Committee Secretary
Senate Finance and Public Administration References Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Compliance with Ministerial Standards – Submission

Dear Dr Palmer,

Thank you for the invitation to provide a submission to the Committee on this reference.

The submission on behalf of the Ethicos Group is attached. We would be happy for the submission to be published by the Committee in the usual way, if the Committee wishes to do so.

The submission is primarily concerned with the historical development of the Standards from the 1997 report of 'the Bowen Committee' onwards, and the context, purposes, and content of the present version of the Standards.

In view of the Committee's specific interest in compliance matters, the submission also addresses the available and potential mechanisms for ensuring compliance with the requirements imposed by the Standards, by Ministers, former Ministers, and others.

The submission is not concerned with questions about compliance with the Standards by individual Ministers or former Ministers.

I wish to acknowledge the advice and assistance of colleagues Dr Andrew Brien, George Thompson, Dr John Uhr, Dr Jeff Malpas, and Dr Cameron Hazlehurst, in the preparation of this submission.

I would be happy to respond to any questions which the members of the Committee may have in relation to this submission or to the Standards more generally.

Yours sincerely,

Howard Whitton
Director, The Ethicos Group

Inquiry into 'Compliance with Ministerial Standards' –

Submission by The Ethicos Group

Background

This submission is primarily concerned with the historical development of Ministerial standards on ethical conduct from the 1997 report of the 'Bowen Committee' onwards, and the context, purposes, and content of the current version of the Standards.

In relation to compliance and enforcement matters, the submission also addresses the available and potential mechanisms for ensuring compliance with the requirements imposed by the Standards, by Ministers, former Ministers, and others.

The submission is not concerned with questions about compliance with the Standards by individual Ministers or former Ministers.

The Background: 'Bowen' and 'Coombs'

The period 1976-78 saw the publication of two significant reports on ethics and integrity matters in Australian government and public service. These reports provided, directly or indirectly, the foundation for the eventual development of formalized 'standards' for regulating ethical conduct by Ministers, to remedy what came to be seen by 1996 as a lack of clarity about acceptable and unacceptable conduct in public life, following a series of scandals in Australia and elsewhere.

The Royal Commission on Australian Government Administration, under Whitlam-appointed Commissioner HC Coombs, reported to PM Fraser in 1976[i]. The report did not address Ministerial conduct as such, but did suggest that a written code of conduct for Commonwealth public servants was not needed, as public officials could be relied upon to know the difference between right and wrong[ii] (It is instructive that the Public Service Board of the day began work on developing just such a formal Code within two years of the Report.)

In 1978, PM Fraser commissioned respected senior lawyer Nigel Bowen QC to conduct a review of Conflict of Interest matters involving APS officials and Ministers, which resulted in what came to be known as 'The Bowen Committee Report', of 1979[iii].

The Bowen committee considered, albeit briefly, the matter of the subsequent employment of ministers and ministerial staff other than public servants. The Committee concluded "that this would not be practicable, nor perhaps desirable, in the absence of security of tenure for such offices", and the relatively small size of the Australian community and the undesirability of restricting the free flow of expertise within it. The committee's reasoning behind this conclusion - especially the relevance of 'tenure' - remains unclear.

The Bowen Committee '…presume[d] that former ministers and ministerial staff would give careful consideration before taking up any subsequent employment which might reflect on the previous conduct of the public duties or imply the possibility of their seeking to apply influence on their former departments or give an appearance of their being in a position to afford improper advantage to their new employers by reason of their previous position'.

The Committee recommended '…that the standards expected of them in relation to post-separation employment should be brought to the attention of ministers and ministerial staff when they take office and again upon their departure from office'.

Two matters are worthy of note: the Committee recognised that there could be an issue with actual and apparent conflicts of interest, or even corruption. Further, instead of regulation, the Committee relied in effect on the 'Court of Public Opinion' to impose a brake on unseemly conduct. The Committee also failed to indicate what were 'the standards' to be expected of them in relation to post-separation employment, or which institution of government should have the task of 'drawing them to their attention'. Apart from criminal prosecution (where warranted), the Committee did not consider the possibility of sanctions for egregious conduct on the part of former Ministers.

