

Senate Standing Committee on Senators' Interests

Submission on Proposed Code of Conduct for Members of Parliament

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Many submissions to this inquiry will deal with the detailed content of the proposed code. My focus is more on process than content. My two recommendations urge the Committee to use this inquiry to (i) examine the merits of *self-regulation* before rushing to adopt one of the many models of *external regulation*; and (ii) *include* rather than *exclude* coverage of the parliamentary conduct of Senate members of the political executive. My comments apply equally to the House of Representatives and I welcome any interest that the House of Representatives' companion committee might have in the implications of this submission.

Two Recommendations

1. Rely primarily on internal regulation rather than external regulation.

The proposed Senate code should be based as much as possible on principles of internal self-regulation, with minimal reliance on external regulation by outside experts or specialist watchdogs. The Senate should adopt a code of conduct and appoint a standards commissioner (the minimal necessary extent of external regulation) to investigate suspected breaches of the code with responsibility to report to a Senate standards committee, which in turn would recommend any corrective action to the Senate for its

determination. The Senate would thus retain primary responsibility for setting and policing standards.

2. Spell out standards for all senators, including Senate ministers.

The proposed Senate code should lead international practice by including provisions relating to the roles and responsibilities of Senate ministers. Ideally, the code should be a relatively brief *principles-based* document rather than a lengthy *rules-based* document. Other submissions will probably examine the relative merits of these two approaches. For me, the important point is that the proposed parliamentary code of conduct should cover the parliamentary conduct of ministerial as well as non-ministerial senators. Around a third of recent ministries are drawn from the Senate. Senators who accept ministerial office (as ministers or parliamentary secretaries) should know what parliamentary standards the Senate expects of them as legislators taking on additional executive roles. Senate ministers remain senators with all the rights and obligations of other senators. Executive office is an extension of, and not a departure from, their primary parliamentary role. The Senate owes its executive members explicit statement of the parliamentary standards it expects of them in their new role: particularly, the obligations of accountability expected of senators appointed to the political executive.

Reasons

The Australian Commonwealth Parliament is one of the few national parliamentary bodies without a code of conduct. This apparent disadvantage can be turned into an advantage. The fact that the Australian Parliament is a late-comer to the world of codes of conduct provides one great benefit: Parliament can learn from the experience of others and ‘leap-frog’ over existing practice in other parliaments and innovate, with the aim of establishing new international benchmarks for parliamentary self-regulation.

I limit my comments to two general policy matters: the merits of self-regulation compared to the risks of external regulation by a non-parliamentary body; and the merits

of spelling out the Senate's expectations of senators who accept ministerial office. At this stage, I focus only on matters of general principle, leaving important matters of detail for later discussion.

self-regulation

A common tendency around the parliamentary world is the adoption of various forms of external regulation of parliamentary conduct. Examples include the establishment of external watchdogs which operate at arms-length from Parliaments. The hope is that such distance can overcome the conflicts of interest alleged to arise where Parliaments exercise self-regulation along traditional lines, often described as 'clubby' or 'chubby'.

My recommendation calls on the Senate to innovate rather than replicate recent trends. I share the views of those who are critical of external-regulation models. Parliament is not like other public institutions and it is not appropriate to impose on it forms of regulation that arise in non-parliamentary environments. Parliament is the central political institution in the Australian system of government. Parliamentary conduct is thus political conduct: debates over acceptable parliamentary conduct are debates over acceptable political conduct. Elected politicians might not be the only authorities but they are certainly the first authorities to turn to when investigating debatable parliamentary conduct. With the assistance of an investigating and reporting officer, a parliamentary body like the Senate acting under public scrutiny can do much to assure the public that the proper norms of parliamentary conduct are respected in the heat of political practice.

The expert views of non-politicians are at some disadvantage when the core task is to promote credible public judgment over debatable political conduct. Ideally, any regulatory instrument for parliamentary standards should be in the hands of elected politicians holding offices of public trust. External regulation places this responsibility in the hands of non-parliamentary regulators. Practically, it is open to the Houses of Parliament to legislate or authorize a degree of external regulation through the establishment of an external watchdog. My strong preference, however, is for each House

of Parliament to exhaust the possibilities of self-regulation before turning towards external regulation. The Commonwealth Parliament has barely begun to search out new possibilities for more effective forms of internal regulation, beyond the traditional forms of the Privileges and the Registration of Interest committees. Although the Standing Orders provide a solid basis for internal regulation, this inquiry presents an opportunity to strengthen those traditional foundations.

