Code of conduct

1.1 The committee reports to the Senate on its inquiry into the development of a code of conduct for senators.

1.2 The matter was referred in the following terms:

> The development of a draft code of conduct for senators, with particular reference to:
>
> (a) the operation of codes of conduct in other parliaments;
>
> (b) who could make a complaint in relation to breaches of a code and how those complaints might be considered;
>
> (c) the role of the proposed Parliamentary Integrity Commissioner in upholding a code; and
>
> (d) how a code might be enforced and what sanctions could be available to the parliament.

1.3 The Senate also asked the committee to consult with the House Committee of Privileges and Members' Interests (the 'House Committee') on the text of the code of conduct 'with the aim of developing a uniform code, together with uniform processes for its implementation' for senators and members.[1]

1.4 The Senators' Interests Committee met with the House Committee for a roundtable discussion with academics, parliamentarians and parliamentary staff and also had the benefit of considering the transcript of a hearing by video-conference involving House Committee members and, from the UK House of Commons, the Chair of its Committee on Standards and Privileges; the Clerk of the House of Commons; and its Parliamentary Standards Commissioner.

1.5 The committee wrote to stakeholders inviting written submissions and received six submissions. The committee would like to thank all those who contributed to the inquiry.[2]

1.6 At the end of last year, having decided not to reach 'a concluded view on the merits of adopting a code of conduct', the House Committee produced a discussion

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1 *Journals of the Senate*, 2 March 2011, p. 644.

2 A list of the witnesses appearing at the roundtable and submissions received is provided in Appendix 1.

paper.[3] The discussion paper canvasses the nature of a proposed code; a process for its implementation; the role of a Parliamentary Integrity Commissioner; a complaints mechanism; the oversight role of a committee of members; possible sanctions for breaches of the code; and procedural matters that would enable the House to consider the recommendations of that committee, including the question of sanctions for members who were found to have breached the code.

1.7 The House Committee made no formal recommendations about the adoption of a code, but made observations on the desirability of different elements of the code it put forward and the related enforcement mechanisms.

1.8 This committee has received much the same evidence as underpins the discussion paper and does not intend to repeat that evidence at length. The committee draws attention to the Background Note prepared by the Parliamentary Library, 'Codes of conduct in Australian and selected overseas parliaments', which is periodically updated and contains useful historical and comparative information on the subject.[4]

Codes of conduct for parliamentarians

1.9 It is appropriate that parliamentarians be judged against appropriate standards in the performance of their duties as parliamentarians. That statement is perhaps axiomatic; so obvious it needn't be stated. But difficulties arise in articulating what those standards should be; deciding who should judge whether parliamentarians have met – or failed to meet – those standards; and determining what consequences should flow from a failure to meet those standards.

1.10 In many areas, in fact, such standards are set out in law and in procedures of the parliament. These range from provisions in the Constitution, through the ordinary civil and criminal law, in other laws directed specifically at parliamentarians or otherwise applicable to those holding public office and in procedural rules of the parliament.

1.11 Many of those provisions have been developed to address ethical questions around, for instance, the avoidance of conflicts of interest, the integrity of the parliament's processes, the abuse of public office and the proper use of entitlements.

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3 House of Representatives Standing Committee of Privileges and Members' Interests, *Draft Code of Conduct for Members of Parliament*, Discussion Paper, November 2011, at 1.16, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pmi/cocreport.htm.

4 Deirdre McKeown, *Codes of Conduct in Australian and Selected Overseas Parliaments*, Parliamentary Library Background Note, 18 September 2012, http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Conduct.

Importantly, the existing provisions governing the conduct of senators carry significant sanctions for non-compliance (ranging from admonishment to fines and terms of imprisonment). Furthermore, they can be enforced by the Senate or the courts because of their specific nature.[5]

1.12 These other questions, however, about the performance of parliamentarians ***as*** parliamentarians are perceived to be different and framed around somewhat elastic concepts, such as community expectations. In those circumstances, what standards should apply and what consequences should flow when they are not met?

