations, acting under dictation or sub-delegating its authority, those decisions could be successfully challenged in the courts.[68]

6.79 Senator Murray therefore concluded that there was no need to provide a further avenue for review. He also advised that the Government Publicity Committee itself would be a mechanism for reviewing decisions made by ministers or their delegates and so was an improvement on the current process in that:

> Decisions currently made by ministers or their delegates are not subject to any effective review process. Far from allowing the exercises of arbitrary non-reviewable power, this Bill provides for a much needed avenue of review to soften the arbitrary nature of existing powers.[69]

Structure of the Bill

6.80 Several submissions from experts in legal and ethical issues, including Dr Preston,[70] Dr Uhr[71] and Dr Carney,[72] suggested that the provisions on government advertising should be in separate legislation from those dealing with parliamentary matters, either because of the complexity of the issues or because of the distinction between executive and parliamentary functions. The Committee agreed with this view as discussed in chapter three, paragraphs 3.99–3.101.

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66 Submission no. 4, p. 4. Ms Enid Jenkins (submission no. 8, p.3) also argued that the Bill should specify who would be eligible to be a delegate.

67 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No. 15 of 2000*, 1 November 2000, pp. 9–10.

68 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 2000*, 29 November 2000, p. 519.

69 ibid, p. 519.

70 Submission no. 21, p. 9.

71 *Committee Hansard*, p. 9.

72 Submission no. 11, pp. 2–3.

Alternatives to the committee model

6.81 Some alternatives to the proposed Government Publicity Committee were suggested.

Parliamentary committee

6.82 The Ombudsman suggested that a parliamentary committee could be established. Parliament could set the standards to be considered, which 'might amount, in effect, to a Code against which the Committee could consider an advertising campaign', either by reference from Parliament, on its own motion or following a complaint. The Ombudsman stated:

> A Committee operating in such a way would be a mechanism to ensure that actions taken in the political field have consequences in Parliament.[73]

6.83 The Ombudsman suggested that the parliamentary committee might recommend action 'related to a Minister' or reimbursement to the relevant agency of money spent on politically partisan advertisements.[74] During the public hearing, the Acting Ombudsman, Mr Oliver Winder, confirmed support for the parliamentary committee model:

> …because that would put it back into the process of politics, which it largely is.[75]

6.84 Deputy Auditor–General, Mr Ian McPhee, also supported the parliamentary committee model for similar reasons, stating:

> … probably a parliamentary committee might be the best placed of all to make these judgments because, at the end of the day, the sorts of decisions as to what people think about the appropriateness or otherwise of advertising proposals are very much made in this place.[76]

6.85 However, Mr McPhee noted that any body which had the 'right of veto' over an executive government advertising program would find its role difficult.[77]

6.86 A contrary view was expressed by the Clerk of the Senate. He preferred the establishment of a separate independent body, such as a government advertising tribunal, which would adjudicate on precise guidelines, arguing:

> A parliamentary committee really appropriately can only be looking at what goes on in the parliamentary sphere; with this body it would be looking at the activities of government as a whole. I see merit in having some independent body outside the political system here.[78]

6.87 The Clerk of the Senate suggested that although it did not appear feasible to regulate the amount of money spent on a particular campaign other than through the normal political process, it might be feasible to formulate 'fairly precise rules' which could limit a

73 Submission no. 5, p. 4.

74 Submission no. 5, p. 4.

75 *Committee Hansard*, p. 24.

76 *Committee Hansard*, p. 33.

77 *Committee Hansard*, p. 34.

78 *Committee Hansard*, p. 4.

government's use of certain forms of advertising for party political purposes.[79] Such guidelines might address issues such as prohibiting the use of photographs of ministers in advertisements,[80] a practice which was described by one member of the public as 'an ego trip at taxpayers'expense' that should be banned.[81]

6.88 Responding to questions about the possibility of parliament appointing an independent person with ethical, governance or advertising training, the Acting Ombudsman, Mr Winder, told the Committee that this could be a feasible option. However, any independent appointee would still experience problems in interpreting the guidelines.[82]

Pre-clearance of government advertising

6.89 Other evidence to the Committee stressed that pre-clearance of major government advertising campaigns was essential. Former member of the Queensland Parliament and former Chairman of its Parliamentary Members Ethics and Parliamentary Privileges Committee, Mr Clem Campbell, considered that the proposed Government Publicity Committee had merit but that its major role should be to give prior approval for significant government advertising programs:

> It will be too late to send government advertising material to the committee after the material has been aired or circulated widely. Major government advertising campaigns are not produced overnight and often have a long production period. The Government Publicity Committee could be directed to report timely—within one or two weeks—on any aspect of a program that does not meet the guidelines.[83]

6.90 The Deputy Auditor-General, Mr McPhee, suggested that another alternative was to require the relevant minister to report to Parliament prior to the campaign:

