



**ADDITIONAL SUBMISSION TO THE AUSTRALIAN SENATE,
FINANCE AND PUBLIC ADMINISTRATION COMMITTEE**

By Professor Charles Sampford

Director, Institute for Ethics, Governance and Law

I did not come here to make partisan comments but to address a genuine problem arising from a temptation to abuse a power that goes directly to the heart of our democracy. I did not come to Canberra to pick a fight with Senator Abetz and I did not make a criticism of any campaign from either side of politics. I am more than happy to make the journey and seriously engage with this committee. I have been invited to appear before quite a few parliamentary committees and served one for seven years (being re-appointed principal legal advisor to the Queensland Scrutiny of Legislation Committee despite two changes in government majorities and a hung parliament). I must say that I am taken aback at the comments of Senator Abetz as I have to date always been treated with respect by parliamentary committees and their members. The same is true of the significant number of politicians from both sides of politics with whom I have dealt. This is the first time I have seen anyone describe any of my writings as 'pathetic' or suffering 'defects of thought'¹. I had not thought it necessary to set out my qualifications but I think that it might be appropriate to append a short CV – which also includes the correct spelling of my name.

I note that Senator Abetz seeks to dismiss some of the other submissions because of the alleged political affiliations of those making them. This seems a strange disqualification in this or the other place. However, if the committee were to accept this as a reason to reject their views, the Committee would also have to reject his – as his affiliation is at least as evident as that of anyone else making submissions. While this might advantage myself and others not charged by the Minister with political affiliation, I believe that the Committee should examine all submissions on their merits. I am not the issue and I do not intend to be the issue. I take it that the same holds true of the others making submissions.

WHAT ARE THE ALLEGED DEFECTS?

Conflation: There is no conflation of government advertising and election advertising. Section 3 identifies a common reason for their importance and also distinguishes them on the basis of different fears.

Straw men: 9.4 indicates theoretical alternatives that are rejected.

On-the-one-hand, on-the-other-hand moralising: I do not see how balance and ethical argument are defects. The Government invokes values without being condemned by the minister for 'moralising'.

Senator Abetz asks some good questions about the proposed neutral arbiter. The answers to most of those questions are set out later in the document in our discussion of the committee proposed in one of the bills on which we are commenting. There are a number of ways of appointing neutral arbiters but in 10.25 we suggest a majority vote by a designated parliamentary committee with the majority including at least one opposition and one government member. Powers are discussed in the following half page. We do not make a recommendation for removal but would now suggest following the same process as dismissing an auditor-general.

¹ I am not sure whether his concession that it contains 'far fewer' defects is damning with faint praise or praising with faint damning but either way it is a novel.

The one argument that Senator Abetz does not address is that in my accompanying letter of August 16th. Indeed, in criticizing Labor governments, he is effectively endorsing the first three propositions – that there is a temptation to abuse the government advertising powers, there is a risk of abuse and at least one side of politics has abused it. His own position becomes remarkably similar to that which point 4 queries – that governmental virtue makes further regulation unnecessary. The problem with this position not only relies on a statistically unlikely distribution of virtue (i.e. all of it on one side of politics) but that it opens up the question: ‘what would happen if the other side DID get in to government?’

I do not expect politicians on either side to be saints. I doubt that many of us would elect a saint even if he or she were to stand for office. The whole point of good governance is try to create institutions that do not need saints to run them and can inspire public confidence despite the fact that they are run by mere mortals.

NOT JUST AN ISSUE FOR THE CURRENT GOVERNMENT

I do not have any difficulty agreeing with Senator Abetz that the Committee should look at state and federal governments and examples of potential or actual abuse by either side of politics. The risk is not confined by political or geographical boundaries. The first advertisement that caused me concern was in 1975 (an advertisement for the AAP). There have been many at state and federal, labor and coalition that have subsequently worried me. I am not concerned to show who did what to whom. My concern is that once a clear risk has been adduced, we should seek to address it rather than seeking more evidence to establish what had already been concluded.

