LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

INQUIRY INTO THE PROPOSED ETHICS COMMITTEE / CODE OF CONDUCT

STANDING COMMITTEE ON ADMINISTRATION AND PROCEDURES

MAY 1991

RESOLUTION OF APPOINTMENT

On 23 May 1989 the ACT Legislative Assembly agreed to a temporary standing order which established the Standing Committee on Administration and Procedures with the following terms of reference:

16A(a) A Standing Committee on Administration and Procedures shall be appointed at the commencement of each Assembly to inquire into and report on, as appropriate:

the Assembly's annual estimates of expenditure;

Members' entitlements including facilities and services;

operation of the Assembly's library;

operation of the transcription service (Hansard);

availability to the public of Assembly documents;

the standing orders of the Assembly; and

the practices and procedures of the Assembly; and

matters relating to the privileges of the Assembly which may be referred to it by the Assembly;

(b) The Committee shall arrange the order of Private Members' Business.

MEMBERSHIP

Mr Speaker (Presiding Member)

Mr W B Berry, MLA

Mr N A Jensen, MLA

Mrs R M Nolan, MLA

Secretary: Mr Mark McRae

Research Staff: Ms Judy Starcevich

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RECOMMENDATIONS

The Committee recommends that:

- **the Legislative Assembly for the Australian Capital Territory not establish an ethics committee.**

  Paragraph 9.4

- **the Legislative Assembly for the Australian Capital Territory adopt a Code of Conduct for Members.**

  Paragraph 9.6

- **the Code of Conduct included in this report be adopted for general application to all Members of the ACT Legislative Assembly.**

  Paragraph 9.9

- **the Legislative Assembly adopt mechanisms similar to those used in the Senate which allow for the right of reply for private citizens aggrieved during parliamentary debate.**

  Paragraph 9.15

- **the investigation of alleged breaches of the Code of Conduct and other related matters be the responsibility of the Standing Committee on Administration and Procedures which shall investigate any alleged breaches of the Code referred to it by the Assembly and provide a report on the matter to the Legislative Assembly for its consideration.**

  Paragraph 9.19

1. INTRODUCTION

1.1 On Wednesday 19 September 1990, Ms Follett (Leader of the Opposition), pursuant to notice, moved –

(1) a standing committee on ethics for Members of the Legislative Assembly be appointed to inquire into and report on matters (a) referred to it by the Assembly, and (b) considered by the committee to be of concern to the community;

(2) the committee shall consist of 5 Members;

(3) the committee be provided with the necessary staff, facilities and resources;

(4) the committee be required to prepare and report to the Assembly on an appropriate code of ethics for Members;

(5) the committee be responsible for promoting the value of ethical behaviour amongst all Members and to the community from which they are elected;

(6) the ethics committee be asked to report on means for members of the community to raise alleged breaches of such a code of ethics, and appropriate action for the Assembly to take in relation to such breaches;

(7) the committee consider the following draft Code of Ethics as a first step:

OBJECT:

The object of the Members of the ACT Legislative Assembly shall be to elevate the practice of representative government by the practice and promotion of sound and honourable discharge of Members' duties.

PRINCIPLES:

To further these objectives, the following ethical principles shall govern the conduct of every Member of the Legislative Assembly who shall:

(a) uphold constitutional government, the laws of the community and the principle of the role of the law;

(b) be dedicated to effective and democratic government by elected members and to the belief that honesty and integrity should be its pillars;

(c) uphold the dignity and worth of services rendered by government, maintain a constructive, creative and practical attitude towards government affairs and a deep sense of social responsibility as an elected representative;

(d) be dedicated to the highest ideals of honour and integrity in all public and personal relationships in order to maintain the dignity of the office so that it may merit the respect and confidence of the elected government, other officials, employees and of the public;

(e) recognise that the main function of government is to serve the best interests of the community;

(f) seek no favour, believing that personal aggrandisement or profit secured by confidential information or by misuse of public time is dishonest;

(g) disclose any personal interest, either direct or indirect on any matter which comes before the Assembly or its committees;

(h) act with scrupulous honesty; and

(i) do the utmost to maintain and promote full confidence in the integrity and dignity of the elected representatives

(8) the committee shall invite members of the public to make submissions on its operations and functions;

(9) the committee shall hold all hearings in public and each and every report of that committee shall be laid on the table of the Assembly for consideration;

(10) the committee shall present to the Assembly a Code of Ethics for consideration prior to the end of September 1990;

(11) the committee shall convene as soon as possible; and

(12) the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

1.2 Ms Follett's motion was considered by the Legislative Assembly on 19 September, 1990 during which the Assembly agreed to a motion moved by Mr Humphries (Minister for Health, Education and the Arts), referring the motion to the Standing Committee on Administration and Procedures for consideration and report to the Assembly.

2. CURRENT RULES GOVERNING MEMBER'S CONDUCT

2.1 Prior to considering the provisions of the motion referred to it, the Committee sought to identify those provisions the Members of the Legislative Assembly were currently bound by. The issues of conflict of interest, qualification and disqualification of Members, pecuniary interests, privilege, provisions for general parliamentary behaviour and other legal sanctions are dealt with under a number of existing Acts and Assembly Standing Orders.

Australian Capital Territory (Self–Government) Act 1988

2.2 Sections 14, 15, 24 and 67 of the *Australian Capital Territory (Self–Government) Act 1988* provide for the qualification and disqualification of Members, conflict of interest and powers of the Legislative Assembly.

> "**Disqualification of member**
>
> **14.(1)** A member vacates office if the member:
>
> (a) at any time after the beginning of the first meeting of the Assembly after a general election, is not qualified to take a seat as a member;
>
> (b) is absent without the permission of the Assembly from:
>
> (i) such number of consecutive meetings as is specified by enactment for the purposes of this subparagraph; or
>
> (ii) if no such enactment is in force – 4 consecutive meetings of the Assembly; or
>
> (c) takes or agrees to take, directly or indirectly, any remuneration, allowance, honorarium or reward for services rendered in the Assembly, otherwise than under section 73.
>
> **(2)** A person who has vacated an office of member may be re–elected.

Conflict of Interest

15.(1) A member of the Assembly who is a party to, or has a direct or indirect interest in, a contract made by or on behalf of the Territory or a Territory authority shall not take part in a discussion of a matter, or vote on a question, in a meeting of the Assembly where the matter or question relates directly or indirectly to that contract.

