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GRIFFITH UNIVERSITY

Submission

to the

Finance & Public Administration

Legislation Committee

Inquiry into Political Honesty and Accountability

Key Centre for Ethics, Law, Justice and Governance (KCELJAG)

Griffith University, Brisbane, Queensland

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1. Introduction

1.1 The Key Centre for Ethics, Law, Justice and Governance (KCELJAG) welcomes this opportunity to contribute to the Finance & Public Administration Legislation Committee's Inquiry. Professor Charles Sampford (Director) and Mr Tom Round (Research Officer and Associate Lecturer) are primarily responsible for this submission. Since 1995 Professor Sampford has been principal legal adviser for the Queensland Parliament's Scrutiny of Legislation Committee.

1.2 We note that Dr Noel Preston and Mr Clem Campbell (former Member for Bundaberg, Queensland Legislative Assembly) have also made submissions to this Committee. Dr Preston and Mr Campbell are both Fellows of KCELJAG, and we endorse the recommendations of their submissions as these relate to areas (the establishment of a separate Parliamentary Ethics Commissioner and of one-line global budgeting for parliamentarians, respectively) in which each has particular expertise.

1.3 The role of this submission is, foremost, to emphasise that in any regime established for raising ethical standards, providing prior advice is greatly preferable to relying on subsequent investigation alone. In addition, this submission comments upon related and incidental matters.

2. Subject-matter of the inquiry

2.1 The Committee has before it four Bills, recently introduced into the Commonwealth Parliament, which seek to regulate two distinct but overlapping matters for the stated purpose of ensuring political honesty and accountability:

1.1.1 ***Electoral advertisements*** – which are commissioned by political parties, are funded privately,[1] and are usually broadcast only during election campaigns periods; and

1.1.2 ***Government advertisements*** – which are commissioned by the executive branch of the Commonwealth Government,[2] are funded publicly from the Commonwealth Treasury, and which are usually broadcast at times *other than* during election campaign periods.

3. Importance of these matters

1.2 Both types of advertising are important to the democratic process because of their potential to affect the heart of the democratic process – the offering of alternative principles, policies and approaches to

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[1] It is true that a substantial percentage of political parties' income now comes from public funding based on votes polled. However it is the very *raison d'être* of such public funding that it is used by each party to promote its own chances and reduce rival parties' votes at elections. Moreover, when such public funds go into the party's coffers they are mixed together, without further distinction, with funds raised privately by membership subscriptions, donations, bequests, and so forth. There is no requirement that the public funds be used only for one purpose – instead, they can be used for any purpose for which the party's privately-raised funds may lawfully be used. By contrast, while it is now common for MPs' letters, etc to carry a disclaimer that they are "not printed at public expense", it is unknown for political parties or private individuals to contribute (voluntarily!) to the cost of government advertising.

[2] The term "government" is often ambiguous in discussions of this kind. It can mean either (1) "governmental" (or "state" or "public"), as distinct from "private"; or (2) the executive branch of a state, as distinct from the legislature or judiciary; or (3) the governing party or coalition, as distinct from Opposition and minor parties. In certain contexts these meanings can diverge sharply: a backbench Liberal Senator is part of "the government" in the first and third senses, but not in the second sense. However, in this submission the term embraces all three meanings unless the context requires otherwise.

government by those who seek to govern and the informed choice among those alternatives by the voters influence how Australians vote.

1.3 However, the two kinds of advertisements arouse different fears:

1.3.1 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. There may be endless argument over the effectiveness of party political advertising. However, party political advertising is *intended* to persuade and if the advertisers choose to employ false and misleading messages, this is because they believe that they will win more votes that way. Where any body parts with valuable and relatively scarce funds to achieve a result, the community must take seriously the possibility that this strategy might be successful. 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.

1.3.2 Government advertising, by contrast, need not be false or misleading to be problematic. It has a legitimate function in providing information on government policies to those who may be affected by them. However, it is capable of abuse if the main effect is to paint the government in a good light. Given that this is public money that is not available to the Opposition this could constitute a particularly unfair advantage and provides a great temptation to any government. It may enable a governing party to entrench itself in power – using the fruits of past electoral victory (ie, control over government resources) to perpetuate future electoral victories it would not have earned had the playing field been level. If the government has introduced popular and effective policies and programs, we would expect

1.4 These relevant differences must be kept in mind when approaching the question of whether, or how, these two areas should be regulated. A "one size fits all" approach might not suit both at once.

4. Can these matters be effectively regulated at all?

1.5 Both areas have traditionally been considered extremely difficult to regulate, especially by means of criminal laws. 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 and in being informed of new laws and policy initiatives by the government, have led many to resign themselves to maintaining a *laissez-faire* approach to these areas for fear we might burn up the wheat along with the tares. Moreover, the same distrust of power that fears governing parties using public funds (or blatant lies) to get themselves re-elected also fears giving unscrupulous governing parties a chance to accomplish the same result using legislative controls over freedom of speech by their opponents. It might be argued that any solution is worse than the problem itself. It might also be argued that the advantages gained by misleading advertising in a vigorous democracy with skeptical media are limited and more or less evenly balanced.

1.6 However, KCELJAG contends that we need not give up on bringing order to these provinces so often ruled by the law of the political jungle. It is both legally possible and politically feasible to enact an integrated ethics regime aimed at raising standards in both these areas.

1.7 Logically, we should first determine what ethical standards (if any) are applicable in these areas. One useful thought-experiment is to ask what answers we might give to a government Minister, or a political party's campaign director, who genuinely seeks our guidance as to how he or she should "do the right thing" – how he or she might make best use, in the interests of everyone concerned, of the powers and resources available to him or her. If no answers come to mind, then the question is solely a matter of taste, like a preference for red over green jelly-beans, and ethics are irrelevant.[3] But if clear answers come to mind, these should be articulated.

1.8 Once we have reached conclusions as to what ideally "the right thing" means, the next question concerns how best to motivate players in the electoral game to do the right thing. This calls for prudence and practical wisdom, since a draconian "shotgun" approach – responding "there ought to be a law" against every imaginable breach of the ethical standards – is rarely successful and usually counter-productive. Indeed, using punishment to compel ethical compliance is often a worse evil than the unethical conduct it seeks to outlaw. There is also the danger that an authority armed with powers of compulsion or punishment might wield (or be accused of wielding) these powers arbitrarily, abusing them with ulterior motives rather than using them to promote the purpose for which such powers were originally granted.

5. Elements of an integrity regime: The "trinity" – ethical standard-setting, legal regulation and institutional reform

5.1 An ethics regime involves not just a list of ethical exhortations, but also includes a number of legal and institutional means designed to realise those standards. KCELJAG has long argued that a "trinity" of coordinated ethical standard-setting, legal regulation and institutional reform are all essential for dealing with undesirable conduct.[4]

5.2 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. But at the same times, legal rules not anchored in the values of the individuals these rules seek to regulate may fail for lack of ethical support. If they appear arbitrary, they may be interpreted and enforced in ways that seek loopholes rather than aiming to give effect to their broader purpose.

5.3 Moreover, even the best-coordinated set of mutually-reinforcing ethical and legal norms may be undermined if those who are supposed to be guided by those norms are working in unsupportive institutions, where they are faced with conflicting demands or with temptations to act unethically. Standards need to be built into the process as a whole, into the organisational and management structures of the organisations to which they apply. In this case, these refer to the government advertising approval process and to the political parties and Australian Electoral Commission respectively.

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[3] Even then, ethics could conceivably be a factor in our decisions – if, say, green (but not red) jelly-beans were carcinogenic, or manufactured by sweatshop labour.

[4] See Charles Sampford and David Wood, "The Future of Business Ethics: Legal Regulation, Ethical Standard-Setting and Institutional Design," in Charles Sampford and AJ Coady (eds) *Ethics, Law and Business* Federation Press Sydney, 1993.

6. Why have regulation at all?

6.1 This submission argues that certain constraints are, first, *justifiable* in principle and, moreover, *workable* in practice. However this would not be universally agreed. Objections will probably be raised that there is no point enacting legal constraints in so political an area, for two reasons. First, there is no impartial arbiter, whose decisions will be respected, available to enforce such constraints. Second, that in relation to political matters of this kind, governments and political parties are responsible at the ballot-box anyway.

6.2 The first objection has some merit. The very nature of politics involves disagreement, among large numbers of citizens, about long-term matters of principle. We might disagree over whether a verdict in a high-profile court case was correct while being happy to accept the jury's interpretation of the facts and the judge's interpretation of the law, since the decision does not impact directly on our lives or on our pre-existing moral convictions. But electoral processes and results are different. In the recent controversy following the November 2000 US Presidential election, almost without exception, liberal scholars supported legal interpretations that would have favoured Al Gore while conservatives wanted to construe the same laws in ways that helped elect George W Bush. Claims by the Florida State Supreme Court and the US Supreme Court that they were merely discovering the meaning of previously-enacted legal texts did not satisfy partisans of either side who noted that most individual judges' interpretations matched their general ideological predispositions.[5]

6.3 One possible solution is to have a completely non-enforceable code, without a designated arbiter. It would function as a kind of "Memorandum of Understanding" among the political parties, and it would be "enforced", if that's the word, in two ways: by crying foul, and by reprisal. The value of such an "MOU" should not be dismissed entirely. Efforts to shame a party for breaching its previous promises might cost it swinging votes in a close election. And the "we won't if you won't" factor is a powerful force in *preventing* unethical conduct from breaking out: no major contender wants to let the genie out of the bottle because a free-for-all would result in which each would lose more than it would gain.[6]

6.4 However the effectiveness of a "knitted wall-motto" code of conduct has limitations, especially when its requirements are vague.

6.5 Obviously some political parties and governments (who, we can safely assume, are not stupid, even if many voters suspect they are self-serving or out of touch) believe there is value in political advertising – especially when this can be had with the seemingly objective imprimatur, and the public funding, of the Commonwealth government rather than of one political party (even when one party is the "hand" that moves the legislative "glove").

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5 Which in turn usually – though not inevitably – matched the ideological colour of the President or Governor who appointed each judge.

6 This is one reason why most Australian jurisdictions use a system of compulsory, full-preferential voting in single-member electorates without this being constitutionally entrenched. Neither Labor nor the Coalition sees any long-term advantage in introducing voluntary, first-past-the-post or proportional voting.

6.6 There is, however, an intermediate option that is neither "open slather" nor involving criminalising "unethical campaigning". This involves a specified code with a credible designated credible and independent interpreter who, however, has no power to impose any penalties. In the case of government advertising, prior approval would be required for the expenditure of public monies on government advertising. In the case of electoral advertising, the arbiter would be able to provide pre-clearance or, if that were not sought, subsequent comment on the veracity of claims.

6.7 It might be argued that, if the standards set are widely accepted, they are not going to be violated anyway since any breach would attract swift electoral retaliation. By their very nature, and unlike other forms of unethical behaviour, both governmental advertising and electoral campaigning are highly visible to the electorate.[7] If the sovereign voters choose to reject candidates because (wholly or partly) of their perceived unethical campaigning methods, that is the voters' prerogative; if the voters decide however to re-elect candidates of a party that has engaged in such advertising, that is also their prerogative and it would be undemocratic for the courts or other unelected authorities to penalise that which the voters have impliedly ratified. (This point applies equally to government advertising and to electoral campaigning.)

6.8 However there are two replies to this objection. The first is that electoral "ratification" may carry little legitimacy if it is procured using unethical means. Just because the voters can and will punish clumsy, ham-fisted attempts at political manipulation does not mean that more subtle tactics cannot succeed.

6.9 The effectiveness of electoral sanctions alone must be questioned in cases where a sufficiently skilled and unscrupulous breach of the relevant ethical standards can enable the culprits to "bootstrap" themselves back into office. The assumption that biased government advertising is always clumsily obvious, and therefore fails, need not always hold true. In the case of casinos we have recently seen how factually accurate information – pictures of happy people enjoying themselves and winning money on poker machines, say – can be distorted to give a completely misleading impression. Populists who dismiss as "elitism" any suggestion that voters' ballots might reflect anything other than their carefully deliberate judgements belie this when they complain, for example, that Electoral Commission advertisements depicting "waves of change", or news media prematurely declaring one candidate the victor based on early returns, may distort the result of a constitutional referendum (Australia, 1988)[8] or a US Presidential election (Florida, 2000).[9] We are not saying that voters are incompetent generally – only that, if they can be misled for a few days while making their voting decisions, they are bound by that decision for the next three or four years.

6.10 The argument that the voters will recognise the deception and either be unaffected by it or respond negatively suffers from a structural flaw. It assumes that those seeking to engage in misleading and deceptive advertising are irrational, that they are spending scarce resources in an activity that is doomed to failure. In fact, they will only engage in such advertising if they believe that they are going

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7 With the exception of use of rumours as a campaign tactic. It is difficult to see how to legislate against rumours: the only consolation is that if spread to enough individuals to swing a typical election, they will usually attract a lawsuit for defamation.

8 See *Boland v Hughes* (1988) 83 ALR 673.

9 "Had the networks not called Florida early that night, [Gore] wouldn't have won the popular vote ... and I think Bush would be above 300 Electoral votes" – Newt Gingrich (5 December 2000); "... the networks' early call of Florida for Gore depressed as many as 10,000 Bush votes in the Florida panhandle ..." – Todd Gaziano, "The Legal Endgame", *National Review* (17 November 2000). We quote these, not to endorse the factual (or rather counter-factual) claims but to indicate the widespread view of the effectiveness of the media in achieving such influences.

to succeed in the deception. While they may often be wrong about their capacity to deceive, it is drawing too long a bow to suggest that they will always or even generally fail. It is a reasonable precaution to examine institutional arrangements that will take into account the possibility that they have rational beliefs in the potential effectiveness of their own deception.

6.11 The second reply is that ethics-enforcing laws can also be justified for the sake of protecting *voters who support the governing party itself*. I may well want a government from my own side of politics to observe the highest ethical standards for a number of reasons – not least to send a message to the community. As US Supreme Court Justice Louis Brandeis noted: "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example".[10] Advertising campaigns urging citizens to avoid drink-driving, littering or smoking will be received with more than the usual cynicism, and represent a waste of money, if they are announced to be *"Authorised By"* Ministers who are themselves known to ignore ethical standards when they can get away with it.