It could be objected that a comparative enquiry would mean that the Senate was investigating the states and that this might mean that state parliamentary committees might investigate the exercise of commonwealth powers. I do not see a problem either way – unless one parliament attempted to interfere with the privileges of another.

RISK MANAGEMENT

Dr Round and I indicated the risk in section 3 of our submission:

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.

Many others characterize the risk in similar ways.

The main issue is not whether this or that politician has done the wrong thing in the past. That implies that the problem is a personal failing rather than a systemic risk. If the problem is seen as a personal failing of one person or one side of politics, then the ostensible solution is to change the personnel or the government. But this will merely hand the power and the temptation to a new group who may prove no more capable of resisting the temptation than the old one – with the fact of previous abuse

being seen as an excuse to do the same or get even.²

The parliament should treat the potential abuse of political advertising in the same way as corporations identify and deal with risk. Once a board has established a risk, its magnitude and its likelihood, then it is bound to consider what it can do to limit the likelihood of the most probably and serious risks materializing and the damage that would be done. While I am not going to say that governments and parliaments should always act like corporate boards, it is always worth considering how they would approach such problems.

AN APPROACH TO REDUCE RISK

The approach suggested is likely to significantly reduce the risk of government advertising being used for party advantage. I will flesh this out a little.

1. There should be a committee to give prior clearance to the advertising brief and the campaign advertisements placed.
2. Each committee member would be appointed by a bi-partisan process such as the one described above. There are other possible methods of appointment. The key is that any such method should produce committee members in whom the public and both sides of politics can feel confident. Where the same advertisement can be described by one side as 'information' and the other side as 'propaganda', it is important that those who make the decision are seen to be independent of both sides.
3. Requests for advertising campaigns above a set figure (say \$100,000, or perhaps \$250,000) would have to go to the committee indicating the information to be communicated, why it needs to be communicated, any relevant research or focus group analysis. They would decide whether or not to proceed and whether to amend the brief. They would approve the final product on the basis of how well it met the brief. The departments would be entitled to make submissions and ultimately to decide whether to fund the campaign.
4. A strong case could be made for all papers to be freely available on the web – with the exception of pitches by external advertising agents. Arguments for secrecy in a Government Information process will always arouse suspicion.

CREDIBILITY and EFFICIENCY

Note that there is a very important side effect of having an independent highly credible body certifying that the accuracy and non-partisan nature of the advertising. This will give the advertising campaign greater credibility and increase the likelihood that it will be accepted. It will also make it far less likely that the campaigns will be attacked as false – and if it is so attacked, the government can brandish the independent arbiter's decision. This will save time and money and increase the efficiency and effectiveness of the government advertising.

² Even worse, in some cases, the potential to abuse the power might well be the reason for seeking power in the first place.

GENERAL

I wrote in 'Prior Advice is Better than Subsequent Investigation'

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 or 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. ...

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.

Politicians have a choice in the way they see their profession.

1. They believe that their own policies are right for the citizens who elect you and all you need is a level playing field to convince them
2. You are either unsure that the policies are right for the citizens or believe that they cannot be persuaded without outspending your opponents by a significant factor.

Most politicians would enter politics with the first view. I hope that most still hold it and I think it is still true of the majority of politicians whom I know. If so, you should insist on a mechanism to minimize the likelihood of abuse, eschewing the use of government advertising to persuade citizens that your policies and/or performance is better than it was.

I would draw your attention to the penultimate paragraph of my letter of August 16th 2004. The temptation to use government advertising for party political purposes is sufficiently strong, and the number of occasions on which both sides of politics genuinely believe that the other side is giving in to the temptation, that we need an institutional solution to make it difficult to give in to the temptation. We did it for electoral distribution and we should do it for government advertising.

