LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Standing Committee on Administration and Procedure

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Inquiry into a Code of Conduct for Members of the Legislative Assembly and a Parliamentary Ethics Adviser for the ACT

Report Number 8

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FOREWORD

In compiling this report, the Committee is mindful that the question of whether or not there should be a code of conduct for all Members has been before it since 1995. The Committee is also conscious that the Assembly is soon to go to an election. This report is presented to enable present Members and any new Members to consider the Committee findings in the next Assembly.

It is hoped that the matters raised in the report will be debated in the next Assembly and that the Committee's recommendations will be fully considered.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

The Committee recommends that the Legislative Assembly for the Australian Capital Territory adopt a code of conduct for Members.

Recommendation 2

The Committee recommends that the code of conduct adopted by the Legislative Assembly for the Australian Capital Territory be predominantly aspirational, setting out general principles that should be met by the Members.

Recommendation 3

The Committee recommends that the code of conduct attached at Appendix A be adopted as the Code of Conduct for the Legislative Assembly.

Recommendation 4

The Committee recommends that if the Legislative Assembly adopts a code of conduct for Members, it should be institutionalised in standing orders or as a resolution of continuing effect.

Recommendation 5

The Committee recommends that if the Assembly adopts a code of conduct for Members, it should be administered and enforced by the Assembly itself and that the Assembly should consider how it will deal (if required) with any allegations raised.

Recommendation 6

The Committee recommends that an Ethics Commissioner not be appointed for the ACT Legislative Assembly at this time.

TABLE OF CONTENTS

TERMS OF REFERENCE

Code of Conduct

On 27 August 1998 the Assembly charged the Standing Committee on Administration and Procedure with the task of developing a code of conduct for all Members. The reference was one that the Committee's predecessor had considered during the Third Assembly.

The terms of reference were as follows:

> That the development of a code of conduct for all Members of the Legislative Assembly be referred to the Standing Committee on Administration and Procedure for inquiry and report with particular reference to:
> (a) parliamentary and personal conduct;
> (b) conflict of interest, including a Member's affiliation or membership of any organisation or association that could potentially constitute a conflict of interest;
> (c) gifts;
> (d) use of public office;
> (e) the application of section 14 of the Australian Capital Territory (Self-Government) Act 1988 (Commonwealth); and
> (f) a complaints and investigation procedure.[1]

Parliamentary Ethics Adviser

On 1 July 1999, the Assembly, upon presentation of a discussion paper entitled "A Parliamentary Ethics Adviser for the ACT Legislative Assembly" by the then Chief Minister (Ms Carnell), passed the following resolution:

> That the Discussion Paper entitled *A Parliamentary Ethics Adviser for the ACT Legislative Assembly* be referred to the Standing Committee on Administration and Procedure to inquire into and report.[2]

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[1] *Minutes of Proceedings*: No. 67, 26 September 1996
[2] *Minutes of Proceedings*: No. 54, 1 July 1999

INTRODUCTION

On 4 December 1997, a statement was made on behalf of the then Standing Committee on Administration and Procedure indicating that the issue of a code of conduct was extremely complex. It identified the trend in all Australian Parliaments "… to have a readily identifiable set of rules of conduct to both assist Members in carrying out their duties and…" to indicate "… to the electorate at large what behavior they can expect from their Members". The statement concluded by stating that while the Committee had considered the matter, it was unable to report during the Third Assembly and urged its successor to take up the inquiry.

The initial inquiry during the Third Assembly was initiated in part by Auditor-General's Report No. 2 of 1996, entitled *Taxi Plates Auction* which recommended that "extracts from the draft Queensland Code of Conduct be utilised as a basis for developing guidelines for Members of the ACT Legislative Assembly…". That Committee acknowledged the Auditor-General's comments but indicated that any code developed should also reflect those standards applied to the executive members of the Assembly by the Ministerial Code of Conduct[3].