This submission notes that the unsatisfactory nature of 'the Bowen doctrine' did not prevent it being deployed on a number of subsequent occasions where Ministerial conduct after leaving public office came into question.

This submission suggests that the general tenor of the Bowen committee's policy position - namely that undue restriction of employment opportunities of former Ministers is generally unwarranted, and that former Ministers are themselves the best judges of their conduct - underlies Dr Parkinson's recent advice to PM Morrison concerning two cases of post-Ministerial office employment[iv].

Bowen and the 'Howard Code' – 1996-2007

After the Hawke Labor government failed to bring in a new suite of Ministerial standards, incoming PM Howard promised to do so after the 1996 election. A Melbourne University scholar, Luke Raffin, observed in 2008:

> 'After his landslide victory in 1996, Prime Minister John Howard promised to improve standards of governance in Australia. He said the "most important thing any government can do is build a sense of trust, a sense of integrity, a sense of honesty and a sense of commitment to the Australian people". To honour his campaign declaration that values in political life were "as important as bread-and-butter political commitments", Howard tabled A Guide on Key Elements of Ministerial Responsibility in 1996. For the first time, an Australian prime minister had codified his conception of the requirements of individual ministerial responsibility[v].

The eventual failure of what became known as 'The Howard Code' was significant for its weakening of Australia's version of the doctrine of Ministerial Responsibility, and failed to provide any form of process or guidance on post-Ministerial employment.

The principles addressed by the Bowen Committee as applicable to former Ministers and their activities post-Parliament were not considered. The 'Bowen doctrine' remained undisturbed.

The Howard Code's main failing lay in its inconsistency and unpredictability of application: as scholar Alan Ward observed at the time[vi] , citing News Limited's Paul Kelly and ANU political scientist John Uhr -

> 'What is clear in Australia is that a Minister serving the house may be asked to resign by the Prime Minister if an action threatens to embarrass the government, and it is the Prime Minister who decides. Paul Kelly finds that John Howard's working rule was that Ministers in effect were responsible not to Parliament but to the Prime Minister …
>
> For these cases John Uhr writes that the press is a better watchdog than Parliament in general… 'The press displays greater power to investigate suspect ministerial conduct than Parliamentary scrutiny does … because Parliamentary debates over ministerial conduct have no real umpire who sits in partially keeping the score.'

The only guidance contained in the 'Howard Code' is not specific to former Ministers, and the key terms of the clause - 'influence' and 'improper' - are not defined, while 'should' has little force:

> *'Ministers should not exercise the influence obtained from their public office, or use official information, to obtain any improper benefit for themselves or another'.*[vii]

Raffin concluded with an insight into the adverse social consequences of bad conduct by former Ministers , citing the work of social researcher Hugh Mackay:

> Despite the gloomy legacy left by Howard's application of the Guide, its underlying principles remain invaluable. The investigation and prosecution of ministerial wrongdoing demands the convention's survival. Upholding ministerial standards is important in a parliamentary democracy. It is vital at a time when public esteem has slumped for "the mongrels in parliament, the pollies with their snouts in the trough"; when the public appears to harbour a "sense of bewilderment that things have got so bad; a deep sense of mistrust of politicians on both sides; [and] a level of cynicism bordering on contempt".[viii]

Origins of the 'Standards of Ministerial Ethics'

Ministerial conduct in office had long been a source of public concern in Australia by 1998, reflecting an almost wholly unregulated past. As Raffin noted:

> 'Howard's initial commitment was to enforce tougher ministerial standards. But the adoption of the Guide was followed by a wave of conflict of interest allegations that threatened to submerge Howard's frontbench.' A list of 17 cases[ix] which drew adverse and timely public comment[x] was provided.

It was against this background of failure that Senator Faulkner, then in Opposition, introduced a draft statement of ethics and integrity 'standards' to the Labor Shadow Cabinet in September 1998. The draft was adopted as Party policy in 2001.