Professor Charles SAMPFORD

Brief CV

After gaining a double first in politics and philosophy and the Supreme Court Prize in Law from Melbourne University, Charles Sampford won a Commonwealth Scholarship to Oxford to pursue all three disciplines in his doctoral studies. He was awarded a DPhil in 1984 which was published by Blackwells as 'The Disorder of Law'. He returned to Melbourne University to teach law before being seconded to the Philosophy Department in 1990 to help establish the Centre for Philosophy and Public Issues as Deputy Director and Principal Research Fellow. In 1991 he was invited to come to Queensland as Foundation Dean of Law at Griffith University. This is widely regarded as the most innovative and most successful of Australia's new law schools and was hailed by Sir Ninian Stephen as a 'revolution in legal education.' In 1999, he was appointed Foundation Director of the Key Centre for Ethics, Law, Justice and Governance (one of only 14 such nationally funded centres across all disciplines and all disciplines). In September 2004, he became the Director of the Institute for Ethics, Governance and Law, a joint initiative of the United Nations University and Griffith. He also takes on the role of Convenor of the Australian Research Council funded Governance Research Network.

Professor Sampford has written eighty articles and chapters in Australian and foreign journals and collections ranging through law, legal education and applied ethics and has completed nineteen books and edited collections for international publishers including Oxford University Press, Blackwell, Routledge, Cavendish and Ashgate. He is on the editorial Boards of Legal Ethics and Public Integrity – the leading journals in their fields based in England and the USA respectively.

Foreign fellowships include the Visiting Senior Research Fellow at St John's College Oxford (1997) and a Fulbright Senior Award to Harvard University (2000).

At the same time he has pursued a successful career as a part time company director and company chairman, gaining insights into the operation of Australian and international business that are valuable in work as an applied governance researcher.

Since October 2001, he has been President of the international association of public ethics practitioners (the International Institute for Public Ethics), the third to have held that post.

Professor Sampford has been consulted by business, government and various Parliaments. In UK has advised the Nolan Committee on Standards in Public Life and the Lord Chancellors Committee on Legal Education and Professional Conduct. In September 1998, he went to Indonesia on a special mission for the World Bank to advise the Indonesian government on governance reforms to deal with corruption. From 1995 to 2002, he was the principal legal advisor to the Queensland Parliament's Scrutiny of Legislation Committee. Since early 2002, he has been a member of a task force on responding to threats to democracy chaired by Madeleine Albright and Bronislaw Geremek.

Current Positions

Foundation Professor of Law and Research Professor of Ethics, Griffith University

Convenor, Australian Research Council Governance Research Network

President, International Institute for Public Ethics

Director, Institute for Ethics, Governance and Law (a joint initiative by the United Nations University and Griffith)

Qualifications:

BA (Melb) 1975: 1st class honours in both Philosophy and Politics and first on all relevant class lists

LLB (Melb) 1978 1st class honours and Supreme Court Prize for student first on class list

DPhil in Law (Oxon) 1984

Publications

In 22 years of academic life, Prof Sampford has completed nineteen monographs and edited collections as well as 80 articles and chapters. In the last seven years, Prof Sampford has completed three monographs and nine edited collections as well as 18 book chapters and seven articles in refereed journals. Some of the highlights include:

1. Encouraging Ethics and Challenging Corruption: Public Sector Ethics in theory and practice Federation Press, 2002 (joint author with Noel Preston, writing over half the text)
2. Retrospectivity and the Rule of Law Delivered to OUP under contract and accepted for publication (reviewer's comments: 'an excellent book, very clearly written and very tidily organized... So far as I am aware no book on the subject has been written in the common law world.')
3. Legal Education: New Foundations Cavendish, 1998 (principal author, other authors Ralph Simmonds and Jack Goldring)
4. Editor Legal Ethics and Legal Practice: Contemporary Issues Oxford University Press, Oxford, 1995 (with S.J. Parker)
5. Editor Interpreting a Constitution: Theories, Principles and Roles, Federation Press, Sydney, 1996 (with K. Preston).
6. Editor Sir Zelman Cowen: A life in the law festschrift for Sir Zelman Cowen, Prospect, 1997 (with C-A Bois)
7. Editor Ethics and Political Practice, Routledge, London, and Federation Press, Sydney, 1998 (with Noel Preston and Carol Bois)
8. Editor Public Sector Ethics: Finding and Implementing Values, Routledge, London, and Federation Press, Sydney, 1998 (with Noel Preston and Carol Bois)
9. Editor Beyond the Republic: Meeting the Global Challenges to Constitutionalism Federation Press, 2001 (with T. Round)
10. Editor Asia Pacific Governance: from Crisis to Reform Ashgate, London, 2002 (with S. Condlln and T.Round)
11. Editor Management Theory, Organisational Theory & Public Sector Ethics: Guiding the Institutionalisation of Ethics in Public Organisations Ashgate, 2003 (with Noel Preston and Carmel Connors)
12. Editor Measuring and Combatting Corruption Ashgate, going to publisher August 2005
13. "Recognize and Declare' - an Australian Experiment in the Codification of Legal Conventions" 7 Oxford Journal of Legal Studies 369 (1987).
14. "Codification of Conventions in Australia" 1987 Public Law 231 (with D.A.R. Wood) 14pp.
15. "Responsible Government and the logic of Federalism" 1990 Public Law 90, 26pp.
16. "Cumulative Effective Tax Rates" 21 Economic Analysis and Policy 211 (1991) 15pp.
17. "Law, Institutions and the Public Private Divide" 20 Federal Law Review 185 (1992) 38pp.
18. "The Future of Business Ethics: Legal Regulation, Ethical Standard Setting and Institutional Design" in Sampford and Coady (eds) Ethics, Law and Business Federation Press, Sydney, 1993, (with D.A.R. Wood).
19. "Retrospective Legislation in Australia" 22 Federal Law Review 217 (1994) 61pp (with Andrew Palmer).
20. "Law, Ethics and Institutional Design: Finding Philosophy, Displacing Ideology" 3 Griffith Law Review 1 (1994)
21. "Judicial Retrospectivity" 4 Griffith Law Review 170 (1995) 44 pp. (with Andrew Palmer)
22. "Institutionalising Public Sector Ethics" in Preston, N. (ed) Ethics for the Public Sector: Education and Training Federation Press, Sydney, 1994, 114, 25pp, reprinted in Woldring, K (ed) Business Ethics in Australia and New Zealand: Essays and Cases, Thomas Nelson, Melbourne, 1995, 195
23. "Academy and Practice" in Sampford and Bois (eds), Sir Zelman Cowen: A Life in the Law Prospect, Sydney 1997
24. Educating Lawyers to be Ethical Advisers' in K. Economides (ed.) The Ethical Challenge for Legal Education Hart Publishing, 1998.
25. "What's a Lawyer doing in a nice place like this? Lawyers and applied ethics", 1 Legal Ethics 1998.
26. 'Prior Advice is Better than Subsequent Investigation' in Fleming and Holland (eds.) Motivating Ministers to Morality, Ashgate, London, 2001
27. 'Sovereignty and Intervention' in Campbell and Leiser (eds.) Human Rights in Theory and Practice, Ashgate, London, 2001
28. "SME Ethics – small on business of small on ethics?" in Whincop (ed) Financing the Future: Ethics, Regulation and Contract, Ashgate, London, 2001
29. Raising the Standard: An Integrated Approach to Promoting Professional Standards and Avoiding Professional Criminality', in Russel Smith (ed) Crime in the Professions Ashgate, Aldershot, 2002 (with Sophie Blencowe)
30. "East and West: Crisis and Reform" Asia Pacific Governance 2000 Ashgate, London, 2002 (with Tom Round)
31. 'Environmental Governance for Biodiversity' Environmental Science and Policy Vol. 5, 2002, 79-90
32. 'What's a Lawyer Doing in a Nice Place Like This? Lawyers and Applied Ethics', 1 Legal Ethics 1998
33. "Media Ethics Regimes and Ethical Risk Management in Australia" 19(2) Journal of Mass Media Ethics, 86-108 2004
34. "Shareholder Values Not Shareholder Value: How to Convert 'Ethical Investment' from an Oxymoron to a Tautology" 2004 Griffith Law Review
35. 'Living up to the Promises of Trade' in Buckley, R. (ed) The WTO and the Doha Round: The Changing Face of World Trade, Ashgate, September 2003 (with T. Chataway, R. Lui, M. Palmer)