6.12 We can safely assume that few if any voters will want to re-elect a particular party or coalition *because* it has used public funds to favour its own re-election. Rather, they will want to re-elect it based on its use of public power and funds for the public benefit, not for its own private use. Far more often voters will be faced with the problem of "holding their nose" to re-elect a party that has bent the rules of fair play, enough to warrant some punishment but not enough to warrant being consigned to opposition for three or four years (especially if the Opposition party itself does not inspire great confidence). They will want to vote for their preferred party *in spite of* its attempts, if any, to bend the ethical rules. Assuming a minimum level of ethical consensus in the Australian community, ethics-enforcing laws do not dilute but rather enhance their voting power.

6.13 It might be otherwise if a legislated ethical code sought to enforce restrictions that did not enjoy such a level of broad consensus but had an ideological bias. For example, a code that declared it the obligation of every candidate to "actively endorse, support and participate in" Sydney's Gay & Lesbian Mardi Gras would be seen by many as discriminating against One Nation and National/Country (and some Liberal and Labor) candidates. Likewise, an ethical norm along the lines of the House of Commons' 1957 resolution, which declared it "inconsistent with the duty of a Member to his [*sic*] constituents [...] to enter into any contractual agreement with an outside body, controlling and limiting the Member's complete independence and freedom of action in Parliament"[11] might be resented by the Labor Party as illegitimatising its particular insistence on caucus solidarity, and privileging the conservative parties' traditional preference for the Burkean view of parliamentary representatives as "trustees" rather than "delegates" of their constituents.

6.14 Two solutions may defuse this problem of ideological bias. The first is to take care, when drafting an ethical code, to avoid ideological or party-political points of dispute where possible. The criterion should be to prohibit only those kinds of behaviour that alienate (eg) Labor voters from Labor MPs, not Labor voters from Liberal, National, Green, Democrat or One Nation voters. It is likely that the same types of behaviour that Labor voters find unacceptable in Labor parliamentarians are very similar to those that National Party voters also find unacceptable in National Party politicians.

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10 *Olmstead v United States* 277 US 438 (1928), Brandeis J dissenting at p 475.

6.15 The second solution might perhaps include a "let-out" clause which states that a parliamentarian or candidate is not deemed to breach the code by acting in a manner that both (i) is lawful and (ii) is explicitly authorised or required by the Constitution of his or her political party, even if such actions would breach the non-enforceable clauses of the code. Complying with one's party's Constitution (assuming this to be a public document of which voters can take notice) should be sufficient to excuse purely ethical breaches, unless these involve law-breaking. We can assume that public opinion will deter any political party from explicitly writing into its Constitution that its MPs and candidates may lie and cheat whenever they see fit!

6.16 This is not to deny the importance of electoral rather than judicial or quasi-judicial mechanisms as the most appropriate forum for resolving disputes between incommensurable value-judgements. However, strongly-worded ethical standards, if framed rightly, are *not* matters on which there is widespread disagreement within the Australian community – at least at the level of legislating about abstract future hypotheticals. No political party will ever go into an election on a platform of amending the law to legalise party-political government advertising from public funds. Instead, most disputes arise after the fact and centre on whether a particular breach is a "hanging offence" or not.[12] And once different players are "locked in" by their previous decisions, and it is known whose ox will be gored by a strict or a lax interpretation of the standard, party-political allegiance generally takes priority.

6.17 No one would argue that, say, Ministers or other MPs who commit thefts or sexual assaults should be immune from criminal prosecution because if the voters disapprove of these actions, they can vote them out at the next election. The voters have already made it clear that they regard theft and sexual assault as unacceptable – so unacceptable that these offences usually deserve imprisonment. Removing the matter from the ballot-box to the courts removes any temptation for political parties to try to "bluff" their voters by re-endorsing a criminal as a candidate and leaving many of their supporters with no "clean-skin" candidate representing their favoured party whom they may vote for.

6.18 On balance, we submit that a certain degree of legal regulation is warranted. However it must be applied with caution – especially when voting and election results may be affected. In these matters, *too much* regulation and *too little* regulation are both equally fatal in undermining "the free expression of the will of the electors".[13] If candidates could simply bribe or intimidate voters into supporting them, without any judicial redress, the result would not represent the consent of the people in any meaningful sense. But the same would be true if judges could disqualify victorious candidates for trifling "offences" (by deeming the slogan *"There is no alternative!"* to be "intimidation", for example, or a classifying a promise of lower petrol taxes as "bribery") which do not compromise the validity of the votes given to those candidates.

7. Prior advice is better than subsequent investigation

7.1 Ethics reforms are usually "scandal-driven". If no flagrant abuses have been committed (or exposed) for a long time, there is little public pressure to institute safeguards against future abuses. Objectors will say "if it ain't broke, don't fix it" or, more rationally, that it's futile to try to legislate against

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11 *Hansard* No 440 (July 1947), column 284; quoted in Dorothy M Pickles, *Democracy* (London, Methuen, 1971), p 120.

12 Emma MacDonald, "No 'hanging offence', says PM as Reith admits breach", *Canberra Times* (11 October 2000).

13 *International Covenant on Civil and Political Rights* (1966), Article 25(b).

future forms of conduct whose details we can't foresee.

7.2 However, once the horse does bolt there will be vocal demands for the gate to be shut (indeed, welded shut) and angry calls for the heads of those who left the gate open in the first place. The problem with this is that subsequent investigation of an alleged ethical lapse wastes time and energy, and rarely produces consensus because each side knows who will benefit or lose from an admission or ruling either way.

7.3 See Professor Sampford's recent chapter "Prior Advice is Better than Subsequent Investigation" *[attached]*, which sets out in detail the arguments in favour of institutionalising an authoritative source of prior advice, and of separating this function from the function of subsequently investigating and ruling upon alleged breaches.

7.4 This covers arguments as to why ethics regimes should give primary emphasis to the provision of prior advice with an integrity commissioner similar to that originally conceived for Canada and developed in Queensland. This provides support for the submission by Dr Noel Preston.

7.5 The question arises as to how to apply this principle to the two areas of government and electoral advertisements. (The comments below are relevant whether or not the proposal to outlaw "false and misleading" electoral advertisements is adopted. Even if the narrower level of prohibition found in *Evans v Crichton-Browne* or *Langer v AEC* is retained – that it remains illegal to induce people to mark their ballots in a way that renders their ballots informal or that misrepresent their actual preferences – the Parliament will have to decide on procedures for screening out such unlawful advertisements.)

7.6 **For government advertising**, the answer is fairly straightforward. There should be a form of pre-clearance for government advertising, especially if a "fast-track" or expedited procedure is available in cases of genuine and demonstrable emergency (for example, a health warning or a dangerous product recall) – these latter cases will be so rare they can easily be accommodated.

7.7 **Electoral advertising** is not so easy for two reasons:

1.1.1 First, the time-frame is much shorter: *all* material for which pre-clearance is sought is produced with only a few days' notice, and it would be harder to find a principled rationale for giving a later one priority in the "queue" over another. The very speed of election campaigns means that a delay of a few days, which the arbiters might require in good faith to gather and consider evidence and arguments (eg, as to whether a campaign statement is false or misleading), could also be used in bad faith to advantage one political party over another.

1.1.2 Second, electoral (unlike government) advertising is overtly adversarial. Political parties would be unwilling to give their opponents a "sneak preview" of their campaign strategy. Even if the members of the adjudicating authority are sworn to confidentiality over draft material submitted to them, this would rely greatly on trust and, in the heat of an election campaign, this trust could quickly erode.

7.8 It might therefore be advisable to lay down ground rules like the following:

1.1.3 A committee should be established in the same way as the government advertising committee. It should be able to provide pre-clearance. If pre-clearance is not sought, the same or another similarly constituted committee could examine objections to the veracity of the advertisement and publish its own independent opinion on the veracity of the claims. There would be no ban on the advertisement. However, the views of an independent, credible committee would be a serious blow to the advertisement's credibility. Indeed, the story would be about the adverse judgement, not the message in the advertisement. For these reasons, it would be in the interests of parties seeking to place advertisements to seek pre-clearance. The sanction for not doing so 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.

1.1.4 If an advertisement were pre-cleared, there would be no subsequent consideration of objections to the advertisement by the electoral advertising committee.

1.1.5 General principle would suggest that the pre-clearance committee would be different from the committee that considered objections – separating out advice and investigation functions.

1.1.6 Delays in clearing advertisements should work in favour of, not against, those seeking pre-clearance. The rule could be established that if, say, the adjudicating body has not rejected a proposed advertisement within 24 hours of submission, it is deemed cleared. As recommended above, this should not prevent an advertisement's clearance being subsequently revoked but it would give the author personal immunity from legal liability and out of pocket expenses if this occurs. The adjudicating body could be authorised to give itself an extension of up to, say, another 24 hours provided it notifies this before the first 24 hours expire.

1.1.7 Generally, it is good that the decision-making process should encourage objections to be aired at the earliest stage. This is important given that production of published and (especially) broadcast electoral advertising is very expensive. Moreover, the adjudicating authority might not pick up on unethical innuendoes conveyed by draft material shown to it unless opposing parties are there to point out their objections.

1.1.8 There are two solutions to this. One is to rely on the selection process in which both sides will want to ensure that those selected are likely to have a nose for problems. The other is to include a formal process for hearing objections. The time-frame could be tight; the legislation could set a period as short as 12 hours during which any duly-nominated candidate could ask for a hearing or put in an objection.

1.1.9 One objection is that political opponents could design response advertisements. This can be easily met by a requirement that any response to an advertisement that sough pre-clearance would have to be submitted to the same process. This would impose a 24-hour delay on the response so that the actual time between the release of the first advertisement and the release of the response would be the same as the currently unregulated environment.

1.1.10 The other concern is that the original advertisement and the objections to it would be aired before the committee met. If the objection were not sustained, the sting might be taken out of the objection and the apparent imprimatur of the committee would reinforce the message that the original advertisement was intended to create. One solution might be to attempt to enforce confidentiality on the parties concerned, or, more effectively, on the media not to report draft advertisements and objections. It is not clear that either would be workable and it may be best to rely on the judgement of the committee. This is not, and could not be, a finely-tuned process. The idea is to discourage some of the most objectionably misleading advertisements.

7.9 It must be remembered that the pre-clearance process, as proposed here, would be voluntary (although compliance with the legislated standards of electoral honesty would and should be compulsory). If a party distrusts the process, that party is free to abstain from the process and take its chances subsequently with the courts if it is prosecuted for publishing an advertisement that breaches the standards laid down.

8. Appropriate ethical standards for electoral advertising

8.1 So far this submission has argued that it is not futile in principle to set out agreed standards of ethical conduct, to specify who shall interpret these standards, and even to provide rewards and penalties to encourage compliance with these standards. The next question is to apply these principles in the concrete – to ask exactly what the applicable ethical standards might be, and what the appropriate level of enforcement might be for each. It is recognised that electoral advertising and Government advertising should be treated separately.

8.2 The best way to map out the appropriate ethical standards for any process or institution is to start from first principles rather than uncritically codifying existing practice. These first principles in particular involve the question of how that institution or process might justify itself. In this case, the question is: what is the purpose of electoral advertising? How is it supposed to benefit the community it serves – ie, the electorate?

8.3 Electoral advertising can be justified as a way of informing voters about political issues, and helping them to form their judgement in the quintessential democratic process – elections. Some societies, like Thailand, sharply restrict electoral campaigning in the interests of eradicating corruption,[14] while others are so small in area and population that their candidates can rely on personal contacts rather than mass-media campaigns. Australia, however, is so geographically dispersed that parties need television, radio and newspapers to reach all electorates. For many years, the United Kingdom has regulated the form in which such "advertising" is provided on TV, requiring the provision of free time to major parties in blocks of five minutes or more. This militates against the "sound-bite" advertisement and encourages the provision of more substance (without ever guaranteeing it).

8.4 However, regulation of electoral advertising – especially regulation of the time, place or manner in which it is presented, without restricting its substantive content – is also ethically justifiable, for two reasons.[15] First, electoral advertising is both intended and likely to influence how votes are cast in

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[14] Bruce Cheesman, "Election Commission gets tough on Thai poll", *Australian Financial Review* (14 November 2000).

[15] "Given ... possible shortcomings in the political process, it may well be that some restrictions on the broadcasting of political

parliamentary elections: it is the whole point of expending scarce financial resources. On it ride not only the distribution of political power but also the protection of many civil liberties (under a Constitution that entrusts the definition of rights largely to parliaments instead of courts, as in the USA). Second, electoral advertising is focused on a relatively short time-frame (usually 4 or 5 weeks), culminating in a sudden cut-off – the close of polls on Election Day. As far as political debate is concerned, a few dozen days are more crucial than the following three or four years. If a party can use unscrupulous methods to mislead voters, its opponents have only a short deadline to respond – and if they respond too late, no matter how convincingly, the whole question is moot for another parliamentary term (at which debate will focus more on future plans than on punishing sharp practice at the preceding poll).

8.5 Although regulation of electoral advertising is constitutionally valid and morally justifiable, certain types of restrictions might not be politically or legislatively prudent. In particular, attempts to prohibit "inaccurate or misleading" electoral statements might backfire. The *Commonwealth Electoral Act 1918* used to contain a similar prohibition, but Federal Parliament repealed this in 1983-84, with little political opposition, because it was considered too difficult to enforce.

8.6 Section 161(e) of the *Electoral Act* formerly outlawed material likely to "mislead an elector in the casting of his vote". Taken literally, this could plausibly outlaw a later-broken campaign promise such as *"Read my lips, no new taxes"* or *"By 1990 no Australian child will be living in poverty"*. But the High Court construed this clause very narrowly to mean only statements that would mislead voters in the physical act of recording a vote on their ballot-paper.[16] It did not cover statements that affect how citizens form their voting intentions – only how citizens indicate these voting intentions at the polls. Thus s 161(e) was interpreted to outlaw only statements that would render a person's ballot *invalid* (*"Put X's next to three Senate candidates' names"* or *"Put a 5 for the candidate you like most, which gives him or her five points, then a 4 to give four points to your second-choice candidate, and so on down to only one point for the candidate you like least"*) – not statements that could render a person's ballot *regretted* by that voter (*"I believed the Government when they said the Opposition would execute all blue-eyed babies if elected to govern, but now I realise that was a lie so I wish I'd voted for the Opposition after all"*).

