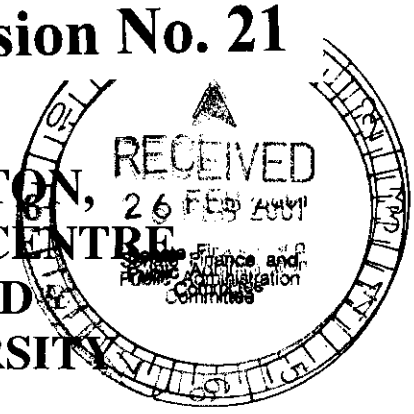
Submission No. 21



SUBMISSION BY DR. NOEL PRESTON, ADJUNCT PROFESSOR IN THE KEY CENTRE FOR ETHICS LAW JUSTICE AND GOVERNANCE, GRIFFITH UNIVERSITY

SUBMISSION TO THE SENATE COMMITTEE INQUIRY INTO BILLS CONCERNING POLITICAL HONESTY AND ACCOUNTABILITY

EXECUTIVE SUMMARY

1. This submission welcomes the Senate Inquiry as a significant step towards formalizing ethics and accountability in the National legislature. The Inquiry canvasses issues that are now central to public confidence in our system of government. Ethics and public trust need to be entwined in ongoing public education and this Committee's work is an essential component of that.

2. However, the submission argues that, while the Bills under examination have valid and important objectives, they should not be accepted without significant amendment.

3. The submission recommends:

(a) that the Auditor of Parliamentary Allowances and Entitlement Bill 2000, be generally supported;

(b) that the Charter of Political Honesty Bill 2000 be amended to provide for:

- a Parliamentary Ethics Committee with the responsibility of drafting a Code of Ethical Standards for Members and to provide for implementation of an education programme, advice to M.P's and investigation of complaints in line with the Code;
- a Parliamentary Ethics Commissioner to work with the Ethics Committee in its various tasks

(c) that the Senate resolves to commend to the Government the establishment of the Office of Ethics Counsellor with functions similar to those operating in the Canadian Government (including the revision of a Minister's Code of Ethics)

4. In conclusion, this submission is developed on the premise that 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 alleged breaches and possible sanctions, the emphasis should be on "exposure" as the major deterring penalty.

5. As I have argued elsewhere:

> *There is widespread expectation that contemporary political practice requires public accountability measures and, in addition, that it is appropriate to develop ways and means which not only enhance the political institutions of democracy but also support legislators to understand and meet the standards of their noble vocation.*
> (Preston 1998: 148-149)

PART A

INTRODUCTION

1. This submission welcomes the Committee's inquiry and the legislative initiatives it is examining as part of a process which, it may be argued, commenced with the Bowen Report, 1979. This process has received more public debate in the past decade because of public concern at the conduct of Members of Parliament with respect to allowances, conflicts of interest, official corruption and duplicity in public office. There is no need to document these deepening levels of public cynicism: recent polls and media analysis provide evidence of that. (Matthews 1997) Whether this evidence represents declining standards of conduct in legislative circles is a moot point. It may not, but it certainly represents a crisis of public confidence in our system of government and a demand for higher ethical standards among public officials.

2. This Part A of the submission will canvass these issues:

- the complexity of ethical questions in the political environment (Section 3)-_
- the idea of institutionalizing ethics in the Parliamentary process (Section 4)
- a brief evaluation of initiatives in other jurisdictions within Australia and overseas (Section 5)

3. The Complexity of ethics in politics (for an elaboration of these ideas see Preston 1996: 153-158)

3.1 It is frequently claimed that ethics and politics are unlikely bed-fellows. Yet the purposes of our political institutions and activity are fundamentally ethical: at the same time, the ethical ambiguity of some political decision-making (referred to in the literature as "the dirty hands dilemma") only serves to emphasize the need for ethical rigor in the pursuit of politics. The view that ethics and politics do not mix is fuelled by the mistaken exaggeration that ethics is a realm of pure principle, unceasingly idealistic, and politics is a realm of pure power, unremittingly pragmatic.

3.2 Obviously, consequentialist considerations are pre-eminent in political ethics but guidelines, rules and principles also have a clear place. Duty to the public interest (over private benefit) is an essential principle in public life; though truth-telling has been ignored by some in practice, in the public-mind truth-telling is essential in public life - certainly, misleading Parliament or causing misleading information to damage a political opponent is unacceptable; it is axiomatic that honesty and consistency in the use of entitlements by M.P's or rigorous application of merit in the appointment of public officials are imperative.

3.3 Nonetheless, any ethics regime applicable to elected officials must be sensitive to, and realistic about, the complex nature of politics. For instance, it must respect the fact that politicians represent diverse interests: an ethic supportive of this role will not ignore this fact but enable M.P's to manage, in the best possible way, conflicting interests and obligations. One of the most difficult areas that any systematic approach to ethics in politics raises is the obligation for elected officials to serve the interests of the political party which they represent while at the same time serving the wider interests demanded of public office. Such ethical conflict surfaced in the vexed question of government advertising. In recent years, the Howard government's advertising regarding the Goods and Services Tax, which received veiled criticism from the Auditor-General, was arguably a serious case where public office was used directly for political party benefit.

3.4 Attempts to regulate, codify and institute ethics measures are complicated by another inevitability: the politicization of ethics.

