21 August 2019

Senate Finance and Public Administration Committee
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Canberra ACT 2600

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Committee's website.

Dear Committee Members,

Following is our submission responding to the Terms of Reference of your Committee's inquiry into the Compliance by former Ministers of State with the requirements of the Prime Minister's Statement of Ministerial Standards.

Yours sincerely

for

Adjunct Professor the Honourable Dr Ken Coghill, member, Accountability Round Table
Professor Charles Sampford, member, Accountability Round Table
Hon David Harper, member, Accountability Round Table
Fiona McLeod, Chair, Accountability Round Table

Your Committee's Terms of Reference require it to report on:

a. compliance by former Ministers of State with the requirements of paragraph 2.25 of the Prime Minister's Statement of Ministerial Standards, dated 30 August 2018, including, but not limited to the undertakings given by Ministers to comply with their obligations concerning post-ministerial employment, and action taken by the Prime Minister and the Department of the Prime Minister and Cabinet to ensure full compliance by former Ministers with paragraph 2.25 of the Ministerial Standards; and
b. any related matters.

For convenience, Prime Minister Morrison's 2018 Statement of Ministerial Standards is attached (Attachment A).

The main points argued by this submission include:

- Ministerial standards should be "principles based and is not a complete list of rules," as indicated in the Foreword;
- Each minister is a public officer entrusted with responsibility to uphold the public trust;
- One of the key elements of that public trust is that ministers do not lie or mislead parliament and the Commonwealth ministerial codes should be praised for long recognizing that lying to or misleading the public is equally heinous (an extension that state jurisdictions have been slower to adopt);
- For a long time misleading parliament has been treated as a 'hanging offence' which requires resignation;
- This may seem to be a tough ask but it is fundamental to the role of a politician and should not be considered any more onerous than the requirements of lawyers to give honest advice and doctors not to harm their patients;
- However, this 'one hanging offence' is one for which far too few ministers swing;
- A key reason for this is the fact that a Prime Minister faces an enormous and unreconcilable conflict of interest;
- As parliamentarians, ministers "are required to disclose private interests to the parliament," as indicated in the Foreword;
- Ministerial standards supplement requirements applying to all parliamentarians;
- Responsible government requires ministers to be accountable to parliament for the discharge of their ministerial responsibilities.[1, 2]
- Accordingly parliament should determine the standards of conduct to be upheld by ministers;
- Ministerial standards set by parliament could be supplemented by the Prime Minister, subject to enforcement by the Prime Minister and/or as described below;
- The Parliament should appoint an ethics adviser[3] available to provide confidential advice to any Member, including ministers, on ethical questions (whether to do with interests or not), and to meet every member at least once each year, but proscribed from investigating alleged breaches of standards of conduct (that advisor should be appointed by a bi-partisan process similar to that for the Queensland Integrity Commissioner and the Chair of the Queensland Crime and Corruption Commission);

[1] *Odgers' Australian Senate Practice* 14th edition. Chapter 1 The Senate and its constitutional role <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_01>

[2] *House of Representatives Practice*, 6th edition – HTML version Chapter 1 - The Parliament and the role of the House <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice6/Practice6HTML?file=Chapter1&section=08 >.

[3] Various titles are used for such an office e.g.: **Parliamentary Integrity Commissioner.**

- Advice by the ethics advisor should be written and confidential but which the member could release in defence of any ethical challenges to demonstrate that they had sought advice, they had accurately described the facts of the case and had followed the advice (of course if they had not done all of those things then there is no defence and the absence of evidence of consultation may be held against the member).
- The parliament should authorise the independent investigation of the facts of an alleged breach of ministerial standards (such investigation to be carried out by a different authority appointed by a similar bi-partisan process);
- The parliament should determine the sanction or sanctions if the independent investigation finds evidence of a breach;
- Enforcement of restrictions on post-parliamentary employment of former ministers should include bans on employers, including associated entities, preventing them from contracting or lobbying government;
- The Senate should adopt a code of conduct[4] describing the standards to be upheld by each member of the Senate and providing for the independent investigation of the facts of an alleged breach of those standards, the Senate to determine the sanction if the independent investigation finds evidence of a breach;[5]
- These measures are likely to be far more effective if supported by a range of other good governance provisions: the requirement to give reasons, administrative appeals, judicial review, the ombudsman, the auditor general and especially a combination of FOI/right to know, whistleblowing and journalistic freedom.