> There needs to be some reporting against the guidelines by the responsible minister at the time a decision is being made to get some disclosure to the parliament about his or her assessment about the proposal…By getting some disclosure of the reasons for the government's decisions against whatever guidelines are agreed…you could at least allow the parliament to debate it if it wished.[84]

6.91 The KCELJAG submission also suggested there should be a form of 'pre-clearance' for government advertising, with a 'fast-track' procedure in cases of 'genuine and demonstrable emergency'.[85] However, rather than giving Parliament the power to 'approve' government advertising, the KCELJAG submission considered that a 'neutral arbiter' (a term on which the submission did not elaborate) should be established to consider government advertising campaigns against set criteria. The KCELJAG suggested the following criteria for consideration:

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79 *Committee Hansard*, p. 2.

80 *Committee Hansard*, p. 2.

81 Mr Bob Holderness-Roddam, submission no. 1, p.1.

82 *Committee Hansard*, p. 24.

83 Submission no. 10, p. 2.

84 *Committee Hansard*, p. 34.

85 Submission no. 22, p. 9.

- public funds must not be spent to persuade or influence voters to support or oppose a particular candidate, political party, policy or proposed law; and
- public funds must not be spent on advertising any policy:
  - before that policy has been enacted into law—unless such advertising gives equal weight to arguments for and against such policy; and
  - after that policy has been enacted into law—unless such advertising encourages people to comply with the law, or offers useful information to assist them in complying with or benefiting from the law.[86]

Evidence on the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000

6.92 As noted above, many submissions supported in principle the objective of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 to ensure that government is accountable for how it spends public funds. For example, Dr Uhr welcomed the Bill's explicit aim of establishing 'minimum standards' to regulate government advertising through amendment of the Financial Management and Accountability Act.[87]

6.93 However, almost all submissions that commented on the Bill expressed serious concern about the proposed creation of a criminal offence, punishable by a maximum of seven years' imprisonment, by reference to guidelines which were considered to be too vague.

6.94 The Clerk of the Senate elaborated on this point:

> Inconsistency with the principles and guidelines in the schedule would be extremely difficult to determine because of the vague and subjective character of the guidelines. The bill would require the courts to determine whether material is presented in a[n] unbiased manner, distinguishes between facts and comment or opinion, promotes party-political interests, is free of partisan promotion or political argument and avoids party-political slogans or images. These are not the kinds of questions which courts are equipped or accustomed to determine, and there would be a high likelihood of any prosecutions failing because the courts found the criteria too vague and subjective to be the basis of a criminal sanction.[88]

6.95 The Clerk referred in particular to the inclusion in the guidelines of phrases such as 'suitable uses for government advertising', 'as a general rule' and 'care should be taken'. He commented:

> If the bill were enacted and were to go before the High Court on a test of its validity, it would be a temptation to judicial activism, and the Court might throw out the whole statute on the ground that it is impossibly vague as a proscription of criminal behaviour.[89]

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86 Submission no. 22, pp. 14-15.

87 Submission no. 16, p. 3.

88 Submission no. 4 p. 2.

89 ibid.

6.96 Dr Gerard Carney expressed similar concern about making violations of the principles and guidelines the subject of criminal sanctions.[90] So too did Professor Jack Richardson, who argued:

> It is a fundamental principle of the criminal law that a crime should be clearly defined so that a reasonable person is left in no doubt whether his or her conduct amounts to a crime…
>
> Different persons could hold quite different opinions as to whether particular official conduct amounts to an infringement of the guidelines applied individually or collectively to that conduct.[91]

6.97 The Attorney–General's Department expressed a similar view.[92]

6.98 Submissions from members of the public also criticised the vagueness of the guidelines. Ms Enid Jenkins argued that the guidelines requiring material to be presented in an objective and fair manner, and in particular that information should be presented in an 'unbiased' and 'equitable' manner, would be extremely difficult to enforce because interpretations would differ widely.[93] Mr Lockett concluded that the guidelines 'would probably be ineffective in achieving their objective and because of their subjective nature would probably create more disputes than they resolve'. He described the guidelines as 'a grab-bag of provisions which range from probably completely redundant…to simply commonsense…or to incomprehensible'.[94]

6.99 Professor Richardson also criticised the proposed scheme on a more fundamental basis:

> … [T]o invoke the criminal law to deal with a situation which is essentially political is inimical to the traditions of the Australian criminal law system, in which crimes are created according to levels of conduct not politically motivated.[95]

6.100 At the public hearing, the Clerk of the Senate agreed with this view, stating that he did not consider that the regulation of government advertising was 'an area for criminal sanction and prosecution in the courts'.[96]

6.101 Senator Murray's submission also argued that the Bill established 'an unworkable framework' for regulating government advertising for two reasons:

- the courts are 'most unwilling to rule on political questions or on the merits of government decisions', including 'imputing to government ministers improper party political motives for government programs, including advertising programs'; and

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90 Submission no. 11, p. 3.