8.7 The problem is that most statements which voters consider "lies" are not really misrepresentations of fact but of future intention. In *Evans*, an Australian Democrat Senate candidate sued Liberal Senator Noel Crichton-Browne for claiming "a vote for the Democrats is really a vote for Labor" and that the Democrats would support Labor's plans for a capital gains tax. But voters 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 judgment is too subjective. Moreover, such an allegation 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* (ie, 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*

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advertisements ... could be justified, notwithstanding that the impact of the restrictions would be to impair freedom of communication to some extent." – *Australian Capital Television (ACTV) v Commonwealth (No 2)* (1992) 177 CLR 106, per Mason CJ, concurring.

16 *Evans v Crichton-Browne* (1980) 147 CLR 169 at pp 207-08.

really have won because the Government was lying when it claimed the Opposition planned to execute all blue-eyed babies".[17]

8.8 These are arguments against legal regulation leading to formal prosecution, which can only effectively take place after the completion of the election campaign and the damage, if any, is already done – and virtually impossible to undo! However, this does not rule out the kind of response envisaged here. The pre-clearance committee could indicate what it considered to be a misrepresentation. The objections committee could likewise tailor its response. It could say that there is no evidence of the planned execution of blue-eyed babies – or of plans to cut hospital funding.

8.9 We are not going to set out what we believe the standards should be – merely the process for establishing them. This is consistent with our views on codes for all groups of practitioners. It is not for "visiting firemen" (even those from ethics institutes!) to create ethical codes for others. All that research centres like ours can do is to suggest, and possibly assist in, the process. The standards should be set in advance by a bipartisan group of political practitioners, probably supplemented by outsiders chosen by the that bipartisan group. The ethics and privileges committee is suggested although there are other possibilities.

9. Appropriate ethical standards for Government advertising

9.1 Government advertising, too, has a clear *prima facie* ethical rationale. Governments make laws and other policy decisions that affect people's lives. Most laws operate by communicating to citizens that if they act in certain ways, they will be individually rewarded or penalised. And voters in turn can hold the government accountable – collectively rewarding or penalising the government for acting in certain ways – only if they know what the government has been doing. As a result, citizens have a clear interest in being informed of their governments' actions, even if this is funded by their tax dollars.

9.2 But at the same time, government advertising also offers strong temptations for abuse. Like other actions of the executive branch of government, it is normally authorised and approved (or at least subject to veto) by Ministers. Yet Ministers are also parliamentary candidates representing a particular political party; they 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" that distorts, or even short-circuits, the electoral responsibility on which parliamentary democracy depends. 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.[18] So "quarantining" public funds from party-political use is essential to ensure a reasonably equal electoral contest.[19] And even apart from the undue advantage such advertising gives one party, it

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17 As shown by Americans' non-interest in the Florida hand recount: George W Bush has already been legally inaugurated as President, so finding that Gore won more Florida votes would be purely academic.

18 And the less electoral success that Opposition parties have, the less likely they are to attract donations from corporations who expect access to Ministerial decision-making in return.

19 Of course parties may well attract greatly differing amounts in private funding. But this will only be exacerbated, not redressed, if millions in public funds can effectively be added to one party's coffers as well.

is likely that its genuine informational value is inversely proportional to its propaganda value, making it at best a waste of public funds.

9.3 Again, the above analysis is not controversial in principle, but applying it in practice would face two objections: (i) By which precise criteria can we discern legitimate from improper Government advertising? (ii) Who has the last word in adjudicating these criteria?

9.4 We could conceivably avoid the first question by laying down, in answer to the second, that all government advertising whatsoever must be approved by (say) a two-thirds or three-fourths majority of both Houses of Parliament, or by agreement among the Prime Minister, Opposition Leader and any independent or minor-party Senators. Then there would be no need for criteria other than "whatever does not offend any political party represented in Parliament." However, this over-corrects the flaws of majority rule by substituting minority rule.[20] Given that laws are enacted by a majority of Parliament, a set-up like this could enable an unscrupulous Opposition to undermine the effectiveness of a policy whose enactment it lacked to parliamentary numbers to defeat. (These objections do not apply, of course, to giving Opposition, minor-party and independent parliamentarians a right to be *consulted* by Government Ministers, or to lodge objections.) A better remedy would be to set up some neutral arbiter.

9.5 Once an arbiter is established, though, it is necessary that it be given criteria to work with so that its decisions can be accepted, even by those whom it rules against, as representing the application of the criteria rather than the arbiter's own personal prejudices.

9.6 Obviously we would consider it improper for the Government to fund advertisements that tell voters (eg) *"Under our predecessors, unemployment was X per cent and inflation was Y per cent. Now both are halved. Australia – We're open for business again"*. But something that blatantly political would probably never get authorised in the first place, and would be easily spotted by most voters if it were broadcast. A greater danger is advertising that has some fig-leaf of a "public interest" rationale, enough to fool voters who do not subject it to closer examination.

9.7 The following criteria are offered for consideration:

1.1.11 Public funds must not be spent to persuade or influence voters to support or oppose a particular candidate, political party, policy, or proposed law.

1.1.12 Public funds must not be spent on any public advertising concerning a particular policy –

(a) before that policy has been enacted into law by Parliament – unless such advertising gives equal weight to arguments for and against that policy.

(b) after that policy has been enacted into law by Parliament – unless such advertising either –

- encourages people to comply with that law *(Example: a campaign against drink-driving)*; or

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20 It would also be unfair to parties with no seats in Parliament, and would fuel suspicions (held by many One Nation Party supporters, for example) that the established parties are "ganging up" against newcomers who challenge their hegemony.

- offers people useful information that will assist them in complying with, or benefiting from, that law *(Example: advertising for some new rebate or benefit that can be claimed).*

9.8 It will be noted that under these criteria, it is not enough that an advertising campaign gives the citizenry *some* kind of information about a newly-legislated policy. If, say, an advertisement merely announces that the policy will take effect from a certain day, or makes unsubstantiated assertions that it will in some way be good for people, it is hard to see how this benefits voters enough to justify spending millions of their tax dollars on it.[21] Clearly, after a policy is enacted there is a legitimate goal of educating the public about it (and to maximise compliance with the new law), but even so this must not unfairly interfere with the public's right and duty to decide, at *future* elections, whether the policy should be repealed and/or the government dismissed for introducing it.

9.9 Two proposed clarifications of these criteria:

1.1.13 The law need not yet have been proclaimed or taken effect, but no public funds can be spent for the "educative" purpose until policy has actually been translated into law.

1.1.14 "Used to" means either (i) used for the express and desired purpose of producing that result, or (ii) having no other reasonably plausible and lawful purpose other than to produce that result.

9.10 The audience for the advertising is a relevant factor. Government advertisements that are designed to attract tourists, students or investors to the country, rather than voters to the governing party, do not raise the same concerns about parties entrenching themselves in power at taxpayers' expense. Thus a greater degree of positive "spin" would be legitimate if the advertisements are broadcast outside Australia and not likely to be viewed by any substantial number of Australian voters. Nevertheless, a regime that required government advertisements to be honest in Australia but not outside of it would generate ridicule that would undermine the advertisements off-shore so that it would be better to set the same requirements for both. It might even enhance the credibility of the advertisements and thereby increase their effectiveness.

9.11 This does raise questions of "overlap". An advertisement broadcast in Jakarta may reach millions of Indonesians and also a few thousand Australians in Darwin, and even if it well out of range of Australia the advertisement might still reach enrolled Australian expatriates – much more so in Bali, or in London's "Kangaroo Valley", say, than in Iraq or Zimbabwe. Perhaps the adjudicating body should apply a litmus test of whether the number of Australians receiving such advertisements is "insignificant" compared to the number of non-Australians in the audience.

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21 Readers can form their own judgements as to how far the Commonwealth Government's pro-GST advertising campaign – whether the pre-1998 election advertisements, or the post-election *"Unchain My Heart"* commercials – would have squared with these criteria, and whether any divergence reflects more adversely on the criteria or on the advertisements.

10. Application of the above principles to the four Bills

(a) *Government Advertising (Objectivity, Fairness and Accountability) Bill 2000* (Mr Beazley)

> ***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;

10.1 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.

10.2 It is unclear what particular harms or evils this clause is meant to prevent. Would it prevent the Commonwealth Government from running an advertising program relating to a matter that constitutionally falls within the residual legislative powers of the States – for example, advertisements against drink-driving?

> 1.2 An information strategy should be co nsidered as a routine and integral part of policy development and program planning;

10.3 This clause illustrates one matter of general concern with the way that this Bill is framed. Although it is undoubtedly desirable as a matter of good administration that a coherent information strategy should be developed, is it so ethically indispensable (and failure to comply so inexcusable) that a Minister or Commonwealth officer should risk imprisonment for failing to institute (or "consider") such a strategy? The verb "should" (as opposed to the "shall" or "must" more traditionally used in legislative drafting) seems to indicate that it is directory or hortatory only, so that a person is not culpable for failing to attain the standard set – or at least, culpable only for failing to make a reasonable effort (or his or her best effort) toward attaining that standard.

10.4 This shows the desirability of separating ***legal regulation*** (which seeks to encourage minimum compliance by threatening punishments) from ***ethical standard-setting*** and ***institutional reform*** (which seek to encourage maximum compliance by offering rewards). For example, it may be preferable to separate these Guidelines and Principles into (a) those standards which are legally enforceable on pain (in extreme cases) of imprisonment, and (b) other standards, which Commonwealth Ministers, agencies and officers are directed and encouraged to take promote (and rewarded, say, with pay increments and other career incentives, if and when they accomplish this intelligently and diligently).

1.3 No campaign should be contemplated without an identified information need by identified recipients based on appropriate market research.

10.5 Again, these terms are sufficiently broad that Commonwealth officers may be reluctant to risk authorising initiatives that could later be held to violate these standards. How narrowly and specifically must the information and recipients be "identified", and which kinds of market research are "appropriate"? However, because the vagueness in these terms is a matter of degree rather than a clash of irreconcilable ethical values, it would not be inappropriate to expect an appropriate adjudicating body to make rulings when requested – or perhaps even to promulgate advance directives on its own initiative – specifying whether particular examples fall within these terms.

Examples of suitable uses for government advertising include to:

- Inform the public of new, existing or proposed government policies, or policy revisions;

10.6 For reasons set out above, it should not be sufficient that the advertising merely "informs" the public. It should be further required to *give citizens useful information that helps them make their own decisions*, in exploiting the benefits offered (and avoiding the burdens imposed) by new laws and policies.

10.7 As an imaginary example, an advertising campaign that tells citizens *"The new Tulip Bulb Tax (TBT), which becomes law on 1 July, was a major plank in the platform of the Tulip Party which was elected to government with a massive 54.7% of the two-party preferred vote at the last election ..."* does indeed give voters information that relates to the new policy. But the relevance of this information is outweighed by its prejudicial effect in party-political terms: it sends a misleading message that political opposition to the new tax is somehow illegitimate and that governing party are splendid fellows for enacting such a well-liked policy. We would agree that if parties want to promote themselves in this way they should pay for it from their own funds.

10.8 For reasons already given, we would also question whether it should be legitimate to use public funds to inform voters about "proposed" new policies or revisions, assuming that "proposed" means these have not yet been enacted by Parliament.

Information should be presented in an unbiased and equitable manner.

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.

10.9 This could be read as implying that it is acceptable to include "comment, opinion and analysis" in ostensibly factual Government advertisements – or as implying that only facts should be included. This should be clarified.

> ***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.

10.10 We agree that classifying material as "party-political" does depend in balancing a number of factors. For example, as mentioned above, "how, when and where it was communicated" is relevant: if Government-funded advertisements depict a smiling Minister for XYZ wearing a construction-worker's helmet and opening a new factory, this is certainly party-political if published in Brisbane, almost certainly not if published in Burundi, and arguably party-political if published in Bali.

10.11 However, the final criterion – "the effect it had" – implies an assessment of its effect in hindsight, which cannot be made in advance. Read in combination with the criminal penalties attached to breaches of the guidelines, it creates an apparent risk that an official could be imprisoned (or at least threatened with prosecution), despite acting in good faith, because of an unforeseen effect produced by advertising he or she authorised.[22]

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22 Many e-mails circling the globe give examples of commercial advertisements that backfired hilariously. For example, the "Nova" car sold poorly in Latin America because no one at General Motors realised that "*no va*" means "doesn't go" in Spanish. Another, hypothetical example might be advertisements aimed at appealing to teenagers, which are framed in terms initially thought to be considered "cool", but which are later found to be received by young people with ironic derision.

10.12 We therefore suggest that, to preserve the personal security offered by a prior-advice regime, only the first-listed six factors (based on information known at the time prior authorisation is sought) should be relevant. If an officer seeks and receives prior approval, based on satisfying these six criteria (appropriately balanced), then he or she should be immune from any subsequent personal liability for acting in good faith in reliance on this approval. However, this should not bar the adjudicating authority from ordering advertising "pulled" at a later time if it is found to be undermining the statutory criteria.

> 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.

10.13 As a grammatical point, it is unclear whether the full meaning of the last four words is "opposition parties or opposition groups" or "groups or opposition parties". Clearly, eg, the Save Albert Park organisation or VETO were "opposition groups" in relation to Victoria's Kennett Liberal Government and Queensland's Goss Labor Government respectively. Yet other community groups would not like to be labelled as "opposition" since, even if they give low scores to particular political parties at times, they would want to retain working relations with all major parties. It might therefore be better to clarify this, eg, by rephrasing it as "the policies and opinions of any political party or community group".

10.14 A prohibition on "directly" attacking or scorning others" views, policies and actions seems to imply that attacking or scorning them indirectly is acceptable. Yet morally there seems little difference between an advertisement that says (eg) *"For all of the past decade, the XYZ Party stole hard-working taxpayers' money and gave it away as handouts to people who wouldn't look after themselves"* and *"Commonwealth Government policies in the past decade have tended to transfer money from hard-working taxpayers to people who didn't look after themselves"*. The latter is indirect but no less an unambiguous criticism of a particular political party.

10.15 A better litmus would be to require that advertising must not express or imply hatred, contempt or ridicule[25] for any political party or community group unless this is necessary or incidental to the advertisement's primary goal of giving citizens useful information about some new policy or legislation. What should be prohibited is not criticism that is direct as opposed to indirect, but criticism that is gratuitous as opposed to proportionate and necessary to the goal of informing the public.