(2) A question concerning the application of subsection (1) shall be decided by the Assembly, and a contravention of that subsection does not invalidate anything done by the Assembly."

2.3 Section 24 provides that until the Legislative Assembly makes a law with respect to its powers, its Members and committees have the same powers as those of the House of Representatives and its Members and committees. Subsection 4 of section 24 prevents the Legislative Assembly from imprisoning or fining a person.

2.4 Under section 67(4)(c) a person is not qualified to take a seat as a Member of the Legislative Assembly if that person "has been convicted and is under sentence for an offence punishable under the law of the Commonwealth or of a State or Territory by imprisonment for 5 years or longer.".

Resolutions of the Assembly

2.5 A Resolution of the Assembly of 24 May, 1989 provides for a register of pecuniary and other interests for Members of the Legislative Assembly. This register places on the public record Members' interests which may conflict, or may be seen to conflict, with public duty. It provides:

"That:

(1) within 28 days of the making and subscribing of an oath or affirmation as a Member of the Legislative Assembly for the Australian Capital Territory each Member of the Legislative Assembly shall provide to the Speaker of the Legislative Assembly a declaration of the private interests of themselves and their immediate family in the form as presented to the Assembly this day and shall notify any alteration of those interests to the Speaker within 28 days of that alteration occurring; and

(2) such declarations be made available to any person on request subject to the Member concerned being advised by the Speaker of the name of the person to whom the information is made available and the reasons why it has been requested, in each case."

2.6 Interests declared include shareholdings in public and private companies, family and business trusts and nominee companies, real estate, registered directorships of companies, partnerships, liabilities, investments, savings or investment accounts, any assets each valued at over $5,000 excluding household and personal effects, the nature of any substantial sources of income, gifts, sponsored travel or hospitality received, membership of any organisation and any other interest where a conflict of interest could foreseeably arise.

Standing Orders

2.7 Parliamentary Privilege is covered by Standing Order 71 of the Legislative Assembly which provides for such issues to be referred to the Standing Committee on Administration and Procedures.

2.8 Standing Order 156 provides that, "A Member who is a party to, or has a direct or indirect interest in, a contract made by or on behalf of the Territory or a Territory authority shall not take part in a discussion of a matter, or vote on a question, in a meeting of the Assembly where the matter or question relates directly or indirectly to that contract. Any question concerning the application of this standing order shall be decided by the Assembly.".

2.9 Standing Order 224 provides that "A Member may not sit on a committee if that Member has any direct pecuniary interest in the inquiry before such committee.".

2.10 Standing Orders 202–209 cover the general behaviour of Members of the Legislative Assembly. Suspension from the Chamber is provided as a sanction against a Member who acts in a disorderly manner.

Legal Sanctions

2.11 The Committee believes that the above provisions combined with the criminal sanctions of the legal system provide a comprehensive list of provisions to ensure that misconduct of the Members of the ACT Legislative Assembly can be addressed.

3. PRACTICES WITHIN THE FEDERAL PARLIAMENT

3.1 The motion that has been referred to the Committee for consideration has two basic elements: it proposes the establishment of an ethics committee to promote the value of ethical behaviour amongst Members of the Legislative Assembly and it includes a draft code of ethics for adoption by the Legislative Assembly of the ACT. As a means of determining whether these provisions should be applied to the Legislative Assembly, the Committee examined whether similar provisions had been adopted in the Federal Parliament and/or any of the State Parliaments.

3.2 The issues of pecuniary and other conflicts of interest, parliamentary privilege, general parliamentary behaviour and the use of codes of conduct overlap with one another. This and the following sections have been included to give some indication of how such issues are dealt with in a number of different jurisdictions.

The House of Representatives

3.3 The issue of members conduct was considered at the Federal level in 1978 when on 15 February the Prime Minister appointed a committee to inquire into matters relating to the public duty and private interest of Members, Senators and Ministers as well as officeholders and members of the Australian Public Service. The committee was chaired by the Chief Judge of the Federal Court of Australia, Sir Nigel Bowen and presented its report on 22 November, 1979.

3.4 The Committee's recommendations included the following provisions:

- That it would not be possible to draw up a completely comprehensive and satisfactory statement of principles on the nature of private interest, pecuniary or , otherwise, which would conflict with the public duty of any or all persons holding positions of trust in relation to the Commonwealth.
- That it is possible to define principles which would promote the avoidance and if necessary the resolution of conflict of interest. Such a statement of principles would constitute a Code of Conduct for all persons holding positions of public trust.

- That generally provisions for the enforcement of the Code of Conduct should be built into the existing basic disciplinary procedures for the various categories of officeholders, but, for occasional cases of particular importance, special machinery in the form of a Public Integrity Commission be established to carry out investigations and report to the relevant disciplinary body.
- That there was insufficient justification at the present time to introduce a system of compulsory registration of officeholders' interests but rather reliance should be placed on the recommended Code of Conduct which includes a requirement for ad hoc declarations of interest.[1]

3.5 A draft code of conduct was included in the report by the committee. The committee also included detailed recommendations for the application of its proposals which included the suggestion that each House appoint an ethics committee to deal with complaints. While the Government announced that it broadly accepted the recommendations of the committee, only procedures relating to Ministers were put in place.

3.6 To date the House of Representatives has not established an ethics committee and there is no code of conduct.

3.7 It has been the practice for Ministers to declare their pecuniary interests in the Federal Parliament since 1978. On 5 October 1983 the House of Representatives agreed to a resolution declaring that it was of the opinion that all Members should provide statements of their private interests and those of their families of which they were aware, and that a public register should be established. The House referred to the Standing Orders Committee the question of what changes would be necessary to give effect to the proposals. The Senate Standing Orders Committee also received a similar reference. In October 1984 the House of Representatives adopted a new standing order 28A which provided for a Committee of Members' Interest to be appointed at the commencement of each Parliament.[2]

3.8 At the commencement of each Parliament the House of Representatives appoints a Committee of Privileges to assist it in its examination of issues of privilege. The Committee consists of the Leader of the House or his or her nominee, the Deputy Leader of the Opposition or his or her nominee and nine other Members. The Committee's role is to inquire into and report on complaints of alleged breaches of privilege or contempt and on other matters referred to it.