This submission focuses on matters of principle and does not seek to replicate the detail of analyses found in authoritative sources such as ***Codes of conduct in Australian and selected overseas parliaments*** (2012).6

Responding to the terms of reference is hampered by the decision to withhold the letter of instruction received from the Prime Minister (referred to as Attachment A in Mr Parkinson's letter), requiring Mr Parkinson to investigate and report in relation to "compliance by former Ministers of State with the requirements … of the Prime Minister's Statement of Ministerial Standards". As a consequence, we can only surmise as to the Prime Minister's precise request and cannot assess the adequacy of Mr Parkinson's report.

Principles based Ministerial standards

The Foreword to the Statement issued by Prime Minister Morrison soon after taking office specifies that the standards should be a set of principles and "not a complete list of rules." That is accepted as desirable, as a list of rules could never completely encompass all possible eventualities.

However, it is curious that the Foreword of the current Statement removes a previous reference to the fundamental principle of democratic governance – the public trust principle, summed up as public office is a public trust. The Foreword of the prior Statement included: "Ministers are entrusted with the conduct of public business".

However, the main text of the Statement does retain the stronger expression of relevant principles, making clear that each minister is a public officer entrusted with responsibility to uphold the public trust.

[4] The House of Representatives should similarly adopt such a code of conduct

[5] As recommended by the Commonwealth Parliamentary Association in *Recommended Benchmarks for Codes of Conduct applying to Members of Parliament* **(Attachment B)** <http://www.cpahq.org/cpahq/Main/Document_Library/Codes_of_Conduct/Codes_of_Conduct_for_Parliamentarians_Handbook_Updated_2016.aspx >

[6] *Codes of conduct in Australian and selected overseas parliaments* <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Conduct#_Toc325623492 >

This is relevant to The Ethicos Group submission in respect of the offence of misconduct in public office. We endorse that argument.

The Statement could be strengthened by specifying those principles recommended by the Commonwealth Parliamentary Association:[7] (see following text boxes **PUBLIC OFFICE OF MEMBERS OF PARLIAMENT** and **PRINCIPLES**).

PUBLIC OFFICE OF MEMBERS OF PARLIAMENT

Members of Parliament are public officers; as such, a Member must act in the best interests of the nation, province, state or territory concerned.

As public officers, they have a fiduciary relationship with the citizens on whose behalf they act and they are entrusted with responsibility to protect and uphold the common interests of the citizens. In other words, they must put the public interest above all others.[3]

Members of Parliament have complementary obligations to their parliament:

- their own behaviour should reflect favourably on the reputation of the institution of parliament;
- they should protect, strengthen and promote the parliament.
- Political parties exist to serve the best interests of the nation, province, state or territory as a whole, as assessed by their Members of Parliament. Again, those Members of Parliament must put the public interest above all others.

[7] *Recommended Benchmarks for Codes of Conduct applying to Members of Parliament* **(Attachment B)** <http://www.cpahq.org/cpahq/Main/Document_Library/Codes_of_Conduct/Codes_of_Conduct_for_Parliamentarians_Handbook_Updated_2016.aspx >

PRINCIPLES

2.1. A Member of Parliament as a public officer exercises a public trust.

2.2. Members of Parliament shall behave according to the following principles:

- ***Selflessness*** - Members of Parliament should act solely in terms of the public interest.
- ***Integrity*** - Members of Parliament must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.
- ***Objectivity*** - Members of Parliament must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.
    - ***Accountability -*** Members of Parliament are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.
    - ***Openness*** - Members of Parliament should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.
    - ***Honesty*** - Members of Parliament should be truthful.
    - ***Leadership*** - Members of Parliament should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.

2.3. Members of Parliament shall:

- Act in good conscience
- Respect the intrinsic dignity of all
- Act so as to merit the trust and respect of the community
- Give effect to the ideals of democratic government and abide by the letter and spirit of the Constitution and uphold the separation of powers and the rule of law
- Hold themselves accountable for conduct for which they are responsible
- Exercise the privileges and discharge the duties of public office diligently and with civility, dignity, care and honour.