10.16 Usually, the essential point of a new law or policy that must be communicated is twofold – that legislation or policy has changed, and that this change is rational and beneficial. For example, a reduction of the default speed limit in suburban streets to 50 km/h would need to be backed by a well-publicised advertising campaign to remind motorists to slow down. And to persuade drivers to obey the new law willingly (rather than resenting it as yet another bureaucratic intrusion, and trying to evade it whenever no police are in sight), it would help to point out that the reason for the change is to save *X* number of lives per year. This message may be construed by some as a slap at previous

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[25] The familiar common-law and statutory definition of defamatory material.

Governments for failing to take the necessary measures to reduce the road toll.[24]

10.17 Likewise, an advertisement that says, *"You may remember that Legal Aid used to be available only to people on very low incomes. Well, thanks to the Commonwealth Government's new "Legal Aid For All" (LAFA) Initiative, anyone who isn't rich enough to hire their own QC is now entitled to reimbursement of all or part of their legal costs, according to their income ..."* unavoidably implies some criticism of past governments for their policies on legal aid funding. However, this is justifiable in order to get across the message to people who may have decided long ago never to bother applying for legal aid because they could never qualify for it. Yet these imputations are unavoidable if the message, which is legitimate, is to be conveyed effectively.

10.18 (See also comments below in relation to a parallel clause in the *Charter of Political Honesty Bill*.)

> 3.4 Information should avoid party-political slogans or images. This may involve restrictions on the use of Ministerial photographs in government publications.

10.19 Again, while this is a worthy principle it would need considerable clarification in individual cases, and applying it might depend on balancing a multitude of factors – eg, the prominence of the Minister's photograph(s), compared to that of any Minister-less photos in the same advertisement. This reinforces the value of authoritative prior advice.

> 4.4 Material should be produced and distributed in an economic and relevant manner, with due regard to accountability.

10.20 The intended effect of clause 4.4 is not clear to the reader, in that it is not obvious what the opposite of a "relevant manner" of production and distribution would look like. (Also, "economical" might be a better term in accordance with colloquial usage.) It might be better to re-cast this principle along such lines as "The method of producing and distributing material should be the most cost-effective and economical available, and all spending must be full and accurately accounted for" (or similar words).

(b) *Auditor of Parliamentary Allowances and Entitlements Bill 2000* (Senator Faulkner)

> ***Section 24: Auditing standards***
>
> The Auditor may, by notice published in the Gazette, set auditing standards that are to be complied with [...].

[24] Likewise, some diehard Queensland National Party voters could conceivably interpret advertisements warning of police breathalyser tests, and justifying these as a life-saving measure, as an implied rebuke of former Premier Bjelke-Petersen's opposition to random breath testing on civil-liberties grounds.

10.21 This clause is to be commended in light of the need, emphasised throughout by this Submission, of offering a reliable and authoritative avenue of prior advice. However, it limits the Auditor to setting auditing standards in general terms applicable to a large number of future cases. This is certainly better than leaving individuals to guess at the meaning of such phrases as "possible misuse of parliamentary entitlements and allowances" (clause 16(a)), but to provide maximum certainty it would be preferable to supplement it with an additional power for the Auditor-General to issue rulings in specific cases, at least on the request of a parliamentarian who is seriously contemplating a particular proposed course of action.

(c) *Charter of Political Honesty Bill 2000* (Senator Murray)

10.22 The *Charter of Political Honesty Bill* seems broadly similar in its intent to the *Government Advertising (Objectivity, Fairness and Accountability) Bill*, discussed above, and our comments are generally applicable to both these Bills.

> ***Section 6: Membership***
>
> (1) The committee consists of the following three members:
>
> (a) the Auditor-General;
>
> (b) the Ombudsman;
>
> (c) a person with knowledge and experience in advertising appointed by written instrument by the Auditor-General.
>
> (2) A member appointed under paragraph (1)(c) is to be appointed on a part-time basis for the period, and on such other terms and conditions, specified in the instrument of appointment.
>
> (5) A member appointed under paragraph (1)(c) must not engage in any paid employment that, in the opinion of the Auditor-General, conflicts or may conflict with the proper performance of the member's duties.
>
> (6) If a member contravenes subsection (5), his or her appointment as a member ceases to have effect.

10.23 We are not certain that a committee constituted in this way – comprising statutory officers *ex officio* – would enjoy sufficient public confidence in its perceived independence to carry out the politically sensitive task assigned to it. In its present form, the bill would effectively give the Auditor-General two votes out of three – it is he or she who appoints and can remove the tie-breaking member. The adjudicating authority must be a committee that not only *is* genuinely independent, but can also be *defended* as genuinely independent even in the face of criticisms from cynical voters and disappointed or opportunistic political rivals.

10.24 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. Moreover, the Ombudsman and Auditor-General are selected because they have skills specific to their roles – investigating maladministration and auditing public accounts, respectively. These skills do not necessarily make them also the best experts available for the different task of ruling on the fairness and propriety of Government advertisements.

10.25 Instead we recommend a separate committee, whose members are appointed specifically rather than *ex officio*, and appointed by an open and transparent process, one designed to screen out partisan bias and aimed to select nominees enjoying the respect of all sides of politics. One option is for a Parliamentary committee (eg, the Ethics and Privileges Committee) to have power to appoint or at least confirm nominees, each nominee needing the support of at least one Government and one Opposition member on the committee.

> ***Section 9: Powers of the committee***
>
> (1) If the committee is of the view that a government advertising campaign does not comply with the Guidelines, the committee may direct a Commonwealth agency or a person employed by a Commonwealth agency to take one or more of the following actions:
>
> (a) to withdraw a campaign from publication or broadcasting;
>
> (b) to modify a campaign so that it will comply with the guidelines;
>
> (c) to refrain from further expenditure on a campaign or to limit expenditure on a campaign so that it will comply with the guidelines.

10.26 Again, given that the adjudicating authority (here, a Government Publicity Committee comprising the Auditor-General, his or her nominee, and the Ombudsman – Clause 6(1)) has extensive powers to order government advertising cancelled, it is important that the Committee be authorised and directed to provide prior rulings when requested, or perhaps on its own motion (or perhaps even made *de rigueur* for all Government advertisement).

10.27 The Committee should retain power to subsequently order advertising withdrawn or modified, if it reconsiders its earlier authorisation or if facts later emerge showing that granting authorisation was a mistake.

> ***Section 15: Commissioner for Ministerial and Parliamentary Ethics***
>
> (2) As soon as practicable after a cod e of conduct developed by the Parliamentary Joint Committee on a Code of Conduct for Ministers and Other Members of Parliament has been adopted by both Houses of the

> Parliament, and whenever a vacancy in the office occurs thereafter, the Presiding Officers must appoint a Commissioner for Ministerial and Parliamentary Ethics (the Commissioner).
>
> (3) Before appointing the Commissioner, the Presiding Officers must consult with the Leader of each recognised political party that is represented in either House of the Parliament and with any independent or minority group Senators or members of the House of Representatives.
>
> (4) In making an appointment under this section, the Presiding Officers must:
>
> (a) base their decision on merit; and
>
> (b) declare any personal interest; and
>
> (c) comply with any relevant laws relating to discrimination; and
>
> (d) publish reasons for their selection of a particular candidate.
>
> (5) In this Act, Presiding Officer means the President of the Senate or the Speaker of the House of Representatives.

10.28 Our comments above about appointment of Government Publicity Committee members apply also to the appointment of a Commissioner for Ministerial and Parliamentary Ethics. The model we have proposed – appointment or at least confirmation by a parliamentary committee, with the vote of at least one Government and one Opposition committee member necessary – would provide a solid institutional mechanism for ensuring (and satisfying skeptical voters) that nominees were not "reliable party hacks".

10.29 Although the criteria specified in the proposed section above are desirable, there would be no legal effect in the Bill's directing the Speaker or the Senate President to observe such statutory requirements, as centuries of common law on parliamentary privilege have put beyond doubt that the courts will not enforce such requirements (eg, via writs of *mandamus*) against the Parliament or its presiding officers.[25]

10.30 Of course it would be regarded as highly improper – even by his or her own party colleagues – if a Speaker or President flagrantly disobeyed a statutory direction. But the criteria proposed by this Bill are subjective enough that a particular appointment could still be attacked as "jobs for the boys" even if the Presiding Officers comply fully with the letter of the statute, so far as anyone can observe. By contrast, a requirement for cross-party committee vetting would inspire more public confidence in the outcome merely by the fact that the stipulated procedure has been followed.

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[25] See *Cormack v Cope* (1974) 131 CLR 432.

Section 16: Functions of the Commissioner

The Commissioner has the following functions:

(a) at least once every 2 years, to review the codes of conduct for Ministers and other Members of Parliament; and

(b) to implement an education program for Ministers and Members of Parliament on ethical standards; and

(c) to give advice on ethical standards if requested to do so by either House of the Parliament; and

(d) to recommend guidelines to both Houses of Parliament on the interpretation of the codes of conduct for Ministers and Members of Parliament; and

(e) to investigate complaints of breaches of the codes of conduct for Ministers and Members of Parliament and to report to the relevant House of the Parliament; and

(f) such other functions in relation to parliamentary ethics and standards as are determined by resolution of either or both Houses of the Parliament.

10.31 We recommend that the function of investigating alleged breaches (e) be assigned to a separate authority from that of giving prior advice on proposed conduct, either generally (b, d) or in individual cases (c). 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 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.

10.32 We recommend that (c) be expanded to read "to give advice on ethical standards if requested to do so by any individual Member of Parliament in relation to decisions he or she is seriously contemplating, or by either House of the Parliament in relation to any actual or hypothetical question." It would be a serious strain on the advisory body's time and resources if it had to answer ethical hypotheticals put to it by any one of 220-plus MHRs and Senators. Individual parliamentarians should have the right to trigger the prior-advice process only if their actual conduct in the immediate future depends upon the answer. However, each House as a corporate body should have the right to refer hypotheticals to the advisory body, if such House sees some substantial public interest in the matter.

> ***Schedule 1 – Guidelines for Government Advertising Campaigns***
>
> (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.

10.33 Our comments above in relation to the analogous, and broadly similar, clause in The *Government Advertising (Objectivity, Fairness and Accountability) Bill* apply here as well. The scope of this clause is very broad: taken literally, it would seem to preclude the Commonwealth spending money on advertising commemorating World Holocaust Day because this might "seem[] to scorn the views, policies, and actions" of Adolf Hitler; an anti-auto-theft initiative warning citizens to lock their cars might "seem[] to scorn the views, [...] and actions" of car thieves. It is of course clear from the context that what this clause really intends to prohibit is *unnecessary* or gratuitous criticism. A campaign whose primary goal is to celebrate human rights or to protect private property may justifiably entail some implied disrespect for those who commit genocide or car theft. Our proposed re-wording, set out above, would better achieve this intention.

> (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. [...]

10.34 The intent of these two clauses are similar to those we have recommended: it is not enough that the Government is informing citizens about some *proposed* new law or policy, because this is still at the stage that counts as political debate rather than neutral information. However, barring public-information campaigns until the government has obtained statutory authorisation to *implement* the program concerned might, ironically, be too strict.

10.35 If, say, legislation passed in 2005 stipulated that on 1 January 2008, all States and Territories shall change to driving on the right-hand side of the road, it would be too late if no funds could be spent on advertising this between 2005 and 2008. (And the three-year preparation delay might prevent the "at short notice" escape clause from applying.)

10.36 To remove such doubts, this clause should specify that a government cannot spend money advertising a new policy until that policy has been enacted into law by Parliament, even if the actual implementation of that policy does not take effect until some time later.

(d) Electoral Amendment (Political Honesty) Bill 2000 (Senator Murray)

> (1A) A person must not print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any electoral advertisement containing a statement, purporting to be a statement of fact, that is inaccurate or misleading to a material extent.

10.37 The safeguard that a statement must be one "purporting to be a statement of fact" is useful, since it avoids some of the absurdities of current defamation law in some States that certain statements can be liable even though they are obviously intended as, and are understood by any ordinary person as, either opinions or satires.

10.38 To remove doubts, and to more clearly link the quantification of the vague term "material" with the Bill's goal in ensuring that citizens make informed voting decisions, it would be preferable to replace "inaccurate or misleading to a material extent" with something more like "that is inaccurate or misleading and as a result is likely to cause any candidate in an election (or any side in a referendum) to lose votes". This gives the adjudicating authority (here, the courts) a clear line they can aim for, even if others will disagree with particular "judgment calls" the courts make.

10.39 Often, the question of whether an error is electorally damaging is a question of degree. Suppose it emerges that "Senator Carr-Driver" has never been charged with driving over the blood-alcohol limit, but has been convicted of exceeding the speed limit. If he or she exceeded the speed limit by only three or four km/h, on a two-lane rural highway, then the courts would probably, and properly, conclude that this is not considered morally culpable to anywhere near the same degree by the electorate as drink-driving is. Assuming (as seems likely) that a drink-driving charge will cost Senator Carr-Driver votes but a speeding charge won't, this means the inaccuracy is material to the purposes of the Bill.

10.40 However, suppose it were proved that Senator Carr-Driver's speeding conviction resulted from his or her exceeding the speed limit by 40 km/h in a primary-school area, at 3 o'clock one afternoon. A court may reasonably take the view that at least some voters will consider this so unforgivable that they resolve never to vote for Senator Carr-Driver again. If the court concludes that the accusation of drink-driving, although inaccurate, would not cost Carr-Driver any *more* votes than the true story would, it should rule that the inaccuracy is not sufficiently material to make the statement in breach of this Bill.

> 329(5A) If the Electoral Commissioner is satisfied that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate or misleading to a material extent, the Electoral Commissioner may request the advertiser to do one or more of the following:
>
> (a) withdraw the advertisement fro m further publication;
>
> (b) publish a retraction in specified terms and a specified manner and form (and in proceedings for an offence against subsection (2) arising from

> the advertisement, the advertiser's response to a request under this subsection will be taken into account in assessing any penalty to which the advertiser may be liable).
>
> 329(5B) If the Federal Court is satisfied beyond reasonable doubt on application by the Electoral Commissioner that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate or misleading to a material extent, the Court may order the advertiser to do one or more of the following:
>
> (a) withdraw the advertisement from further publication;
>
> (b) publish a retraction in specified term s and a specified manner and form.

