

# Australia's public integrity institutions: Strengths, weaknesses, options

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## ***Integrity Institutions and Parliaments***

***Chair: Richard Bingham, Chief Executive, Integrity Commission, Tasmania***

## Strengthening integrity assurance for parliament and politics

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### **Abstract**

This paper examines some of the factors that can affect the integrity of parliament and by extension, politics.

A key factor in assuring integrity is the trust that citizens place in their parliament. This in turn is a product of the conduct of the parliamentarians who constitute each house of the particular parliament.

This conduct is of two types: (i) the manner in which parliamentarians approach their responsibilities to represent, make or unmake government, legislate (including budget-making), scrutinise the Executive, and address grievances;

(ii) the ethical standards that parliamentarians apply to their personal conduct whilst holding public office.

This conduct may be subject to two forms of control (i.e. regulation): the common law public trust principle whereby parliamentarians are public officers entrusted with responsibility for the public trust; and, codes of conduct (and like instruments) which guide parliamentarians' personal conduct, provide for investigation of alleged breaches and enable sanctions for breaches.

This paper reports research into codes of conduct, provisions for investigations and sanctions adopted by the Commonwealth Parliamentary Association.

Recommendations are made for the design and enforcement of codes of conduct with the aim of enhancing trust in parliaments.

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## Introduction

This paper examines some of the factors that can affect the integrity of parliament and by extension, politics. It argues that the conduct of members of parliament (MPs) is a major factor in assuring the integrity of parliament and politics. Note an important distinction between members of parliament and other politicians such as candidates. Members of Parliament are public officers “elected or appointed to public office” (Solomon, 2018, p.1); other politicians are not.

### MPs responsibility for the public trust

The public trust principle is central to the role of parliament and the conduct of politicians. There are multiple relevant, distinct uses of the word “trust” in English language literature as it applies to parliaments and MPs, which it is important to distinguish. In the context of parliaments, the more common use relates to the relationship between the citizens and their MPs, summed up in a Guardian Poll as: “trust politicians to act with honesty and integrity” (Guardian, 2011).

The second usage of trust relates to the public trust exercised by MPs i.e. powers entrusted in the MP or the institution of the parliament:

The central thesis of the doctrine of representative government is that all powers of government are derived from, ultimately belong to, and may only be exercised for and on behalf of, the people. It follows that persons entrusted with such power owe a fiduciary “duty of loyalty” to the public. Indeed, it is widely accepted that public office is a “public trust” and public officials are “trustees (Lusty, 2014, pp.337-8)

Solomon adds to our understanding of “public trust”. He differentiates “public office **as** a public trust” and “public office **is** a public trust”.

The first – public office **as** a public trust – is favoured by some judges who take the word ‘trust’ in its strictly legal sense, involving fiduciary obligations under equitable doctrines. Former Chief Justice of the High Court, Robert French has referred to the ‘public trust metaphor’, saying the notion of public office as a public trust is an old one, ‘borrowed ... from the principles of equity which define the duties of trustees’.<sup>2</sup>

The second - public office **is** a public trust - uses ‘public trust’ as a special kind of trust,

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<sup>2</sup> French, ‘*Public Office and Public Trust*’, the Seventh Annual St Thomas More Forum Lecture (2011), p. 8.

involving obligations not necessarily the same as those that arise with private trusts (Solomon, 2018, p.1).

Further, he points out that:

the term 'public trust' has been recognised and adopted in the statutes establishing anti-corruption bodies in NSW, Queensland, Western Australia and Victoria,<sup>3</sup> requiring those bodies to provide a safeguard against 'a breach of public trust' (Solomon, 2018)p.1).

The conduct of parliaments and politicians in relation to their public trust obligations is affected by Codes of conduct. These are intended to guide and influence MPs behaviour, to curb behaviour that undermines public respect for offending MPs and by association MPs in general and hence the parliament as an institution.

Underpinning the functions of parliaments are the principles of fiduciary duty and public trust. According to these principles, the parliament must act in the best interests of the polity on whose behalf it acts and must act to protect assets held in common, such as waterways and the atmosphere to give but two obvious examples. By ratifying the United Nations Framework Convention on Climate Change (UNFCCC), countries have accepted that they would be guided by principles including that they should 'protect the climate system for the benefit of present and future generations of humankind' (United Nations Framework Convention of Climate Change (UNFCCC), 1992).