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1 "Public Duty and Private Interest", Report of the Committee of Inquiry pp. 131–2, (1979).

2 A. R. Browning (ed.) House of Representatives Practice (2nd edn: AGPS Canberra 1989), pp. 179-81.

3.9 The issue of whether an undischarged bankrupt is disqualified from taking a seat in the House of Representatives was considered in 1977. In that year a motion was moved questioning whether the seat held by a Member had become vacant pursuant to section 45(ii) of the Constitution. This subsection provides that if a Senator or Member of the House of Representatives takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors his place shall become vacant. While the motion for referral to the Court of Disputed Returns in that case was negatived, **House of Representatives Practice** notes that:

> "There has been no precedent in the House of Representatives of the seat of a Member being vacated because he has become bankrupt. Therefore, while a seat is vacated at the instant that the Member is declared bankrupt, the machinery for bringing this fact to the attention of the House is not established."[3]

The Senate

3.10 Although the Senate Standing Orders Committee received a similar reference as the House of Representatives Standing Orders Committee with regard to pecuniary interest, it did not report on the issue.

3.11 Like the House of Representatives, the Senate does not have an ethics committee or a code of conduct. In the Senate only Ministers provide details of their pecuniary interests.

3.12 Senate Standing Order 33A provides that a Committee of Privileges be appointed at the commencement of each Parliament to inquire into and report on complaints of breach of privilege which may be referred to it by the Senate. The Committee is to consist of seven Senators.

3.13 The Senate has made provision since February 1988 for a right of reply for individuals outside Parliament aggrieved by what they claim to be false or defamatory statements made about them in Senate debates. The Senate's resolution providing for citizens' right of reply was adopted on the 25 February 1988. This resolution is included in this report at Appendix B.

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3 ibid p. 172.

3.14 It provides that a person who has been referred to in the Senate may make a submission to the President claiming to have been adversely affected in reputation, in respect in dealings with others or injured in occupation or finance or by unreasonable invasion of privacy. The President may refer the matter to the Committee of Privileges if he considers that the matter is not trivial, frivolous or vexatious. The Committee may decide not to consider a submission if it considers the subject of the submission not sufficiently serious or is frivolous, vexatious or offensive in character. This decision is reported to the Senate.

3.15 If the Committee decides to consider a submission it shall meet in private session when conferring with the person and any relevant Senators. It shall not publish a submission referred to it or its proceedings but may present minutes of its proceedings and all or part of such submission to the Senate. The Committee shall not consider or judge the truth of any statements made in the Senate or of the submission.

3.16 In its report to the Senate the Committee may make either of the following recommendations – that no further action be taken by the Senate or by the Committee or, that a response by the person who made the submission be published by the Senate or incorporated in Hansard. The Committee then shall not make any further recommendations. The response by the person who made the submission shall not contain anything offensive in character.

4. PRACTICES WITHIN THE STATES

4.1 The Committee considered the practices adopted within the State Parliaments with regard to ethics committees, matters of privilege, codes of conduct and registers of interests. It found that there was considerable variation in the provisions adopted in the States. The following is a summary of the information obtained by the Committee.

Standing Committees on Ethics

4.2 As with the Federal Parliament, none of the Parliaments within the Australian States or Territories have Standing Committees on Ethics. However, allegations of conflict of interest and breach of parliamentary privilege are dealt with in a wide variety of other ways. These can include, in some instances, investigation by a Standing Orders Committee as in New South Wales or a hearing by Joint Services Committees as in South Australia. Also in South Australia, a recent case of an allegation against a Member regarding a conflict of interest was pursued informally through liaison between party leaders. Some years ago in Victoria, when a member of the public raised a complaint about a Member's private interest the mechanism used to deal with the matter was for the Speaker to raise this issue and for the Member to refute the allegation to the satisfaction of the House.

Standing Committees on Privilege

4.3 There are Standing Committees on Privilege in Tasmania, Queensland and the Northern Territory.

4.4 As with many legislatures, Standing Committees of Privilege are appointed as a matter of course in Victoria and the Upper House in NSW. The usual procedure is for these committees to investigate the matters referred to them by the relevant Parliament and report back with recommendations.

4.5 In Western Australia a Select Committee on Privilege may be appointed to investigate whether or not a Member has breached privilege as a result of remarks made in the House. However, the Report of the Parliamentary Standards Committee found that past history had shown that there was little to be gained from the appointment of such committees.[4] Nevertheless, the committee did recommend that each House of the Western Australian Parliament give serious consideration to the establishment of a Standing Committee on Privilege.[5]

Code of Conduct

4.6 The Victorian Parliament addressed the issue of whether to adopt a Code of Conduct in 1972. In November of that year a Bill was introduced into the Parliament, "To Constitute a Joint Select Committee to enquire and report into the law relating to certain disqualifications for membership of the Legislative Assembly, to make further temporary provision with respect to the law relating to disqualifications, to amend the *Constitution Act Amendment Act 1958* and for other purposes.". The Bill became law and a resolution was passed by both Houses appointing 6 Members of each House to be members of the Committee. The Committee submitted a progress report on "A code of conduct for the Members and Ministers of the Crown.". This code was slightly amended and was incorporated in "The Members of Parliament (Register of Interests) Act 1978.". It should be noted that the Victorian Parliament's code of conduct primarily refers to potential conflict of pecuniary interest.

4.7 In New South Wales, in July 1989, an agreement was reached between the Minister for Local Government, the Minister for Planning, the Ombudsman, the Independent Commission Against Corruption and the Local Government and Shires Associations, to prepare a comprehensive code of conduct for local government. The code and associated guidance manual were adopted on 19 July 1990.

4.8 Although the 1989 Report of the Parliamentary Standards Committee in Western Australia concluded that in most respects there is an adequate code already available in the form of the standing orders and practices of both Houses, the Committee nevertheless provided an abbreviated code of conduct for educational purposes and for the guidance of Members generally. The code included a "statement of intent" with regard to allegations against private citizens along the lines of the resolution adopted by the Senate.[6] The Western Australian Parliament has recently adopted a "Code of Ethics – Ministers of the Crown".

4 Report of the Parliamentary Standards Committee. Western Australia, 1989. Vol. 1 pp. 36–37.

5 ibid p. 38.