The likelihood that ethics measures will be used as political weapons underlines the need to support these instruments in statutes that give them a degree of independence and status. There can be no denying that one of the challenging assumptions which a sound program of legislative ethics must make, is that good Parliamentary practice ultimately moves beyond a ruthless and mindless adversarial approval to political practice. Elsewhere I have commented on this tendency to politicize ethics.

The politicization of ethics is deplorable inasmuch as it disables both moral and political judgement. When ethics become yet another political weapon, it loses moral authority. The prospects of politicization are real but the challenge is to pursue the ethics agenda in the faith that it will enhance the political maturity which is an antidote to mindless partisanship among all political stakeholders. Such faith is not without basis, for it is sometimes the case that multi-party ethics committees may adopt a rather non-partisan style.

(Preston 1998: 146-147)

4. The idea of Institutionalizing Ethics in the Parliamentary Process

4.1 The "institutionalizing of ethics" as a general phenomenon (for a further discussion, see Sampford, 1994) may be described as a multi-faceted process. It mainstreams concerns about ethical issues and develops mechanisms for monitoring and encouraging discourse around ethical matters in such a way that this process is integrated into management and organization, accepted by all stakeholders to such an extent that it has continuing impact on the practices and policies of those organizations. Central to the institutionalizing of ethics is the Aristotelian notion that the ethical character of an institution, here legislative democracy, is rooted in and expressive of the fundamental purposes of that institution and practice. In the legislative sphere, the institution of an ethical culture and standards involves a continuing attempt to strike a balance between legitimate yet contradictory ethical, political, legislative and procedural demands.

4.3 The Senate and the House of Representatives have already adopted measures which form part of a systematic approach to accountability (for example, Pecuniary Interests Registers, the scrutiny of an effective Committee system, as well as certain Standing Orders and other Constitutional and Legal Restraints)

The Bills which are the subject of this Senate Committee inquiry reflect further elements of an integrity system" through which ethics and accountability may be institutionalized" in the Australian Parliament

In particular, the Bills add a code of ethical standards, a committee of the Parliament with a brief to develop and implement the code, and independent officers of the Parliament whose function was to advise on the code as well as investigate as appropriate and report to Parliament. In addition, the Bills develop mechanisms for addressing issues such as Parliamentary entitlements, government advertising and appointments, each of which, historically, have contributed to ethical concerns and the erosion of public trust in the political process.

4.4 In the legislative sphere, a comprehensive approach to an ethics regime firstly involves identification of the values central to the institution of Parliament and the role of Parliamentarians. These values may then be presented as the basis for a charter of ethical standards. As a guardian and to provide leadership on behalf of the Parliament, a standing committee of members is necessary for both the development and implementation of this charter or code. On the basis of experience in other jurisdictions, I maintain that the support of an ethics commissioner (or the like) to supplement this process is highly desirable. It is, in my view, important to emphasize that the purpose of all this is educative, preventative and advisory i.e. a support to elected officials, rather than primarily punitive, though the need for sanctions as a final resort remains. Likewise, the fundamental aim is to promote public confidence in the institution of democracy, just as its focus should be directed as much to institutional reform as to ethics violations by individuals.

4.5 A brief comment about codes for M.P's is warranted. For a start, a distinction must be made between an aspirational code of ethics and a detailed code of conduct. As the proposed Queensland Members' Code of Ethical Standards document shows, the detailing of existing guidance for M.P's conduct in conjunction with the aspirational principles is a useful way to develop codes. No doubt the Senate Committee will examine the Reports of the Queensland Ethics and Parliamentary Privileges Committee on a Code for Members as well as, the Reports of the New South Wales legislature's ethics committees. They are an excellent resource.

No extravagant claims should be made about the efficacy of codes. They do not remove ethical problems for individual members or the institutions. They are no more than a means, (not an end in themselves) and a necessary piece in the multi-faceted process. Used properly and educatively they may enhance understanding among M.P's and the public about the ethical exercise of the

role of Parliamentarians. The justification for codes and associated measures is strengthened when it is realised the turnover of legislators is fairly rapid. (I believe the average term served by an M.P. in Australia is about two terms). Moreover, the pluralism and confusion about ethical standards in the culture generally suggests it is appropriate to document guidance which won't otherwise be automatically or informally passed on.

As things stand in our Parliaments, the informal culture shaped as it is by the ethos within major political parties is the dubious teacher of standards and customs within Australia political p5actice. We can do better than this. The reflective process which may be encouraged through codes and associated measures is a worthwhile way forward.

5. Cross-Jurisdictional Comparisons (Note for a detailed account of ethics and law as it affects M.P's in Australia and the Commonwealth see Gerard Carney's recent volume (2000), Members of Parliament: law and ethics, St Leonard's, N.S.W. Prospect Media)

5.1 In Australia, the original drive for independent scrutiny of ethics in government was the Public Integrity Commission suggested within the Bowen Report (1979, paras 12.41-43). The PIC was to be a judicial investigative body with the duty of reporting to Parliament. That recommendation has never been adopted, though several judicial inquires (Fitzgerald, WA Inc, Wood, etc) have had an impact on the debate about parliamentary ethics. In the 1990's, several State Parliaments have examined the possibility of adopting Codes of Ethics.. I have examined this process in detail in a paper, "Confiding Ethical Conduct for Australian Parliamentarians 1990-99" forthcoming in Australian Journal of Political Science, Vol 36, No. 1. In addition most Australian Parliaments now have Registers of Pecuniary Interests; others (notably South Australia) have investigated and adopted measures to control government advertising.