Authorities argue that ethical responsibility is both an individual responsibility and a collective ethical norm. This understanding that responsibility may be a collective norm assists explanation of mass departures from ethical standards, such as the UK House of Commons "moats and dovecots" allowances scandal (The Telegraph, 2015, 2016).

It is this undermining of respect that derogates from the public's trust in the parliament. As parliament is the peak institution in parliamentary systems of government, a code of conduct applying to the members who constitute a parliament has the potential to be a key factor in public support for democratic governance.

## Legislatures

The paper's argument is in the context of the one known international standard for parliaments and legislatures in general - *Recommended Benchmarks for Democratic Legislatures*, developed by the Commonwealth Parliamentary Association, United Nations Development

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<sup>3</sup> For example, the *Independent Commission Against Corruption Act (NSW)* s. 8 (1) (c) (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust.

Programme, & World Bank Institute. The Benchmarks include:

ETHICAL GOVERNANCE

10.1 Transparency and Integrity

10.1.1 Legislators should maintain high standards of accountability, transparency and responsibility in the conduct of all public and parliamentary matters.

10.1.2 The Legislature shall approve and enforce a code of conduct, including rules on conflicts of interest and the acceptance of gifts.

10.1.3 Legislatures shall require legislators to fully and publicly disclose their financial assets and business interests.

(Commonwealth Parliamentary Association, United Nations Development Programme, & World Bank Institute, 2006).

It is important to note that neither the Australian House of Representatives nor the Australia Senate have a code of conduct as advocated by these Benchmarks.

The CPA's involvement reflects its Statement of Purpose which indicates that it

connects, develops, promotes and supports Parliamentarians and their staff to identify benchmarks of good governance and the implementation of the enduring values of the Commonwealth (Commonwealth Parliamentary Association (CPA), 2018).

The CPA has almost 200 affiliated houses of parliament.

The Ethical Governance Benchmark is consistent with contemporary literature, which suggests that codes of conduct should

ensure the highest ethical standards, not only to guarantee the integrity of the office and public confidence in the assembly, but also to allow legislators freedom in their legislative activities (National Democratic Institute for International Affairs (NDI), 2007, p. 64).

When these Benchmarks were adopted in 2006, there were no corresponding recommendations concerning the desirable features of codes of conduct applying to the MPs who constitute a parliament, nor how codes should be adopted or enforced.

Pressure for greater integrity continued to grow. Increased interest in the functioning of parliaments coincided with a wider concern with integrity in systems of government, such as the

Open Government Partnership, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Organisation for Economic Co-operation and Development (OECD), 2011), the United Nations Convention Against Corruption (UNCAC) (United Nations, 2004) and Transparency International's National Integrity System (NIS) (Transparency International, 2011). An NIS aims to facilitate ethical conduct and reduce risks of corrupt behaviour through a system of structural and behavioural features. An NIS explicitly includes the parliament as one of its pillars.

## Codes

Stapenhurst and Pelizzo indicate that codes

have generally taken two main forms: ethics codes and conduct codes. Ethics codes tend to be fairly general documents: they formulate broad principles of behavior but they do not define what is appropriate and what is inappropriate behavior, nor do they establish sanctions for violations of the code. By contrast, codes of conduct tend to contain very specific provisions with clear sanctions for those who violate the dispositions of the code (Stapenhurst & Pelizzo, 2004, Foreword).

The Benchmarks' advocacy of codes of conduct led the Commonwealth Parliamentary Association (CPA) to commission recommendations for codes of conduct (codes recommendations).

The recommendations for codes of conduct were published in 2015 (Coghill, Neesham, & Kinyondo, 2015). As will be seen, the recommendations propose that codes should combine features of both forms identified by Stapenhurst and Pelizzo (2004).

This conduct addressed by codes is of two main types:

- (i) the manner in which parliamentarians approach their responsibilities to represent, make or unmake government, legislate (including budget-making), scrutinise the Executive, deliberate and address grievances; and
- (ii) the ethical standards that parliamentarians apply to their individual conduct whilst holding public office.

This conduct may be subject to two forms of control (i.e. regulation):

- (iii) the common law public trust principle whereby parliamentarians are public officers entrusted with responsibility for the public trust; and,
- (iv) codes of conduct (and like instruments) which guide parliamentarians' personal

conduct, provide for investigation of alleged breaches and enable sanctions for breaches.

This paper reports research into codes of conduct, provisions for investigations and sanctions adopted amongst the houses of Commonwealth parliaments.