10.41 Again, it is highly desirable that a system of authoritative prior advice be instituted so that political actors are encouraged to responsibly cover themselves against wasting perhaps thousands of dollars in producing advertisements that are later ordered withdrawn by the Federal Court pursuant to this provision. As we advocate, the "deal" offered is that, while the Commonwealth retains power to order inaccurate or misleading material drawn at any time, its author is safe from any personal criminal or financial liability as a result provided he or she sought and relied upon authoritative pre-clearance by one of two or more designated authorities.

11. Conclusions

11.1 If the Committee or the Parliament so wishes, KCELJAG would be pleased to provide further advice on implementation of an ethics regime along the above lines, and is available to discuss work already done by KCELJAG in Queensland and Western Australia, as well as experience gained through consultancy work done with the Nolan Committee in the UK, with the OECD, and with private consultancies.

Yours sincerely,

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Attachment 1:

"Prior Advice is Better than Subsequent Investigation"

Charles Sampford

From* Motivating Ministers to Morality, *edited by Jenny Fleming and Ian Holland (London, Ashgate, forthcoming 2001).

This chapter argues that ethics reforms are stimulated by scandals whose subsequent investigation is massively diverting in time and energy. The various remedies that are tried – legal rules, public ethical standards or institutional reforms cannot furnish a solution by themselves. To be effective, they must be combined into an effective "ethics regime" or "integrity system" (Sampford 1992). However, one of the most common reasons for not creating strong clear statements of political ethical standards is that they might later be used as a weapon against those who promulgated them. The problem lies not in the idea of ethical codes *per se* but in promulgating "bare codes" of ethics without institutional backup. In particular, the creation of a credible "ethics counsellor" or "integrity commissioner" to provide prior advice on potential breaches of ethical codes could be a very effective means both of raising standards and of avoiding the scandals that lead to subsequent investigations. This chapter discusses some of the (still imperfect) institutions attempting to provide such advice, and some of the potential problems of political accountability and responsibility that arise from them.

The Love of Scandal

Ethics reforms are almost invariably prompted by political scandals. Accusations of wrongdoing are damaging to the individual and his or her party and demand from both a great deal of crisis management on the back foot. The media concentrate on seeking out culprits, individually or severally. Given the public perception of politicians, it is ironic that scandal is considered so newsworthy. If principled behaviour really were so rare, its news value would increase correspondingly, along the "man bites dog" analogy. However, the media generally find it easier to report on stereotypes acting stereotypically.

Much less attention is devoted to institutional means to prevent such problems recurring.[26] The media show little interest in eliminating future scandals (which are, after all, their bread and butter) and the Opposition wants to take the scalps of their individual opponents. To acknowledge that the system is flawed might be seen as an extenuating factor and might blur the political message that the government are in the wrong and the solution to the whole problem is simply to put the Opposition in power.

Ethics Regimes and the Prevention of Scandal

Much less attention is devoted to the means for preventing such problems arising in the future. Although after-the-event scandals may grab the headlines, preventative measures that protect against abuse of political office are clearly more important.

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[26] This concentration on individual rather than institutional problems is not confined to the media but is found even among public sector ethicists - eg Bailey 1964.

I have long argued that enforceable codes as a form of legal regulation are, on their own, largely ineffective in raising standards of institutional behaviour (Sampford 1990, Sampford and Wood 1992, Sampford 1994). They are useful as a backstop, at setting the minimum acceptable threshold, but will not help to raise conduct above that minimum. They have to be read narrowly to preserve the rights of the "accused"; and if all Ministers need do is to comply with the bare minimum, the code becomes more like tax legislation than a set of principles guiding their political behaviour. Accordingly, improving the standards of conduct of key participants requires an integrated approach, which combines:

- ethical standard-setting
- legal regulation, and
- institutional reform

The key to achieving this integration is the public "justification" of the institution whose standards we are trying to improve. Such institutions begin by articulating the values or public benefits which that institution is meant to safeguard or promote – the *raison d'être* of the institution, the reason why it should continue to exist and why it deserves public support in one form or another. These values not only offer the core of the ethical standards, but also the principles underlying the legal regulation (and its interpretation) and the standards for assessing the design and performance of the institution.

Such an approach recognises that institutional behaviour falls into a normative continuum from the highest standards, down through good work, sub-par work, misconduct and outright criminality. This integrated strategy aims to raise standards of behaviour by, simultaneously, articulating ethical principles about what it means to be a good member, Minister or staffer as the case may be and providing legal rules which provide sanctions for behaviour that falls so far below that standard as to deserve condemnation (this argument is further developed in Sampford and Blencowe 2001).

Compliance regimes aim to ensure that minimum standards are not broken. By contrast, an ethics regime does not concentrate on the legal backstop but, more ambitiously, "plays from the front" by seeking to improve standards. Ethics regimes add this positive dimension of articulating the highest, aspirational standards (and thus emphasise "positive" rather than "negative" ethics – see Sampford and Wood 1992). The legally enforceable elements (and the ICAC style institutions that investigate and enforce them) do resemble a simple compliance regime, since they do impose negative sanctions. But an ethics regime, in addition, seeks to raise behaviour well above that minimum – by exhortation, example and positive rewards (Sampford & Blencowe 2001).[27]

A perceived problem

One frequent and substantial objection to implementing the kind of approach outlined above is the concern that introducing a code of conduct will expose the incumbent government to criticism from both the Opposition and media for failing to comply with its own guidelines. This has been a strong disincentive to many who were otherwise well-disposed toward improving ethical standards. In 1996, a colleague and I approached the

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[27] One of the workshop participants questioned whether discretionary standards that are part of ethics regimes provide space for behaviour to fall below the minimum. The discretionary space is an essential element of the regime – see Sampford 1992. However, the discretionary space is above the minimum because that is provided by law acting as backstop. The whole scheme here is that law provides the legally enforceable minimum and ethics provides the principles that guide the formulation and interpretation of the law and (see Sampford 1993). To suggest that we rely on legal norms alone rejects the idea of ethics and limits the weapons deployed to improve Ministerial behaviour.

National/Liberal Party government and the Australian Labor Party Opposition in relation to a code of ethics for parliamentarians and Ministers and the creation of an independent office to give them ethical advice about the code's meaning and effect. Both government and Opposition raised the same concern – that once a code was introduced, it would be open to anyone to interpret in their own favour, allowing interested parties to claim triumphantly that the government was in breach of its own rules (Sampford 1997). This was precisely the accusation levelled at the Howard government (see Weller, Chapter ... of this book) which felt that they had in effect been penalised for setting high standards.

However, 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.

This mistake would never have been made when drafting the kinds of normative rules that governments are most familiar with – legislation. There are numerous guides to interpretation of statutes, outlining their justification, purpose and detailed meaning. Lawyers give advice in advance, and judges rule authoritatively after claimed breaches are committed and challenged. However, because it seems to be generally assumed that ethical norms are completely different from legal norms, it is rarely asked who will advise, interpret and rule on ethical standards. Ethical norms are different, in that individual conscience and interpretation play a larger role, and the courts do not have the final say (although courts do regulate the decision-making processes of others whose final say may reflect adversely on the interests of those affected). But ethical norms are not so different from law that those subject to them do not need advice, or that avenues for determining, developing and changing their meanings are not needed.[28] Nor are they so different from legal norms that it becomes acceptable for the one body to make, interpret, rule and punish. If such institutional arrangements were applied to legal rules, they would not only breach the rule of law but also result in a loss of public confidence – and be largely ineffective.

So the mistake lies not in introducing and publicising ethics reforms, but in introducing a "bare code" of ethics that is not part of an "ethics regime" and not supported by other institutions. Agencies that investigate breaches of legal norms are important. But one of the most important institutions is one that provides ethical advice to Ministers before they take any actions that might be subsequently questioned and investigated.

Institutions offering prior advice

United States

In the United States, this problem with the interpretation of ethical codes of conduct has to some extent been addressed by the Office of Government Ethics (OGE). Although the rules set out by the OGE may be criticised for being overly detailed and legalistic, one feature of the process adopted by the OGE is particularly deserving of note. The OGE does not confine itself to the usual sending out of reminders and questionnaires and the organisation of ethics training seminars.

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28 Twining has emphasised that many of the problems with legal rules are problems of rules in general – and vice versa (Twining and Miers 1983). The problem highlighted here is the need for rules (and institutions) for identity, adjudication and change which Hart argued as so necessary for law and which are seen here as necessary for ethical norms (Hart 1961).

The OGE process starts with a standard measure, the declarations of all financial interests must be publicly filed. Some 25,000 appointees must make such declarations – including the President, Vice President, members of Cabinet, heads of agencies, all employees paid above a set minimum, senior military officers, administrative law judges – and the ethics officer of each agency (OGE 2000). All of the above must file within 30 days of their appointment, thereafter annually and within 30 days of their leaving office. They must include any interests of their spouses and dependent children. Those officials whose appointments must be ratified by the Senate (including all those of Cabinet-level rank – "Ministers" (in the terminology of this project), must have their disclosure statement filed, and cleared by the OGE, before they are formally nominated by the President.

For most appointees, their declarations are checked by their own agency and any issues are discussed. One important practice, however, is that the agency ethics officer goes through the document with the appointee. For Cabinet-level appointments the procedures are even more comprehensive. The agency ethics officer goes through the financial disclosure form with the prospective nominee. The form then goes to the OGE, to the nominee's employing agency and to the White House, where any potential conflicts of interest are discussed. The OGE is prepared to sit down with Cabinet nominees and take a second look if necessary. Any potential conflict of interest must be resolved before the nomination is made to the relevant Senate Committee, which will discuss any forms of assets that could cause problems.

Standard procedures are available for resolving most conflicts of interest – including divestiture, recusal from participation in relevant decisions, or an OGE-approved form of blind trust (which is so blind that the appointee will not even know whether the assets that caused the potential conflict of interest remain in the portfolio). This procedure is particularly relevant to Australia, where there are strong indications that at least some of the Ministers caught out by the Howard code did not deliberately intend to flout the conflict of interest rules in relation to private investments, but rather acted (or failed to act at all) inadvertently. It is certainly hard to see Finance Minister Jim Short's breach (holding on to a few bank shares) as a deliberate breach of the rules.

Of course, there are particular reasons for following such careful procedures in the United States, where Senate Committees vet Cabinet nominees publicly, a process in which there is a strong desire to avoid controversy. However, Westminster parliamentary democracies like Australia and the UK have shown that post-appointment questioning in parliament can cause enormous embarrassment to questionable appointees. The quick turnaround of governments in some parliamentary systems means that Oppositions would be best to consider these issues when selecting members of their shadow Cabinet. Indeed, they might find this a good political move to embarrass any government that was not going through processes as stringent for their current Ministers. Certainly the process of having officials sit down with Ministers, alerting them to their portfolio's particular requirements and going through potential problems, would be a useful development. This may be the best way to help Ministers learn about ethics – one-to-one education is generally perceived to be the most effective, especially if it is practical and task-oriented.

Canada and Australia

More comprehensive in its content, but less comprehensive in the personnel it covers, is the advice provided by the Canadian Ethics Counsellor and the Queensland Integrity Commissioner (see Jackson, Chapter ... of this book and Preston, Chapter ... of this book). These officers are available to advise the HOG and, generally when approved by the HOG, other Ministers and senior public servants. One of the most important features of both these positions is that, if a Minister seeks prior advice and follows it, the counsellor or commissioner will subsequently defend the decision in public – either personally (in Canada) or by publishing the advice they gave (in Queensland).

Effective Ethical Advisory Institutions

The above discussion has identified some key elements for the provision of prior advice as part of an effective ethics regime:

- An established practice of combing through every Minister's financial affairs to identify potential problems and avoid them. This helps to avoid major conflict-of-interest problems and provides effective prior clearance as well as sensitising Ministers to ethical issues;
- The availability of ongoing prior advice on ethical issues; and
- The power of such advice to nullify, or at least largely deflect, any later criticism of actions taken in accordance with that advice.

The availability of this public defence addresses the very real concern that interpretation of any code of conduct is so open-ended and that those who create such codes make themselves hostage to any interpretation that journalists or Opposition legislators can put on it. If the counsellor/commissioner enjoys genuine bipartisan respect, fewer problems will arise. It will certainly deter some of the more blatantly partisan or dishonest interpretations of ethics codes and may make the more ideological uses of codes more difficult (see Kultgen 1998). But it does not close off all further ethical debate – nor should it. It may mitigate the tendency for governments otherwise to leave all ethics decisions, especially about breaches, in the hands of the HOG.

However, under such a model the dynamics of debate change fundamentally. The issue is no longer whether the relevant Minister acted in an unethical (or worse) way, even less whether the Minister is a good or bad person. The Minister has done the right thing by seeking advice and following it or, in the case of conflicts of interest, taking the advice offered. The remaining issues are likely to be more substantive and systematic:

- What is the correct interpretation of the norm?
- Does the norm need to be changed, added to etc?
- Should the process be refined?

Such issues should be handled by a bipartisan committee or review panel with community representation to consider issues arising and interpretations given over the previous year and makes prospective recommendations for changes to norms or procedures.

Bipartisan support

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.

A preferred model would involve a formal process of appointment by a committee with nominees of all major

parliamentary parties and a requirement that at least one Opposition committee member concur with the appointment before it can be made. In a parliamentary system, the committee could be a committee of parliament; this may be preferred as part of a process where the parliament is seen to be in control of the ethics of Ministers as well as of its backbench members. If the chosen committee were responsible for the ethics of members, this would have the advantage of providing a coherent overview of the ethical issues confronting both members and Ministers.

The argument against appointment by a parliamentary committee is that the committee might fail to distinguish between the standards appropriate to Ministers and the standards appropriate for ordinary Members of Parliament. 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. This would provide a strong justification for a separate committee for the appointment of a Ministerial ethics adviser. A non-parliamentary committee could also include political outsiders – as did the committee that advised the Queensland premier on the selection of his Integrity Commissioner. However, I would still argue for at least one politician from either side of politics– each of whom would have a veto.

Separation of ethics advice and ethics investigation functions

While arguing for institutions providing prior ethical advice, I am much more wary of bodies carrying out ethical "investigations". Investigation into breaches of laws and disciplinary codes (seen as effectively another form of law in Sampford 1992) and the imposition of sanctions on those whose behaviour falls below the tolerable minimum, form part of a well-designed "ethics regime" or "integrity system".

In the absence of such formal sanctions, debates about ethical standards should remain matters for public debate. Prior ethical advice provides a defence in that debate and turns the question away from the individual Minister's personal behaviour to the clarification of the rules. Where Ministers have not sought that advice, the debate will still be focussed on Ministerial behaviour – with the added question of why they had not sought ethical advice.

