



A paper delivered by:

The Hon Murray Kellam AO
Chief Commissioner, Integrity Commission

to the

Parliament Law, Practice and Procedure Course
Australian & New Zealand Association of Clerks-at-the-Table (ANZACATT)

Hobart, 6 July 2012

The issue of Parliamentary Codes of Conduct has been of particular interest to the Integrity Commission in Tasmania. Last year the Commission tabled a report in the Tasmanian Parliament which recommended the adoption by each House of a Code of Conduct applicable to all members. However, it is not only in Tasmania that the question of whether or not Codes of Conduct have any value has been the subject of debate.

This debate is far from new and the fact that the issue is contentious is reflected in the wide disparity of approaches to Parliamentary Codes of Conduct and other ethical mechanisms in Australia.

Neither the Commonwealth, South Australia, Western Australia, Tasmania or the Northern Territory has a Code of Conduct for all members of their respective Parliaments. In fact, the only area of complete unanimity among Australian Parliaments is that they all have a Register of Interests for Parliamentarians. Some have a stand-alone Ministerial Code of Conduct, some do not. Some have a Parliamentary Integrity Adviser, some do not. Some have external bodies, such as the New South Wales Independent Commission Against Corruption and in Tasmania, the Integrity Commission, which have power to investigate MPs' conduct. Others do not have such bodies.

In an excellent research paper published more than 13 years ago, Dr Andrew Brien argued that a Code of Conduct for Commonwealth Parliamentarians should be adopted.ⁱ

He referred to research which revealed that the public viewed the honesty and ethics of both State and Federal Parliament as only slightly better than those of car salesmen. Only 7% of Australians had the view that MPs hold high or very high standards of honesty and ethics. He noted the "torrid 1997 sittings" of Federal Parliament and "allegations surrounding the probity of members in the major parties" which "received considerable attention within the Parliament, the Press and the Community".

He noted that “one result of this ongoing focus on probity was that the attention of the legislature and the community was ... diverted from pressing and important matters”.

As the events of 2012 unfold, does anyone here have a sense of déjà vu?

However, the Australian experience of reluctance by Members of Parliament to regulate their own conduct is not unique. The United Kingdom Nolan Committee on Standards in Public Life recommended 18 years ago that there should be a Code of Conduct for MPs. Indeed, it drafted one.

Although the House of Commons adopted such a Code in 1995, it was not until 2009 that the House of Lords did so.

New Zealand has likewise proved to be a reluctant starter on Codes of Conduct. In a speech given in Raratonga in 2007, the then-Speaker of the New Zealand Parliament, in discussing a Code of Conduct which had been proposed by four minor parties said:

In conclusion then, the Code of Conduct is unlikely to attract support from the large parties and will therefore go down in our Parliamentary history as another attempt to raise the standards of Parliament. I doubt that the issue will go away, however. The public service has just adopted a Code of Conduct. Most professional bodies have such codes, and there is a general trend towards ethical matters to be a part of decision-making in public and private spheres. The New Zealand Parliament, however, has a long tradition of resisting regulatory intrusions into matters that govern the working of Parliament and the conduct of members. Short of the issue becoming the subject of a coalition agreement, it is unlikely that the New Zealand Parliament will be subject to a formal code of conduct.ⁱⁱ

On 22 February 2012, Labour MP Ross Robertson introduced a Private Member's Bill in the New Zealand Parliament, describing it as “deliberately modest and declaratory”. Speaking publicly in April, he said the adoption of a Code was about good governance. In his view: “It is about such things as integrity, transparency, legitimacy, accountability, an acceptable standard of behaviour, and acting in good faith. Good governance and transparency are non-negotiable for a healthy democracy”.

Notwithstanding the MP's views, it appears there has been no further progress with the Bill. Closer to home, the House of Representatives Standing Committee of Privileges prepared a discussion paper on the matter of Codes of Conduct in November 2011ⁱⁱⁱ. The Senate is to report on it in November this year.

In Tasmania, as I have said, the Integrity Commission produced a report on Codes of Conduct for Members of Parliament, Members and Ministerial Staff in Tasmania in June 2011. I am delighted to observe that the Premier adopted most of the Commission's recommendations and that a Code of Conduct is now in place for Ministers. Her department is currently working on a code for ministerial staff.

I am, however, less delighted to say that neither House of Parliament, and in particular the Legislative Council, which at the moment has no code of conduct for its Members, is yet to respond in a meaningful way to the 2011 report.

So why is it that what appears, at least to me, to be an irrefutable case for the adoption of Codes of Conduct to bind all Parliamentarians does not happen?

Perhaps I should spell out why I say the case is irrefutable. First, it is beyond argument that the community, both at a State and Commonwealth level, is sceptical of the level of trust that can be placed in politicians. Indeed, it was the very reason for the Tasmanian Government to create the Integrity Commission. From the public viewpoint, there appear to be no standards that apply to politicians.

A Code of Conduct would set standards by which the behaviour of Parliamentarians can be assessed.