6 ibid pp. 70–72.

Register of Interests

4.9 In New South Wales there is a Ministerial Register of Interests with disclosure provisions.

4.10 The Northern Territory has a Register of Members' Interests, while Tasmania is considering the establishment of such a register.

4.11 Western Australia and Queensland are both currently introducing legislation to establish registers of Members' interest, both of which will be published.

5. OVERSEAS EXAMPLES

5.1 The Committee also sought to determine what practices had been adopted overseas. It found that there is considerable variation in the way members are dealt with for misconduct. In some countries a two–thirds majority at least is required to expel members. Such decisions are often the result of a recommendation of a committee which has had the matter referred to it (e.g. in Czechoslovakia it is the Mandate and Immunities Committee; in Denmark it is the Committee of Scrutineers and in the Republic of Korea it is the Legislative and Judicial Committee). Other procedures exist such as in Austria where the Constitutional Court decides whether to expel a Member based on a recommendation from Parliament.[7]

5.2 The Committee found that the Government of Ontario has recently taken a very different approach to the issue of conflict of interest.[8] While the *Members' Conflict of Interest Act, 1987*, contains provisions similar to those in other legislatures in that it requires Members to publicly disclose their interests and the interests of close family members, the Act has also created a Conflict of Interest Commissioner.

5.3 The role of the Conflict of Interest Commissioner is to protect Members from getting into a conflict of interest situation. The Commissioner is empowered to give authoritative advice about ethical duties under the statute and encourages Members of Parliament to go to him before they encounter conflicts. The Commissioner ensures that the required disclosures are adequate. He may conduct inquiries and give opinions respecting compliance with the Act. He may also recommend that the Assembly impose specified penalties against a Member who contravenes the Act. Accordingly, the Commissioner has both an advisory function and a responsibility to conduct investigations into alleged contraventions of the Act. While the initial disclosure is made privately to the Commissioner, the Commissioner must prepare a public disclosure statement.

5.4 Under the legislation, all members are subject to rules designed to prevent the improper use of office, although there are certain stricter rules provided for Ministers.

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7 Parliaments of the World. Second Edition, 1986 p. 105.

8 Polsinelli, C "Conflict and the Commissioner. The Ontario Solution to Conflict of Interest". The Parliamentarian October, 1990, LXXI, No. 4, pp. 240–242.

5.5 The Committee was also interested to learn that the California legislature has introduced a new, tougher code of conduct for 1991 with greater restrictions on the way Members conduct their personal and legislative business.[9]

5.6 The Californian State Constitution bars the Members of the Legislature from granting themselves a large salary rise. This has led to the practice of supplementing parliamentary incomes by accepting thousands of dollars in honoraria for speaking to groups that were pushing bills in the Legislature.

5.7 The new standards of conduct are a result of Proposition 112, a ballot measure placed on the ballot by the Legislature to improve its tarnished image among the state's voters. The results of Proposition 112 made it clear that voters are prepared to pay legislators higher salary in exchange for limiting their outside income. It created a commission to set the level of compensation for the state's elected officials.

5.8 The new code of conduct is a wide ranging law designed to limit the influence of groups that have a stake in legislative actions. Specifically, the law bans all honoraria and limits gifts to no more than $250 annually per donor. Free trips to foreign countries are prohibited unless they are paid for by a government agency or a non–profit group. Furthermore, legislators who vote on matters affecting their own financial interests will be subject to a fine of up to $2,000. Legislators who leave office will be banned from lobbying their former colleagues for up to 12 months. All legislators, staff members and lobbyists will be required to attend courses on ethical conduct at least once every two years. In addition, the ballot measure has written into the State Constitution the requirement that the Legislature hold most of its meetings in public.

5.9 While aware of the tough new restrictions enforced under the Code of Conduct in California, the Committee is also aware that these new limits are a result of features peculiar to the Californian Constitution and legislature.

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9 R.C. Paddock, "California's Tough New Ethics Law". State Legislatures Vol. 16(7), August, 1990, p. 9.

6. ETHICS COMMITTEES – THE UNITED STATES EXPERIENCE

6.1 The most obvious example of the use of ethics committees are those employed in both Houses of the United States Congress. The Committee therefore examined the membership and procedures of those committees and the implications of their use for the United States political system.[10]

6.2 The United States Constitution assigns to each House of Congress responsibility for disciplining its Members and enforcing ethics provisions. This function is carried out in the House of Representatives by the Committee on Standards of Official Conduct and in the Senate by the Committee on Ethics (previously the Select Committee on Standards and Conduct).

6.3 The Senate committee was created in 1964 and the House committee in 1967. However, their current forms are said to date from 1977 when, as a result of Watergate and other scandals, both the House and Senate rewrote and expanded their codes of conduct. In 1978 Congress also enacted the *Ethics in Government Act 1978* which required members, federal judges and top executive branch officials to file annual financial disclosure reports.

6.4 While conducting investigations according to prescribed procedures, the Committees also hire outside attorneys to assist in cases when matters are too complex and time–consuming for the staff alone. In addition, both Ethics Committees have stood aside when the Department of Justice has had a parallel investigation in progress. This may have been due simply to the fact that the Department has refused to share evidence or witnesses.

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10 The following information is taken from a number of articles including:

Calmes, Jacqueline, "The Ethics Committees: Shield or Sword?", Congressional Quarterly Weekly Report Vol. 45, April 4, 1987, pp. 591–97.

Mills, M. "Ever–Changing Ethics Panel Could Get New Rules" Congressional Quarterly Weekly Report Vol. 47, July 8, 1989, pp. 1677–81.

Hook, Janet, "Durenberger Inquiry Ready to go Public, on the Air". Congressional Quarterly Weekly Report Vol. 48, June 9, 1990, pp. 1769–72.

The United States House of Representatives

6.5 The Committee on Standards of Official Conduct consists of 12 members equally divided between the Democrats and Republicans. This is the only standing committee of the House evenly divided between the two parties and is so designed to limit partisanship at the outset.

6.6 The committee can recommend that the House reprimand, censure or expel a member if it finds wrong doing. But the committee has frequently considered it punishment enough to make public embarrassing details of misconduct. Where government money has been involved, restitution has frequently been recommended.