1.13 In addressing these questions there is some appeal in the idea of instituting a code of conduct, particularly at a time when the standing of parliamentarians (and of the parliament itself) is reputed to be at such a low ebb. But much of that appeal is superficial; and much of the debate surrounding the adoption, implementation and supervision of such a code is based on unrealistic expectations of what conduct such a code could address and what such a code could achieve.

1.14 Against this background the committee is asked to consider the development of a code of conduct and surrounding mechanisms. In this report the committee considers:

- whether implementing a code of conduct is the right approach;
- whether the code proposed by the House Committee is the right code; and
- whether the implementation and enforcement arrangements recommended by the House Committee to accompany its code are appropriate.

1.15 In doing so the committee has attempted to ask whether these measures are likely to improve the perceptions of parliament or, indeed, parliamentary standards themselves.

Aims of the inquiry

1.16 The catalyst for the current inquiry lies in the agreements struck between parliamentary parties and, in some cases, independent members of the House of Representatives prior to the current minority government being formed in the House of Representatives in September 2010.[6]

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5 Dr Rosemary Laing, Clerk of the Senate, *Submission 6*, at pp 1–2 and 13–16. The submission contains a summary of the main provisions which might be said to regulate the conduct of senators:

6 These are described in paragraph 1.12 and Appendix 2 of the House Committee's discussion paper.

1.17 Each of those agreements – directly or indirectly – provided for the development of a code of conduct for members and the appointment of a Parliamentary Integrity Commissioner to, among other things, 'uphold' the code.

1.18 The discussion paper quotes the Leader of the House, in proposing the reference to the House Committee, as follows:

> It is the government's hope and expectation that the work of these committees and the eventual adoption by parliament of a code of conduct for members and senators will make a positive contribution to parliamentary standards and the standing of parliament in the general community.[7]

1.19 The aims of the process are spelled out in no more detail than that. Consequently the committee's consideration of the merits of implementing a code is not guided by particular examples of the sorts of conduct which are sought to be addressed, which makes it difficult to assess whether a code of conduct is the right approach to addressing them. The committee considers the Senate should not adopt a code of conduct unless it is meaningful and workable, and can be reasonably expected to be effective.

Threshold question: Should there be a code of conduct?

1.20 The threshold question asked in the House Committee's discussion paper is 'Should there be a code of conduct?' In chapter 3 the discussion paper rehearses the familiar arguments for and against.[8] The House Committee makes no recommendation on the matter, but observes:

> The competing arguments identified in relation to implementing a code of conduct raise serious issues which are deserving of careful consideration. The overall standing of the Parliament and parliamentarians in the community is not as strong as would be desirable, and there is a range of factors involved in those perceptions. A code of conduct for members is not a panacea for a dramatic change in the overall perceptions about parliamentarians. However, it could make a modest contribution to an improvement in perceptions.[9]

1.21 Arguably, however, that question – should there be a code? – is the wrong threshold question. If the answer is posed in this way, lack of support for a code of conduct is too easily equated to lack of support for an improvement in standards. Conversely, if the question is answered 'yes' that leads – perhaps inevitably – to the

7 Discussion paper, at 1.14.

8 Discussion paper, at 3.7–3.29.

9 Discussion paper, at 3.30.

conclusion that the federal parliament should adopt a code of conduct similar to one of the codes applying at state level or in another comparable parliament overseas.

1.22 The difficulty the Senators' Interests Committee has with this approach is the paucity of evidence that the codes of conduct applying in other Australian jurisdictions have done anything to improve community perceptions. Several state parliaments have now had codes of conduct in place for many years. Although members and officials from some of those jurisdictions have reported their opinion that standards have risen or that conduct has improved, it has to be doubted that the *public perception* of those parliaments and of their members has improved.

1.23 The model in the discussion paper for considering complaints and enforcing the code of conduct draws heavily on the model employed in the UK House of Commons, yet nothing in the code or in the enforcement mechanisms was able to prevent the recent scandal over misuse of members' allowances.