5.2 The international experience is instructive for Australia. Codes have been widely adopted in North America legislatures. Judgements about their efficacy vary considerably. As Harvard scholar Dennis Thompson has argued, to be effective they must be supported by independent ethics advice (Thomson 1995, 159-160). Within the Westminster Parliamentary system, the United Kingdom's development of the Nolan Committee recommendations for a code and a Commissioner for Parliamentary Standards is especially instructive. While, the Canadian national Government's appointment of an Ethics Counselor is also of particular interest, though it must be remembered that the Canadian Ethics Counselor advises Executive Governments, the Cabinet, only. Indeed, to the best of my knowledge, the Canadian Parliament itself is still baulking at the adoption of a Code.

5.3 Within the Australian States there have been two initiatives involving the appointment of ethics advisers. In Queensland an Integrity Commissioner was appointed in 2000, to provide certain ethics advice on conflict of interest to executive government. (I attach a draft of a chapter about the Queensland Integrity Commissioner for your information.) In New South Wales, in 1999

along with the adoption of a Parliamentary Code of Conduct, a part-time ethics counsellor was appointed. The terms of this appointment were much more limited than that envisaged by Dr Meredith Burgmann M.L.C and her Upper House Ethics Committee. It is my view that the N.S.W. position does not represent a good example of how such a position may operate.

5.4 It is noteworthy that none of those initiatives canvassed in 5.1 - 5.3 have dealt explicitly with reforms in the area of Parliamentary allowances. That has generally been a matter dealt with administratively, apart from what might be termed "the integrity system". Senator Faulkner's Bill quite properly raises the possibility of integrating reforms of Parliamentary entitlements procedure with enhanced overall ethical accountability for Parliamentarians.

PART B : THE BILLS

1. Auditor of Parliamentary Allowance and Entitlements Bill, 2000

1.1 One fundamental uncertainty I have regarding the Bill, is whether it is predicated on a system of Members' Entitlements/Allowances which itself needs a major overhaul. Arguably, it is preferable to institute a system (similar to that in certain European parliaments as I understand it) where M.P's were given a lump- sum, global payment sufficient to cover all their allowance needs, (except perhaps for special travel on overseas fact-finding missions). Members are then to be responsible for the management of this amount and accountable to the Tax office and for audit (on a random basis) by the Auditor-General. This argument is that this approach eliminates the temptation to concoct spurious justifications for expenditure and the suspicions which the current system of entitlements provokes. It follows that it may then not be necessary to establish the separate Auditor outlined in Senator Faulkner's Bill. (For an illuminating discussion of the issues surrounding Entitlements I refer the Committee to Dr Michael Macklin's submission to the Queensland Members Ethics and Parliamentary Privileges Committee in its collection of submissions, 13/11/96)

1.2 Nevertheless, while a system of allowances similar to that presently operating in the Australian Parliament remains, public confidence and transparency requires that there is a need for an office with the specific brief (and public visibility) to fulfill the Functions outlines in Division 1 of the Bill. I do not accept the suggestion that these functions may be incorporated in those of the Auditor-General. This special Auditor needs to work closely with Members of Parliament.

1.3. Because it is necessary for this function to have power of investigation and auditing, it must be empowered and established separately from the Ethics Commissioner as envisaged in Senator Murray's Bill.

1.4. On the other hand, the Auditor of Parliamentary Allowances and Entitlements cannot be expected to give general ethics advice (on conflicts of interest for instance) as implied in Senator Faulkner's Second Reading speech when he says: "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". In my view, this cannot be the function of this Auditor, nor is it what the Bill says at 16(h). Advice from this Auditor must be limited to allowances and entitlements issues. The regime suggested in Senator Murray's Bill has separate, independent but complementary merit.

1.5. I believe Senator Faulkner's Bill has a good balance of due process, secrecy and openness. I endorse the proposal for sample audits. Section 39 dealing with "disclosure of information by the auditor "is workable and fair. The limitations on disclosure (39(2) and 39(3)) are necessary and reasonable. Altogether, by comparison with the Queensland Integrity Commissioner (a

different but related office) this proposed legislation achieves a better balance between the public interest and the rights of public officials to certain protections. (An attachment to this submission is my draft chapter on the Queensland Integrity Commissioner for a forthcoming publication,"Motivating Ministerial Morality".)

1.6 Section 8 deals with the appointment of the auditor. As this position is created to assist and monitor the of entitlements and allowances by M.P's across the Parliament, it is highly desirable that the appointment should have the support (across Party lines) of an appropriate Parliamentary Committee.

2. Charter of Political Honesty Bill 2000

2.1 The four objects of this Bill are clearly commendable, although they are potentially so different from each other that it would be better if separate pieces of legislation were drafted. Objects (b) and (c) are so linked that they should be enacted in the one piece of legislation and my comments in this section will be directed to that end.

2.2 The preparation of a Members' Code, the operation of an Ethics Committee and the establishment of a Parliamentary Ethics Commissioner are clearly related. However, I find Senator Murray's Bill is unclear and unsatisfactory on this relationship at several points.

