



The nature of a code of conduct

Introduction

- 4.1 The Committee has considered the issue of the style or nature of any code of conduct, that is, whether it would be preferable for a code to be prescriptive or aspirational in nature. The experience of other jurisdictions indicates that once this issue has been settled the code will evolve over time.
- 4.2 Associated important issues to be determined are how the code relates to other rules and guidelines applicable to members, including those applying to entitlements, and the authority and status of the code.

Character of a code – prescriptive or aspirational

- 4.3 Of the codes of conduct examined by the Committee they seemed to fall into the two categories identified above – prescriptive or aspirational. One approach is to establish a more directive or prescriptive code which would include quite detailed rules and be a rather lengthy statement. The aim of a prescriptive code is to provide a comprehensive account of the conduct required of members in all conceivable situations.
- 4.4 The alternative approach is for a more aspirational code, which declares a set of principles from which each member must determine his or her own behaviour. An aspirational code aims to provide a frame of reference for making decisions that involve competing values.

- 4.5 Since the earliest considerations of a code of conduct for members, comments and findings have highlighted the practical difficulty of any attempt to draft a completely comprehensive statement in relation to conduct which would apply to members, or indeed to public officeholders at large.¹ Mr Russell Grove, Clerk of the Legislative Assembly, Parliament of New South Wales, expresses concerns in relation to a prescriptive style of code in this way: ‘The danger of a defined set is that you will leave some out. If something happens, and it is the wrong thing, and it should be in the code but it is not there. Okay, you are not guilty under the current code’.²
- 4.6 The Committee was mindful of the proposed code drafted in the 1990s by the Australian Parliament and notes that it was developed at a time when the conduct of members of parliament in some Australian jurisdictions was being scrutinised in the context of independent commissions investigating claims of misconduct or corruption. In presenting the draft framework of ethical principles, Speaker Stephen Martin told the House that the choice of approach was of primary concern to the working group of Members and Senators. The Committee recognised a familiar theme, noting that much of the debate was about whether the code should consist of a very detailed set of rules and procedures governing all aspects of the behaviour of a member, or should be an aspirational set of principles and values within which a member could make decisions about their own behaviour. A majority of those on the working group favoured the aspirational approach.
- 4.7 The code of conduct for members of the House of Commons at Westminster, as referred in chapter 2, can be described as an aspirational style of code although it also has some directive detail. Members are expected to observe a set of seven principles or values, the ‘standards of public life’, at the core of the code, in carrying out their parliamentary and public duties.³
- 4.8 The principles, referred to as the ‘Nolan Principles’ are taken into consideration when any complaint is received of breaches of the provisions in other sections of the code. The code is used as a reference point for each member in making decisions concerning his or her own behaviour. In this respect, Mr John Lyon CB, Parliamentary Commissioner for Standards, considered that a code can have a unifying effect for the

1 For example, see submission 6 from the Hon Philip Ruddock MP, Member for Berowra.

2 Transcript of round table discussion, 21 March 2011, p. 33.

3 Submission from Dr Malcolm Jack, Clerk and Chief Executive of the House of Commons, United Kingdom, pp. 1 and 2.

body of members because it sets up common minimum standards for members from disparate backgrounds, in addition to providing a basis on which any complaints and concerns can be examined.⁴

- 4.9 The code of conduct for members of the House of Commons in Canada, as referred in chapter 2, is titled a 'Conflict of interest code' and it focuses on preventing and enabling disclosure of relevant financial interests that may give rise to actual or perceived conflicts of interest.⁵ At its core this code has a short statement of principles, and at the same time has considerable directive detail which tries to anticipate a range of circumstances and situations. This code seems to fit more within the prescriptive or directive category of code.
- 4.10 Most codes the Committee reviewed contained broad statements of principles and values and appeared to be more aspirational in style. The Queensland Parliament had originally implemented a more detailed and prescriptive style of code of conduct. The Committee found it most instructive that a recent review of the code by the Integrity, Ethics and Parliamentary Privileges Committee, has resulted in that committee recommending the adoption of a more simplified code built around key principles. The review concluded there was a concern that members, especially new members, might find that the existing relatively long and complex document made it difficult to understand their obligations and responsibilities under the code.⁶ Mr Kerry Shine, Chair of the Queensland committee, stated: 'We believe fundamentally in that approach of recording principles as opposed to setting out in codified form every possible circumstance that might arise'.⁷
- 4.11 Mr Shine commented further: 'I think it is important, particularly from the public perception point of view, that you have a limited number of aspirational principles ... so that a constituent can see where I as a member of parliament have, in that constituent's view, breached a particular principle'.⁸ In commenting on the recommended reform of the code to adopt a principles based approach, Mr Neil Laurie, Clerk of the Queensland Parliament, explained: 'The draft was conceived on the