91 Submission no. 24, p. 1.

92 Submission no. 17, pp. 1–2.

93 Submission no. 8, p. 1.

94 Submission no. 12, pp. 3–4.

95 Submission no. 24, p. 1.

96 *Committee Hansard*, p. 3.

- the Bill imposed an onerous burden of proof for the offence, particularly in light of the high penalty.

6.102 Senator Murray submitted that the effect would be to allow 'all but the most blatant examples of partisan advertising' to escape prosecution. Even if a prosecution succeeded, the process could not reclaim money spent or prevent the political party from reaping the benefits of the advertising campaign. He concluded that the Bill 'simply fails to meet the need for a timely and effective means of regulating government advertising'.[97]

6.103 As noted above in paragraph 6.43, the KCELJAG submission urged that any ethics regime should give primary emphasis to the provision of prior advice, and stated:

> The fact that many of these Principles and Guidelines are so broad that their interpretation and application may not be obvious in advance makes it even more crucial to have a system of authoritative prior advice in place.[98]

6.104 As an example, the KCELJAG submission argued that the requirement for an information campaign to be developed in response to 'an identified need by identified recipients based on appropriate market research' was so broad that Commonwealth officers might be reluctant to develop initiatives that could later be determined to have violated the guideline. Among other criticisms the submission made of particular guidelines were the following:

- the requirement to inform the public of new, existing or proposed government policies needed reconsideration: information must be 'useful', not merely informative;
- whether it was appropriate to fund campaigns that are proposed but not enacted policy; and
- the prohibition on 'directly' scorning or attacking the view of other political parties or groups should be amended, to prohibit criticism that is gratuitous rather than proportionate and necessary to the goal of informing the public.[99]

Conclusions and recommendations

6.105 The Committee considers it is an integral part of a properly accountable system of government that government advertising is not used as a vehicle for promoting party political interests. However, whether it is possible to legislate effectively against such conduct is a difficult issue, as evidenced by submissions to the inquiry.

6.106 The Committee considers that both bills present substantial difficulties.

6.107 The Committee's chief concern with the Charter of Political Honesty Bill 2000 [2002] is the role and function of the proposed Government Publicity Committee. As members of that Committee, the Auditor–General and the Ombudsman would be required to act in ways that are inconsistent with their establishing legislation, particularly in relation to investigating the actions of ministers and initiating enforcement procedures against government agencies. The Auditor-General and the Ombudsman as members of the

97 Submission no. 13, p. 15.

98 Submission no. 22, p. 16.

99 Submission no. 22, pp. 16-20.

committee may be called upon to direct management of government programs and dictate to responsible ministers. Such functions represent a substantial departure from their current roles.

6.108 The Committee heard strong evidence that, in carrying out their duties as committee members, the Offices of the Auditor–General and the Commonwealth Ombudsman may become embroiled in political controversy. Public confidence in their roles as independent regulators and reviewers of government agencies, as well as the confidence of parliament, may be damaged. There is also a risk that future appointments to these offices may become politicised, or that their funding may be detrimentally affected by their activities on the proposed Government Publicity Committee.

6.109 The Committee also heard evidence of other serious flaws in the proposed committee. Giving the Auditor-General the responsibility for appointing and, in effect, removing the third committee member is undesirable. The Ombudsman's uncertain jurisdiction in relation to Commonwealth contractors may prove an obstacle where an external body is to manage an advertising campaign. The unlimited power of delegation proposed for the Ombudsman and Auditor-General makes exercise of the committee's powers uncertain, and the lack of any mechanism to review committee decisions is undesirable. Some serious constitutional issues about the proper role of the courts in relation to the proposed committee's decisions were also raised.

6.110 The Committee therefore believes that while the appointment of these two office-holders to the proposed Government Publicity Committee on the basis of their impartiality and integrity may have seemed attractive, in practice the system would present major difficulties.

6.111 The Committee therefore does not support the implementation of Part 2 of the Charter of Political Honesty Bill 2000 [2002].

6.112 In relation to the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, the Committee heard different but even more serious concerns. Most submissions expressed severe reservations about the proposed creation of a serious criminal offence defined by reference to vague and uncertain guidelines.

6.113 As several legal experts pointed out, it is a fundamental principle of our criminal law that offences should be clearly defined. The Bill as drafted would put the courts in the untenable position of trying to determine whether a crime had been committed by reference to vague criteria and policy statements. The Committee also heard reservations about the appropriateness of the courts traversing matters which were essentially political in nature, particularly in light of their traditional reluctance to interfere in such issues.