1.24 In his submission to the inquiry the Clerk of the Western Australian Legislative Council observed:

> Any decision to adopt a code of conduct must surely be based on history and the effectiveness of such codes... In my view no jurisdictions with codes of conduct have seen any demonstrable improvement in conduct of members or compare more favourably against those jurisdictions that have not adopted codes...
>
> If the Senate adopts an aspirational code it will indicate to members the fundamental duties and standards which they should observe. However, I doubt a code will have any significant impact on the media's portrayal of or the community attitude towards members of Parliament as a whole.[10]

1.25 The committees received similar evidence from Professor Gerard Carney at their roundtable:

> …I agree, it will not improve the public image of integrity in political life. That is often argued as the fundamental reason for a code of conduct. But I think the main reason is that it brings together what is existing, it guides members and it also guides the public as to the scope of those obligations.[11]

1.26 In the committee's view, there is little objective evidence that such perceptions have improved in relation to the state parliaments which have adopted such codes, and the committee is hesitant to recommend that the Senate go down the same path.

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10 Mr Malcolm Peacock, Clerk of the Legislative Council of Western Australia, *Submission 1*, pp 2–4 and 9.

11 *Transcript of roundtable*, 21 March 2011, p. 11.

1.27 The committee considers that the matter has been raised the wrong way around. It is assumed that a code of conduct is the answer. The questions then become about the nature, the content and the implementation of a code. The focus on perceptions of the parliament and on the form and function of a code in some ways distracts from the underlying questions that might instead be asked: where are standards deficient and what specific measures should be adopted to address them? Reform of areas such as potential conflicts of interest, proper accountability for entitlements and the appropriate scope of the powers and privileges of the parliament followed this model of identifying and addressing the particular problems.

1.28 Nonetheless, the committee has been asked to look at the development of a possible code of conduct, and that is discussed in the next section of the report.

Possible code of conduct models

1.29 Codes of conduct are generally described as ranging from those which set out general standards of ethical conduct to those which prescribed specific and detailed rules pertaining to particular situations. These two models are sometimes differentiated as ‘principles-based’ and ‘rules-based’.

1.30 Another way of describing the range of possible codes of conduct is between ‘aspirational codes’ and ‘enforceable codes’. In subscribing to the first kind, parliamentarians ‘aspire’ to meet stated ethical standards. The second kind contains enforceable provisions, which are usually supported by mechanisms for investigating breaches and imposing penalties.

1.31 In addressing the arguments for and against a code of conduct Professor Gerard Carney identifies the underlying characteristics of the different types of codes:

> Opposition to a code of conduct is based primarily on three grounds: a code only states the obvious in terms of ethical standards; it may encourage attacks on the integrity of members; and as a gimmick, it can only increase public cynicism of the political system. On the other hand, quite substantive grounds support a code of conduct depending where along the aspirational/prescriptive spectrum it lies. An aspirational code at least reminds members of the fundamental duties and standards which they must observe. It also provides a role model for others engaged in public service. These benefits are notably enhanced with more prescriptive codes. Their specific standards provide better guidance to members in a range of ethical dilemmas. At the same time, they allow the conduct of members to be more objectively assessed ... While a code of conduct may bolster public

> confidence, an enforcement regime is usually needed to make any significant impact.[12]

1.32 Codes of conduct with clear and specific rules can be objectively enforced but they have been criticised because they may promote a mentality of limited compliance.[13]

1.33 Conversely, if a code of conduct is merely principles-based, and therefore incapable of objective enforcement, the inevitable question to be asked is whether they serve any useful purpose because:

> ... advisory codes can become as elastic as the circumstances require and their application is invariably determined by political realities. On the other hand they can contribute to setting standards for making judgements about what behaviour is or is not appropriate. [14]

1.34 In fact, most parliamentary codes of conduct are hybrids, combining some general principles but also making some specific requirements, most frequently relating to avoidance of conflicts of interest and proper use of parliamentary entitlements. This combination is frequently achieved by including as a principle the fact that parliamentarians must meet detailed procedural or legal requirements relating to those issues.