The hope of external regulation is that it can ‘take the politics’ out of the regulatory process. My view is that it is better to leave the politics where it is: with elected politicians in Parliament. Conduct that will give rise to accusations of unparliamentary or improper conduct will frequently involve matters of difficult political judgment about the choice of questionable means to promote debatable ends. I do not think that external experts are always, or even often, best placed to make such difficult political judgments about what it means to be ‘a good representative’ or ‘a good parliamentarian’.

But I acknowledge that there are also dangers in taking a minimalist position. One version of the minimalist option is the current no-code position which is quite open-ended: nothing really stands in the way of either House of Parliament doing anything at any time to deal with any possible type of alleged misconduct. But what is the benchmark that the community can expect Parliament to use when judging allegations of unparliamentary conduct? I think that public confidence in the integrity of Parliament requires that something now be done to articulate standards of official conduct that the public can reasonably expect of their elected representatives. The practical question is how best to do this.

The political executive has stolen the march on Parliament with the promulgation, first by Prime Minister John Howard, then by Prime Ministers Rudd and Gillard, of long overdue public statements of the ministerial standards expected by prime ministers. Both Houses of Parliament can do much more to articulate their own standards, especially given that Parliament has passed a public service statute enacting the standards expected of the public service. The challenge now is to determine who should be covered by

parliamentary codes: elected members of each House separately, or together, with or without their staff, with or without a separate code for ministerial officers and their staff?

One lesson from the Australian experience with prime-ministerial codes is the lack of confidence in the independence of the mechanisms of investigation and enforcement. The proposed Senate code should establish an office of investigation along the lines of a standards commissioner: appointed on the approval of the Senate, with tenure dependent on support of the Senate, empowered to advise and where necessary investigate, reporting to a Senate standards committee. The model is one of an independent parliamentary officer rather than an external watchdog associated with a non-parliamentary public body. At this stage, the details matter less than the general principle: which is that the new office act as counselor to the Senate which retains primary responsibility for policing the proposed code.

ministerial conduct

We know that the political executive has stolen the march and included within the current prime ministerial guidelines important aspects of parliamentary conduct expected of ministers. What is less often noticed is that these guidelines have never been officially endorsed by either parliamentary House and, even if they were, that action would not exhaust the interest that either House might have in setting its own standards for ministerial responsibility.

For good practical reasons, a Senate code might indeed recognize the place of a separate ministerial code authorized by the prime minister, setting out prime ministerial expectations of the official conduct of members of the political executive. But the Senate should not delegate to the prime minister or any other executive official total responsibility for regulating the official conduct of Senate members of the political executive.

Senate ministers do not give up any of their rights as senators when accepting additional responsibilities as members of the political executive. Their ability to continue to work effectively as senators depends on their compliance with a Senate code of conduct relevant not only to their primary role as senators but also to their secondary role as ministers. The code need not cover all aspects of executive conduct (eg, their obligations as employers of ministerial advisers, perhaps better suited to prime ministerial guidelines) but should, at the very least, cover those aspects of executive conduct relevant to relationships between ministers and the Senate: eg, obligations of access, answerability and accountability to the Senate, Senate committees and senators generally.

The Senate now has an opportunity to build on its proud history of institutional innovation by showing the parliamentary world a new way of standards-setting for the highest political offices. Debates over alleged ministerial misconduct will never go away because parliamentary bodies rightly have an interest in addressing issues of public confidence in the political management of government. The usual practice is reactive: reacting to non-government claims that the official conduct of government ministers is improper or defective. But what is the relevant benchmark? The trouble is that the relevant standards of conduct expected of ministers are rarely agreed to before hand by those debating the conduct. The proposed code offers the Senate an opportunity to move from reaction to proaction by taking the first steps towards standards-setting for senators who accept ministerial office.

Conclusion

There are many models for codes and compliance-mechanisms. My contribution is limited to two general principles:

- (i) a preference for Senate 'ownership' through *internal* rather than *external* regulation; and
- (ii) a preference for *including* rather than *excluding* ministers in the code of conduct.

At present, the only publicly-expressed parliamentary standards of ministerial responsibility and accountability are those of the prime minister in the latest edition of the

Standards of Ministerial Ethics (September 2010). This executive code illustrates one rather ambitious approach to self-regulation which allows the executive to set and monitor its own standards of parliamentary integrity. While very welcome as a guide to what the public can reasonably expect of the parliamentary standards of government ministers, the prime-ministerial guidelines should be reinforced by the standards of ministerial responsibility and accountability expected by Parliament itself. Such an approach would 'deal Parliament back in' to the practice of responsible parliamentary government in Australia.

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