2.4. Members of Parliament have individual responsibility as contributors to the functioning of the institution.

2.5. Parliamentary immunity (i.e. parliamentary privilege) protects the right of Members of Parliament to speak in parliament without fear of prosecution or suit for defamation.

2.6. Members of Parliament shall respect the roles, independence, rights and responsibilities of parliamentary staff.

2.7 In a parliamentary democracy, every Member of Parliament has a responsibility to ensure that the Executive Government is accountable to the Parliament.

Disclosure of private interests

Disclosure of private interests to the parliament and thereby to the public is an essential feature of a democratic system. This is dealt with appropriately in the Statement.

Standards applying to all parliamentarians

Ministers are, of course, subject to the same standards as all other members of parliament – the Senate or the House of representatives as the case may be.

However, neither House has adopted a code of conduct defining such standards or giving Senators and MHRs guidance on acceptable conduct. There have been earlier attempts to develop and adopt a code of

conduct in one or both Houses but none have succeeded. [8] This leaves the Federal Parliament as the only Australian parliament lacking such a code and also out of step with most comparable parliaments.

Responsible government

Australia's parliamentary system requires ministers to be accountable to parliament for the discharge of their ministerial responsibilities. Whilst it is reasonable for the Prime Minister as head of government to require ministers *(appointed on the authority of his/her recommendation to the Governor-General)* to practice certain standards of competence and probity, it is the Parliament to whom they are accountable.

A key element that links the principles of responsible government and public trust is the requirement that ministers neither lie to nor mislead the Parliament. Indeed, it is the one 'hanging offence' for which the sanction is resignation/dismissal of a minister. Commonwealth ministerial codes should be praised for long recognizing that lying to or misleading the public is equally heinous (an extension that state jurisdictions have unfortunately been slower to adopt)

This may seem to be a tough ask but it is fundamental to the role of a politician and should not be considered any more onerous than the requirements of lawyers to give honest advice and doctors not to harm their patients.

While the principle is suitably strongly worded and the sanctions massive. Unfortunately it is a hanging offence for which far too few ministers swing.

The problem is that the Prime Minister is the judge of whether or not there has been a breach and what sanction should be imposed. PMs have a massive and irredeemable conflict of interest. The conflict occurs in its starkest form where the PM is the minister misleading the public. But it is hardly less when any other ministers misleads. The sacking of a minister will generally be seen as damaging the government[9] (damage that is compounded by the resistance to taking action). Ministers are sacked when their continuation in office is seen as more politically damaging than dismissing them. This fundamentally changes the rule from not misleading the public to not damaging the PM's re-election prospects. Indeed, if a minister constantly misleads the public in ways that will enhance the PMs re-election prospects, the PM has a vested interest in the minister continuing to mislead and 'even' lie to the public. While this may improve the prospects of re-election it damages the office to which re-election is sought.[10]

The conflict is not resolved by asking a senior public servant to investigate now that public servants can be sacked at will without cause.

Parliament and PM

Because ministers are responsible to the Parliament, Ministerial Standards should be an instrument of the

[8] *Codes of conduct in Australian and selected overseas parliaments* <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Conduct#_Toc325623492 >

[9] Whitlam was very strong in sacking misleading ministers in his only term and it was used against him. Howard took a strong line on sacking ministers who had not dealt with conflicts of interest. As the body count rose, he softened his line.

[10] See 'Prior Advice is better than subsequent investigation' Fleming and Holland Motivating Ministers to Morality, Ashgate, London, 2001 for five other reasons why Heads of Government should not be the ones to decide

Parliament, either as a resolution of both Houses, or (as in Canada) by Act of Parliament.[11] It would be acceptable for the Prime Minister to provide supplementary standards, which could be subject to enforcement by the Prime Minister and/or in the same way as Standards (i.e. similarly to a Code of Conduct – see below).