## Research Approach

Coghill, Neesham and Thornton (2018) describe the research method. The final draft Benchmarks were adopted at a three-day workshop, with participants from each of the CPA's nine global regions; eight were represented (the representative of the ninth withdraw at the last minute); they ranged from first term to highly experienced MPs. In addition, several Clerks, academics, the US Office of Congressional Ethics co-chair and a legislative strengthening expert participated.

The Benchmarks highlight the roles and functions of the parliament and its MPs as public officers in a democracy. It sets out the principles on which a code should be founded. These principles draw on the 'Nolan' Principles of Standards in Public Life and certain other principles that complement them. The Nolan Principles are: selflessness; integrity; objectivity; accountability; openness; honesty; and leadership (Committee on Standards in Public Life (UK), 1995). This background then provides the context for the actual Benchmarks that provide guidance to a legislative house on provisions to include in a new or revised Code of Conduct.

Rather than prescribe precise provisions, these Benchmarks indicate the effect that it is desired to achieve, having regard to the number of members in the house, the human, physical and technical resources available to it, and other factors such as cultural norms affecting the behaviour of MPs and the functioning of the house.

The Benchmarks are structured to: indicate the types of conduct to which a code would apply; provide for ethics advice; indicate processes for complaints; suggest appropriate sanctions, indicate processes for making and amending codes; and canvas sustaining a culture of ethical conduct.

## **FINDINGS**

The research process outlined above yielded a wide range of findings that have been grouped and summarised into: types of conduct; institutionalisation of ethics advice; references to culture; advice on making and re-making a code; and advice on complementary provisions, enforcement and sanctions.

## **1) Types of Conduct**

The types of conduct affected focus on MPs giving precedence to the interests of the polity ahead of interests of self, family, friends, businesses, campaign donors, political party, donors of foreign travel or any other source of influence. A code should require all MPs to immediately and continuously disclose all assets, income, liabilities and gifts. These continuous disclosures are to be published by the parliament and should be liable to verification if doubts arise as to their accuracy.

Gifts (including hospitality) are a particularly interesting category, as it is often claimed that the exchange of gifts is customary and that to decline a gift may cause offence. Firstly, research has confirmed that the exchange of gifts does generate a relationship in which favoured treatment is more probable (Axelrod, 2006) p.189). This applies even where the gift of no material value (Malmendier & Schmidt, 2012). However, this is not an argument for banning the offer or acceptance of gifts. To do so is to set the scene for failure as people of integrity find themselves accepting small gifts in innocuous circumstances (Kania, 2004). Rather the solution is to require disclosure in all circumstance in which a gift may be perceived to risk influencing behaviour. A low threshold below which disclosure is not mandatory may be appropriate.

The recommendation require disclosure of “interests held by the member’s spouse or close family members”.

Other types of conduct covered by the Benchmarks include the misuse of public property and inducements such as cash for questions or other payment for performing a MP’s roles.

## **2) Ethics Advice**

Members of parliaments are likely to be faced with ethical issues that are uncommon or unknown in their prior occupations. That circumstance makes it especially important that they have ready access to expert advice on recognising and addressing potential ethical problems. Some Australian parliaments now have such a role, but there is considerable variation in the descriptions, powers and functioning of the roles. The Benchmarks indicate that the adviser should be independent of influence, should be appointed by a non-partisan process, be safe from unjustified removal and be barred from investigating complaints about the conduct of any member. That avoids the adviser having to investigate an issue on which s/he had advised the MP.

In addition to these safeguards, the Benchmarks advise that the ethics adviser should be readily available and accessible, so that talking to him or her is something routine and unremarkable

rather than raising suspicions that the MP is confronting a serious ethical problem.

### **3) Significance of Culture**

As discussed above, there is widespread acceptance that the culture among MPs is fundamental to compliance with acceptable standards of conduct. Stapenhurst & Pelizzo argue for the significance of cultural factors stating:

... that one of the success factors is whether the individuals that the code is regulates actually share the same ethical standards, have a common understanding of what is appropriate behavior and a common understanding of what constitutes misconduct (Stapenhurst & Pelizzo, 2004).

In one large parliament, some MPs encouraged each other to apply for allowances for expenses that were of dubious merit. Some other members of the same parliament regarded some such expenditure as ethically unjustifiable and declined opportunities to apply for the allowance (Interview 1 (HoC UK), 2014).

Accordingly, the Benchmarks strongly advise that a Code include certain provisions (see Appendix 1).