The Faulkner standards drew on established public ethics principles[xi], law, and community expectations as to the integrity expectations of public officials in Australia[xii]. The resulting *Standards of Ministerial Ethics* were intended to be enforceable by the Government itself. The Standards recognised three specific challenges unique to Parliamentary government: MPs were not 'employees' in any meaningful sense; the Parliament had not enacted a Code of Conduct for MPs; and the Parliament had recently legislated to remove its power to expel a sitting MP for misconduct[xiii]. The Standards therefore made the Prime Minister of the day responsible for their application, by default.[xiv]

The Rudd Government, elected at the end of 2007, moved quickly to formally endorse Labor's new Standards as Government policy, replacing (by convention) the 'Howard Code' of 1998. The Department of the Prime Minister and Cabinet became the custodian of the new 'Standards' document, having added a new section on Ministers' Assets and Interests drawing on previous parliamentary practice.

In accordance with convention, the Standards have been re-endorsed by each succeeding Prime Minister since 2007, largely unchanged as to substance[xv], but with some significant changes to the title and preamble by individual incoming Prime Ministers. Prime Ministers Abbott, Turnbull and Morrison omitted reference to 'Ethics' from the title, preferring to use the language of a '*Statement on Ministerial Standards'*.

Compliance and Enforcement: 'Undertakings'

Criticism of the limitation contained in para 2.25 of the Standards usually focuses on the view that the prohibition on ministers taking employment related to their former portfolios, once they leave public office, is unenforceable. (Dr Parkinson's advice to PM Morrison on the recent cases of former Ministers Pyne and Bishop explicitly takes this view.)

In our view this conclusion may be mistaken. And there are sound public policy reasons why, if it is found not to be mistaken, the difficult Ministerial accountability issues which this view raises must be addressed forthwith.

The case in point is that of former Defence Minister, Peter Reith, who resigned from the Parliament at the November 2001 election. Mr Reith (and others) refused to appear before the 2004 Senate inquiry into 'A Certain Maritime Incident' – an incident in which he had played a key part as Defence Minister in 2001 – on the basis that Mr Reith was by then a private citizen. In 2004, the Standards applied only to serving Ministers.

This impasse for the principle of Ministerial Accountability caught the attention of the authors of this Submission in 2004. They realised that the draft Standards of Ministerial Ethics would require amendment so as to apply to *former* Ministers and officials.

The authors accordingly devised the 'enforceable undertaking' mechanism which follows, drawing on specific legal advice and scholarship from several sources in its preparation, as well as their understanding of community expectations. In summary, that advice was to the effect that the 'enforceable undertaking' mechanism would work, as it was based on a sound public interest justification and the Courts would be unlikely to reject it on 'restraint of trade' grounds.

The solution to the Accountability problem emerged in the form of the reference to an 'undertaking', as found in the current para 2.25. The extension of effect of the restriction beyond the term of a Ministerial appointment was intended to be achieved through a binding 'undertaking' to be given to the Prime Minister by an MP <u>as a pre-condition for their being appointed as a Minister</u>.

The preamble to the Rudd version of the Standards carried the following language, (which was omitted from subsequent preamble by later PMs, though it continues to appear in the body of the Standards on each re-endorsement – see below).

- *'Ministers will be required to undertake that, when they leave office, they will not seek to have business dealings with members of the Government, the Public Service or the Defence Force on any matters that they dealt with in an official capacity in the preceding 18 months;'* *[*Underlining added.*]*

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The preamble to the Rudd version of the Standards foreshadows the substance of current para. 2.25, and the supporting para 2.26, as in the 2007 version and in all subsequent versions, unchanged:

> **2.25** *'Ministers are required to 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 in office. Ministers are also required to undertake that, on leaving office, they will not take personal advantage of information to which they have had access as a Minister, where that information is not generally available to the public.*
>
> **2.26** *Ministers shall ensure that their personal conduct is consistent with the dignity, reputation and integrity of the Parliament.*

Such a contract could take the form of a letter of agreement which created the legal relationship fundamental to a contract. The agreement would provide for the proposed appointee to recognise that the agreement was enforceable at law. The *proforma* agreement document could be published as an Attachment to the Ministerial Standards.