1.35 Many Australian state and territory Houses have adopted some form of code of conduct for their members.[15] These codes of conduct generally follow a principles-based model, in that they do not set any specific standards capable of rigorous enforcement other than by reference to existing, enforceable regimes. For example, the Clerk of the Legislative Assembly for the Australian Capital Territory noted that the code applying to members in the ACT:

> ...is aspirational in nature in that it doesn't set out particular penalties for breaches, nor a process for investigating non-compliance, but instead exhorts members to live up to the spirit of its contents and to observe certain expected standards of propriety and probity.[16]

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12 Gerard Carney, *Members of Parliament: Law and Ethics*, Prospect Media Pty Ltd, St Leonards, 2000, p. 260.

13 Victorian Parliament Law Reform Committee, *Review of the Members of Parliament (Register of Interests) Act 1978*, December 2009, p. 21.

14 Dr Rosemary Laing, Clerk of the Senate, *Submission 6*, p. 6.

15 The Houses of the South Australian Parliament and the Western Australian and Tasmanian Legislative Councils have not adopted codes of conduct for their members. Deirdre McKeown, Background Note, 18 September 2012, p. 2

16 Mr Tom Duncan, Clerk of the Legislative Assembly for the Australian Capital Territory, *Submission 5*, p. 2.

1.36 That code has recently been the subject of an independent review which recommended refinements to the code but no fundamental changes in approach.[17] Legislated codes of conduct in Victoria and the Northern Territory are also largely aspirational in nature.[18]

1.37 The Queensland Parliament's Code of Ethical Standards might be termed a hybrid, in that it provides a single document containing all of the rules governing the conduct of members which exist in a variety of sources.[19] The rules are organised in accordance with six fundamental principles:

- integrity of the Parliament;
- primacy of the public interest;
- independence of action;
- appropriate use of information;
- respect for persons; and
- appropriate use of entitlements.

1.38 The two codes of conduct of the New South Wales Parliament are uniquely linked to the *Independent Commission Against Corruption Act 1988*, by way of a provision which includes 'a substantial breach' of the codes in the Act's definition of corruption.

1.39 At the roundtable, Professor Carney told the committees that he saw the value of a code of conduct for parliamentarians in bringing together all the existing obligations applying to them:

> There are corruption offences, register of interest requirements, political donations requirements, standing orders, privileges—there is an enormous array of obligations. A code of conduct provides an opportunity to collate that material, to summarise it, and to provide a neat source to access that. You have a general statement and then other documents which back that up with the specific rules. It's not as though members of parliament are not already subject to a whole range of obligations—they are. A code of

17 Stephen Skehill, *Review of the Code of Conduct for Members of the Legislative Assembly for the Australian Capital Territory*, 31 July 2012, http://www.parliament.act.gov.au/members/ethics/ReviewCodeofConduct-July%202012.pdf.

18 *Members of Parliament (Register of Interests) Act 1978* (Vic) and *Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act 2008* (NT).

19 Mr Neil Laurie, Clerk of the Queensland Parliament, *Submission 7 to the House of Representatives Standing Committee of Privileges and Members' Interests Inquiry into a Draft Code of Conduct for Members of Parliament*, 7 February 2011, p. 3.

> conduct provides a vehicle to remind them, as well as the public, that these obligations already exist and to put it into some useful form.[20]

1.40 The committee sees the value in this kind of approach: in bringing together the raft of existing provisions and obligations, and publishing them as a frame of reference both for parliamentarians and for members of the public against which anyone may make their own judgements about how well parliamentarians are meeting these requirements.

1.41 The committee is hesitant, however, about describing the overall framework document as a 'code', because in many people's minds that connotes an enforceable regime whereas, in the committee's view, many of the general principles which would exist within such a framework are not objectively capable of enforcement.

Enforcement of codes of conduct

1.42 The committee heard evidence at the roundtable that aspirational codes cannot be strictly enforced, and are not ***intended*** to be strictly enforced;

> For the guidance of members or the guidance of the public it is a useful mechanism for education and a reminder… But can I just say: the code I am talking about is not an enforceable code. It is just a statement of the general principles which underlie the regime that you already have in place. [21]

The committee considers, however, there is a great likelihood that people seeing a thing called a 'code' – whether it is aspirational or not; whether it is capable objectively of being enforced – will tend to expect that it will somehow be applied and enforced.