Since the committee statement was made in December 1997, the Government has revised its Code of Conduct for Ministers and the revised code was presented to the Assembly on 26 August 1998. The Chief Minister when presenting the Code to the Assembly indicated that the Government, in line with the government response to the Public Accounts Committee report on the *Taxi Plates Auction*, had incorporated into the revised Code "… the basic values that describe the obligations of elected office" and that the terms used were those in the "… report of the Queensland Electoral and Administrative Review Committee in 1992 …".[4]

The Committee also currently has under its consideration the discussion paper entitled *A Parliamentary Ethics Advisor for the ACT Legislative Assembly* presented by the Chief Minister to the Assembly on 1 July 1999. The Assembly agreed to the motion and moved immediately upon presentation to refer the paper to the Standing Committee on Administration and Procedure for inquiry and report. As the two matters are closely associated, the Committee has extended its inquiry on the code of conduct to include the consideration of an ethics commissioner. The Committee also notes recommendations 20 and 21 of the Report of the Select Committee on the Report of the Review of Governance recommending the appointment of an ethics commissioner and the development of a code of conduct.[5]

BACKGROUND

The adoption of a code of conduct for all Members of the Assembly has been intermittently on the Assembly's long-term agenda. In 1991, the then Standing Committee on Administration and Procedure presented a report to the Assembly[6] entitled *Inquiry into the Proposed Ethics Committee/Code of Conduct*. In that report the Committee made two fundamental recommendations. It recommended that an ethics committee should **not** be established by the Legislative Assembly and secondly that the draft Code of Conduct

[3] presented to the Assembly by the Chief Minister on 2 May 1995
[4] Hansard, 26 August 1998, p 1370
[5] Report of the Select Committee on the Report of the review of Governance, June 1999, p. 32
[6] The Report of the Committee was tabled on 6 June 1991, the same day that a want of confidence notion was passed in the then Chief Minister resulting in a change of government in the Territory and a change of membership in the Committee. The new Government did not respond to the report and the new Committee did not pursue the report.

included in the report be adopted. The Committee argued that “a code of conduct should be designed to set the standards by which not only Members of Parliament can measure their conduct but also be measured by members of the public”.[7]

In 1995, the then Leader of the Opposition, Ms Follett, indicated that she considered “… that it is the duty of every person elected to public office to ensure that their personal standards and behaviour maintain the dignity and professionalism of their office”.[8]

In 1998, the then Chief Minister (Ms Carnell) also made it clear that she was a strong advocate for the adoption of a code of conduct for Members:

> I am also convinced that the people of Canberra expect these codes of conduct to be in place and to be on the public record. They want to be confident that the members of this place understand what is expected of them.[9]

Discussion outside the walls of parliaments on the need for parliaments to adopt a code of conduct for their Members focuses on the view that the community’s perception of politicians’ honesty and ethics is extremely low. In his submission to the Committee Dr Brien cites Hugh McKay’s research:

> [Australians] …view the honesty and ethics of Members of both State and Federal Parliaments as only slightly better than those of used car salesman… Only 7% of Australians believe that Members of both State (down 2%, since 1997) and Federal (down 2%) Parliament are of high or very high standards of honesty and ethics. The only profession rating lower than Members of Parliament is car salesmen (2%, down 1%).[10]

Dr Brien argues that although these perceptions may be unjustified “… the consequences for our system of government are enormous.”.[11] He paints a dark picture of society becoming alienated from the institutions that are designed to represent and protect their interests. He stated that “people will lose faith in democratic institutions and ideals and the very idea of democracy itself.”[12] It is arguable that before the total break down of representative democracy there will be a greater reluctance for those of good standing and of sound ethics to offer to represent their community’s interests in the Parliamentary forum. Dr Brien puts the proposition that ... “A code of conduct is required as an element of a program to restore faith in our system of government and in our elected officials.”[13] .