A breach of the contractual agreement by a former Minister after leaving public office would provide the legal basis for an action by the state, or an aggrieved business competitor, or a public interest group, seeking an injunction to enforce the contract by requiring either that the former Minister resign from the offending employment, or that the employer rescind or cancel the employment arrangement.

The undertaking referred to in paragraph 2.25 was intended to be effected in writing, as a form of voluntary enforceable agreement with the Prime Minister on behalf of Australia. The substance of the agreement would be to the effect that the appointee would agree to comply with the relevant provisions of the Standards for a specified period after leaving public office, or in perpetuity, as appropriate.

In practice, because of the nature of the contract mechanism, and its public interest justification (adverted to in para 2.26 of the current Standards, with its reference to 'integrity of the Parliament'), the restriction may prove to be self-enforcing, as recognised by the Bowen Committee two decades earlier. Few companies (and few former Ministers) would be likely to risk the public disapproval (and possible legal consequences) which could result from knowingly offering or accepting offending employment.

In the event of a change of government, an incoming government might well choose to take enforcement action against a former Minister under the contract agreement. In any case, it is

foreseeable that an aggrieved business competitor, or a public interest group, could also wish to take action seeking to protect particular interests by ensuring compliance with the former Minister's undertaking, assuming that such an undertaking had been given.

Where a Prime Minister refused to take action against an egregious breach of the agreement, the matter might well be decided in the Court of Public Opinion.

The same Court might well provide a verdict on unacceptable conduct by a former Minister even if the relevant undertakings had not been obtained by the responsible Prime Minister.

A suggested general outline of the proposed form of undertaking is:

> To: [Prime Minister ….]
>
> I, [*name*], acknowledge that I have read and understood the [name of relevant *ethics Standard*], and undertake to comply with *the Standard's provisions* in all respects.
>
> In consideration of your offer of appointment / nomination for appointment as a [*Minister/etc*], which I hereby accept, I undertake in particular to comply in all respects with the provisions of [*clauses 2.25 and 2.26…governing appointments and employment*] of [*the Standards*].
>
> In so doing I acknowledge that the provisions of this agreement will be legally enforceable in contract by virtue of my acceptance of your offer of appointment as a [*Minister/etc*].
>
> Signed….. . Date / /

The extent to which such undertakings have actually been demanded of appointees to Ministerial positions is not known. The contractual mechanism of providing 'undertakings' may not in practice have been applied in all Ministerial appointments since 2007, and the mechanism has not been tested in court.

Compliance and Enforcement: 'Prohibition'

In practice, compliance by former Ministers with the limitations imposed by the Standards at para 2.25, and the situations to which any undertaking might be relevant, are important to meeting the requirements of para 2.26, in that they include the employment of a former Minister in circumstances where:

- the former Minister is in possession of commercially-sensitive information belonging to that organisation's competitors;
- the former Minister is in possession of sensitive regulatory information concerning that organisation's competitors; and
- the former Minister is in possession of knowledge of any pending changes in government policy, Budgetary measures, or regulatory focus related to that organisation or its competitors.

In this context, it should be noted that para 2.25 has two parts, the second of which does not limit the use of information obtained as a Minister to any particular portfolio or period of time. A retiring Minister will be likely to be in possession of a vast range of 'information' as a result of their position as a Minister which is not specific to their current portfolio responsibilities. It is not possible to 'un-know' such information, or more difficult still, to convince a sceptical public that they have not taken improper advantage of it.

In addition, it could be argued that personal use by a Minister of privileged information about the business plans or viability of one or more organisations, in order to identify a suitable potential employer or business partner, would amount to a breach of the second part of para 2.25 and para 2.26.

In any case, para 2.26 is intended to remind individual MPs that they still have an ethical duty to act with integrity, respecting the trust placed in them as elected officials, by protecting the integrity of the Parliament.