6.114 For these reasons, the Committee does not support the implementation of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000.

Recommendation No. 6

6.115 The Committee recommends that Part 2 of the Charter of Political Honesty Bill 2000 [2002] relating to government advertising and the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 should not proceed because of fundamental flaws in both bills.

6.116 The Committee nevertheless considers that there is strong evidence to support the argument that the current arrangements for the regulation of the political content of government advertising need to be improved in the face of public criticism.

6.117 As the Committee's examination of current arrangements has revealed, the present guidelines on government advertising offer no guidance to departments or ministers on the avoidance of political content in government advertising campaigns. The process is administered by the Government Communication Unit in the Department of the Prime Minister and Cabinet, and decisions about the appropriateness of any major or 'sensitive' campaign are made by the Ministerial Committee on Government Communications.

6.118 Under this system, it is the ministry itself which determines what constitutes responsible use of the ministerial office in relation to government advertising. The fact that there are no rules or guidelines preventing the party political use of government advertising means that decisions about content and presentation style are wholly in the power of the Executive. This lack of guidance allows the party in government to conduct government advertising campaigns, particularly in the lead up to an election, without any reference to standards regarding the appropriate use of public monies to promote government interests as distinct from party interests.

6.119 It is widely acknowledged, as evidenced by the submissions that the Committee received, that the distinction between what is party political and what is not is difficult to codify. However, as a minimum the Committee considers that the *Guidelines for Australian Government Information Activities: Principles and Procedures* should include a clear statement of the fundamental principle: that government information programs should not be, or be liable to misrepresentation as being, party political. This principle has been recognised in the United Kingdom's equivalent guidelines, with elaboration on how that principle is to be applied. The Committee sees no reason why similar material should not be contained in the Australian guidelines.

Recommendation No. 7

6.120 The Committee recommends that the *Guidelines for Australian Government Information Activities: Principles and Procedures* issued by the Government Communications Unit in the Department of the Prime Minister and Cabinet be amended to refer explicitly to the fundamental principle that government information programs should not be, or be liable to misrepresentation as being, party political, and should provide guidance as to how that principle is to be applied in practice.

6.121 While guidelines for government agencies are important, the Committee is not persuaded that this amendment alone will provide sufficient safeguards against the expenditure of public funds on advertising that promotes party political interests.

6.122 During this inquiry the Committee heard various suggestions as to the appropriate mechanism for ensuring proper scrutiny of expenditure on government advertising. The Committee considers highly persuasive the arguments that these are essentially political matters and that consequently it is for Parliament as a whole to examine, decide and issue detailed guidelines on what is appropriate.

6.123 Because of flaws in the two bills which the Committee has considered above, the Committee believes that more detailed consideration of the regulation of government

advertising is essential. The Committee considers it would be appropriate for this matter to be referred to the proposed Parliamentary Joint Standing Committee on a Code of Conduct for Ministers and Other Members of Parliament, as set out in recommendation 2, for further consideration and development of appropriate guidelines.

6.124 That committee should also have the opportunity to consider proposals raised during this inquiry such as the establishment of a parliamentary committee to adjudicate on the guidelines for government advertising or the introduction of some form of pre-clearance procedure for major government advertising campaigns including the requirement for the responsible minister to report to parliament on proposed government advertising campaigns.

6.125 The guidelines proposed by the Auditor-General and the JCPAA, in combination with evidence received during this inquiry, should be used as a basis for developing a detailed set of standards.

Recommendation No. 8

6.126 The Committee recommends that the issue of appropriate guidelines for government advertising campaigns be referred to the proposed Parliamentary Joint Standing Committee on a Code of Conduct for Ministers and Other Members of Parliament for further consideration.

Senator Brett Mason
Committee Chair

ALP MINORITY REPORT

ADDITIONAL COMMENTS AND POINTS OF DISSENT BY SENATOR THE HON JOHN FAULKNER AND SENATOR MICHAEL FORSHAW

ADDITIONAL COMMENTS AND POINTS OF DISSENT, BY SENATOR FAULKNER AND SENATOR FORSHAW

The minority Senators support most of this report and many of its recommendations. The report is thorough and constitutes a valuable contribution to the continuing debate about ethical standards in public life and public confidence in the institutions of government. We consider, however, that there are some important points of disagreement and some additional comments that need to be recorded.

Labor strongly supports a code of conduct for ministers and has committed itself to introducing such a code if elected to government. The Labor Party Platform (16.28) provides that:

"Labor Ministers will be required to adhere to a formal code of conduct which sets out the action to be taken when conflicts of interest, or perceived conflicts of interest, arise and which prohibits behaviour likely to bring discredit to the government."