36. 'Reconceiving the Rule of Law for a Globalizing World' in Zifcak (ed) Reconceiving the Rule of Law, Routledge, London, 2004
37. 'Strengthening Domestic Responses' in Morton H. Halperin and Mirna Galic, Eds., Protecting Democracy: International Responses, Lexington Books, 2004 (with M. Palmer)
38. 'International Responses' in Morton H. Halperin and Mirna Galic, Eds., Protecting Democracy: International Responses, Lexington Books, 2004 (with M. Palmer)
39. 'Go Global, think local: rethinking national constitutions in the age of globalisation' in Hudson, W. and Brown, A.J. Restructuring Australia, Federation Press, Sydney, 2004, pp 211-226(with AJ Brown)
40. "From Greek Temple to Bird's Nest: Towards a Theory of Coherence and Mutual Accountability for National Integrity Systems" 64 (2) Australian Journal of Public Administration 96-108, 2005

Governance work

Professor Sampford was heavily involved in the reform process in Queensland, especially:

- Public sector ethics, codes of conduct and improvement of ethical standards (setting the framework and advising on structure, legislation and implementation);
- Scrutiny of legislation (he worked on improving legislative standards and has been principal advisor to the Scrutiny of Legislation Committee since its inception in 1995);
- Human rights (advising on the effective recognition of human rights);
- Administrative law reform (linking this with attempts to improve ethical, integrity and governance standards).

This work generated international recognition.

- He was the first person consulted by the UK Nolan Committee on Standards in Public Life in 1994 and its proposals reflected the Queensland approach which he developed with Howard Whitton and Noel Preston and which he wrote about extensively.
- The OECD PUMA recommendations on public sector ethics closely follow this approach.
- The Office of Government Ethics in the USA has acknowledged the importance of this approach.
- He was the governance expert on the World Bank's Mission to Indonesia in 1998 to advise on governance reform to deal with corruption, cronyism and nepotism. He was invited to give a keynote address at the conference that established a TI network in Indonesia. Following that, he was invited by Professor Rasyid (head of the then Political Reform Team) to give a workshop on building ethics into government.
- The Key Centre has hosted a number of high level week-long governance workshops in Brisbane involving MPs and senior government officials from the Philippines and the Pacific islands (funded by AusAID through PAGF and CDI respectively).
- He led a Key Centre group funded by UNDP who developed a leadership code for the Pacific Islands and recommended institutional measures to make it work
- He led an Open Society Institute funded series of dialogues on governance values involving western and Islamic scholars and practitioners.
- He is a member of the Centre for Foreign Relations Task Force on 'Threats to Democracy' chaired by Secretary Allbright and Bronislaw Geremek whose report was adopted by the second community of democracies ministerial meeting in Seoul in November 2002.
- He led the academic team working with Transparency International (TI) to improve their instruments to measure corruption
- He led the academic team working with TI to develop an improved means of assessing integrity systems with a major study of the Australian integrity system with a view to applying it to developing countries
- He is a member of a Soros' funded team that is doing an assessment based on that methodology in Georgia
- He was a member of the World Bank governance team looking assessing East Timor

The international anti-corruption movement traditionally emphasised detection and enforcement of anti-corruption laws. The Centre has long emphasised that ethics and good governance must lie at the heart of any concerted effort to reduce corruption. This approach has become increasingly influential, in significant part through the Centre's influence whether directly or indirectly (e.g. through the explicit adoption of our approach by the highly influential UK Nolan Committee on Standards in Public Life). This culminated in May 2003 with the final communiqués of the 11th International Anti-Corruption Conference and the 3rd Global Forum Against Corruption, which marked this shift in the clearest possible way. Hon Justice Barry O'Keefe as Chairman of the IACC and Jeremy Pope of TI were the ones who drove this methodology through but would certainly freely acknowledge the contribution.