The United States Senate

6.7 The Senate Ethics Committee consists of six members of the Senate evenly divided between Democrats and Republicans.

6.8 This committee handles issues of ethics pursuant to the procedures of Senate Resolution 110, adopted by the Senate in 1977.[11] Prior to this, the Ethics Committee exercised virtually unlimited discretion to investigate or not to investigate allegations as it deemed appropriate.

6.9 Under Resolution 110 the Committee, on receiving a complaint, must conduct an initial review to determine whether there is substantial credible evidence of a violation. If it finds that such substantial credible evidence is lacking it reports that determination together with an explanation of the basis of its determination. If the committee finds that substantial credible evidence of a serious violation does exist, it must proceed with an informal investigation, usually featuring a trial–type hearing, and report its conclusions and recommendations to the full Senate.

6.10 Such procedure permits frivolous complaints to be quickly dispensed with while at the same time ensuring that serious allegations will be carefully considered. Prior to Senate Resolution 110 the lack of formal procedure detracted from public confidence in the Senate's ability to enforce its rules.

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11 T.F. Eagleton, "Reflections on Ethics". Congressional Quarterly Weekly Report Vol. 37, October 20, 1979, p. 2361.

An Evaluation of the Ethics Committees of Congress

6.11 The Committee notes that the Ethics Committees of Congress are beneficial to the effective working of the American parliamentary system in a number of different ways.[12] These benefits may be summarised as follows:

(i) as both Committees are evenly divided between Democrats and Republicans they are able to carry out their work in a nonpartisan manner;

(ii) the procedures of the Committees are such that they have proven effective at investigating facts, evaluating evidence and then taking appropriate action;

(iii) the practice of engaging outside counsel to deal with matters too complex and time consuming for staff alone gives the Ethics Committees added independence and credibility;

(iv) the practice of holding hearings in public ensures proceedings are open and the committees can be held accountable;

(v) the fact that the procedures of the Committees mirror judicial processes also gives added credibility to deliberations. Members facing ethics panel inquiries are permitted certain due processes. They are presumed innocent until proven otherwise, they can challenge evidence used against them and they have a right to counsel;

(vi) the Code of Conduct and the deliberations of the Committees serve as a continual reminder to the other Members and Senators of the required standard of conduct; and

(viii) the effective working of the Ethics Committees protect the integrity of Congress from attacks by ensuring that through their functions high standards are maintained.

6.12 However, the Committee also noted that there were a number of problems with the use of Ethics Committees. The main problems may be summarised as follows:

(i) It is frequently contended that the Committees are relatively inactive or produce self–serving action which is bad for the public's perception of Congress. The Committees are slow to act on some charges of misconduct, silent or secretive about others, and too hesitant to recommend sanctions

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12 In addition to those articles already mentioned see:

C. Alston, "Once Soft Ethics Committee Hardens its Standards" Congressional Quarterly Weekly Report Vol. 47, May 27, 1989, pp. 1233–34.

I.B. Arieff, "New Chairman Seeks Change in Congress' Ethics Policies" Congressional Quarterly Weekly Report Vol. 39, January 17, 1981, pp. 134–35.

when they do find violations. Both Ethics Committees traditionally have declined to seek sanctions against members who retire by choice or are defeated and allow remedial action to absolve the violations. Because of these criticisms it is contended that the Committees act more like a shield than a sword. Alternatively it is argued that the Committees are not trying to avoid sanctions but that the reports themselves are damaging due to public disclosure.

(ii) It is also argued that the Committees bear an enormous burden when confronted with a serious allegation against one of their own. There is inevitable sensitivity that makes judgment by ones's congressional peers so much different from going before a 12 member jury of strangers. Congress is essentially policing itself.

(iii) The conduct of the Committees' investigations can also be time consuming, demanding an extraordinary amount of effort from members. Cases can be lengthy because witnesses are often unavailable, the tracing of financial transactions can be complex, evidence must be sifted through, briefings by staff and other advisers must be attended, reports must be considered and an initial charge can spawn others that must be investigated. Such work can interfere with constituency work, parliamentary business and a Member's other responsibilities.

(iv) The implications of party politics must also be taken into account. Tension between the Democrats and Republicans in Ethics Committee enquires are common with the Committees being attacked as the instrument of a partisan vendetta.

(v) It has also been argued that such Committees create a situation where in reality the members under investigation are being judged by six/twelve of their own colleagues, rather than the full chamber with the burden of decision being shared more generally.

(vi) In the congressional Ethics Committees the same members who collect evidence and decide whether there is substantial credible evidence to warrant a full investigation also issue charges and conduct the trial. It is questionable whether it is realistic to expect that these same members can approach the evidence presented at the formal hearing with open minds.

It has been suggested that the formal hearing should be turned over to an independent outside person, such as a retired federal judge. The judge could then report either to the Committee, which could add its comments before going to Congress, or the judge's report could be transmitted directly to Congress for consideration.

(vii) Concern has also been expressed that the Houses' disciplinary procedures were unfair to accused members. For example, the House Ethics Committee can talk to the press about a pending case if they want to. Recently, the Committees have responded to criticisms by signalling that they would no longer protect their own at the expense of the institution's image.

(viii) Complaints have also been made that the ethics code is so specific as to be "nit–picking".

7. COMPARATIVE CODES OF CONDUCT

7.1 The second part of the motion under consideration by the Committee proposed the adoption of a code of conduct. As a means of determining what specific provisions such a code should include the Committee examined similar codes proposed or already adopted in other jurisdictions. This chapter includes a summary of the main provisions of six codes of conduct. Those codes examined by the Committee were the Victorian Parliament's Code of Conduct; the WA Parliamentary Standards Committee Code of Conduct; the 1978 Federal Government's Committee of Inquiry Code of Conduct; the Western Australian Code of Ethics – Ministers of the Crown; the NSW Local Government Code of Conduct and the Code of Ethics included in the motion moved by Ms Follett.

The Victorian Parliament – Code of Conduct

7.2 As pointed out in Chapter 4 of this report, the Victorian Code of Conduct forms Part I of the *Members of Parliament (Register of Interests) Act 1978.* This code is the simplest of those examined:

- it requires Members of Parliament to disclose any direct pecuniary interest; the name of any trade or professional organisation of which he/she is a member, and any other material interest whether of a pecuniary nature or not;
- Members must not advance their private interest by using confidential information gained in the performance of their public duty;
- they must also not receive a fee, payment, retainer or reward nor permit any compensation to accrue to his/her personal beneficial interest as a result of his/her position; and
- separate mention is also made of the need for Ministers to guard against conflict of interest.