In February 2002 the Leader of the Opposition, Simon Crean, stated that he would be releasing a new ministerial code of conduct for public discussion and comment. He also indicated that the code would include a requirement that former ministers not take employment in the area of their portfolio responsibility for a period of twelve months after leaving office. This would prevent former ministers using the contacts and knowledge they had gained as ministers to secure lucrative employment immediately after leaving office, as has been the case with Mr Reith, Dr Wooldridge and Mr Fahey.

We consider it is a matter for the Prime Minister to set the standards to be adhered to by ministers. Those standards should be rigorous and transparent and the Prime Minister should be accountable for enforcing them. Prime Minister Howard's release in April 1996 of the "Guide on Key Elements of Ministerial Responsibility" was potentially a positive step. Unfortunately, Mr Howard's 'code of conduct' has been discredited by his lack of will in enforcing it and that, regrettably, has further undermined public trust in the elected government.

Labor is not persuaded of the merits of the Committee's recommendation to establish a Parliamentary Joint Committee on a Code of Conduct for Ministers and Other Members of Parliament. As noted above we consider a code of conduct for ministers is a matter for the Prime

Minister. As for a code for parliamentarians, the previous attempts by the Bowen Committee (1978-79) and the 1995 Working Group provide little cause for optimism that a third attempt will be any more successful. Given the many other competing demands on the limited resources of Parliament, we do not support the establishment of such a committee at this stage.

Labor considers increased transparency is a more effective way to lift standards of conduct among members of parliament. It was Labor, in government, which introduced the parliamentary systems of registration of interests by members of parliament. These have been effective in reducing the potential for conflicts between private interests and public duty.

The Howard Government has introduced, with Labor's full support, the six monthly tabling of expenditure details, for all Senators and Members, of the costs of air and car transport and related travelling allowances. This followed the 'travel rorts' affair in 1997. Since the introduction of this system there have been no known incidences of misuse of travel allowance.

Labor believes this system should be extended to include publication of the expenditure on all parliamentary entitlements. Transparency and public scrutiny are powerful incentives to do the right thing. Further, we remain of the view that an independent Auditor of Parliamentary Allowances and Entitlements with the necessary powers to investigate allegations of misuse, is needed.

We agree with the Committee that the inquiry has identified flaws in the *Auditor of Parliamentary Allowances and Entitlements Bill 2000* as introduced. But we do not agree these flaws are incapable of being remedied. In relation to the serious reservations the Committee has expressed about the proposed Auditor having both an advisory and investigative function, we note that this is a feature of the ethics regimes in the United States of America, Canada and the United Kingdom. In the US both the House of Representatives Committee on Standards of Official Conduct and the Senate Select Committee on Ethics have an advisory and investigative function; in Canada the Ethics Counsellor advises and investigates; and in the United Kingdom the Parliamentary Commissioner for Standards – to quote this report (2.20) – "was created to keep the Register of Members' Interests, advise members of parliament on their conduct and to investigate complaints." In fact our own Australian National Audit Office combines an important advisory and educational role with its audit responsibilities. In New South Wales, the

Independent Commission Against Corruption also has an advisory as well as an investigative function.

Accordingly, it is our intention to re-examine the *Auditor of Parliamentary Allowances and Entitlements Bill 2000* and draw on these models to find a way of better combining these two equally important functions.

We will also attempt to address the other issues identified by the Committee: the potential impact of the entry and search provisions on personal rights and liberties; the adequacy of the review provisions; defining the boundaries of the Auditor's function; and the appropriateness of the suggested penalties. We believe it is important that the Auditor have a sound and workable statutory basis and will continue to work towards achieving this.

In relation to the *Government Advertising (Objectivity, Fairness and Accountability) Bill 2000* we remain convinced of the need for strict guidelines to prevent the misuse of government advertising for political purposes. The current *Guidelines for Australian Government Information Activities* are essentially administrative and, as the Committee notes, do not address the issue of party political content, have no legal status and are not reviewable.

We appreciate, however, the serious difficulties, to which the Committee has drawn attention, of creating a criminal offence by reference to guidelines which necessarily lack precision and involve a large element of subjective assessment. We therefore accept the Committee's finding that the Bill in this form should not proceed.

We continue to endorse the set of guidelines proposed by the Auditor-General in his Audit Report No 12, *Taxation Reform:Community Education Information Programme*, of October 1998 and further refined by the Joint Committee of Public Accounts and Audit in its Report No 377, *Guidelines for Government Advertising*, of September 2000. We commend these guidelines to the Government and urge that they be adopted.

Senator the Hon John Faulkner **Senator Michael Forshaw**

AUSTRALIAN DEMOCRATS' MINORITY REPORT

ADDITIONAL COMMENTS BY SENATOR ANDREW MURRAY

Additional Comments by Senator Andrew Murray on behalf of the Australian Democrats

The *Charter of Political Honesty Bill 2000 [2002]* and the *Electoral Amendment (Political Honesty) Bill 2000 [2002]* were introduced to make a contribution to better standards in public life. The bills provided an important opportunity for the Committee to consider the need for a legislative response to community concern over standards of ethics in politics.