Others have taken a different view, preferring to establish a body that is adjudicatory as well as advisory. The Canadian Starr-Sharp Report proposed an ethics commissioner to subsequently investigate allegations as well as a separate position of ethics counsellor to give prior advice. As Jackson reports, this aspect of the Starr-Sharp report was ignored and the two distinct roles were combined. The Canadian ethics counsellor has not only been used to give prior advice but has also been asked to investigate past behaviour of Ministers after that behaviour has already become a political issue. The subsequent report then involves matters on which at least one side of politics has already taken a position. It would appear that it is this aspect of the ethics counsellor's role that has been most controversial (see Jackson, Chapter ... of this book). The close relationship necessary for the giving of advice compromises the requirement of impartiality required of subsequent investigation. I am not convinced that establishing an ethics commissioner armed with investigatory powers is desirable anyway, and the model suggested here does not include one. However, if subsequent investigation of ethical (as opposed to legal) issues does take place, the government's ethical adviser should not be the one to perform this task.

Failure to take advice

The ability of Ministers to keep themselves in the clear by giving the facts to an ethics counsellor/integrity commissioner and seeking advice has two natural corollaries. First, the Minister must state the facts accurately. If an important fact is missed out (deliberately or inadvertently), this may negate the Minister's protection. Indeed, it will expose the Minister to suspicions that ethical clearance was given only because of the omission of

that fact. Any such omission also raises questions about the Minister's *bona fides* in seeking the advice. Was this omission deliberate, to mislead the commissioner and get the advice the Minister wanted all along? Such situations could lead to interminable debate about which "facts" were relevant. The system could offer Ministers some protection by allowing the commissioner to find that the omission was trivial and would have made no difference to the advice given. This might be seen as placing undue pressure on the commissioner. However, an independent commissioner has protection from such pressure and any report of such pressure would be enormously damaging to the government. The rational strategy for a Minister genuinely seeking ethical clearance is to state, fully and accurately, all the facts that he or she thinks might be relevant. It is the only way to get good advice and it is the only way to secure the subsequent protection from an integrity commissioner. This is a principle that is well understood in seeking prior legal advice, as compared to engaging a criminal lawyer to defend you.

Secondly, the protection provided by the commissioner is so valuable, and the dangers of seeking and taking it are so great, that it leads to another potential objection. Does this hand too much power to the commissioner, effectively transferring power from elected officials to an appointed official and making Ministers effectively responsible and accountable to the ethics adviser (even, or perhaps especially, if the commissioner is appointed with bipartisan support)? There are four answers to this objection:

- It is not in the ethics commissioner's own interests to get involved in political issues because the commissioner's reputation and authority depends on being seen as aloof from them;
- The ethics commissioner's reasoning will have to be in terms of the previously agreed ethical standards and will have to be in terms that are general and not policy specific;
- Subsequent concerns about the commissioner's rulings can be dealt with within the review process discussed below; and
- The commissioner has no legal power to fine, suspend, unseat, jail or otherwise punish Ministers, only to shame them (the sting from any such rebukes will be diminished if it is perceived in parliament or among the general public that the commissioner is biased or has let power go to his/her head).

One solution, adopted in both Canada and Queensland, is to limit the range of issues with which the counsellor/commissioner may be involved. In both cases, they deal only with "conflict of interest" issues. However, the problem with limiting the range of issues is that it leaves the government open to claims of unethical behaviour in all the areas excepted with no means of defending its members against Opposition and media allegations that they have breached its ethical code. The very argument that was erroneously raised against ethical codes applies with full force against these limitations. The very silence of the counsellor/commissioner might be politically damaging. Finally, if there was any argument over the meaning of the exceptions, the Minister could be portrayed as foolishly avoiding advice in order to pursue unethical practices. The suggested solution is that the advice be available on all areas of behaviour covered by any Ministerial codes (the distinction is not "public" versus "private" behaviour – though any well-constructed code will consider such issues and, in particular, the conflict between the public and private involved in "conflict of interest").

This does not provide a perfect solution (there is none). Like most issues of principle, it is important to have a clearly understandable public rationale for the range of issues covered by the ethics commissioner and the range of issues that are not. Blurred boundaries will remain in difficult cases, but most issues will be either clearly in or clearly out. In any case, the wise Minister will consult in areas of uncertainty. Therein lies his or her protection.

Why have separate advisors at all? Why not leave it to the Head of Government?

Professor Weller (Chapter ... of this book), argues primarily against an outsider acting as a judge, and is skeptical about having an independent adviser. Having an adviser might complicate an already complicated situation further and blurs the line of Westminster accountability. He points to the "old", "but still good", solution "that prime Ministers who preside over a long list of scandals will face electoral justice".

This argument highlights the basic principle of parliamentary democracy – the periodic summative judgment passed on government by electors. Other feedback loops can interfere with that core accountability and responsibility. I am in total agreement with the principle and the general philosophy behind it. I have long argued for parliamentary over presidential forms of executive government and against entrenched constitutional rights (Sampford 1986). However, I would still argue in favour of this particular "complication". It addresses a real obstacle in getting politicians to sign up to codes of ethics. Without it, Ministers are de-motivated from supporting public statements of ethical standards. Such a failure would not only involve a politically unsustainable reversal, but would also run contrary to one of the core ideas of what it is to be ethical – "asking hard questions about your values, giving honest and public answers, and trying to live by them" (Sampford 1993).

If ethical judgments are left in the hands of Head of Government (Prime Minister or Premier), the maintenance and advancement of ethical standards will be less effective for a number of reasons:

- Heads of Government (HoGs) would be in the position of making, interpreting and enforcing the rules of Ministerial ethics. That sits ill with the idea of the rule of law and the separation of powers, and reduces confidence in the impartiality of such rules and enforcement
- For these and other reasons, a HoG's clearance of a Minister will never have the same degree of credibility as that provided by an independent adviser – especially one provided in advance.

Although HoGs have an interest in avoiding the "electoral justice" meted out upon leaders who are seen as presiding over a long list of scandals, it is dangerous to place too much reliance on this. HoGs may seek other means of avoiding electoral harm. They may rely on spin-doctors and on personal attacks against those who give opinions contrary to their own. They may seek to dilute and confuse the meaning of existing norms, rendering them of lesser and lesser effectiveness. Indeed, if they come to believe that publicly stated standards inevitably leave them defenceless against attack by press and Opposition, using any interpretation that suits such attacks, behaving like this is entirely rational.

Although having apparently ethical Ministers is generally in the long-term self-interest of HoGs, their short-term interest in political survival is stronger. The motivation to power that fuelled their rise to the top is likely to propel them to risk, even abandon, ethical principle rather than sacrifice power when faced with a choice. If we leave such decisions entirely in the hands of HoGs, we are making a choice against ethical principles in those actual and potential crises where ethics are most needed.

It is in the interests of our democracy to have strong public institutions with high levels of legitimacy and public support. It can be argued that it is generally in the interests of the democratic politicians who seek power within those institutions for those institutions to be strong. However, if faced with a choice, most politicians would prefer to hold on to power within weaker, less legitimate institutions than to lose power. Accordingly, if the choice is left in the HoG's hands, we can assume that most rational HoGs will be prepared to put those institutions at risk to preserve their control of them. A strong case could be made out that the decline in the

legitimacy of our institutions and the respect for the politicians who run them can be traced to a series of such decisions by successive Heads of Government. This is not to deny that, where such attempts collapse, there may be a strong public reaction and some politicians may deservedly make political capital in seeking to improve the integrity of public institutions. However, if they and their successors are left to decide which to sacrifice – the integrity and strength of democratic institutions, or their own grip on power – it is standards that will lose out. The public's reaction may be to elect reformist new faces. On the other hand, it might also lead to public cynicism and a spiralling decline in confidence in our democratic institutions.

Once ethical standards are introduced into public life without any means for interpreting them, it may become too easy to frame every issue in terms of attacks on the ethics of individual politicians. Personal vilification may replace policy debate. The provision for independent advice acts as a defence against such specious and self-serving Opposition charges.

We can conclude that there are some decisions that cannot be safely left in the hands of politicians. The core idea of democracy is that the people delegate executive and/or legislative power to politicians whom the electors believe will best use that power to serve electors' interests. It is in the interests of governments to use that power in ways that will earn approval and convince a majority that it is the better choice. However, there is always a temptation to use governmental power to secure re-election by avoiding or distorting that choice. The crudest form of avoiding that choice involves a cancellation of postponement of elections. However, there are many other means of avoiding that choice – distorting electorates and electoral boundaries, manipulating electoral practices and electoral machinery, using governmental power to silence opposition or promote government policies. The temptation is so great that it might seem that only strong laws will suffice. Certainly there is a need for clear constitutional provisions, electoral laws with teeth, and independent electoral commissions with clear procedures for calling elections and counting the votes. There is a need for clear legal rules on electoral advertising, election funding and government advertising.

Wherever there is power there is a temptation for abuse and it is important that the fundamental democratic principles underlying those legal rules be clearly and publicly articulated and attempts made to live by them. Politicians in a democracy are members of a very important public profession. Politicians seek to articulate policy choices and put them before the people. If they believe that their policies and the general philosophy underlying it are correct, they should be proud to do so and to believe that those public values and public policies deserve to be chosen on their merits by their fellow citizens. To seek to win by other means discredits those values and policies and dishonours their profession.

Preventing the abuse of power for the purpose of holding on to power requires the support of a strong ethics regime – including strong laws, ethical standards and independent institutions (courts and electoral commissions *and* ethics advisors whose prior advice is available to those who want to keep to principle and the absence of whose advice could be politically damaging)

Institutional emphasis on subsequent investigation

This chapter has argued that prior advice to Ministers is better than subsequent investigation of alleged wrongdoing. However, virtually all the major public expenditure and effort remains focused on "after-the-fact" investigations and investigatory bodies such as the various ICACs and the CJC. These have an important place in any ethics regime or integrity system, that is, investigating breaches of legal standards set in advance.

However, where standards are unclear and/or not established in advance, real difficulties have emerged. For example, Fleming (see Chapter ... of this book) reports the "lack of guidelines and paperwork" in the

Queensland travel rorts case and the "absence of legally recognisable standards" found by the Supreme Court in the Metherell affair. In such cases, the investigatory body not only investigates alleged breaches of standards after the event but must also determine what those standards are and interpret them. Fleming refers to Greiner's complaints that new and higher standards were being applied to him retrospectively. It is easy to mock such complaints – "what a terrible thing for politicians to be expected to do the right thing and behave ethically when they never did in the past". But is it is generally seen as unfair to sanction somebody for the breach of a rule which had not been articulated at the time the action was taken. It is also inefficient because rules that are not communicated cannot be followed. These are the classic arguments in favour of the rule of law and the general case against retrospective activity.

Fleming points out that "politicians have shown a reluctance to subject themselves to ICAC's ethical standards". However, that expression reflects the fact that, in the absence of prior standards, ICAC had to set these standards. Setting aside the not unattractive view that the ethical standards for politicians should be set by them and not ICAC, the idea that investigators should make the rules whose breaches they are investigating is contrary to our normal conception of the separation of powers between those who make and enforce rules.

In Queensland, it is easy to see why so much emphasis was put on the CJC. The apparent success of and public support for a one-off inquiry led many to expect a permanent investigatory body to achieve similar success and respect. However, one of the great strengths of the Fitzgerald Report (1989) was that it recommended a permanent body, the Electoral and Administrative Review Commission (EARC), to consider reforms to the constitutional, legal and administrative mechanisms of government. Unfortunately, it dealt with ethics last rather than first – bringing down wholesale reform before discussing the values that reform was intended to generate. It was also given a sunset clause so it was unable to continue its work. In the interim, the CJC was expected deal with the task of improving behaviour – whether in matters involving travel expenses or issues that go to the constitution of the government such as vote-rorting scandals, or securing covert police union support for a change of government. This forced it to combine both roles, of investigatory body and ethical adviser/reformer. This inevitably meant that there would be far more conflict over the CJC and that its ability to fulfil either function would be compromised.

Efficiency and Cost Effectiveness

Subsequent investigations cost a great deal in terms of time and resources and create high stakes for those who are investigated – including findings of improper conduct and potential loss of office, power and influence. The latter means that such investigations will be resisted strongly, which in turn drives up the cost of conducting them. As noted above, fairness demands that sanctions can only be imposed for clear breaches of previously established rules. The costs of giving prior advice are far less and some of the issues on which Ministers have been embarrassed, exposed and investigated, the issue could have been settled in minutes. There may be resistance to the advice if it means that the policy end must be abandoned. However, in most cases it will merely mean that different means may have to be adopted. These different means may impose extra political hurdles but, once alerted to the ethical difficulties and the potential political backlash involved from subsequent investigation, politicians will have an incentive to follow the ethically defensible course. The sensible politician will be thankful for having avoided the potential flak and will seek it eagerly.

This will make prior advice more effective. There is also a good chance that higher standards may be developed as a result. There is an analogy in the sphere of law. If an individual's actions are challenged in court, the defendant seeks a lawyer to defend his action and argue that he/she did not fall below the lowest acceptable standard. However, if advice is sought beforehand, the advice that will be given is how to avoid legal problems

and the likelihood of investigation and legal sanction (Sampford and Blencowe 1998). In avoiding legally questionable conduct, the behaviour of the individual concerned will be of a higher standard than that which is questioned and successfully defended in court. It is even higher than that which is *not* successfully defended. We can assume that similar standards-raising effects will flow from prior ethical advice.

Conclusion

There are many ways in which laws may achieve their goals of changing behaviour. Although much of the public perception and fascination with law concerns its punitive element, law achieves most of its effects by non-punitive means. Concentrating on the criminal law is no way to pursue effective institutional or social reform. Compliance occurs because citizens know about the law and if they are uncertain they seek legal advice. It should not be surprising if this is even more true of other, non-legal, norms about Ministerial conduct.

This essay has argued that one of the best ways to encourage Ministers to comply with ethical codes is to offer them the facility of seeking prior advice – advice which they can act on in the confidence that even if the advice is subsequently criticised, they will bear no blame. This will motivate Ministers to consider if contemplated actions involve ethical issues and to seek that advice if there is any doubt that it may. This is a significant carrot.