I favour

(a) a separation of the development of and administration of, a Code for Ministers from that for Parliamentarians (though it would be applicable also to Ministers inasmuch as they are Parliamentarians). It follows that the Parliamentary Ethics Commissioner's role with respect to Ministers would also be limited (see 3 below).

(b) clarification of the relationship between the Commissioner and the Ethics Committee. 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 MP's. I suggest that investigations be the prerogative of the Parliamentary Committee assisted by the Commissioner. However, I strongly favour the requirement of a public Annual Report to Parliament by the Commissioner.

(c) amending Section 16 on the Functions of the Commissioner to remove reference to Ministers, reference to investigations and to include the capacity to provide advice to individual MP's (noting there are major questions about the status e.g. confidentiality, of such advice) and to provide for a function of "researching ethics and integrity matters relevant to Parliamentarians".

(d) amending Section 14 on the Function of the Committee to remove reference to Ministers.

2.3. Though there must always be a role for Parliamentary Committees to scrutinize the activity of Government Ministers, 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. Beyond this, I favour a model such as that operating in the national Parliament of Canada where an Ethics Counselor (responsible to the Prime Minister) provides advice on conflict of interest, post-employment issues and other integrity matters. A detailed, public Ministerial Code of Ethics adopted by the Government must be developed alongside this function. In this regard I commend to the Committee the Canadian Conflict of Interest and Post-Employment Code for Public Service Holders 1994. I would add that it is important that the Government Ethics Counselor should provide the Prime Minister with a detailed Annual Report to be tabled in Parliament by the Prime Minister. This device gives the Counselor an appropriate public forum.

2.4 I support the development of a Code of Practice for the making of appointments by Ministers and indeed it could be another aspect of the processes supervised by the Ethics Counselor along with the other functions of advice on Conflicts of Interest and Post-Employment practices.

3 Government Advertising

3.1 Obviously the proposals raised in Senator Murray's Bill and that of Mr Beazley are critical to the ethical reputation of government. However, at this point, I am able only to make the most general comments about the Bills.

3.2. Two aspects of this problem must be recognised for they may be able to be dealt with by separate mechanisms. Those two aspects are: (a) political advertising in election campaigns, (b) general government advertising - I recognise there can be an overlap between the two as in the Howard government's GST promotions. In either aspect, it is unethical and unacceptable for public monies to support party political purposes. The Guidelines at Schedule 1 of the Charter of Political Honesty are therefore to be commended. I would add that in the case of "general government advertising" it should be feasible to implement a process of prior approval by a committee such as that envisaged by Senator Murray's Bill.

3.3 The attempts made in various State jurisdictions to deal with these questions is instructive. They also demonstrate how difficult it is to implement constraints on the misuse of government advertising, I suspect these matters will continue to be contested politically.

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Chapter

Integrity and Ministerial Office: The Queensland Integrity Commissioner

Noel Preston

In contrast to Westminster-derived governments in Canada, Australian federal and state governments have been reluctant to embrace, or even discuss, the idea of a specialised, independent ethics adviser within executive government responsible for providing counsel to Ministers on conflict of interest matters and other ethical concerns. Across the years and across Australian jurisdictions various ad hoc practices, such as consulting senior political colleagues, have been adopted to resolve dilemmas troubling ethically conscientious Ministers of the Crown. More recently, and with debatable results, Prime Minister Howard has delegated to the Head of the Department of Prime Minister and Cabinet the supervision of cabinet rules on ministerial conduct (see Weller's chapter)[i].

Those opposed to further enhancing the ethics infrastructure in government sometimes argue that the number of integrity measures instituted in the past decade or so, such as anti-corruption bodies and public registers of pecuniary interests, is already prolific enough (Hayden,1998), and that, after all, the ultimate accountability of governments is to the ballot box. Moreover, some assert that the over-regulation of political life ignores the morally ambiguous nature of political practice and sets unrealistic standards (see Uhr's chapter). Maintaining the irrelevance or futility of locating an official ethics adviser in government, opponents might cynically quote Machiavelli: *"A man who wishes to profess goodness at all times will come to ruin among so many who are not so good" (*Machiavelli, 1979, chapter xv*).* Alternatively, they might push the plausible view that people who need the services of an ethics adviser to define the difference between right and wrong should not be in charge of government anyway.

Arguably, these objections mask the more fundamental reasons for the reluctance of governments to adopt proposals for an official ethics adviser within government. Those reasons are located in the profound political instinct that ministerial power should be accountable to the fewest number of officials and regulations possible. By and large, the reality is that governments are more inclined to use their numbers to tough out ethical crises than to facilitate ethics reforms. I maintain that the arguments resisting such ethics measures are dubious inasmuch as they misrepresent the capacity of an ethics infrastructure in government, centred on an ethics adviser, to support

Cabinet ministers and enhance better public administration (Burgmann 1998, Kernot,1998, Preston,1998, Thompson,1995, Wilson, 1999, Wilson,1998, Uhr 1999).