In my submission to the Committee, I indicated that if particular aspects of the bills require amendment to better serve their purpose, I would be supportive of any reasonable recommendations the Committee may have along those lines. Accordingly, I intend to carefully consider the recommendations of the Committee with a view to refining the bills. I thank the Committee for the quality and depth of its consideration of these bills.

Senator Andrew Murray
Accountability Spokesperson for the Australian Democrats

APPENDIX 1

LIST OF SUBMISSIONS

Submission Number	Organisation/Individual
1	Mr Bob Holderness-Roddam
2	Ms Betty Moore
3	Mr Reginald Parry Jones
4	Clerk of the Senate
5	Commonwealth Ombudsman
6	Mr Arnold Sandell
7	South Australian Electoral Commissioner
8	Ms Enid Jenkins
9	G Lloyd-Smith
10	Clem Campbell
11	Dr Gerard Carney
12	Mr E J Lockett
13	Senator Andrew Murray
14	Australian Electoral Commission
14a	Australian Electoral Commission - Supplementary
15	Australian National Audit Office
16	Dr John Uhr
17	Attorney-General's Department
18	Australian Christian Lobby
19	Mr Richard Czupryna
20	Australian Broadcasting Authority
21	Dr Noel Preston
22	Professor Charles Sampford
23	Australian Press Council
24	Emeritus Professor J E Richardson

APPENDIX 2

PUBLIC HEARING

A public hearing was held in Parliament House, Canberra, on Friday 6 April 2001.

Witnesses:

Department of the Senate
Mr Harry Evans, Clerk of the Senate

Australian Electoral Commission
Mr Andrew Becker, Electoral Commissioner
Mr Mark Cunliffe, First Assistant Commissioner
Mr Paul Dacey, Deputy Electoral Commissioner

Office of the Ombudsman
Mr Oliver Winder, Acting Ombudsman
Mr Frederick Bluck, Director, Policy

Australian National Audit Office
Mr Ian McPhee, Deputy Auditor-General
Mr Russell Coleman, Executive Director, Corporate Management
Mr Michael Lewis, Executive Director, Performance Audit

Dr Noel Preston, Adjunct Professor, Key Centre for Ethics, Law, Justice and Governance, Griffith University

Dr John Uhr (private capacity)

APPENDIX 3

CODE OF CONDUCT (BOWEN REPORT)

Code of conduct as recommended in *Public duty and private interest,* the Report of the Committee of Inquiry established by the Prime Minister on 15 February 1978, July 1979, pp. 31–33.

CODE OF CONDUCT

Under the system of government which operates in Australia the main legislative and executive functions of government are carried out by Ministers, Members of Parliament, public servants and statutory officeholders. Each category of officeholder has a duty to discharge responsibilities entrusted by the Constitution and the laws made under the Constitution according to the highest standards of conduct. The public is entitled to have confidence in the integrity of its government. Officeholders may be required by the nature of public office to accept restrictions on certain areas of their private conduct beyond those imposed on ordinary citizens.

The following Code of Conduct embodies principles which should be observed by all four categories of officeholders.

1. An officeholder should perform the duties of his office impartially, uninfluenced by fear or favour.

2. An officeholder should be frank and honest in official dealings with colleagues.

3. An officeholder should avoid situations in which his private interest, whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict with his public duty.

4. When an officeholder possesses, directly or indirectly, an interest which conflicts or might reasonably be thought to conflict with his public duty, or improperly to influence his conduct in the discharge of his responsibilities in respect of some matter with which he is concerned, he should disclose that interest according to the prescribed procedures. Should circumstances change after an initial disclosure has been made, so that new or additional facts become material, the officeholder should disclose the further information.

5. When the interests of members of his immediate family are involved, the officeholder should disclose those interests, to the extent that they are known

to him. Members of the immediate family will ordinarily comprise only the officeholder's spouse and dependent children, but may include other members of his household or family when their interests are closely connected with his.

6. When an officeholder (other than a Member of Parliament) possesses an interest which conflicts or might reasonably be thought to conflict with the duties of his office and such interest is not prescribed as a qualification for that office, he should forthwith divest himself of that interest, secure his removal from the duties in question, or obtain the authorisation of his superior or colleagues to continue to discharge the duties. Transfer to a trustee or to a member of the officeholder's family is not a sufficient divestment for the purpose. If immediate divestment would work significant hardship on the officeholder, possession of the interest should be disclosed to colleagues or superiors and authorisation obtained for temporary retention pending divestment.