Most carrots are made more tempting by co-existing with a painful stick. Those Ministers who do not seek the advice are likely to find themselves in the midst of controversy and a subsequent investigation of their actions. This will reinforce advice seeking in the remaining Ministers. I do not anticipate that this will turn politicians into by-words of ethical probity. However, in conjunction with other elements of the ethics regime/integrity system, it has the capacity to raise Ministerial standards. There is a real chance that it will also encourage Ministers to consider ethical issues in contemplating future action just as they consider the legality of their actions before they seek formal legal advice. In such cases, ethics would not be an afterthought but a part of the way that policy is formed and justified. One dare not hope that this will become the norm. However, if prior advice is available, one can hope that most Ministers will have the common sense to seek advance ethical clearance and avoid potential problems. Those lacking such common sense will soon find themselves out of Ministerial office.

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Attachment 2:

"The Role of the Auditor-General in Scrutinising Ministerial Ethics"

John Wanna and Alexander Gash

From* Motivating Ministers to Morality, *edited by Jenny Fleming and Ian Holland (London, Ashgate, forthcoming 2001).

The office of the Commonwealth Auditor-General was established by legislation in 1901 as a *single* statutory office holder responsible for providing independent opinion on the financial statements of the government. Such arrangements followed evolving Westminster practice (in the United Kingdom, Canada, New Zealand and the Australian colonies) of separating responsibility for auditing and reporting on the accuracy of the public account from the head of the government's budget agency (eg, the Chancellor, Treasurer or President of Treasury Board who would have reported annually on the state of the books). Some Australian jurisdictions had adopted multiple auditors-general and divided aspects of the audit function across two or more officials who were usually charged with other statutory or administrative duties. However, at the Commonwealth level it was felt more appropriate that a single, independent office-holder be given responsibility for scrutinising the public accounts, auditing the

books and stocks of public entities and reporting on the end of year financial statements. [1] The establishment of a dedicated statutory officer in Australia underlined the importance of money, revenues and expenses in a young federal nation where the regional colonies had surrendered some of their financial powers to a central government. The fact that multiple public auditors could be appointed, however, is an important precedent to which we later return.

The Commonwealth government attempted to separate the Auditor-General (AG) from the executive in a number of important ways. For example, the AG's salary was stipulated in legislation and itemised separately in annual appropriations; the AG was given wide inquisitorial powers to summon officials, inspect records and search premises; the AG was provided with secure tenure and protection from dismissal; and, in the annual report presented to Parliament, the AG was unconstrained as to the matters on which he/she could report (other than that a report on the Treasurer's end of year financial statements had to be presented). But in other important ways the AG was dependent on the executive. The office-holder remains an executive appointment. The position has never been advertised and, although appointed by the Governor-General, remains at the discretion of the Prime Minister, Treasurer and later the Finance Minister. 2 The annual budget of the Audit Office has until very recently been policed by the government budget agency (Treasury and Finance); in effect, the Audit Office has had to extract resources from the same government it is auditing. And, while the AG enjoys wide powers of inspection, in practice the AG and audit staff have experienced instances where requested information has been denied or delayed. For the AG to be effective in dispensing his/her statutory duties, requires good working relationships and the cooperation of agencies and Ministers. The AG is inevitably walking a very fine line.

The argument put forward in this chapter is that for much of the twentieth century successive AG's, and the Audit Office, 3 have not generally investigated or reported on Ministerial ethics or Ministerial behaviour. In the last decade, however, there are signs the AG's mandate has been extended, both through interpretation and statutory provision, to include *aspects of Ministerial behaviour*. But the bounds of the AG's investigatory powers in this area remain unclear. Principally, topics for investigation would be confined to the financial or procedural aspects of administration and in particular the capacity to undertake performance audits that in some way involve the Minister. Such powers are at present dependent on a broad and convoluted set of statutory powers that under certain circumstances can include Ministers. But these powers are also couched in conventions and protocols. While the AG can initiate or extend an investigation to include some aspects of Ministerial behaviour, the more likely occurrence is for matters to be referred to the AG by the relevant Minister (or the Prime Minister or Finance Minister), with the Ministers then agreeing to cooperate with the audit investigation.

It could be argued that during the 1990s, the AG became a reluctant volunteer or even conscript involved in scrutinising the administrative-ethical behaviour of Ministers. Such developments occurred not so much because of the personal motivation of the AG. Rather, they occurred as a result of performance audit investigations or requests from Ministers for the AG to investigate their behaviour. Circumstances, not auditor motivation,

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1 At Federation, the Head of State, High Court judges, the Crown Solicitor, the Auditor-General and the Public Service Commissioner were regarded as key public officials who should be provided with independent (constitutional-statutory) powers and other protections of their positions given they were (or could be) expected to form independent opinions. Later other statutory office holders and commissioners with independent powers were gradually added (eg, the Privacy Commissioner, Ombudsman).

2 The original *Audit Act* did not stipulate an appointment process or criteria for appointment for the AG. The 1997 Act still requires the proposed appointee be nominated by the executive but now also requires the responsible Minister to seek the agreement of the Joint Committee of Public Accounts and Audit on the proposal.

3 The Audit Office has appeared under many different titles since its establishment in 1902. Initially the Office was referred to as the Auditor-General's Department, occasionally the Federal Audit Office or Commonwealth Audit Office. In 1984 it became known as the Australian Audit Office, and in 1991 the Australian National Audit Office. This latter name is enshrined in the new *Auditor-General Act 1997* and the office is established as a statutory authority in its own right for the first time.

brought Ministerial behaviour more into focus.

While this may be viewed in a positive light (ie; as a means of enhancing scrutiny of the executive, bringing wayward Ministers to heel, providing Oppositions with independent judgments with which to score political points), we argue there are substantial risks in relying on the AG to perform this function. There are political dangers associated with an extension of the role of the AG into areas where auditors may or will be required to investigate the ethical behaviour of Ministers. Increasing the involvement of the AG in such matters is likely to compromise the office and expose the AG to various forms of political attack or denigration. Also affected may be the AG's core activities in auditing public sector agencies and maintaining effective working relations with departments. We question whether the AG is the appropriate office-holder or has the capacity to scrutinise effectively the privileged domain of Ministers. A better alternative may be to establish a separate auditor with the powers to investigate parliamentary and Ministerial allowances and entitlements.

Ministers and the Body Politic: Beyond Effective Reach?

Officially, Ministers are appointed by the head of state generally to administer a department or area of administration. But they are elected representatives enjoying both parliamentary and executive privileges. Cabinet proceedings remain confidential and Cabinet records are only selectively released publicly after thirty years (although the AG can gain confidential access to Cabinet documents providing they relate to an audit and reasons are provided).[4] Ministerial decisions were traditionally regarded as privileged, although the procedural and substantive nature of those decisions has increasingly come under review through administrative law and the courts. Ministers have traditionally enjoyed protection under public interest immunity (previously known as crown privilege) in their deliberations and for most of their decisions. Such privileges have also been accepted as extending to their behaviour and practices. The Minister's private office and immediate staff were similarly considered sacrosanct – not part of the general area of administration, and more recently governed by the *Members of Parliament (Staff) Act 1984*.[5]

For the most part the decisions and behaviour of Ministers can be debated in parliament but are beyond (or at least appear to be beyond) the purview of other officials and accountability officers. The notion of "Ministerial provenance" has existed to define an area that is off limits to other investigators, although the actual boundaries of this domain remain unclear and often untested. But, if Ministers are beyond effective reach it may not be because they are formally excluded but because they are conventionally regarded as outside the parameters of statutory investigators.

Role of the Auditor-General in Scrutinising Ethics in the Public Sector Generally

The first *Audit Act* of 1901 limited the scope of the audit function but provided a wide range of powers for the AG within those limits. As Funnell (1994:344) has argued: "The original intent of the *Audit Act* was to limit the state auditor to the auditing of Consolidated Revenue Fund, the Loan Fund and the Trust Fund". The auditor was meant to give an opinion on the Treasurer's end of year financial statements. As such, "much of the Act dealt with detailed financial procedures, such as the operation of bank accounts and the proper procedures for the payment and collection of monies" (Funnell 1994:299). In other words, the AG's mandate and authority was limited to transactions involving the three main public funds operated by the Commonwealth, but otherwise had wide powers of investigation, surveillance and cross-examination under oath. There is also little specific detail in the original act as to how the AG should discharge his or her responsibilities and undertake actual audits. For example, issues of whether the AG and Audit Office staff should visit the site (the "travelling audit"), conduct a

comprehensive audit or a sample audit, chase small amounts of money or investigate systems of assurance, or even initiate an investigation – are left to the discretion of the AG.

Initially, one of the AG's main roles was to report and eliminate instances of fraud, financial malpractice and corruption. So, although the role of the AG was presented as one of independent verification and assurance, the darker-side of the job originally was to perform the bloodhound role and seek out miscreants and corrupt practices involving the use of public money. But over the years the emphasis on catching the culprit in personal cases of fraud has tended to decline. In part this is due to the growth in size of the Australian Public Service (making the identification of individuals increasingly difficult) and in part because of greater administrative regulations and later, more sophisticated computer systems served to minimise opportunities for fraud. The Audit Office instead prefers to review internal audit control systems, financial and management information systems in order to eliminate possibilities of non-compliance or malfeasance. Individual fraud cases are still referred to the relevant authorities to initiate criminal proceedings, but the overwhelming orientation of the Audit Office is the move away from the "gotcha mentality" in public auditing to a ethos of improving internal systems of assurance to prevent suspect behaviour – a philosophy that would presumably guide any investigation into cases of Ministerial abuse.

Role the Auditor-General Plays in Scrutinising Ministerial Behaviour

Until recently, Auditors-General have not played a major role in scrutinising the behaviour of Ministers. Moreover, Auditors-General have rarely attempted to clarify their powers in relation to the auditing of Ministers. So what held the auditors back? A number of factors are often seen as constraining the AG from engaging in Ministerial investigations of a more substantive nature.

Australia, along with many other Westminster-derived systems, traditionally operated with a mixture of statutes and conventions. It could be argued the *Audit Act 1901* was one of the main factors inhibiting Auditors-General from investigating Ministers, but neither the original Act nor its subsequent amendments specifically prohibited the AG from investigating Ministers (or other parliamentarians). Section 14 of the original Act provides that the AG is "authorised and required to examine upon oath declaration of affirmation ... all persons whom he shall think fit to examine respecting the receipt or expenditure of money or any stores respectively affecting the provisions of this act". A subsequent section (s 14(b) inserted in 1948 and amended again in 1969) stated that the AG shall have "full and free access to all accounts, books, documents and papers in the possession of (a) any authority established or appointed under any law of the Commonwealth; (b) any officer or employee under the control of any such authority; and (c) any other person". Such clauses applied to those areas of public administration that auditors *could* audit, though they did not appear to exempt Ministers.

One area of the public sector explicitly excluded from the *Audit Act* in 1961 was the parliamentary refreshment rooms. Section 2A(3) stated: "The provisions of this Act do not apply to or in relation to affairs and transactions (including the receipt or expenditure of money) in relation to the Parliamentary Refreshment Rooms except affairs of transactions involving expenditure of moneys for the purpose of which the Consolidated Revenue Fund has been appropriated". Nevertheless, this specific amendment does not provide a general statutory exemption of Ministerial entitlements under the Act.

Under the new *Auditor-General Act 1997*, the AG has a wide mandate to audit Commonwealth agencies, authorities, companies and subsidiaries. The Act specifies the main functions of the AG as two-fold: auditing financial statements and conducting performance audits. Moreover, the AG can audit any Commonwealth entity "at any time" and can also ask the responsible Minister, the Finance Minister or the Joint Committee of Public Accounts and Audit to request a particular audit of an entity. While the main provisions of the act relate

principally to legal entities (agencies, authorities and companies), other sections refer to "any person of body" which has been interpreted to include Ministers. Hence, it is clear that the AG's core responsibilities are to audit the various listed public sector entities and activities. But it is also apparent that Ministers and parliamentarians (as persons) are *not* excluded from the scope of the Act and, depending on the circumstances, their activities (including information they may have) are now clearly within the AG's powers of investigation. So, although not specifically mentioned by the Act, Ministers and Ministerial activities can now become the target of investigation.

More persuasively, the powers of the AG are limited by parliamentary privilege and the immunities enjoyed by members of each House of Parliament. The AG may not use his/her powers so as to breach or infringe parliamentary privilege, but this statutory protection (under the *Parliamentary Privileges Act 1987*) may not cover *all* circumstances involving Ministers, nor may an AG's request for information from a Minister necessarily be in breach of privilege. Ministerial offices, however, since the proclamation of the *Members of Parliament (Staff) Act 1984*, are exempt from falling under the AG's mandate for the purposes of performance auditing. This provision is repeated in the *Auditor-General's Act 1997*, which states that a general capacity to undertake performance audits of agencies "is taken not to include any persons who are employed or engaged under the *Members of Parliament (Staff) Act 1984* and who are allocated to the Agency" (s 15).

In addition, it appears that certain conventional understandings of crown privilege or "public interest immunity", have meant that many political participants and observers generally considered Ministers beyond the purview of the AG's mandate. Such conventional understandings of the "area of Ministerial provenance" may have discouraged Auditors-General from attempting to investigate Ministerial behaviour, perhaps because they regarded Ministers as outside their mandate. Indeed, some Auditors-General have gone on record stating that they considered the Ministerial and "political" area to be outside their scope, and something they kept "well out of" (Craik 1980:2).

Certainly, from the written documentation, Auditors-General have not reported much on matters involving Ministerial behaviour or ethics since Federation. Excluding the decade of the 1990s one could be forgiven for believing that successive Auditors-General have shown little inclination to initiate or pursue an investigation into Ministerial practice and ethics off their own bat. 6 Moreover, when traditional forms of auditing into agencies, programs or administrative practices have in the course of investigation touched on Ministerial involvement the AG has generally either excluded such considerations from the final recommendations or not commented on Ministerial behaviour *per se*.

But such conventions have been challenged in recent years with the intention of opening up a somewhat more significant role for the AG in auditing the ethical behaviour of Commonwealth Ministers, especially in relation to their expense claims and uses of public funds for official purposes. John Taylor (AG from 1988-95) did attempt to introduce a US-style system of Ministerial ethics but was frustrated by the total lack of support in Canberra. He recalled that, "I took this little thing around with me (a US General Accounting Office ethical code) whenever I could talk to anybody about Ministerial ethics and the framework in which it could operate. I couldn't go into a Minister's office, I had no power to go into a Minister's office and inspect papers ... I don't think I had a hope of implementing anything significant in relation to a Ministerial ethics framework" (Wanna and Ryan 2000).