### **4) Making and Re-making a Code**

MPs should be helped to sustain a culture of ethical conduct through opportunities for every MP to participate in development and review of their code, with reminders of its provisions and the reasoning underpinning them. It should be reviewed periodically as a matter of course and revised accordingly, again involving all MPs.

### **5) Complementary Provisions**

The Benchmarks recognise that a Code of Conduct for Parliamentarians is part of a broader integrity system and accordingly notes a number of measures that lie outside the Code proper. This would include referral of alleged breaches of criminal law to the police and alleged corruption to a corruption control agency.

### **6) Enforcement**

Codes of conduct require effective mechanisms for investigation of complaints alleging breaches of the Code. The major problem that arises is the temptation for MPs to defend members of their own political party or other close affiliation, making it difficult for an allegation to be dealt with on the merits of the case.

Here one or more investigators must be fully independent and appointed by a non-partisan process. All complaints must be directed to the Investigator and remain confidential. The

Investigator must determine the facts of the allegation and if s/he finds evidence of a breach, it must be reported to the parliament.

## **7) Sanctions**

The Code must include graduated sanctions (penalties). The Code must provide that where the Investigator has found a breach to have occurred, the parliament must decide on the appropriate sanction. Typically, sanctions range from an admonition to expulsion from the parliament.

## Conclusion

In the aftermath of recent scandals involving misconduct by Members of Parliament, our findings are more relevant than ever. The most recurrent breaches seem to be those related to misuse of MP entitlements by claiming private expenses to be covered by public funds. Despite steady efforts to clarify the principles and rules for work-related claims and reimbursements, setting and enforcing sanctions are still areas in need of improvement.

Two broad attitudes or approaches seem to characterise the positions MPs take when ethical issues in MPs' behaviour are revealed.

The first (and perhaps most immediate) reaction is to call for tougher sanctions for non-compliance, in order to provide a deterrent example for current and future MPs. This is, for example, what one could repeatedly hear in the Victorian Parliament when the case of Geoff Shaw (MP for Frankston) was exposed and discussed in November 2017. It has also been noticed, however, that in a strict compliance culture professionals confronted with ethical issues to resolve (especially in cases of conflicts of interest) will not come forward to discuss such matters with any ethics advisers for fear of punishment (Neesham & Azim, 2017).

Preventive advice is also essential for preserving and fostering an ethical climate. If communication on ethical problems and solutions does not occur at the time at which it is most needed, then the effectiveness of the ethics regime (including its most direct compliance mechanisms) can be seriously impaired. Hence, a second approach recommends focus on solving ethical problems in a proactive manner, based on open communication, lack of pre-judgment and mutual trust.

Therefore it is argued that both approaches need to be used, to reinforce each other and to support an effective ethics regime for MPs and for the institution of parliament. Accordingly, codes of conduct for parliaments should include not only principles and rules for professional and ethical conduct for parliamentarians but also (1) provisions outlining sanctions for breaches as well as

procedures and allocations of duties for the enforcement of such sanctions; and (2) provisions encouraging MPs to confidentially approach parliamentary ethics advisers and expect to receive non-judgmental, supportive, solution-oriented professional advice.

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This paper draws on

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- Coghill, K., Neesham, C. & Thornton, J. (2018) *Enhancing conduct to enhance trust*. Paper presented at the Australasian Study of Parliament Group 2018 Annual Conference, Brisbane 18 – 20 July 2018.

APPENDIX 1. Codes of Conduct recommended provisions:

- Introductory and continuing education to assist Members to enhance their skills in ethical deliberation.
- Induction which includes mentoring and experience-sharing activities involving both new and experienced Members.
- Exemplary behaviour by those in leadership roles.
- Endeavours to detect and act to deter even minor breaches from which serious breaches may develop.
- Members being encouraged to consult with the Ethics Advisor before acting on a matter that raises ethical issues.
- Members acknowledging and accepting provisions of a Code of Conduct when swearing an Oath or making an Affirmation.
- Publishing and making available the Code to both Members and the public.
- Ensuring that newly elected members receive induction in the Code of Conduct, and engaging in self-assessment of their individual ethical competence.
- Encouraging discussions with the ethics adviser which shall be treated as routine and normal, with frequent informal contact between the ethics adviser and Members.
- Requiring every Member to participate in activities to enhance their ethical competence on a regular basis. These activities could be online, if resources permit.
- Requiring Members to provide evidence on a regular basis that they have read and understood the provisions of the Code
- Endeavouring to adapt the code to changing expectations of society with regard to ethical conduct.

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