7. An officeholder should not use information obtained in the course of official duties to gain directly or indirectly a pecuniary advantage for himself or for any other person. In particular, an officeholder should scrupulously avoid investments or other transactions about which he has, or might reasonably be thought to have, early or confidential information which might confer on him an unfair or improper advantage over other persons.

8. An officeholder should not:

   (a) solicit or accept from any person any remuneration or benefit for the discharge of the duties of his office over and above the official remuneration;

   (b) solicit or accept any benefit, advantage or promise of future advantage, whether far himself, his immediate family or any business concern or trust with which he is associated from persons who are in, or seek to be in, any contractual or special relationship with government;

   (c) except as may be permitted under the rules applicable to his office, accept any gift, hospitality or concessional travel offered in connection with the discharge of the duties of his office.

The impression should be avoided that any person can improperly influence the officeholder or unduly enjoy his favour.

9. An officeholder should be scrupulous in his use of public property and services, and should not permit their misuse by other persons.

10. An officeholder should not allow the pursuit of his private interest to interfere with the proper discharge of his public duties.

APPENDIX 4

A FRAMEWORK OF ETHICAL PRINCIPLES

FOR MEMBERS AND SENATORS

Department of the Senate Paper no. 10965, presented 21 June 1995

A FRAMEWORK OF ETHICAL PRINCIPLES

FOR MEMBERS AND SENATORS

[DRAFT PROPOSED BY WORK GROUP]

The principles which follow are intended to provide a framework of reference for Members and Senators in the discharge of their responsibilities. They outline the minimum standards of behaviour which the Australian people have a right to expect of their elected representatives. They incorporate some relevant ethical standards which should guide the considerations of Members of Parliament, and which should be a continuing reference point for former Members.

It is by adherence to such principles that Members of Parliament can maintain and strengthen the public's trust and confidence in the integrity of the Parliamentary institution and uphold the dignity of public office.

This framework does not seek to anticipate circumstances or to prescribe behaviour in hypothetical cases. While terms such as "the public interest" or "just cause" are not capable of definition in the abstract, over time, each House will develop a body of interpretation and clarification which has regard to individual cases and contemporary values.

Each House of the Parliament will consider matters which are raised by Members and Senators under the framework and a majority of two thirds of Members of a House will be necessary to resolve a matter.

THE PRINCIPLES

1. **Loyalty to the Nation and Regard for its Laws**

Members and Senators must be loyal to Australia and its people. They must uphold the laws of Australia and ensure that their conduct does not, without just cause as an exercise of freedom of conscience, breach or evade those laws.

2. **Diligence and Economy**

Members and Senators must exercise due diligence, and in performing their official duties to the best of their ability, apply public resources economically and only for the purposes for which they are intended.

3. **Respect for the Dignity and Privacy of Others**

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.

4. **Integrity**

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.

5. **Primacy of the Public Interest**

Members and Senators must base their conduct on a consideration of the public interest, avoid conflict between personal interest and the requirements of public duty, and resolve any conflict, real or apparent, quickly and in favour of the public interest.

6. **Proper Exercise of Influence**

Members and Senators must exercise the influence gained from their public office only to advance the public interest. They must not obtain improperly any property or benefit, whether for themselves or another, or affect improperly any process undertaken by officials or members of the public.

7. **Personal Conduct**

Members and Senators must ensure that their personal conduct is consistent with the dignity and integrity of the Parliament.

8. **Additional Responsibilities of Parliamentary Office Holders**

Members and Senators who hold a Parliamentary office have a duty to exercise their additional responsibilities with strict adherence to these principles. They must have particular regard for the proper exercise of influence and the use of information gained from their duties as Parliamentary office holders. They must also be accountable for their administrative actions and for their conduct insofar as it affects their public duties.

ADDITIONAL GUIDANCE

In individually considering these principles, Members and Senators should also have regard to:

- sections 44 and 45 of the Constitution;
- provisions of the Parliamentary Entitlements Act 1990;
- standing and sessional orders of the House of the Parliament of which they are members;

- resolutions of continuing effect of the House of the Parliament of which they are members;
- decisions and determinations of the relevant Presiding Officer and the appropriate Minister concerning the obligations and entitlements of Members and Senators;
- determinations of the Remuneration Tribunal; and
- section 73A of the Crimes Act 1914.

Interpretation

In this Framework, the term Parliamentary office holder includes Leaders of Parties, Shadow Ministers and Shadow Parliamentary Secretaries, Party Whips, Deputy President of the Senate and Chairman of Committees, Deputy Speaker, Second Deputy Speaker and Chairs of Parliamentary Committees.

APPENDIX 5

THE CHARTER OF POLITICAL HONESTY BILL 2000 [2002]

SCHEDULE 1—GUIDELINES FOR GOVERNMENT ADVERTISING CAMPAIGNS

The following guidelines apply to Government Advertising Campaigns.