The WA Parliamentary Standards Committee – Code of Conduct

7.3 The Code of Conduct recommended by the Western Australian Parliamentary Standards Committee exclusively covers behaviour of Members within the House and is, therefore, of limited assistance:

. the Code includes the provision that if a Member holds a direct personal pecuniary interest in a matter being considered by the House, the Member should declare that interest prior to speaking or voting on the matter; and

. the Code also states that a Member speaking in the House should take into account the damage done by allegations made in Parliament to those who are the subject of such allegations and the limited opportunities for persons other then Members to respond to such allegations. This was included in light of the Senate resolution mentioned earlier.

1978 Federal Government's Committee of Inquiry – Code of Conduct

7.4 The 1978 Federal Government Committee of Inquiry's Code of Conduct refers to four categories of officeholders: Ministers, Members of Parliament, public servants and statutory officeholders. The Code does not refer specifically to what public servants and statutory officeholders the provisions are to apply to:

. in referring to these groups the Code provides that officeholders should avoid situations in which their private interest whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict with their public duty. Such interest should be disclosed according to prescribed procedures;

. an officeholder should also disclose the interest of members of his immediate family (ordinarily only his spouse and dependent children but may include other members when their interests are closely connected with his);

. if an officeholder who is not a Member of Parliament possesses an interest which conflicts with the duties of his office and such interest is not prescribed as a qualification for that office then he must divest himself of that interest, remove himself from the duties in question or obtain authorisation to continue to discharge those duties;

. an officeholder should not use information obtained in the course of official duties to gain or indirectly gain a pecuniary advantage for himself or anyone else;

- provision is made prohibiting the acceptance of any remuneration or benefit for the discharge of an officeholders duties. An officeholder must not solicit or accept any benefit, advantage or promise of future advantage for himself, family or any business concern or trust. Except as otherwise prescribed, an officeholder should not accept any gift, hospitality or concessional travel offered in the connection with the discharge of his duties; and
- it is also provided that an officeholder should be scrupulous in his use of public property and services and should not permit their misuse by other persons.

Western Australian Code of Ethics – Ministers of the Crown

7.5 The Western Australian Code of Ethics – Ministers of the Crown, while exclusively directed at Ministers of the Crown, contains similar provisions to those codes mentioned above:

- Ministers should provide a statement of their pecuniary interests with one copy being kept by the Auditor–General and another by the Premier. Such statements are to include all sources of income, real property, trusts, etc; positions in companies, partnerships, etc; any outstanding debts of more than $10,000 excluding home mortgage; disposition of property where the Minister retained the right to use, benefit or reacquire the property; and, membership in any trade union or professional body;
- Ministers must resign any directorships in public and/or private companies unless it is not likely to conflict with their public duty. Ministers are to advise the Premier if they find themselves in a position of conflict which will then be referred to Cabinet;
- Ministers shall not use information obtained in the course of their duties to gain any financial advantage for themselves or any other person. When the interests of a Minister or his immediate family are involved he must disclose the interest on a confidential basis to the Premier. A Minister shall not solicit or accept any remuneration or benefit from the discharge of his duties and shall be scrupulous in his use of public property and services and shall not permit any other person to misuse them. These provisions are similar to those included in the preceding code;
- the Code also includes separate provisions for the proper use of Ministerial expenses; and
- the circumstances under which acceptance of gifts is permitted is detailed. In most circumstances this is prohibited although the Premier may endorse some circumstances.

NSW Local Government – Code of Conduct

7.6 The NSW Local Government Code of Conduct is perhaps the most detailed code available. It is questionable whether such detail is desirable or even necessary. Like the Federal code recommended in 1979, it is applied to staff as well as Members:

. as with the codes already discussed there is provision for conflict and disclosure of interest whether pecuniary or otherwise;

. the Code includes a section dealing with "Personal Benefit" which like the preceding codes deals with use of confidential information, improper or undue influence and gifts and bribery;

. the Code tends to differ from the preceding codes in that it sets down in far greater detail personal behaviour of members and staff and administrative provisions for dealing with council property. It is these areas which most codes refer to in a more general manner;

. the NSW Code also contains a provision for compliance by Members and staff with proper and reasonable administrative practices and standards of conduct, and professional and responsible management practices. The Code also has a section dealing with corporate obligations which covers communication with the community; adequate premises for the health, well–being and safety of staff and the public; professional advice from the staff to the council; council activities for the assessment of private proposals or applications. These two areas are not covered by the other codes of conduct; and

. the NSW Code also contains a detailed manual for the application of its various provisions.

The Proposed Code of Ethics Referred to the Committee

7.7 The Code of Ethics in the motion moved by Ms Follett, like those already discussed, contains general comment on the need for the honourable discharge of Members' duties:

. with regard to issues such as pecuniary interest in (7)(f) and (g) the Code is much more general then those already discussed; and

. it is this generality that could also cause difficulties with paragraph (d). In this subsection reference to personal relationships could be misconstrued. All codes examined do not refer to personal relationships other than "pecuniary and other interests of family members" and similar references (see Chapter 1).

8. THE APPLICATION OF CODES OF CONDUCT

8.1 A code of conduct should be designed to set standards by which not only Members of Parliament can measure their conduct but also be measured by members of the public. It is from such a code that Members can be certain that compliance will protect their standing as parliamentarians. Therefore, the Committee recognised that procedures need to be in place for resolving issues impartially and with a minimum of time and expense.