Accordingly, there is a clear public purpose to be served by having a Code of Conduct. That public purpose is served by having clear guidelines which permit certain types of conduct but proscribe others. An example is the employment of relatives by an MP or a Minister. A Code would define the proper boundaries of such employment. Many members of the public no doubt employ relatives and would not understand the basis of such a restriction on employment by an MP. A Code dealing with that issue would service as a public criterion that can be used to judge whether the conduct is either acceptable or unacceptable.

A further public purpose is the enhancement of public trust in the institution of Parliament. That is, the community will know that certain standards of conduct apply to all Parliamentarians and if MPs generally comply with those standards, trust in the institution of Parliament will be enhanced. Even a breach of those standards could, if properly enforced, enhance public confidence.

Additionally, a clearly-drafted Code of Conduct is an educational tool providing both public and institutional benefit. The standards expected of Parliamentarians can be readily accessed by the public but, equally as importantly, the individual parliamentarian is provided with clarity and guidance. Members are elected to Parliament at all ages – some very young, and from all backgrounds. It is simply unrealistic to think that the newly elected have considered all of the ethical issues that might be relevant to them. A well-drafted code would alert them to issues which, quite reasonably, they had not previously considered.

In this regard, a Code can provide a basis for assessing future conduct and thus effectively guide those subject to it towards acceptable, appropriate behaviour. A well-drafted Code can provide clarity when there is an allegation of breach. That is, there is an agreed foundation for a response to unacceptable behaviour. If such a response is in accordance with clearly defined processes, then surely the community will be reassured that the trust they have placed in their politicians is not misplaced.

However, those arguments – persuasive as they are, in my view – have not convinced all politicians.

Why not?

South Australian Senator Nick Xenophon recently stated that “establishing a Code of Conduct and a Parliamentary Integrity Commission” will make little difference. “I am worried that this will just be another layer of bureaucracy,” he said.

This, no doubt, was an expression of an argument raised in the 2011 House of Representatives Discussion Paper in relation to a draft code of conduct that Members are already subject to many rules. However, as the paper states:

While external rules and guidelines apply to the actions and behaviours of members, they currently do not cover broader ethical values and principles, nor are they drawn together in any structured manner.

I reject Senator Xenophon's view that a Code creates another layer of bureaucracy. Rather, I would argue that the fact that ethical conduct obligations are all set out in one convenient code is of benefit to both the public and MPs.

Likewise, the comment by Shadow Attorney-General, Senator George Brandis that the starting point is for MPs to improve their own behaviour "and that Members of Parliament simply have to make a conscious decision to conduct themselves appropriately," appears to reflect a view that a Code of Conduct would not improve behaviour.

Certainly, the mere existence of a Code does not guarantee good behaviour. However, as the House of Representatives report notes: "Codes have, in fact, been widely accepted as a guide to ethical behaviour and as communicating with the community about its expectations of the Standards to be expected of Public Officials".

Furthermore, it should be noted that in 1999 the Commonwealth Parliament passed the *Parliamentary Services Act* which contains a Code of Conduct that emphasises:

- honesty diligence and integrity;
- respect for others;
- confidentiality;
- compliance with the law;
- proper use of Commonwealth resources;
- avoidance and disclosure of real or perceived conflict of interest;
- ensuring false or misleading information is not given; and
- behaviour that upholds the value and integrity of the Parliamentary Service.

Those of you who work in the Commonwealth are bound by that Code. How can it be argued seriously, that each of those obligations do not or should not apply to Parliamentarians?

To my mind the argument that is made and is, indeed, referred to in the House of Representatives discussion paper – that Parliamentarians are different because they are subject to elections – is specious.

Likewise, the argument that complaints under a Code of Conduct would be pursued purely for political reasons does not hold water. Whilst I accept that a complaint mechanism might encourage politically-motivated complaints, the fact is that such complaints would, in a proper process, be required to articulate clearly the basis upon which it is asserted the Code has been breached.

I might add that the experience of the Integrity Commission in Tasmania, which has power to investigate misconduct on the part of Parliamentarians, is that to date there is little evidence

of abuse by way of politically-motivated complaints. A Code would bring more certainty even in circumstances whereby the motivation to make a complaint was purely political.

In summary, the House of Representatives discussion paper is generally supportive of a Code of Conduct, and indeed appends a draft code. The draft code appended is a good start, although it might be argued that it should contain more detail.

However, in a climate where it has taken several decades to get to this point, and of course there is still a risk that the Senate will not come on board, any progress will be good progress.

ⁱ *A Code of Conduct for Parliamentarians*: Dr Andrew Brien: Research Paper 2 1998-99: Parliamentary Library Canberra

ⁱⁱ <http://www.parliament.nz/en-NZ/AboutParl/HowPWorks/Speaker/Speeches/0/4/5/48Speakspeech130720071-A-Code-of-Conduct-for-Members-of-Parliament.htm>

ⁱⁱⁱ House of Representatives Standing Committee of Privileges and Members' Interests – *Draft Code of Conduct for Members of Parliament Discussion Paper* November 2011