We do not support "(a)n independent body be established to administer, regulate and enforce postseparation employment standards and Codes of Conduct for parliamentarians and lobbyists" as proposed in the submission by Transparency International Australia or a similar scheme proposed in the Grattan Institute submission. Such a model would derogate from and further undermine Australia's parliamentary system, creating yet another agency performing a function of the parliament but ultimately accountable to the Executive Branch

Parliamentary Ethics Adviser

One of the biggest problems that honest politicians have with codes of ethics is that ethical codes are sometimes very general (intentionally so in the case of principles based norms. As such it is open to a range of hostile interpretations by media and opposition. The answer to this is to provide a non-partisan source of ethical advice to which ministers can turn before they act and on which they can rely if their subsequent actions are challenged. The Queensland Integrity Commissioner (whose establishment was recommended the National Institute for Law, Ethics and Public Affairs in 1997)[12] is the preferred model. Like other major integrity positions in Queensland, the Integrity Commissioner can only be appointed on the majority recommendation of a Parliamentary committee with such majority including at least one member of both government and opposition.[13]

Accordingly, it is our view that the Parliament should appoint an ethics adviser[14] available to provide confidential advice to any Member, including ministers, on ethical dilemmas. The ethics adviser should also be available to former parliamentarians, as suggested in the Grattan Institute submission.

Building on Queensland experience we recommend that advice by the ethics advisor should be written and confidential but which the member could release in defence of any ethical challenges to demonstrate that they had sought advice, they had accurately described the facts of the case and had followed the advice (of course if they had not done all of those things then there is no defence and the absence of evidence of consultation may be held against the member).

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[11] Ministerial code of conduct. The Canadian Privy Council Office published Accountable government: a guide for ministers and ministers of state 2011which 'set out the duties and responsibilities of the Prime Minister, Ministers and Ministers of State, and outlines key principles of responsible government in Canada'. The Guide operates in conjunction with the codes of conduct contained in the *Federal Accountability Act 2006*. These codes, now enshrined in legislation, are the Conflict of Interest Code for Public Office Holders and the Post-Employment Code for Public Office Holders. They cover ministers' behaviour in the areas of conflict of interest, post-separation employment and lobbying. <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Conduct#_Toc325623492 >

[12] This was part of a major research project led by Prof Sampford that reviewed the Fitzgerald reforms and the 'ethics regime'/'integrity system' they established. It was funded by the Australian Research Council and both ALP and coalition governments

[13] This is a form of what Rawls calls 'pure procedural justice'

[14] Various titles are used for such an office e.g.: **Parliamentary Integrity Commissioner.** Similar offices have been created in The UK and Canadian Houses of Commons and several Australian State Parliaments including NSW, Queensland and Victoria

In Queensland, every Minister is required to meet the Integrity Commissioner routinely at least once each year. Here is is argued that every member (whether or not a minister) could be required to meet the ethics adviser at least once each year.

Independent investigation

The role of the ethics advisor in giving advice means that they should not be charged with investigating alleged breaches of standards of conduct

As argued above, the Prime Minister and his officers face conflicts of interest if required to investigate and arbitrate alleged breaches of Ministerial Standards. As recommended for parliamentary codes of conduct, the parliament should authorise the independent investigation of the facts of an alleged breach of ministerial standards. The independent investigator should be appointed by a bi-partisan process similar to that by which the Queensland Integrity Commissioner is appointed.

Sanctions for breaches

The parliament should determine the sanction or sanctions if an independent investigation finds evidence of a breach. However, publication of the results of the investigations may have political consequences, especially if no evidence of wrong-doing is found.

Post-parliamentary employment

Enforcement of restrictions on post-parliamentary employment of former ministers raises difficult practical issues. Ministerial Standards should be drawn in the knowledge that Ministers contemplating employment after Ministerial life will be inclined to provide special favours to entities which are potential employers of that Minister. The elimination of that inclination must be a focal point of the Ministerial Standards. As provided for in Mr Morrison' s Statement, proscriptions on employment for a relevant period must be included within the means.

Ministers may say that they will not (in their new job) draw upon any information not in the public domain. But at the least they will draw upon information not in that domain to give more precise context to that which is publicly known. That ability will be of great benefit to the new employer, and is a reason for improper relationships to be created before a Minister's retirement.

We endorse the 'enforceable undertaking' mechanism as argued in The Ethicos Group submission, which is consistent with the Statement's provision:

> Ministers will undertake that for an eighteen month period after ceasing to be a Minister, they will not lobby, advocate or have business meetings with members of the government, parliament, public service or defence force on any matters on which they have had official dealings as Minister in their last eighteen months of office

Another option is to remove incentives for employers to take advantage of the insider knowledge and personal networks that a defeated or retired minister may carry away from his or her ministerial career. This could include bans on employers who engage former ministers, preventing such employers from contracting or lobbying government during the former minister's quarantine period. This provision should extend to associated entities of both former ministers and employers i.e. it should apply to (1) a former minister's company or other business associate and to (2) employment by any business associated with lobbying, consulting, tendering, etc. or contracting with government.