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[7] Standing Committee on Administration and Procedures, Inquiry into the Proposed Ethics Committee/Code of Conduct, May 19991, p. 27
[8] Hansard, 9 March 1995, p 9
[9] Hansard, 27 August 1998, p 1430
[10] Submission from Dr Andrew Brien Associate Director Centre for Professional and Applied Ethics, St Mark’s National Theological Centre, dated 27 May 1999, p. 2
[11] *Ibid*. p. 3.
[12] *Ibid*. p. 3.
[13] *Ibid*. p. 3

DO MEMBERS OF THE ASSEMBLY NEED A CODE?

Prior to consideration on whether a code is required, it is important to note that Members of the Assembly are already bound by a number of other obligations and legal requirements once elected.

Australian Capital Territory (Self-Government) Act 1988 (Cwlth)

Sections 14, 15 and 67 of the Australian Capital Territory (Self-Government) Act provide for the disqualification of Members and conflict of interest.

14 Disqualification of member

(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 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.

15 Conflict of interest

(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.

Section 67(4)(c) states;

(4) A person is not qualified to take a seat as a member if:
- (c) 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

The Assembly has provided for Members to be accountable for what they say in the Chamber or a committee of the Assembly by passing two resolutions on 4 May 1995.

One resolution deals with a citizen's right of reply and states in part:

1. Where a person or corporation who has been referred to by name, or in such a way as to be readily identified in the Assembly makes a submission in writing to the Speaker:
   - (a) claiming that the person or corporation 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 or corporation; and

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

The other resolution deals with freedom of speech and obliges Members to take the following matters into account when speaking in the Assembly:

(a) the need to exercise their valuable right of freedom of speech in a responsible manner;
(b) the damage that may be done by allegations made in the Assembly to those who are the subject of such allegations and to the standing of the Assembly;
(c) the limited opportunities for persons other than Members of the Assembly to respond to allegations made in the Assembly;
(d) the need for Members, while fearlessly performing their duties, to have regard to the rights of others; and
(e) the desirability of ensuring that statements reflecting adversely on persons are soundly based.

In yet another resolution passed on 7 April 1992 and amended on 27 August 1998, Members of the Legislative Assembly must "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 … provide to the Speaker of the Legislative Assembly a declaration of the private interests of themselves and their immediate family … and shall notify any alteration of those interests to the Speaker within 28 days of that alteration occurring".

Standing Orders

Standing Orders set out the rules for debate and procedure for the Legislative Assembly. They also provide rules on the conduct of Members.

Matters concerning parliamentary privilege are dealt with in standing order 71. Upon receipt from a Member of an alleged breach, the Speaker may give precedence to the matter and enable it to be raised in the Assembly as a motion and referred to a select committee.

Standing order 156 reflects the provisions of section 15 of the Australian Capital Territory (Self-Government) Act concerning conflict of interest. Conflict of interest issues are also to be found in standing order 224 that provides that "A Member may not sit on a committee if that Member has any direct pecuniary interest in the inquiry before such a committee".

Standing orders 202 to 209 cover the disorderly behaviour of Members and others and provide for their removal from the Assembly.

Other legal Sanctions

If a Member commits any offence in the conduct of his or her business as a Member of the Legislative Assembly then they are, like any citizen of the Territory, subject to the laws of the Territory. Further, Territory legislation includes provisions rendering any action to corrupt or bribe a Member of the Legislative Assembly a criminal offence (*Crimes (Offences against the Government) Act 1989*).

Committee comment

It can be seen from the foregoing that Members of the Legislative Assembly already have a number of obligations they must meet as an elected representative. These obligations are quite extensive and are arguably quite sufficient to control dishonest or inappropriate conduct.

It can also be argued that if these measures cannot secure the honesty and integrity of the people's elected representatives in their official capacity then a code of conduct will make no significant contribution. Furthermore, every Member has his or her behaviour and performance carefully assessed by the electorate at every election. If the Member was found wanting in their conduct, then it could be expected that he or she will not be supported by the electorate. Finally it is often stated that it is the Member alone who is answerable for his or her actions and it is up to him or her to ensure that they work honestly for the good of the people they represent.