Australian practice providing evidence to support the case for institutionalised ethics advice within government, unlike in Canada (see Jackson's chapter), is virtually non-existent (though the New South Wales Parliament has a part-time ethics counsellor for all Members of Parliament (MPs) and, in addition, **legislation was introduced into the Australian Senate in 2000** by the Opposition and minority Australian Democrats for an adviser for MPs – not the government - regarding entitlements and other ethics matters). However, one Australian jurisdiction has recently taken steps which may eventually provide data for testing the view that ethics advice should be institutionalised within government. This chapter describes and analyses this particular, first Australian example, the establishment of an ethics adviser (or Integrity Commissioner) within the **Government of Queensland led by Premier Peter Beattie**. This move is an exception to the Australian trend of reluctance to go down such a road, though, unsurprisingly, there are indicators in its development of the resistance, delay and doubt typical of moves to establish public sector ethics regimes.

Legislating for an Integrity Commissioner

In June 1998, the Australian Labor Party in Queensland led by Peter Beattie included a section in its election policy platform on "Good Government" to differentiate it in terms of ethics and accountability from the **incumbent National Party administration under Premier Rob Borbidge** which was perceived as still vulnerable to the tags of cronyism and unethical practice left over from the Government of Joh Bjelke-Petersen, Premier of Queensland from 1969 to 1988. (Bjelke-Petersen left office under the pressure of a Commission of Inquiry into Possible illegal Activities and associated Police Misconduct chaired by G E (Tony) Fitzgerald QC). Among the several Good Government initiatives promised by Beattie was a policy proposal, without detail, for a Queensland Integrity Commissioner. This was, in part, a response to a submission to the then Opposition based on research into the implementation of Queensland's Public Sector Ethics Act (1994). This research conducted by several academics, including this author, was presented to both sides of Queensland politics. It argued for a range of initiatives to give more substance to the ethics regime under the Public Sector Ethics Act.

Following the Fitzgerald Inquiry Report of 1988, the Queensland Public Sector was transformed by a number of administrative and ethical reforms. These included the adoption of the Public Sector Ethics Act recommended by the Electoral and Administrative Review Commission (EARC) in its 1992 Report on the Review of Codes of Conduct for Public Officials. This Act contains a set of five fundamental ethical obligations for the public sector and requires the development of Codes of Conduct consistent with these obligations by all Queensland public sector agencies. Members of Parliament (including members of Cabinet) were not covered by these Codes. (A Members' Code has still not been adopted by the Legislative Assembly, though a final draft **was presented to Parliament in October 2000** by the Members' Ethics and Parliamentary Privileges Committee, a draft which had been in the making since the Committee was first formed in 1995). The National Party Government of 1988-89 led by Premier Mike Ahern had earlier introduced a Ministerial Code of Ethics. As Members of Parliament, Ministers are also covered by the Register of

Members' Interests, first established by resolution of the House on 19 April 1989. A subsequent proposal from the Members' Ethics and Privileges Parliamentary Committee that there be a more detailed register for Ministers kept with the Premier was rejected by both sides of Queensland politics – a demonstration that reluctance to institutionalising ethics measures in government is often bipartisan.

A couple of months after taking office following the 13 June 1998 election, Premier Beattie sought this author's personal advice as a professional ethics expert to examine his (the Premier's) pecuniary interests as to whether they indicated any potential conflicts of interest. Though this was done privately, Peter Beattie later publicly (and subsequently in Parliament) announced he had taken this action and, as a result, had sold a certain parcel of shares. On 26 May 1999, the Premier introduced the detailed proposal for the Integrity Commissioner in a Bill to amend the Public Sector Ethics Act (1994). Parliament resumed debate on the matter on 11 November, 1999, passing the legislation that day. Two months later, the Department of Premier and Cabinet invited applications for the part-time position to close on 7 February, 2000. On August 21, 2000, more than two years after the Beattie Government assumed office the appointment of the Integrity Commissioner was announced. This followed a second year in office when the Government had found itself in several ethics controversies, **including the so called Net Bet Affair which resulted in the Treasurer, David Hamill, standing aside while his action in approving an Internet Gaming Licence to a company involving certain Labor Party identities was examined by the Auditor-General and the Queensland Criminal Justice Commission. The delay in implementation of the Integrity Commissioner proposal for twenty seven months into the life of the Beattie Government** was partly due to the determination of some in the Cabinet to carefully proscribe the bounds of the role.

The purpose behind the creation of the Queensland Integrity Commissioner, as stated in the legislation (Division 1, Section 25) is to help Ministers and others to avoid conflicts of interest and in so doing to encourage confidence in public institutions. The functions of the Office described in the Public Sector Ethics Amendment Act (1999) are threefold:
*to give advice to designated persons about conflict of interest issues;

*to give advice to the Premier, when the Premier asks, on issues concerning ethics and integrity, including standard-setting for issues concerning ethics and integrity ;

*to contribute to public understanding on these matters by contributing to public discussion of policy and practice relevant to the Integrity Commissioner's functions.
(Div.4,Sec28)

This range of functions clearly moves the purpose of the office beyond mere advice-giving on particular cases of conflicts of interest, although the extent to which the Commissioner can act proactively is dependent on the relationship with, and attitude of, the Premier of the day. The Commissioner's capacity to take initiatives to promote an ethics and integrity agenda within government will also be constrained by the resources provided. The appointment is under the Public Sector Ethics Amendment Act, not the Public Service Act 1996, and is part-time (forty percent) for up to five

years , though initially only for three years. A staff of two persons is proposed, though the Commissioner is also supported by a revamped Ethics and Integrity branch in the Department of Premier and Cabinet. The qualities required by the Act for appointment as Commissioner are "knowledge, experience, personal qualities and standing within the community suitable to the office" (Div.7,Sec 37.2). The person currently appointed is a recently retired Supreme Court Judge, Alan Demack AO.