1. Campaigns should provide objective, factual and explanatory information.

2. Campaigns should present information in an unbiased and equitable manner.

3. Information presented in campaigns should be based on accurate, verifiable facts and be expressed in conformity with those facts.

4. Campaigns should not contain clauses or statements which cannot be substantiated.

5. Campaigns should present information in a way that makes facts clearly and easily distinguishable from comment, opinion and analysis.

6. If Campaigns contain information of a comparative nature, the information must state the basis of the comparison and must not be misleading.

7. Campaigns should not intentionally promote party-political interests or give rise to a reasonable perception that they promote party-political interests.

8. Campaigns should present information in objective and unbiased language and be free from partisan promotion of government policies or political arguments.

9. Campaigns should not contain any material which directly attacks or seems to scorn the views, policies or actions of others, including the policies and opinions of other political parties.

10. Campaigns should not contain party political slogans or images.

11. Campaigns should include a statement of the Campaign's objective.

12. No expenditure of public money should be undertaken on mass media advertising, telephone canvassing or information services, on-line services, direct mail or other distribution of unsolicited material until the Government has obtained assent to legislation giving it authority to implement the policy, program or service described in the public information or education campaign.

13. The only exception to the requirement in clause (12) is where major issues of public health, public safety or public order may arise at short notice.

APPENDIX 6

THE GOVERNMENT ADVERTISING (OBJECTIVITY, FAIRNESS AND ACCOUNTABILITY) BILL 2000

SCHEDULE 1—PRINCIPLES AND GUIDELINES FOR THE USE OF GOVERNMENT ADVERTISING

1 Material Should Be Relevant to Government Responsibilities

In developing material to be communicated to the public:

1.1 The subject matter should be directly related to the Government's responsibilities;

1.2 An information strategy should be considered as a routine and integral part of policy development and program planning; and

1.3 No campaign should be contemplated without an identified information need by identified recipients based on appropriate market research.

Examples of suitable uses for government advertising include to:

- Inform the public of new, existing or proposed government policies, or policy revisions;
- Provide information on government programs or services or revisions to programs or services to which the public are entitled;
- Disseminate scientific, medical or health and safety information; or
- Provide information on the performance of government to facilitate accountability to the public.

2 Material Should be Presented In An Objective and Fair Manner

2.1 Information campaigns should be directed at the provision of objective, factual and explanatory information. Information should be presented in an unbiased and equitable manner.

2.2 Information should be based on accurate, verifiable facts, carefully and precisely expressed in conformity with those facts. No claim or statement should be made which cannot be substantiated.

2.3 The recipient of the information should always be able to distinguish clearly and easily between facts on the one hand, and comment, opinion and analysis on the other.

2.4 When making a comparison, the material should not mislead the recipient about the situation with which the comparison is made and it should state explicitly the basis for the comparison.

3 Material Should Not Be Liable To Misrepresentation As Party-Political

3.1 Information campaigns should not intentionally promote, or be perceived as promoting, party-political interests. Communication may be perceived as being party-political because of any one of a number of factors, including:

- what was communicated;
- who communicated it;
- why it was communicated;
- what it was meant to do;
- how, when and where it was communicated;
- the environment in which it was communicated; or the effect it had.

3.2 Material should be presented in unbiased and objective language, and in a manner free from partisan promotion of government policy and political argument.

3.3 Material should not directly attack or scorn the views, policies or actions of others such as the policies and opinions of opposition parties or groups.

3.4 Information should avoid party-political slogans or images. This may involve restrictions on the use of ministerial photographs in government publications.

4 Distribution of Sensitive Material Should be Controlled

4.1 Distribution of sensitive, unsolicited material should be carefully controlled. As a general rule, publicity touching on politically controversial issues should not reach members of the public unsolicited except where the information clearly and directly affects their interests. Generally, material may only be issued in response to individual requests, enclosed with replies to related correspondence or sent to organisations or individuals with a known interest in the area.

4.2 Care should be taken to ensure that Government advertising material is not used or reproduced by members of political parties in support of party-political activities without appropriate approval.

4.3 All advertising material and the manner of presentation should comply with relevant law, including broadcasting, media and electoral law.

4.4 Material should be produced and distributed in an economic and relevant manner, with due regard to accountability.

4.5 No information campaign should be undertaken without a justifiable cost/benefit analysis. The cost of the chosen scale and methods of communicating information

must be justifiable in terms of achieving the identified objective(s) for the least practicable expenses. Objectives which have little prospect of being achieved, or which are likely to be achieved only at disproportionate cost, should not be pursued without good reasons.

4.6 Care should be taken to ensure that media placement of government advertising is determined on a needs basis and targeted accordingly and without favour.

4.7 Existing purchasing/procurement policies and procedures for the tendering and commissioning of services and the employment of consultants should be followed.