4 Transcript of video conference, 21 June 2011, p. 1.

5 Submission from Ms Audrey O'Brien, Clerk of the House of Commons, Canada, pp.1-2.

6 Submission from Mr Kerry Shine, Chair of the Integrity, Ethics and Parliamentary Privileges Committee, Queensland Parliament, p. 1.

7 Transcript of round table discussion, 21 March 2011, p. 2.

8 Transcript of round table discussion, 21 March 2011, p. 8.

assumption that it is not possible to detail all possible ethical situations or dilemmas that a member may face.⁹

- 4.12 The desire for simplicity in style, while capturing the important elements seems to be an important factor in the evolution of the Queensland Parliament's code of conduct. The Committee notes also that there is a draft proposal for the codes of conduct regimes of the Australian Public Service and the Australian Parliamentary Service to simplify the two, aspirational style, codes. Each of the two separate, but similar regimes, currently contains 15 separate values and 13 individual elements of the code. It is proposed to retain the ideal of complete coverage of conduct, but to reduce the number of principles by more than 50 per cent.

Observations

- 4.13 The Committee recognises that members must individually observe a code of conduct and make appropriate decisions about their own behaviour.
- 4.14 The Committee considers that it would be difficult for one document to anticipate and capture every possible circumstance in which a complaint might be made about the conduct of a member. Nor is it possible to prescribe all appropriate behaviour in these hypothetical situations.
- 4.15 The Committee notes that criminal matters would not be dealt with under a code. Any such matters would be dealt with quite separately by the public prosecutors and the courts.
- 4.16 The Committee considers that it would be preferable for a code of conduct for members to be broad in nature and reflect key principles and values as a guide to conduct. The framework for ethical principles for members and senators that was developed in the mid-1990s provided a starting point for the Committee to draft a possible code, which is included at Appendix 5.
- 4.17 The Committee notes also that over time a code would evolve and the House would develop a body of interpretative and explanatory material which has regard to individual cases and contemporary values. However, the Committee considers that starting from the implementation of a code, there would be a need for initial explanatory material and for clearly identifying related rules and guidelines affecting members, so considers this matter next.

9 Submission from Mr Neil Laurie, Clerk of the Parliament, Queensland, p. 2.

Other rules and guidelines affecting Members

- 4.18 As discussed above, the Committee considers that a code of conduct based on aspirational principles and values would be preferable to a directive code, and it also considers that such a code should be cross-referenced to other key rules and guidelines that relate to the various aspects of a member's role and behaviour as a member. These other rules were identified above, in chapter 3, as including constitutional provisions, standing orders, resolutions of the House, the Register of Members' Interests, the entitlements regime, etc. The Committee notes that such additional guidance was also cross-referenced in the draft framework of ethical principles prepared by the Parliament in 1995¹⁰, and that the Senate publishes a guide about such other requirements.¹¹
- 4.19 The codes of conduct of other parliaments also include references to specific rules and guidelines affecting their parliamentarians, which sit outside the individual codes.
- 4.20 The issue of entitlements features expressly in the codes of conduct for members of many parliaments, as many Houses have the principal responsibility for deciding and administering members' entitlements. However, this is not the case for the great majority of entitlements paid to Members and Senators of the Australian Parliament, although the Presiding Officers have responsibility for services provided to Members and Senators at Parliament House. At the federal level, most entitlements are established either by the Remuneration Tribunal or the Executive, and the great majority are administered by the Executive.