1.43 The committee does not consider that a broad, principles-based code – what has sometimes been called an 'aspirational code' – is inherently problematic. However, the committee considers that intractable problems arise in attempting to enforce them, without regard to the inherent difficulties in interpreting these rules.

1.44 In coming to this view, the committee has reflected in part on an inquiry of the Finance and Public Administration Legislation Committee in 2001 into a number of bills broadly in the area of political and ethical regulation. In evidence before that committee, former Clerk of the Senate, Harry Evans, identified 'two traps' in the area of ethics regulation:

> ... prescribing rules of insufficient precision—vague, imprecise rules and what are usually called motherhood statements—and then attempting to

20 *Transcript of roundtable*, 21 March 2011, p. 5.

21 Professor Gerard Carney, *Transcript of roundtable*, 21 March 2011, pp 33–34.

> enforce them, with a great deal of room for dispute about their meaning and application...
>
> I do not think vague and general statements such as 'members will be honest in their dealings' and so on are very helpful, particularly when you combine them with some enforcement mechanism whereby some, as I have put it, inquisitor-general, is going to say whether a member has breached such a guideline.[22]

1.45 The committee considers that any further consideration of a code of conduct needs to take account of the inherent difficulties in seeking to enforce codes consisting primarily of general principles.

Content of the code proposed by the House Committee

1.46 As the motion referring the matter asked the committee to consult with the House committee with a view to developing a uniform code, it is necessary for the committee to comment on the observations made in that discussion paper.

1.47 The House Committee, without recommending its adoption, included its preferred model for a code of conduct in Appendix 5 of its discussion paper. The draft code is based on the draft 'Framework of Ethical Principles for Members and Senators' produced in the mid-1990s.'

1.48 As noted above, evidence put at the roundtable held by the two committees as to the most appropriate kind of code of conduct, should one be adopted, favoured the idea of a code as an overarching framework document comprising a collection of relevant principles, referencing the specific requirements which apply in particular areas.

1.49 The arguments in favour of a code of this nature revolve around:

- gathering regulatory provisions in one place to ensure parliamentarians are aware of their obligations;
- articulating the standards the public should be entitled to expect of parliamentarians; and
- identifying and filling ethical gaps.

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22 Mr Harry Evans, *Committee Hansard*, Senate Finance and Public Administration Legislation Committee Inquiry into the Charter of Political Honesty Bill 2000 [2002], Electoral Amendment (Political Honesty) Bill 2000 [2002], Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, and the Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2], 6 April 2001, pp 1 and 6.

1.50 This approach is also identified in the House Committee's discussion paper:

> …there are already many rules which apply to the various aspects of a Member's life as a parliamentarian, which could at best be described as a collection. An express code of conduct could overcome any gaps there may be in the existing ethical requirements, put principles in place and consolidate the rules, thereby providing a useful, structured statement in relation to members' conduct.[23]

1.51 How well does the code proposed by the House Committee meet these aims?

1.52 The discussion paper addresses the first requirement by suggesting that a note be appended to the code setting out those other obligations. The Senators' Interests Committee considers that it would be preferable to demonstrate the connection between the principles being articulated and the specific rules which are related to them. As has been noted, the committee sees value in an approach which brings together the existing obligations of senators in a meaningful and methodical way, in order to give people a frame of reference from which to make their own judgements.

1.53 Of some concern to the committee is the highly subjective nature of some of the principles contained in the code. Members must be 'loyal to Australia and its people' [principle 1]; 'strive to maintain the public trust placed in them' [principle 4]; and 'base their conduct on a consideration of the public interest' [principle 5]. These are worthy principles – for the most part common sense tells each of us what they all mean – but there would be many different views on what they encapsulate and it would be difficult to maintain that they articulate objective standards.[24]

1.54 People are also entitled to be cynical, if the complaint is of poor parliamentary standards, of a principle that:

> Members must ensure that their personal conduct is consistent with the dignity of the Parliament.

1.55 The committee does not consider this language is particularly helpful as a means of articulating standards, however useful it might be to parliamentarians and others seeking an ethical framework to resolve questions that come before them.

1.56 In this sense, the principles in the House Committee's code reflect their origin in the work in the mid-1990s of the Working Group to Develop a Framework of Ethical Principles for Members and Senators. As noted in the submission to the committee from the Clerk of the Senate:

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23 Discussion paper, November 2011, at 3.10.