8.2 Most codes do not provide for a set procedure for disciplinary action relying instead on the relevant parliamentary standing orders and related provisions. As the 1978 Federal Government's Committee of Inquiry concerning Public Duty and Private Interest concluded:

> "Broadly, the Committee expects statements of principle, such as are embodied in a draft Code of Conduct applicable to officeholders, to be manifest in such forms as the Standing Orders, resolutions and conventions of a legislative body, or the staff rules or guidelines of an executive body. They may require supplementing by additional rules, sometimes reflecting minimum standards more onerous or restrictive than the general principle, sometimes explaining or enlarging upon a qualification to the general principles already incorporated in the Code of Conduct, to make them fit more satisfactorily the cases of particular groups of officeholders within wider categories."[13]

8.3 The United States Code of Conduct is enforced by the congressional ethics committees. The Western Australian Ministerial Code has provided for the breaches of the Code to be monitored by the Auditor–General although no detail of how this is to be achieved is given. The Premier of Western Australia is also given a considerable role in ensuring that the Ministerial Code is adhered to. The NSW Code provides no set procedure. The Code is designed not only as a guide for members and staff of local councils but also to provide clear understanding of the powers, obligations and responsibilities which apply to members and staff. In this way it is designed to assist those who have responsibility for investigating the conduct of councils, their Members and staff under the Local Government Act and its Ordinances as well as many other statutes and regulations.

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13 "Public Duty and Private Interest". Op cit p. 32.

9. CONCLUSION

9.1 The Members of the ACT Legislative Assembly are already bound by a number of provisions governing their conduct as members of Parliament.

9.2 The Committee sought to determine what supplementary measures, if any, were needed to ensure that the Members of the Legislative Assembly are brought to account for any misconduct.

9.3 The examination of the United States system has highlighted the problems that ethics committees can face. In addition, neither the Federal Parliament nor any of the State or Territory Parliaments have ethics committees although a variety of other measures are in place to ensure that the conduct of Members is of a high standard. With these facts in mind, the Committee believes that an ethics committee should not be established for the ACT Legislative Assembly.

9.4 The Committee recommends that:

- **the Legislative Assembly for the Australian Capital Territory not establish an ethics committee.**

9.5 As a supplement to the provisions already binding the Members of the Legislative Assembly, the Committee believes that a Code of Conduct should be adopted for general application to Members of the ACT Legislative Assembly.

9.6 The Committee recommends that:

- **the Legislative Assembly for the Australian Capital Territory adopt a Code of Conduct for Members.**

9.7 The Committee has prepared a draft Code of Conduct for the ACT Legislative Assembly which is included in this report at Appendix A. This Code has been drafted with the special features of the ACT in mind.

9.8 The Committee is aware that some governments have adopted separate and additional codes for Ministers while other governments have adopted one code for all Members. It is not up to this Committee to determine a separate Code of Conduct for Ministers but the Committee believes that the same Code of Conduct should apply to all Members. It is the perogative of the Chief Minister to establish any additional code for Ministers.

9.9 The Committee recommends that:

- **the Code of Conduct included in this report be adopted for general application to all Members of the ACT Legislative Assembly.**

9.10 The Committee also noted that some Parliaments have applied such codes of conducts to public servants as well as Members of Parliament. The Committee considered that the issue of whether a Code of Conduct be applicable to public servants within the ACT Government Service was beyond its terms of reference. The Committee believes that this is something for the Government of the day to consider.

9.11 It was brought to the Committees' attention that there existed no provisions applicable to the ACT Legislative Assembly that disqualified a Member on the basis that he or she was an undischarged bankrupt. Such a provision was specifically rejected by the Federal Parliament when proposed in the Senate during debate on the Australian Capital Territory (Self Government) Bill 1988. The Committee examined these provisions and agreed to maintain the status quo.

9.12 In considering what provisions should form the basis of the Code of Conduct, the Committee examined the current provisions for declaring pecuniary and other interests and compared those applying in other jurisdictions. The Committee concluded that the ACT provisions were adequate.

9.13 Similarly, the Committee considered whether access to the register of pecuniary and other interests was adequate bearing in mind access to such information available in other jurisdictions. The Committee believes that access to the ACT Legislative Assembly register is adequate.

9.14 The Committee examined the Senate resolution allowing for a right of reply for private citizens who have had allegations made about them within the Senate (see Appendix B). There are obviously limited opportunities for private individuals to respond to allegations made about them within the parliamentary arena. Due to the damage that may be done to private individuals by allegations made about them within Parliament it is necessary to ensure that statements reflecting adversely on persons are soundly based. The Committee believes that a mechanism to ensure this should be put in place for the ACT Legislative Assembly.

9.15 The Committee recommends that:

- **the Legislative Assembly adopt mechanisms similar to those used in the Senate which allow for the right of reply for private citizens aggrieved during parliamentary debate.**

9.16 The Committee considered the question of whether further disciplinary procedures were necessary to provide for adequate machinery to address misconduct by Members of the Legislative Assembly. These must be additional to any other standards the Committee may decide to adopt in the Code of Conduct.

9.17 Despite the lack of specific disciplinary provisions in other Codes of Conduct and the otherwise reliance on Standing Orders, resolutions and conventions, the Committee believes that additional mechanisms should be put in place for the ACT Legislative Assembly rather than relying on existing provisions.

9.18 To this end it was decided by the Committee that the investigation of alleged breaches of the Code of Conduct and related matters should be the responsibility of the Standing Committee on Administration and Procedures.

9.19 The Committee recommends that:

- **the investigation of alleged breaches of the Code of Conduct and other related matters be the responsibility of the Standing Committee on Administration and Procedures which shall investigate any alleged breaches of the Code referred to it by the Assembly and provide a report on the matter to the Legislative Assembly for its consideration.**

9.20 The Committee considered the options for bringing notice of alleged breaches of the Code of Conduct to the attention of the Assembly and has concluded that the appropriate way for matters to be raised is by a Member giving notice of motion to refer a matter for investigation.

D J Prowse MLA
Presiding Member

28 May 1991

APPENDIX A

CODE OF CONDUCT

Introduction:

The ACT community is entitled to have confidence in the integrity of its government. Members of the Legislative Assembly, as elected representatives of the Australian Capital Territory, must elevate the practice of representative government by discharging their duties in a sound and honourable manner.

The electors of the ACT have a right to expect that:

- the business of the Assembly is conducted with efficiency, impartiality and integrity and in accordance with established principles of Parliamentary practice and procedures;
- Members of the Assembly will obey the spirit and letter of the law and, in particular, the provisions of all relevant legislation, statutes, ordinances, regulations and instruments; and
- Members should ensure that their private interests do not interfere with the proper discharge of their public duty according to the highest standards of conduct.

Due to the nature of public office Members of the Legislative Assembly must accept restrictions on certain areas of their conduct beyond those imposed on ordinary citizens.

Without overriding or affecting legislation and provisions currently applicable to the ACT Legislative Assembly, the Members of the Assembly are bound by the following principles.