While acknowledging the points made concerning the public's perceptions of politicians, the Committee believes that Members of the Legislative Assembly have, on the whole, maintained high standards of honesty and ethics. However, during the years that a code of conduct for Members has been under consideration, there have been a number of speeches given in the Assembly supporting the introduction of a code. Indeed the predecessor of this Committee tabled a report on 6 June 1991 recommending the adoption of a code. The present Committee has also come to the conclusion that a code of conduct for all members of the Legislative Assembly should be introduced.

If the Assembly adopts a code, the Committee sees it as an opportunity to make a public statement acknowledging and reiterating the obligations and conduct expected of elected representatives of the people.

Recommendation 1

The Committee recommends that the Legislative Assembly for the Australian Capital Territory adopt a code of conduct for Members.

WHAT SORT OF CODE SHOULD BE ADOPTED?

Codes of conduct would appear to fall into two primary categories. One category could best be described as aspirational while the other prescriptive. The aspirational model is one that sets a number of values and ideals that those to whom the code relates should seek to aspire, for example the code of conduct adopted in Queensland and by both Houses of the New South Wales Parliament. The prescriptive model is one that seeks to control the behavior of those to whom it relates. The United States Congress Code perhaps best exemplifies this type.

> There is considerable detail in the codes and rules [for the US Congress]. For example the Gift Rule, adopted on 7 December 1995, was accompanied by a ten page explanatory memorandum, which set out numerous, finely-distinguished situations in which gifts were or were not permitted. The *House Ethics Manual*, which is a compendium of rules and interpretative guidelines for members and officers of the House of Representatives, runs to some 500 pages.[14]

The codes that have been developed in Australian jurisdictions[15] [16] have been a blend of the two types of codes but have been predominantly aspirational in that they set out general principles that should be met by Members. Certainly those that state general principles have been more acceptable around Australia than those that are a detailed set of prohibitions that could never be regarded as exhaustive. If one of the reasons to adopt a code is to set a benchmark by which both members and the community can assess behavior, it can be argued that a brief statement of ideals is more likely to achieve that goal than a complex document that attempts to codify acceptable behavior.

The Committee has considered the contents of codes both interstate and overseas and has agreed to a code that is attached to this report at Appendix A.

Recommendation 2

The Committee recommends that the code of conduct adopted by the Legislative Assembly for the Australian Capital Territory be predominantly aspirational, setting out general principles that should be met by the Members.

Recommendation 3

The Committee recommends that the code of conduct attached at Appendix A be adopted as the Code of Conduct for the Legislative Assembly.

[14] Ibid..
[15] only the New South Wales and Victorian Parliaments and the Tasmanian House of Assembly have formally adopted codes
[16] See Appendix B for details of codes in other Australian Parliaments

HOW SHOULD ANY CODE BE INSTITUTIONALISED?

It is Dr Brien's view[17] that there are three diverging approaches to institutionalising codes of conduct. One approach involves enshrining the code in legislation (as in Victoria) and providing for an independent external body to administer the code and oversee the conduct of Members (as in New South Wales). In New South Wales, both the Legislative Assembly and Legislative Council have adopted a code as a resolution of continuing effect. A breach of the code may constitute a breach of law by virtue of section 9 of the *Independent Commission Against Corruption Act 1988 (NSW)*. Investigations into alleged breaches of the Code (particularly where allegations of corruption have been made) is primarily the duty of the Independent Commission Against Corruption, rather than the Parliament or a Committee of it.

The second approach is to establish within the legislature a body that oversees the conduct of members. This may take the form of a parliamentary committee or it may take the form of an independent parliamentary commissioner, established under standing orders or a resolution of the House. Such a body would report to a committee of the legislature or the legislature itself. This is the approach that has been adopted in the United Kingdom.

In a variation to this approach, it is noted that in Queensland an Integrity Commissioner has been appointed by legislation to advise the Legislative Assembly (among others) about conflicts of interest. The Commissioner works independently of the Members' Ethics and Parliamentary Privileges Committee.