24 In the next section of the report the committee notes the difficulties that arise in putting in place formal complaints and enforcement mechanisms on the basis of principles that are incapable of objective interpretation.

> It had been the intention of the working party to develop a draft code of conduct for presentation to both Houses for endorsement, with a view to it being available for use in seminars for new members and senators in particular, and for the guidance of parliamentarians generally. In developing a draft code of conduct, the working party had not envisaged any formal enforcement mechanism. [25]

1.57 Should this kind of approach find favour in either House, a better set of principles could no doubt be articulated. The committee considers that the 'Nolan Principles' provide a better starting point for articulating the individual obligations of parliamentarians. Those principles arose from the work of the UK Committee on Standards in Public Life (the Nolan Committee). In her submission to the committee, the Clerk of the Senate noted that 'The Nolan Committee proposed seven principles of public life: selflessness, integrity, objectivity, accountability, openness, honesty and leadership'.[26] Appendix 2 to this report reproduces an expanded list of those principles.

1.58 For the above reasons, the committee does not endorse the code proposed in the House Committee's discussion paper.

Implementation of the proposed code of conduct

1.59 Each of the 'parliamentary reform agreements' mentioned above contained a proposal for the appointment of a Parliamentary Integrity Commissioner to:

- provide advice, administration and reporting on parliamentary entitlements;
- investigate and make recommendations to the Privileges Committee on 'individual investigations' [on topics unspecified];
- provide advice to parliamentarians on ethical issues;
- uphold the Parliamentary Code of Conduct; and
- control and maintain the Government's lobbyists register.

1.60 Following on from this, the terms of reference for the inquiry, in effect, assume that:

- the code be of a kind which may be 'breached', and that a range of people may lodge complaints about 'breaches of the code'
- a Parliamentary Integrity Commissioner must 'uphold' the code.

25 Dr Rosemary Laing, Clerk of the Senate, *Submission 6*, p. 5.

26 Dr Rosemary Laing, Clerk of the Senate, *Submission 6*, p. 4.

1.61 The committee is of the view that it is neither possible nor desirable to implement a formal complaints procedure and engage a person to 'uphold' a code unless the code in question is detailed, specific and capable of objective interpretation. The committee does not consider that the code proposed in the House Committee's discussion paper meet these tests.

1.62 It is clear from the last three chapters of the discussion paper that the House Committee favours oversight mechanisms involving a complaints procedure, an investigative role for the Parliamentary Integrity Commissioner reporting to a rebadged 'Privileges, Ethics and Members' Interests Committee', which can recommend a range of sanctions for the House.

1.63 The Senators' Interests Committee sees a difficulty in combining a highly aspirational code with a complaints and enforcement mechanism that is more appropriate for specific, prescriptive rules. This difficulty is recognised in the House Committee's proposals by providing an independent investigator with the power to filter out or dismiss complaints according to stated criteria, for instance where complaints are frivolous or vexatious, or inherently political.

1.64 The Senators' Interests Committee is not convinced, however, that the model proposed in the discussion paper is the right one, particularly because of the somewhat artificial nature of the process by which complaints are to be filtered out.[27] The process is based on the system in place in the UK House of Commons. The discussion paper notes that:

> The 2009-10 annual report of the UK Parliamentary Standards Commissioner indicates that the overwhelming majority of complaints, approximately 90 per cent, do not merit a final report to the Committee on Standards and Privileges.[28]

1.65 The committee considers this sort of approach – which effectively sets aside 90 *per cent* of complaints raised – will do little to raise public confidence in the code to which it relates.