It is self-evident that a scheme of statutory bans on certain specified classes of employment post public office is required, if public confidence in the integrity of the institution of Parliament is to be fostered. Scholar Deirdre McKeown has produced an admirable study of the various relevant regimes which might be considered as models for such a scheme in Australia.[xvi]

In the absence of the will on the part of Government to enact such a scheme legislation with meaningful sanctions for non-compliance and a workable definition of an offence of 'official corruption', we have only the voluntary Standards as enforced, or not, by the Prime Minister of the day.

Or as the Secretary of the Commonwealth Department of the Prime Minister and Cabinet, Dr Parkinson, recently observed in this context[xvii]:

> *"I can only make an assessment against the Standards as they actually are. Those Standards are pretty clear and reasonably …well structured.*
>
> *The key issue is that people should not be able to misuse information which they obtained simply because they happened to be the Minister for X at a particular time."*

Compliance and Enforcement: 'Misconduct in Public Office'

The Standards were designed to be enforceable as a form of contract, but even if it turns out (when tested) that they are not, the common law offence of 'Misconduct in Public Office' may apply.

The Canberra Times has reported that Minister Pyne discussed his future employment prospects, and was offered employment, with EY, while he was still a Minister[xviii] EY's confirmation of this claim is now on the public record.Dr Parkinson's report found that Minister Pyne 'had put in place mechanisms to ensure … he will not impart direct or specific knowledge known to him only by virtue of his ministerial position"[xix]

With due respect to both Mr Pyne and Dr Parkinson, this submission argues that Mr Pyne's personal trust in the integrity of *his* processes (or EY's, for that matter) is not the relevant test in this case. *Public* trust is the relevant test.

The proper basis of 'the public trust' in Australian democracy has been traced, over period of 450 years of case law development and legal theorising, by legal scholar David Lusty, in an encyclopaedic account of *'The Revival of the Common Law Offence of Misconduct in Public Office'*.[xx]

Too large to summarise here, Lusty's paper, citing Australian judge Paul Finn as context, makes the following observation:

> The common law offence of misconduct in public office can be traced back to the 13th century. A few decades ago Professor Paul Finn remarked that this ancient misdemeanour, which he described as "obscure and often ill-defined", had "withered" and was "in danger of passing into oblivion".
>
> However, since that time it has been extensively utilised in North America and has experienced a major revival in the United Kingdom, Hong Kong and Australia. The offence now ranks as the charge of choice for anti-corruption investigators and prosecutors in a host of jurisdictions, yet it has been the subject of relatively little academic research or recent commentary.[xxi]

Lusty further focuses the concern about integrity in the exercise of public office, and its essentially fiduciary character in respect of 'the public interest', as follows:

> More recently, a former Chief Justice of Australia has remarked that "the fiduciary nature of political office" is "a fundamental conception which underpins a free democracy", and the current Chief Justice of Australia has observed that 'The application of the concept of trusteeship to the exercise of public power is longstanding and persistent ... [T]he trusteeship analogy is consistent with a characterisation of public power as fiduciary in nature.
>
> The public trust principle embodies a trust "in the higher sense" rather than one necessarily enforceable in equity, and encapsulates the common law's insistence that public officials adhere to fiduciary standards of behaviour. The offence of misconduct in public office enforces these standards.
>
> The justification for the criminal law adopting such a role inhered in the nature of public office itself, namely "as public office was founded upon a public trust and involved the discharge of a public function, abuse of office ... was such a matter of public concern as to be treated as a public wrong", even though similar wrongdoing in the private sector might not attract criminal liability.[xxii]

The Lusty account of the legal and policy framework ends with the following observations:

> 'A few decades ago the offence was somewhat ill-defined, but this is no longer the case. Its specific elements are now sufficiently certain and stringent to weather criticisms based on asserted vagueness. This has not prevented calls for it be abolished and replaced by one or

more statutory offences, but, in this author's opinion, it would be a mistake to do so. In 1976, a Royal Commission chaired by Lord Salmon concluded that the common law offence of misconduct in public office "should be retained in its present form" and specifically recommended against codification, stating "We doubt whether the task could be satisfactorily performed".