In his second reading speech of the Bill, the Premier linked this initiative to the range of "pioneering reforms" established by Queensland Labor Governments since the Fitzgerald Inquiry. He emphasised that this is the first such appointment in Australia. His justification for a specialised ethics adviser focussing on conflicts of interest was made in the following terms:
"It can be overwhelming to work through these situations alone. My government believes that a source of voluntary, confidential and expert advice on ethical dilemmas can be a real benefit in resolving potential conflicts before they happen." ***(Hansard,26 May1999:1941)***
In concluding his second reading speech the Premier said he expected the Commissioner would provide "independent and tough-minded advice". The advertisement for the position claimed that the Integrity Commissioner *"will assist in improving standards of integrity and probity in Government and public administration, and thereby make an important contribution to raising community confidence in public institutions".*

As a functionary within, rather than alongside, government and directly responsible to the Premier, the Queensland position is undoubtedly influenced by (rather than modelled on) the Canadian Federal Government's approach with its Ethics Counsellor (see Jackson's chapter). It is not modelled on the Canadian office because its powers are much more restricted. Indeed the Premier did not make an explicit reference to the Canadian role in his second reading parliamentary speech, though Opposition Leader, Rob Borbidge, did. The Opposition, while acknowledging the Integrity Commissioner initiative was a "positive one", did not support the Bill when most of its own amendments were rejected by the Premier.

The range of officials ("designated persons") able to seek advice from the Commissioner on conflicts of interest is considerable (Division 3, Section 27.1). Effectively, they fall into four groupings: first, the Premier, all Ministers, Parliamentary secretaries and those employed in their offices; second, all government members (as well as any Independents appointed by the Government to Parliamentary Committees); third, chief executive officers and certain senior executive officers or equivalents; fourthly, statutory office holders. So, the constituency potentially covers about 5000 persons. It is not simply the ministry, but also those most politically significant in the ranks of executive government. The ethical conduct of others in the bureaucracy is subject to the administration of the Public Sector Ethics Act (1994)

Designated persons are not compelled to seek advice on possible conflicts of interest which advice must take account of relevant codes and standards . The advice is confidential (rather like that of a lawyer's advice to a client). Neither are they compelled to follow the advice which must be sought in writing. An inducement to those wondering whether or not to seek advice is the immunity and protection

provided (Division 6, Section 35.1). Any person taking action in compliance with the Commissioner's advice is not liable in a civil action or an administrative procedure for that action, just as the Commissioner himself is protected (6, 36.). In apparent violation of the principle of transparency, the conflict of interest advice is exempt from Freedom of Information provisions[ii].

The secrecy provisions extend further . They prevent the Commissioner from disclosing the request for advice as well as the advice itself. Only the person in receipt of the advice can disclose it . However, under certain circumstances the Premier may be given a copy of the advice, as too may Ministers and Chief Executives in the case of officials under their authority. In fact the legislation stipulates that other senior officers may only seek advice with the permission of their chief executives. For instance, if the Integrity Commissioner believes an "actual and significant" conflict of interest exists for a designated person and they have failed to resolve the conflict within seven days of receiving the advice, the Commissioner must advise the Premier, providing "natural justice" is observed. That is, the person must be told of the Commissioner's view and that this is a matter to put before the Premier if the conflict is not resolved in seven days.

The nature of the initiative: problems and prospects

Though it has not been explicitly explained by the Government, the use of the title, "Integrity Commissioner", rather than say "Conflict of Interest Commissioner" or "Ethics Counsellor"(for both terms are used in North America), is worthy of note. Arguably, it implies a role wider than the advisory role on conflicts of interest which dominates the legislation setting up the Office. The other functions provided for statutorily, advice to the Premier and the promotion of public understanding on ethics in Government matters, are clearly important components of an integrity agenda.

Another way of understanding this choice of term is by distinguishing between, on the one hand, a negative, "compliance" oriented public sector ethics system, which is legalistic focussing on stopping the unethical by catching the crooked, and , on the other hand, a positive, "integrity" system which is supportive, educative, preventative and promotes the ethical. Obviously the Integrity Commissioner is interested in compliance, but primarily the role emphasises an integrity approach. As the Premier reminded the Parliament when introducing the legislation:
*"The Integrity Commissioner will not, in general, be a watchdog for conflicts of interests. The functions of the Integrity Commissioner do not empower the Commissioner to conduct any independent investigation, decision making or enforcement, as this is currently the role of the Criminal Justice Commission and will remain so."(**Hansard 26 May 1999:1942**)*

It is in its "integrity " orientation that the Queensland office is similar to the Canadian Federal Government's model. Commenting on the relationship between compliance and integrity in government ethics measures, Mr Howie Wilson, the Canadian Ethics Counsellor has observed:
"Our goal is to promote an attitude of integrity and compliance, not beat that cooperation out of people.... Over the past five years, we have seen that if you set a high, principled standard that seeks to prevent even the possibility for conflict, office

holders do rise to it. People come forward with questions because they know they will get advice that should keep them out of trouble....We have avoided the negative fallout of systems that obsess on compliance with rigid rules that never seem to encompass all possible problems. (These are) systems that assume that all public office holders are either crooks or are too dumb to know what is proper, no matter how senior they are, or how much money they make....We have created a system that enables us to address the appearance as well as the reality of a conflict"(Wilson,1999).