Complaints mechanisms

1.66 Professor Carney told the committees that he favoured an independent complaints process as a 'necessary assurance to the public of what it's all about',[29] but it seems to the committee his concern was to ensure that there was a process for

27 Discussion paper, November 2011, at 6.11–6.12.

28 Discussion paper, November 2011, at 6.8.

29 *Transcript of roundtable*, 21 March 2011, p. 5.

complaints to be raised about breaches of specific, enforceable provisions in existing regimes:

> … I think the breach of the code is the breach of the individual obligations that you are already are subjected to under those different regimes. They are the breaches, the technical ones, that can lead to serious consequences. But if you have a general code that just states general principles for the guidance and edification of members and the public, a breach of those principles as such should not be the subject of a complaint at all other than by reference to the regimes that are put in place.[30]

1.67 In his view, other complaints could be raised – for instance with an ethics committee – which would receive, but not investigate the matter further unless it was a serious matter. The view was that serious breaches – breaches of the specific provisions of existing regimes – would continue to be dealt with in line with the contempt procedures of the relevant house. The committee notes the high threshold for findings of contempt, which involves for instance 'improper interference with the free exercise by a House or committee of its authority or functions'.[31]

1.68 A similarly high threshold should apply in relation to any formal process for raising complaints of breaches of any code that might be adopted. The committee considers this is best achieved by restricting formal complaints processes to the enforceable provisions which apply in existing regimes. Ethical gaps and emerging areas of concerns, as they are identified, should be addressed by adopting specific measures relating to their regulation, not by hoping that a general principle will suffice. The committee does not consider that there should be a formal complaints procedure in relation to the aspirational principles of such a code.

Perceptions of the Parliament and the operation of the proposed code

1.69 As has been noted, the committee does not endorse adoption of the code proposed in the House discussion paper, nor the complaints procedure attached to it. The committee does not think these will provide a meaningful and workable method of addressing parliamentary standards, and does not expect that would be effective in improving perceptions of the parliament.

1.70 Perhaps the best way to assess the effectiveness of the proposed code and its associated complaints mechanism in addressing public perceptions of the parliament is to consider what it would **not** cover:

- allegations of criminal behaviour and other matters, which properly should be dealt with by the legal system and by the courts;

30 *Transcript of roundtable*, 21 March 2011, p. 5.

31 Section 4, *Parliamentary Privileges Act 1987* (Cth).

- conduct of members before or after they were members, which are generally beyond the jurisdiction of the parliament;
- conduct in the chamber, which (in the House Committee's view) are matters for the Speaker [and, in the case of the Senate, would no doubt be matters for the Senate itself];
- policy matters or a member's views or opinions; or
- handling of a decision about an individual case.

1.71 Realistically, however, the effectiveness of a code will be judged against conduct in these areas.

Other observations in the discussion paper

1.72 The committee does not endorse the code of conduct contained in the House Committee's discussion paper, for the reasons set out above. Neither does the committee endorse the complaints process proposed in the discussion paper.

1.73 Consequently, the committee does not intend to explore further the implementation and enforcement mechanisms contained in the discussion paper except in relation to:

- the method of implementation of a code; and
- the role of a parliamentary integrity commissioner

Implementation of a code

1.74 Should the Senate nonetheless determine the need for a code of conduct of the sort proposed by the House Committee, this committee concurs that such a code should be adopted by means of a resolution of the Senate.[32] This would enable the Senate to ensure that the code could be implemented consistently with parliamentary privilege and with the processes for investigating possible contempts.[33]

Role of a Parliamentary Integrity Commissioner

1.75 The committee does not endorse a specific complaints mechanism in relation to the sort of code proposed by the House and therefore sees no need for the appointment of a commissioner as investigator. The committee does, however, see value in the Senate considering whether to appoint a person as an ethics adviser, to provide advice to senators on ethical matters, including in relation to conflicts of interest.

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32 Discussion paper, at 4.26.

33 *And see* paragraphs 1.78–1.79, below.

1.76 Should the Senate nevertheless determine the need for an investigator, the committee does not consider that the adviser and the investigator should be the same person. The committee accepts the position put by the Clerk of the Senate:

> There is an inherent conflict between the provision of advice in relation to conduct and the subsequent investigation of it. In his or her advisory role, for example, the commissioner could effectively endorse or clear proposed conduct. That conduct could then be the subject of a complaint and the commissioner, having investigated it, might come to a different conclusion. The commissioner is conflicted and the member has been treated unfairly by being penalised for conduct which the investigating authority has previously cleared. If the investigation cleared the member, doubt would nonetheless be cast on the integrity of the process because the investigator would be perceived as compromised by the advice previously given. There could be no confidence in such a system.[34]

1.77 In 2010 and again in 2012 the Australian Greens have introduced a National Integrity Commissioner Bill to provide for, among other things, the creation of an office of Independent Parliamentary Advisor, with a range of advisory and investigative powers. Should that bill proceed to debate that will give the Senate an opportunity to consider the proper role of such a position.