A similar opinion was more recently expressed by Sir Anthony Mason NPJ:

> "*The common law offence of misconduct in public office is necessarily cast in general terms because itis designed to cover many forms of misconduct on the part of public officers. An alternative way of dealing with misconduct by public officers would be to enact a statute formulating specific offences for particular categories of misconduct in public office. The adoption of that course would involve a loss of flexibility and run the risk that the net would fail to catch some forms of serious misconduct. To suggest that the offence requires further definition would be to pursue a degree of definition which is unattainable, having regard to the wide range of acts and omissions which are capable of amounting to misconduct by a public officer in or relating to his office. The offence serves an important purpose in providing a criminal sanction against misconduct by public officers*".

For many centuries the common law offence of misconduct in public office has provided society with a potent weapon against errant officials who culpably betray their public trust. This offence has stood the test of time and withstood many legal challenges in different jurisdictions. Its recent resurgence and continued existence serves as a vital safeguard of the people's entitlement to integrity in government'.[xxiii]

Conclusion

Today, our submission is that as a nation, we need to recognise how fragile our democratic institutions are.

It is generally accepted by the Australian community that 'public office is a public trust', but the nature and extent of that trust are open to continuing debate, as they should be.

Ministers and individual MPs are exposed to public scrutiny as never before, and the public are skeptical of political institutions as never before.

But ethics rules and laws for MPs can only be part of the answer: as (US) Senator Simpson put it, so succinctly - "If you have integrity, nothing else matters. And if you don't have integrity, nothing else matters."

[i] RCAGA: Royal Commission on Australian Government Administration (Dr H. C. Coombs, Chairman), Report, 1976.

[ii] RCAGA: Recommendation 1.

[iii] Bowen, N. *Public Duty and Private Interest* - Report of the committee of inquiry established by the Prime Minister on 15 February 1978, par 13.38

[iv] Letter from Dr Parkinson to PM Morrison, 19 July 2019, p4, p6.

[v] Raffin, L. *Individual Ministerial Responsibility During the Howard Years: 1996-2007* Australian Journal of Politics and History: Volume 54, Number 2, 2008, pp. 225-247.

[vi] Ward, Alan. Parliamentary Government in Australia. Anthem Press 2014, *passim*

[vii] Accessed at https://australianpolitics.com/1996/04/13/howard-ministerial-code-of-conduct.html

[viii] Raffin, ibid, p 247, citing Hugh Mackay, *Mind and Mood (Melbourne, 1998), p. 39*

[ix] Raffin ,ibid. p.228

[x] See: Michael Gordon, "Howard's Credibility Crisis", The Australian, 19 October 1996, p. 23.

[xi] See: Uhr, John. *Ethics at Large*. ANU Discussion Paper No. 74 September 2000. ISBN: 0 7315 3417 4

[xii] See: Uhr, John. *Keeping Governments Honest* - accessed from - https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/~/link.aspx?_id=54B15879D3FA4BFE84D1A1885AE7950C&_z=z

[xiii] See: *Parliamentary Privileges Act 1986 (Cth)*, s.8

[xiv] Australian Government, *Standards of ministerial ethics,* December 2007 (reissued by Prime Minister Gillard in 2010). Accessed from - https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter2/The_Ministry

[xv] Author's note: The sole substantive change to the conduct-related elements of the Standards was imposed by PM Turnbull in 2018, following adverse public comment on certain private conduct of MP Barnaby Joyce. The ill-conceived new measure, at para 2.24 of the Morrison version, is widely regarded as inappropriate, and is probably *ultra vires*.

[xvi] McKeown, D. *Codes of conduct in Australian and selected overseas parliaments*. Australian Parliamentary Library, 2012

[xvii] Dr Parkinson, interview with Laura Tingle. ABC 7:30, 26 July 2019

[xviii] *Canberra Times*, Tuesday 13 August 2019

[xix] Dr Parkinson letter to Sen Wong, Sen Cormann 19 July 2019

[xx] Lusty, D – *Revival of the Common Law Offence of Misconduct in Public Office* – accessed at www.accountabilityrt.org

[xxii] Lusty, ibid, pp 337-338

[xxiii] Lusty, ibid, p 362 -363