In addition, we endorse the Grattan Institute submission's proposals:

- … access to Parliament House and to all government officials should be restricted; they should be required to report any contact with government officials; and they should be subject to penalties imposed by the parliament, at levels that apply for contempt of parliament.
- (if so employed -clarification added) they should not be allowed to attend political party functions – another critical avenue of influence – and political parties that fail to enforce this sanction could be subject to fines.

- Organisations employing any former minister in breach of the code could also be penalised: their access to Parliament House, government officials and government tenders could be restricted.

Ministerial Standard 2.25

It is impossible to assess the adequacy of Mr Parkinson's report to the Prime Minister in the absence of the instructions issued by Mr Morrison. It is unclear how the grounds cited by Mr Parkinson were sufficient for him to believe that neither Ms Bishop nor Mr Pyne have breached the Standards. It is unknown whether further investigation would have exposed grounds bringing Mr Parkinson's belief into question.

Senate Code of Conduct

The lack of a code of conduct leaves the Australian Parliament out of step with all but one other Australian parliamentary chamber (WA Legislative Council) and with most comparable parliaments. The Senate (or both Houses) should adopt a code of conduct describing the standards to be upheld by each member of the Senate and providing for the independent investigation of the facts of an alleged breach of those standards, the Senate to determine the sanction if the independent investigation finds evidence of a breach

Ministerial codes of conduct are much more effective when supported by other governance/integrity reforms

These measures are likely to be far more effective if supported by a range of other good governance and integrity provisions: the requirement to give reasons, administrative appeals, judicial review, the ombudsman, the auditor general and especially a combination of FOI/right to know, whistleblowing and journalistic freedom and anti-corruption commissions.

This can be illustrated by the clearest and strongest element of the ministerial code – the requirement of not misleading or lying to parliament.

Ministers have a duty not to mislead the public and the public have a right not to be misled. If a minister has mislead the public, the public have an absolute right to documents that would provide evidence that the minister has mislead them.
This has consequences for decisions about FOI. If a minister exercises a power to refuse to release information that a minister or one of their colleagues had misled the public it should not only be treated as void for improper purpose and irrelevant consideration but it is corrupt - in the sense that it is an abuse of entrusted power for personal or political gain. The same logic means that there is a right for whistle-blowers to release such information and for journalists to report it. Under such circumstances it is the minister who loses his or her job and the whistleblower should be rewarded in one of a number of ways:
- receive a bonus,
- commended for exemplary conduct
- considered favourably in promotions
- considered favourably for AO/AM
- right to a transfer if he or she wants it.

Support can be found in other areas of administrative law. The requirement of giving written reasons which can be reviewed for purpose and relevance by courts is an important check on dishonest executive action. The ombudsman and auditor general can investigate and report on government action which may throw up inconsistencies with ministerial statements.

Recommendations

- That the Prime Minister's letter to Mr Parkinson be published
- Parliament determine the standards of conduct to be upheld by ministers;
- Ministerial standards set by parliament could be supplemented by the Prime Minister

- Parliament appoint an ethics adviser available to provide confidential advice to any Member, including ministers, on ethical dilemmas, and to meet every member at least once each year, but proscribed from investigating alleged breaches of standards of conduct;
- Parliament authorise the independent investigation of the facts of an alleged breach of ministerial standards;
- Parliament determine sanctions if independent investigation finds evidence of a breach;
- Enforcement of restrictions on post-parliamentary employment of former ministers include bans on employers, including associated entities, preventing them from contracting or lobbying government.
- The Senate adopt a code of conduct describing the standards to be upheld by each member of the Senate and providing for the independent investigation of the facts of an alleged breach of those standards, the Senate to determine the sanction if the independent investigation finds evidence of a breach.

Submission: Compliance by former Ministers of State with the requirements of the Prime Minister's Statement of Ministerial Standards.

Attachment A.

Attachment B.