Observations

- 4.21 The Committee considers that if there were a code of conduct it would be helpful to both the community and to members of the House to have a single point of reference for the rules and guidelines which address the various obligations and conduct of members. The Committee recognises that the Executive administers the great majority of members' entitlements and that they are subject to an extensive regulatory regime in relation to which the House does not have a direct role. Nevertheless, the Committee considers that entitlements should be referenced to any code of conduct as members must ensure they satisfy the rules and guidelines, laid down elsewhere, in relation to parliamentary entitlements.

¹⁰ See, Appendix 1 below.

¹¹ See, *Brief Guide to Senate Procedure – 'No. 23 – Provisions governing the conduct of Senators'*.

Process for implementing a code

- 4.22 The Committee has reviewed how codes of conduct have been implemented in various other parliaments, and has found that there seem to be three options for implementing a code. A code could be adopted by resolution of a House and included in its standing orders. This is the process followed by Canada's House of Commons which has resolved that the code of conduct be part of its standing orders, where it is placed in a separate appendix. Another option is for a House to adopt a code as a separate resolution, and such is the case in the United Kingdom's House of Commons which has adopted a code of conduct by resolution. A third option is for a code of conduct to be part of an Act of Parliament, and Victoria's Legislative Assembly and Legislative Council are each bound by a common code of conduct which is part of the Members of Parliament (Register of Interests) Act 1978 (Vic), s. 3.
- 4.23 The Committee noted above, in chapter 2, the strongly held views expressed both by the Clerk of the UK House of Commons¹² and the Clerk of the Canadian House of Commons¹³ that a code of conduct should be adopted by resolution and not be statutory. These statements reflect the deliberately non statutory nature of the codes adopted in those Houses. The approach of adoption by resolution would ensure that the respective House itself retained control over its own affairs including the conduct of its members, and that these matters then would not be contestable in the courts. The courts would not have a role in, or be able to pass judgement on, what is regarded as essentially an internal matter, the appropriateness of the behaviour of members as assessed against the standard set by the Houses.
- 4.24 If this approach were followed in the Australian Parliament, clearly the House of Representatives would retain control over its members, although it is noted that the courts would still potentially have jurisdiction in relation to conduct matters if they raised some aspects of parliamentary privilege. The Committee notes also that while the House would retain jurisdiction in relation to misconduct matters under a code of conduct adopted by resolution, any criminal investigation related to the same facts would be a matter for the courts and therefore quite a separate process.

12 Submission from Dr Malcolm Jack, Clerk and Chief Executive of the UK House of Commons, p. 1.

13 Submission from Ms Audrey O'Brien, Clerk of the Canadian House of Commons, pp.1-2.

4.25 In addition, The Rt Hon Kevin Barron, Chair, Committee on Standards and Privileges, House of Commons, United Kingdom told the Committee that one of the greatest strengths of the adoption of the House of Commons code by resolution was ‘the flexibility of being able to alter the code in terms of what is happening at any one time in parliament ...’.¹⁴ The Committee recognises that it would be highly desirable to be able to easily review and amend a code in the light of developments, thereby quickly addressing any problems or weaknesses in the code. All the jurisdictions examined by the Committee have amended their codes and changed their processes following developments over time and specific or annual reviews. The Committee expects that the normal course would be for a code of conduct to change from time to time.

Observations

- 4.26 The Committee considers that it would be preferable for any code of conduct to be adopted by resolution of a House. It would be important that members see a code as their own, one they have debated and agreed to, and not as a measure that has been imposed on them remotely. The Committee considers that information and education for members about a code would be an important means for Members to learn how the code would support them in their role as Members, see chapter 7 below.
- 4.27 A statutory code appears to be a less favourable option because as a practical effect its interpretation could directly involve the courts in matters of members’ conduct, which would prevent flexibility and responsiveness if changes are required.

¹⁴ Transcript of video conference, 21 June 2011, p. 1.