Interaction with privilege law and practice

1.78 Although this committee and the Senate Privileges Committee were authorised to consult on this matter, the two committees did not meet. Discussion of relevant matters did, however, take place between the chairs of the two committees.

1.79 This committee had envisaged a need for advice from the Privileges Committee to ensure that the detail of any proposed code did not infringe the law and practice of parliamentary privilege, and was compatible with the Privileges Committee's proper role in investigating possible contempts of the Senate. As the committee is not recommending the adoption of a detailed code, formal consultations have not to date been required. Should the Senate decide to pursue the development of a code of conduct, it is this committee's recommendation that the formal advice of the Privileges Committee should be sought.

Conclusions

1.80 The committee is not convinced that there is any objective evidence showing that the adoption of an aspirational, principles-based code has improved the perceptions of parliaments and parliamentarians in other jurisdictions. Accordingly, the committee does not recommend that the Senate go down that path.

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34 Dr Rosemary Laing, Clerk of the Senate, *Submission 6*, p. 8.

1.81 For the reasons set out above, the committee does not endorse the code proposed by the House Committee. If the Senate nonetheless decides to pursue a code of that nature, the committee has made some suggestions about the structure of such a code.

1.82 As has been mentioned throughout this report, the committee does not consider it necessary to put in place a formal code in order to better articulate the standards expected of parliamentarians. The committee sees value in bringing together the raft of existing provisions relating to the conduct of senators and related obligations.

1.83 The areas covered by existing regimes would continue to contain specific, enforceable provisions; whereas the general principles would provide a frame of reference against which anyone may make their own judgements about how well parliamentarians are meeting these requirements.

1.84 Parliamentarians are among the most scrutinised people in public life. They are accountable to the parliament, scrutinised by their political opponents (not always on the other side of the chamber!), by the media and, increasingly, in social media. To suggest that parliamentarians escape without sanction when they are subject to the will of the electorate, the scrutiny of their fellow parliamentarians and the court of public opinion is to ignore the realities of the Australian political system.

1.85 If the aim is an improvement in standards, the approach that has been shown to work is to identify particular concerns and devise systems of regulation that are appropriate to address them. An advantage of bringing these provisions together in a structured way is the opportunity to identify whether there are any gaps in the coverage of that framework, and then to make decisions about how to properly address those gaps, with targeted measures, rather than with a generic and largely unenforceable code.

Conclusions against the terms of reference

(a) the development of a code of conduct

- The committee considers that the Senate should not adopt a code of conduct unless it is meaningful, workable and reasonable likely to be effective.
- The committee does not recommend that the Senate adopt the code contained in Appendix 5 of the House Committee's discussion paper.
- A better approach to improving parliamentary standards would be to:
  - Consolidate the numerous provisions which regulate the conduct of senators;
  - Identify any gaps in conduct or ethical matters; and
  - Implement specific measures to address those gaps.

(b) complaints mechanism

- Complaints against specific provisions regulating the conduct of senators are provided for in the Constitution, in legislation, in the Senate's privilege resolutions and in the contempt jurisdiction of the Senate.
- Parliamentary and media scrutiny of senators.
- Should any matters be added to the consolidated code, consideration be given to what appropriate mechanisms should be added for their enforcement etc.

(c) role of the Parliamentary Integrity Commissioner

- The committee supports, in principle, introducing a mechanism by which senators can receive advice in relation to ethical matters. The committee considers that, however this is achieved, senators must retain personal responsibility for their actions.
- The committee considers it undesirable that the roles of adviser and investigator be combined.

(d) enforcement and sanctions

- If a code is adopted, these should remain those which apply in existing enforceable regimes under law and the procedures of the parliament or specific new measures which might be developed