Yet, unlike its Queensland cousin, the Canadian process compels ministers to seek advice regarding their pecuniary interests and potential Conflicts of Interest. As well, it requires compliance with clear regulations about post-ministerial employment. The additional functions in the Queensland role, of general advice to the Premier and the promotion of public understanding on ethics in government matters, potentially strengthen the Queensland model, but in terms of its capacity to encourage ethical compliance it is more like a basic sedan than a Rolls Royce.

A key element common to both the Canadian and Queensland positions is that neither report to Parliament but rather to the Prime Minister or Premier. It is argued that this is appropriate, for the functions differ in significant ways from other Offices within their respective Government Integrity Systems such as the Ombudsman, anti-corruption Commissioners or the Auditor-General, each of which report directly to Parliament. Their functions are different: an Auditor-General is entrusted to audit accounts to ensure that Government is using its resources effectively and within the law, likewise the Queensland Criminal Justice Commission is concerned with official misconduct or actions which are allegedly illegal. As an ethics adviser within government, the Integrity Commissioner is dealing with less precise matters, such as the appearance of conflict, matters that go beyond what the law requires. Were the Integrity Commissioner to become too public a player in the political process, he would be seen as an "ethics policeman" and this perception would undermine the confidence of the designated persons in his essential function as adviser. For these reasons it is contended that a reporting obligation to the Premier alone is appropriate. The Annual Report to the Premier provided for in the legislation must not refer to particular cases but to how the integrity and advice-giving system is working overall (Div.7 Sec43,2). There is, of course, no reason why this Annual Report should not be tabled in Parliament or be publicly accessible – unless it is a highly questionable reason based on a government's self-interested need to prevent the Integrity Commissioner from being able to appeal to forums outside government.

Viewed optimistically, the Office provides an enhanced opportunity for the integration and monitoring of how various ethics measures across the Queensland Government are working, especially with respect to Ministers. Furthermore, it provides the opportunity to place these matters on the Premier's desk. Currently, Ministerial conduct is guided by a Ministerial Handbook which covers matters like entitlements and gifts administered through the Ministerial Services Branch, a body which is neither equipped nor mandated to give authoritative advice on the most difficult of ethical issues. As previously mentioned, as Members of Parliament, Ministers are subject to requirements that they lodge their Pecuniary Interests in the Members' Register. Like all Members of Parliament, Ministers have access to advice on ethics and privilege matters from the Parliamentary committee. Ministers will also

be subject to the Code of Ethical Standards when and if it is adopted by Parliament. That Parliamentary Code is potentially an important tool for the Integrity Commissioner with respect to Ministers and government back-benchers though the Members' Ethics and Parliamentary Privileges Committee is likely to be jealous of its jurisdiction in relation to the Integrity Commissioner (MEPP, Report No.44).

Some problems with the proposal will only emerge over time. One that can be anticipated is the issue of "conflicting advice". For instance, in the case of Ministers and other Members of Parliament, the Members' Ethics and Parliamentary Privileges Committee is empowered to give advice on ethical matters. What happens then if the Commissioner gives different advice on a matter ? Of course, no one is compelled to take the Commissioner's advice though, if they do not, they may forfeit the statutory protections.

The Queensland Ministerial Code of Ethics (published in the Ministerial Handbook and a completely different document to the Parliamentary Code) has received little attention in public disputes over Ministerial conduct. Its exhortation to Ministers to observe "high standards in the execution of their public duties" is followed by ten more specific injunctions which range from a restatement of cabinet conventions like collective responsibility and the caretaker conventions, to pecuniary interest responsibilities of disclosure and divestment where appropriate, as well as to "avoid falling under an obligation to those in the hospitality or travel industry". Arguably the Ministerial Code is deficient in several respects; for instance, it is silent about post-employment obligations or potential conflicts with party-political roles facing Ministers. The Ministerial Code is clearly fundamental to the Integrity Commissioner's role, and the Code's deficiencies are arguably important matters for the Commissioner to address. It remains to be seen whether a review of the Code is one of the tasks of the Commissioner's first year in Office.

In terms of its capacity to "motivate ministerial ethics" there are significant problems with the Integrity Commissioner proposal. One problem is that a literal interpretation of the legislation leaves the Commissioner with a merely reactive role, potentially waiting in his office for the phone to ring. The voluntary nature of the relationship between the Commissioner and Ministers (as well as other "designated persons") means that particular Ministers and their colleagues may avoid any engagement with the Commissioner. Obviously the urges of the Premier and strategies adopted by the Integrity Commissioner to win the confidence of designated persons will become important in fostering motivation to seek his assistance. Much will depend then on the individual in the office as to whether, in a part-time capacity, time and energy will be found to promote the agenda potentially associated with the role. At the end of the day, though, the role is bound in the difficulty that as an instrument designed to enhance accountability, it is gravely limited in its capacity to demonstrate the record of accountability publicly.