The new Act does clarify some aspects of Ministerial provenance. In relation to financial or assurance audits the Ministerial office is not specifically excluded. Furthermore, Division 3 Section 20 of the legislation specifically gives the AG the power to undertake audits "by arrangement with any person or body". Already legal advice and a particular precedent (the Health Minister Michael Wooldridge) indicates this can include Ministers (if they

secure Ministerial agreement). Section 20(1) of the Act states that:

> The Auditor-General may enter into an agreement with any person or body:
>
> (a) to audit financial statements of the person or body; or
>
> (b) to conduct a performance audit of the person or body, or
>
> (c) to provide services to the person or body that are of a kind commonly performed by auditors.

The only limitation to this power is that the AG must not perform functions under Section 20(1) "for a purpose that is outside the Commonwealth's legislative power". This limitation was included to prevent the Commonwealth AG straying into state or inter-jurisdictional affairs and to prevent the AG operating as a private business. The limitation, however, does not exclude Ministers or their offices. The new Act also extends the definition of Minister of state to include the Speaker of the House and President of the Senate as Ministers.

Audit of Ministers by Ministerial Invitation

There is no statutory or formal mechanism preventing Ministers from requesting the AG to investigate matters in which they have had a hand. However, while Ministerial requests for audit investigations into agencies or programs are reasonably frequent (and occur regularly for some organisations), it is hard to find any evidence where the AG was requested by Ministers to investigate *themselves* until 1997. Since 1997 there have been just two requests from Ministers to investigate Ministerial behaviour.

There are two ways by which Ministers can request (but not direct) the AG to investigate their behaviour. First, the Prime Minister and/or Finance Minister have the power to request the AG to investigate matters in another portfolio that may involve another serving Minister. Second, Ministers are at liberty to write to the AG requesting an investigation into matters where they personally may be involved or implicated. In both cases, such action may be taken for a variety of reasons. A prime Minister or Minister may wish to be seen to be transparent and publicly accountable, or they may hope to have the AG exonerate their behaviour or that of their personal and/or departmental staff. The Minister may be embarrassed by a scandal and consider an independent audit report the least damaging way out. To date, there have been two requests: first a request was received by the AG from Prime Minister John Howard in 1997; and in 1999 the Health Minister Michael Wooldridge made a further request.

On 24 September 1997 the Prime Minister John Howard requested the AG to conduct an investigation into matters relating to Ministerial travel allowance claims. The prime Minister's request was made amid accusations of impropriety raised about the travel claims lodged by the then Minister for Transport and Regional Development, John Sharp. The AG was somewhat reluctant to undertake the audit, not because it involved a Minister but, because he considered an efficiency audit under the *Audit Act 1901*, would or could not reveal anything likely to be of benefit. But judging the matter to be sufficiently in the public interest, he responded to the prime Minister's request by advising that the inquiry would involve the examination of "any actions carried out by, or on behalf of, a Minister which had any bearing on the operations of the relevant departments" (Australian National Audit Office (ANAO), 1997, xiv). He also reminded the government, however, that his "statutory functions did not extend to examining the operations of a Minister or a Minister's office other than as they related to the conduct of the audit" (ANAO, 1997, xiv). While most of the AG's findings centred around the lack of appropriate administrative systems in processing Ministerial travel claims, the Audit Office was critical of the personal role the Minister had played. The AG went as far as to say that in a number of instances Sharp "incorrectly" certified that he was entitled to a travel allowance – a damning finding which stopped short of accusing the Minister of fraud. Sharp was found not to have taken due care in making travel claims. The AG also

warned all Ministers that before lodging claims "Ministers should ensure that they are correct" (ANAO, 1997, xviii).

At that time, systems of payment of Ministerial entitlements and reimbursement of expenses (separate from departmental expenses) were handled by Ministers themselves through a self-authorising procedure, assisted by their personal staff. Often a small unit was attached to the Prime Minister's department to process the claims and report totals. Historically, these amounts were relatively small but could still be audited. Over time the amounts involved increased while the system of checking and monitoring remained lax. Following the scandal of the 1997 Travel Rorts Affair (see Tiernan, Chapter __), responsibility for Ministerial entitlements and expenses was transferred to a unit in the Department of Finance and Administration (DoFA) that established new, relatively strict guidelines and reporting practices. The processing of Ministerial claims for expenses is now audited by the ANAO. 7 In other words, the amounts claimed in Ministerial expenses and receipts produced are now audited by the AG, as are the internal processes of administration adopted by DoFA to process these claims. But the reasons for the expenses or the substance of the claims is not itself audited – the AG has agreed to trust the word of the Minister providing the correct disclosure procedure has been adopted. 8.

The second case involved a request made in October 1999 by the Minister for Health, Michael Wooldridge. The Minister requested the AG investigate a matter in which the Minister was personally involved and which in effect asked the AG to investigate aspects of the Minister's behaviour. The matter related to the budget round of the previous year (May 1998) when the Commonwealth government announced arrangements to fund improved access to Magnetic Resonance Imaging (MRI) services under the Medicare benefits scheme – after intense negotiation with representatives from the Royal College of Radiologists. By February 1999 questions were raised in the Senate and subsequently in the House of Representatives, over a number of accusations and suggestions of "inappropriate behaviour by various parties involved in the negotiation process" (ANAO 2000:11). The accusations centred on the excessive placement of orders for MRI machines before budget night by persons who had access to confidential information about the scheme to be announced in the budget – thus providing certain individuals with a financial advantage. On 18 October 1999, the Minister requested the AG conduct an audit into the "probity of the processes surrounding the negotiation of the Agreement between the Government and the diagnostic imaging profession" (ANAO 2000:12). In particular, the request invited the AG to investigate why a sudden influx of MRI orders had occurred, just prior to the scheme being officially announced.

The unique aspect of this inquiry is that for the first time in history the AG had required a Minister give evidence under oath – an agreed procedure with the Minister. Following legal advice, the Audit Office had used section 20 (1) of the *Auditor-General Act 1997* to enter into an agreement with the Minister to acquire full and free access to the relevant documents and information and to engage in the necessary discussions with the Minister and his staff. The investigation extended beyond the routine grounds of a section 18 audit and invoked previously unused access and information gathering powers. However, the main focus of the AG's investigation remained on probity and process issues. In collecting evidence, the audit revealed differing accounts of events given by people under oath – which then raised questions about what the AG should then do when confronted with such different recollections of the events.

From one perspective, the MRI audit may have set a precedent whereby Ministers may be personally interrogated by an Auditor in the process of an audit investigation. However, the Audit Office does not consider the Wooldridge case a precedent, preferring to regard it as a last resort and not normal practice. In many ways, the MRI audit has increased expectations of the Audit Office; so that when a comparable case occurs sometime in the future the Office may well be asked whether it is going to use its section 20(1) powers and, if not, why not.

Audit by Ministerial invitation also begs the question: how far can the AG initiate an investigation without the Minister's invitation. There may be many instances where matters under audit may involve the Minister and where some questions of propriety or process are raised. Conventionally, were a Minister to indicate that he/she did not wish to cooperate with the audit investigation the AG would eschew that particular matter or redirect the line of investigation to focus the audit solely on administrative/procedural matters. While the new Act enables the AG to obtain information widely by directing "a person" in writing to provide "any information the Auditor-General requires" and if necessary to "attend and give evidence before the Auditor-General or an authorised official" and "produce to the Auditor-General any documents in the custody or under the control of the person" (section 32(1)), these powers relate only to an Auditor-General function. This section is not sufficiently encompassing to include Ministers and their staff in their own right.

A scenario could conceivably unfold in which an AG were to approach a Minister to provide "information or answers to questions" and for those to "be verified or given on oath or affirmation". Conceivably, the AG could approach a Minister and seek to put him/her under oath (which would bring them under the provisions of section 32 of the *Auditor-General Act 1997).* Hence, the audit-related information gathering powers of the AG imply that the auditor can certainly approach Ministers for information provided it relates to audit mandate functions. The AG is empowered to write to Ministers demanding information, and can seek to extract information orally from them under oath or affirmation.

Of course, Ministers may elect to refuse to provide an oath or affirmation (claiming parliamentary privilege or Ministerial provenance and challenging the specific provision applies to Ministers). But in circumstances where the AG had formally directed they do so, a refusal to answer under oath could be either illegal or politically damaging to the Minister concerned and erode their standing or credibility. The need to manage perceptions may force Ministers increasingly to "come clean" by providing the AG with information and answers to questions under oath.

Performance Audits as a Means to Explore Ethical Behaviour by Ministers

The Royal Commission into Australian Government Administration (1976) recommended the AG's mandate be extended to encompass the ability to report on the efficiency and economy of government agencies. Subsequent legislative changes extended the powers of the AG in 1979. Since that time the Audit Office has gradually moved away from solely concentrating on traditional concerns of probity and financial compliance to also include an ethos of accountability through performance and economic efficiency. Certainly, the main target of efficiency audits was routine administration in departments and agencies, but this extension of the AG's powers may have increased (perhaps unintentionally) the possibility of the AG investigating the ethical practices or integrity of Ministers (eg, the trajectory of the "Sports Rorts Affair" efficiency audit tabled in 1993).

The 1993 "Sports Rorts Affair" became an infamous case in which an efficiency audit found irregularities in the administrative procedures of Ros Kelly, the then Minister for Arts, Sport, the Environment and Territories. A political row exploded between the then Keating Labor government and the Coalition over grant allocations from the *Community Cultural, Recreational and Sporting Facilities Program.* The unproven but ultimately damaging allegation was that she had "interfered with the due process of public administration and exercised her Ministerial influence" for political party purposes (Uhr, 1998,153). As a result of an efficiency audit report tabled in 1993, the Opposition parties claimed that marginal government seats had received a disproportionate percentage of funding (ANAO, 1993, 11). The audit report, however, was more cautious in its findings. Other than making a brief statistical comparison to the percentage of Labor and Liberal seats that received funding, the Auditor shied away from accusations of unethical conduct by concluding that the statistical analysis did not

"demonstrate one way or the other that projects were approved on party political grounds" (ANAO, 1993, 12).

Further claims of inappropriate conduct centred on the Minister's lack of cooperation with the audit inquiry, the extent and use of departmental documentation in her Ministerial office and incidents where the Minister had ignored departmental advice. The AG's report did not accuse the Minister of impropriety. Rather, recommendations concentrated on the department's administration of the program and improving the criteria upon which community cultural, recreation and sporting grants were allocated. The Minister concerned eventually agreed to present evidence to a House of Representatives committee investigating the administrative procedures. She was ultimately damaged, less by the audit report, but by her own decisions to tough-it-out. Her admissions brought further embarrassment to her when she personally admitted allocating grants on a whiteboard in the Minister's office. Under mounting political pressure she then elected to resign from office.

The *Auditor-General Act 1997* now lists the main functions and powers of the AG to conduct performance audits, special audits by arrangement and "extra audits". The general scope of these audits is directed toward Commonwealth organisations, but three important points arise from this statutory power. First, the AG can initiate these types of audits independently without waiting for a request and without needing to obtain a court order to force people to comply with directions to provide information. Second, the AG is required after undertaking these types of audits to "bring to the attention of the responsible Minister any important matter that comes to the attention of the Auditor-General". The definition of "important matter" being "any matter that, in the Auditor-General's opinion, is important enough to justify it being brought to the attention of the responsible Minister". And, third, the AG can undertake performance audits *by arrangement* with individuals or bodies (which has been interpreted as extending the potential scope of such audits subject to agreement). So, if in the process of conducting an audit the ANAO discovers some apparent anomalies, questionable procedures or unethical behaviour by the Minister, the AG is empowered to draw that matter to the attention of the responsible Minister and approach the Minister with the intention of arranging an agreement to audit the person. Moreover, the AG is also able to draw such matters to the attention of the Prime Minister and/or Finance Minister and present a special report to Parliament.

Conclusions

The degree to which the AG can perform an effective accountability function in relation to Ministerial behaviour is ambiguous. Much relies on agreements, interpretations of powers, understandings of conventions and the circumstances involved in particular cases. The new Act has significantly enhanced the role and power of the Auditor in scrutinising administrative and financial behaviours across the public sector, including in certain circumstances Ministers themselves. However, if the AG is to become more heavily involved in the scrutinising of Ministers, there is a significant risk that this will lead to the unfortunate politicisation of the office of the Auditor-General, perhaps exposing the incumbent to invidious political situations or where there may be risk of appearing as a pawn in a partisan conflict. Extending the AG's investigations explicitly into the Ministerial domain may indeed undermine the Audit Office's capacities to undertake the core responsibilities with which it is charged (the assurance and performance auditing of the public sector at large).

There are some fundamental problems in relying on the AG to investigate incidences of Ministerial breaches of accountability. There has been a reluctance in the past to explore this domain and uncertainty about the extent of the AG's powers or mandate. Moreover, auditors may only operate within the audit function, and many issues of Ministerial behaviour or ethics may fall outside such bounds (eg., judicial or statutory appointments, discrimination, improper personal relations). In addition, if the AG becomes more active in this respect, it may sour working relations with executive government and parliament, therefore, inhibiting the AG's effectiveness in

scrutinising public expenditure. This would most certainly be a "high price to pay" for what is in effect an assurance function relating to a relatively minor aspect of public expenditure.

A better solution maybe to place less expectations on the AG by the establishment of a dedicated Ministerial and parliamentary auditor. [9] This would not necessarily remove the AG from the picture, but complement his/her endeavours with a specialist and equally independent office-holder enjoying equivalent powers of investigation but narrower responsibilities. The role of a Ministerial and parliamentary auditor, responsible to the parliament, could focus on financial matters and practices (allowances, entitlements, travel claims etc) but could entail a wider ethical mission. The officer could also be used to investigate complaints almost as a specialist ombudsman, provide advice or counselling, and codify and monitor ethical standards for parliament as a whole. This position need only require a part-time officer and a small staff whose sole concern is the auditing of Ministers, parliamentarians, and their support staff. By appointing a parliamentary auditor, the parliament would allow the AG to concentrate on improving financial accountability and issues of value for money in the broader public sector. And, the existence of a parliamentary auditor would arguably have a stronger deterrent effect on parliamentary and Ministerial behaviour – and at least require adequate documentation was maintained and procedures followed.

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