Conflict and Disclosure of Interest:

1. (i) Members shall complete a statement of their pecuniary and other interests in accordance with the requirements as set out in the Resolution of the Assembly of 24 May, 1989.

   (ii) Members shall be scrupulous in the completion of their statement of interests and ensure that it is updated as required by the Assembly.

2. (i) Members shall ensure that no conflict of interest, whether pecuniary or otherwise, exists between their public duty and their private interests.

   (ii) If a Member, directly or indirectly, holds an interest which conflicts with his or her public duty, or which could improperly influence his or her conduct in the discharge of his or her responsibilities, the Member shall disclose that interest prior to speaking to or voting on that matter within the Assembly or committee or other relevant meeting.

   (iii) If circumstances change after an initial disclosure has been made the Member shall disclose the nature of those changes.

   (iv) When the interest of a Member's immediate family are involved, the Member shall disclose those interests to the extent that they are known to the Member. "Immediate family" is taken to include the Member's spouse and dependant children. It also shall be taken to include other members of his or her household or family when they are closely connected with the Member's interests.

Personal Benefit:

3. The following principles are to apply to ensure that no personal benefit or reward is taken by a Member and that no person can improperly influence a Member or unduly enjoy that Member's favour.

   (i) Members shall not solicit or accept from any person any remuneration or benefit for the discharge of the duties of his or her office over and above the official remuneration as provided by the *Australian Capital Territory (Self Government) Act 1988*. This is to include a fee payment, retainer or reward, and any other compensation accrued to a Member's beneficial interest for or on account of, or as a result of, his or her position as a Member.

(ii) Members shall not solicit or accept any benefit, advantage or promise of future advantage whether for themselves or their immediate families or any business concern or trust in which they are associated from persons who are or seek to be in any contractual or special relationship with the Government.

(iii) Members shall declare any gifts, sponsored travel or hospitality in accordance with the explanatory notes to the *Statement of Registrable Interests* as tabled in the Assembly on 24 May 1989.

4. (i) Members shall not advance their private interests by use of confidential information gained in the performance of their public duty.

(ii) Members shall undertake not to improperly use information obtained in the course of official duties to gain, either directly or indirectly, a pecuniary advantage for themselves, their families or for any other person.

Personal Behaviour of Members:

5. (i) Members shall act in accordance with the requirements of this Code.

(ii) Members shall be honest in official dealings with colleagues, staff and the general public.

(iii) Members shall not take advantage of their position to improperly influence other Members or staff in the performance of their duties, in order to gain either directly or indirectly improper advantage for themselves or for any other person or body.

(iv) Members shall observe the provisions of the *Sex Discrimination Act 1984, Racial Discrimination Act 1975* and *Human Rights and Equal Opportunity Act 1986* which prohibit sexism, racism and sexual harassment.

6. Members must be mindful of the need to protect and enhance the reputation of the Assembly by ensuring that their conduct does not bring discredit upon the Legislative Assembly. They shall not:

(i) knowingly mislead the Assembly by any act or omission;

(ii) disobey any lawful instruction of the Speaker, the Assembly or a Committee of the Assembly; or

(iii) engage in any activity outside of the Assembly which brings the Assembly into disrepute.

7. When speaking in the Assembly or in a Committee of the Assembly, Members should be mindful of the following matters:

   (i) the need to exercise their right of freedom of speech in a responsible manner at all times while having regard to the rights of others;

   (ii) the likely damage that may be done by allegations made in the Assembly to those who are the subject of such allegations;

   (iii) the limited opportunities for persons other than Members of the Assembly to respond to allegations made in the Assembly; and

   (iv) the desirability of ensuring that statements reflecting adversely on persons are soundly based.

Dealing with Assembly Property:

8. Members shall not misuse or permit the misuse by any other person or body of public property, staff and services.

9. Members shall not misuse monies allocated for official purposes.

Corporate Obligations:

10. Members must recognise that the main function of the Legislative Assembly is to serve and represent the ACT community.

APPENDIX B

Resolution Adopted by the Senate Providing for Private Citizens Right of Reply – 25 February, 1988

5. Protection of persons referred to in the Senate

(1) Where a person who has been referred to by name, or in such a way as to be readily identified, in the Senate, makes a submission in writing to the President:

(a) claiming that the person has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference to the person; and

(b) requesting that the person be able to incorporate an appropriate response in the parliamentary record,

if the President is satisfied:

(c) that the subject of the submission is not so obviously trivial or the submission so frivolous, vexatious or offensive in character as to make it inappropriate that it be considered by the Committee of Privileges; and

(d) that it is practicable for the Committee of Privileges to consider the submission under this resolution,

the President shall refer the submission to that Committee

(2) The Committee may decide not to consider a submission referred to it under this resolution if the Committee considers that the subject of the submission is not sufficiently serious or the submission is frivolous, vexatious or offensive in character, and such a decision shall be reported to the Senate.

(3) If the Committee decides to consider a submission under this resolution, the Committee may confer with the person who made the submission and any Senator who referred in the Senate to that person.

(4) In considering a submission under this resolution, the Committee shall meet in private session.

(5) The Committee shall not publish a submission referred to it under this resolution or its proceedings in relation to such a submission, but may present minutes of its proceedings and all or part of such submission to the Senate.

(6) In considering a submission under this resolution and reporting to the Senate the Committee shall not consider or judge the truth of any statements made in the Senate or of the submission.

(7) In its report to the Senate on a submission under this resolution, the Committee may make either of the following recommendations:

(a) that no further action be taken by the Senate or by the Committee in relation to the submission; or

(b) that a response by the person who made the submission, in terms specified in the report and agreed to by the person and the Committee, be published by the Senate or incorporated in *Hansard*,

and shall not make any other recommendations.

(8) A document presented to the Senate under paragraph (5) or (7):

(a) in the case of a response by a person who made a submission, shall be succinct and strictly relevant to the questions in issue and shall not contain anything offensive in character; and

(b) shall not contain any matter the publication of which would have the effect of:

(i) unreasonably adversely affecting or injuring a person, or unreasonably invading a person's privacy, in the manner referred to in paragraph (1); or

(ii) unreasonably adding to or aggravating any such adverse effect, injury or invasion of privacy suffered by a person.