The secrecy and protection provisions surrounding the advice are presented as means to encourage people to make use of the Commissioner. The downside of those provisions (as also illustrated in Jackson's chapter) is that they may undermine public confidence in the role as the Integrity Commissioner will have no capacity to

comment on any particular case or to assure the public that she is intervening in a particular case. These provisions make the following scenario perfectly feasible: under the privilege of Parliament a Minister may untruthfully announce that he has received XYZ advice from the Commissioner when he has not even approached the Commissioner, and the Integrity Commissioner is powerless to comment publicly. What is more, the Premier may refuse to act on a particular matter drawn to his attention under the terms of the Act, and the Commissioner again has no capacity to raise this directly in the public domain. Unlikely as each of these scenarios may be, the possibility of them (and some other chapters in this book testify to that possibility), when combined with the voluntary and reactive nature of the Commissioner's position, might legitimately undermine public confidence in this office.

Further, the Commissioner's advice itself, if disclosed by the recipient, is likely to be debatable, even controversial, and embroil the Commissioner in a political brawl. The antidote to this problematic situation can only be public belief that the holder of the office is of such integrity that he or she would resign her office in such circumstances. But is this so weak a position as to be implausible? Given such worst case scenarios, is this Office a prisoner of government?

Already the Opposition has predictably decried the Integrity Commissioner proposal as mere window-dressing. Yet a danger for government is that it will raise public expectations regarding solving general ethics in government problems which can't be met. A problem this initiative confronts is to demonstrate to the cynics that it is an initiative of integrity, not a partisan political weapon, though, at the same time, no government can be denied as reason for its actions that it wants to boost its image. To some , a major difficulty with this model is that it excludes Opposition MPs (potential Ministerial office-holders) from the process. These were themes in the Opposition Leader's address to Parliament on 11 November 1999, a fact which is a reminder of how easily ethics issues are politicised (Preston,1998,149-151). The incumbent of this Office faces an ongoing challenge to convince all sides of Queensland politics that this Office is suitably independent and effective. Opposition Leader Borbidge described this challenge colourfully in Parliament:
"*How are we to view the proposed Integrity Commissioner ? Is he or she to be employed to keep the stables clean? Is their job to keep the stable door locked? Is it a job that is there on a stand-by basis so that if the horse bolts, the stable door can be slammed shut straight after the breakout instead of when an event becomes public knowledge? Is it more of a veterinarian's job; one that will provide a handy in house gelding facility? Is it intended that this surgery should be performed as a preventive measure before the fact or as an onsite sanction available to deal with transgressors who have actually bolted through the door and been returned only after a public hue and cry?*"***(Hansard 11 November 1999:4982)**

Conclusion

Because the Queensland Integrity Commissioner has been appointed very recently, this discussion has been limited to a description and critique of the institutional design of this model of ethics advice to Ministers and senior members of government. An analysis of how this model actually operates must await the passage of time.

However, it is interesting to speculate how such a position may have influenced the management of recent ethics crises in government. Arguably it has potential to forestall problems like those confronting the first term Howard Government when a few of its Ministers faced conflicts of interest embarrassments (see Weller's chapter and end-note one) or when the Beattie Government confronted the socalled Net Bet Affair **referred to above**. At the core of the Net Bet Affair was a question of the Minister's judgment with respect to approaches by Labor Party identities including MPs who were in a conflict of interest as shareholders in the successful Internet Gaming company. In these cases, the ethics adviser, on the Queensland model, could only make a difference if the relevant ministers first recognised the conflict of interest issue and took the initiative of seeking advice. Other ethical issues have arisen recently in Queensland where the presence of an Integrity Commissioner would probably have no effect. These are occasions, as when one member of the Cabinet was involved in public fisticuffs with another Labor figure , when it is unlikely that the Premier would listen to the Commissioner to the exclusion of other political considerations. **Another major ethical matter which bedevilled the Beattie Government in late 2000 and early 2001 involved a public inquiry about party members and officials rorting or manipulating internal party pre-selection ballots by falsifying electoral enrolments. In the midst of this damaging public inquiry the Premier was reported as telling journalists that he had not sought advice from the Integrity Commissioner on these questions because they belonged to the jurisdiction of the Criminal Justice Commission notwithstanding the fact that, according to the Public Sector Ethics Amendment Act, the Premier may seek advice from the Integrity Commissioner on "issues involving ethics and integrity".**

Nonetheless, there's scope for ongoing ethical reform arising from the Integrity Commissioner's functions , including the promotion of public understanding of ethics in government, regardless of how seldom Ministers knock on the Commissioner's door; it will not surprise if the contribution of the Integrity Commissioner is only indirectly with Ministers. Despite its problems, the Queensland approach has possibilities, and strengthens the government integrity management system overall. Nonetheless, on the really tough issues of political ethics, when motivating ministerial morality comes into question, the Integrity Commissioner's official integrity will be no stronger than the Premier's integrity. The workability of this model hinges on that relationship.

NOTES:

[i] In the period 1996-99 several Ministers and Parliamentary Secretaries were forced to resign over conflict of interest transgressions of the Ministerial code. However, arguably, the arbitrary administration of these provisions was demonstrated when in 1998 Senator Parer, who was half owner of a coal company was not required to step down as Minister for Resources

[ii] There is a view that the advice to designated persons may be released if the reviewing officer deems it to be " in the public interest", which probably implies "with the agreement of the designated person". It is possible that there may have to be some testing of this question before the courts.

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