The third option is that followed in the United States Congress. Each House has its own Code of Official Conduct for Members and staff and its own ethics committee, which operate independently of the other. Each committee provides interpretative and advisory rulings, has jurisdiction over the members and officers of each House, and can investigate allegations of improper conduct and can impose sanctions based on a detailed set of rules.

Committee Comment

The Committee is concerned that the legislative option may lead to a weakening of the separation of powers as it opens the way for litigation and delaying proceedings in the courts on points of procedure and interpretation. The Committee is also mindful that a code, if adopted, should not become the captive of the legal system, which could weaken its effectiveness and reduce public confidence in the process.

Further, the Committee believes that if a code is administered externally to the Assembly, Members would be separated from its introduction and ongoing amendment. Members may feel that they have no ownership of the code to which they are subject.

The Committee does not support the institutionalisation of a Congressional style of code where an established ethics committee sits in judgment of fellow members assessing their conduct against a detailed set of rules. This model is clearly unworkable in a small Parliament.

The Committee believes that a code should remain within the ownership of the members and should be administered by the Assembly. To enable this to occur, a code should be

[17] Dr Andrew Brien, Research Paper No. 2 1998-1999, A Code of Conduct for Parliamentarians; Politics and Public Administration Group, 14 September 1998.

part of standing orders[18] (as in the House of Assembly, Tasmania) or established under a resolution of the House (as in both Houses of the New South Wales Parliament). This approach would ensure that Members have ownership of the code and avoids the problem faced by an external code.

Recommendation 4

The Committee recommends that if the Legislative Assembly adopts a code of conduct for Members, it should be institutionalised in standing orders or as a resolution of continuing effect.

[18] The Committee notes that the Queensland Legislative Assembly adopted a new standing order concerning pecuniary interest at its sitting on 8 August 2001.

HOW SHOULD THE CODE BE ENFORCED?

Whenever codes of conduct are discussed, the question of enforceability usually arises.

Of the four codes that have been adopted in Australian states, three have made provision for enforcement of the code. In the Victorian instance the Code is enshrined in legislation (section 3, *Members of Parliament (Register of Interests) Act 1978 (VIC)*) and provides penalty provisions for Members who fail to comply.

Sections 9 and 10 of the Victorian Act states:

> Any wilful contravention of any of the requirements of this Act by any person shall be a contempt of the Parliament and may be dealt with accordingly and in addition to any other punishment that may be awarded by either House of the Parliament for a contempt of the House of which the Member is a Member the House may impose a fine upon the Member of such amount not exceeding $2,000 as it determines.
>
> In default of the payment of any fine imposed on a Member under section 9 of the Consolidated Fund within the time ordered by the House the seat of the Member shall become vacant.

The placement of the Victorian code in legislation is unique in Australia. Breaches of the Victorian Code can also be investigated by the Parliament as a breach of privilege.

In the New South Wales Parliament, the adoption of the Code of Ethics has been linked with the appointment of a Parliamentary Ethics Advisor. Allegations of wrongdoing can be pursued by existing anti-corruption authorities such as the police and the Independent Commission against Corruption.

The most recent code adopted in Australia has been by the Queensland's Legislative Assembly[19]. The Members' Ethics and Parliamentary Privileges Committee ("MEPPC") in a report tabled late last year[20] outlined its view concerning the operation and enforcement of the Queensland code. The report states:

> Under s 16(3) of the Committees Act, complaints against a member not complying with the code may only be considered by the Legislative Assembly or the MEPPC. It is obvious that s 16(3) was drafted so as to preserve the privileges of the Legislative Assembly to regulate its own proceedings. It may have also been drafted with the intention that the committee would recommend a "rules based code", rather than one relying on current obligations. The committee gave careful consideration to this issue and concluded that the enforcement of the code for non-criminal matters should remain with the Parliament.
>
> Self-regulation is consistent with other professions which maintain standards of conduct among their members, and deal with breaches of the professions' ethical rules, through their disciplinary committees.

[19] This code is due for a review by Queensland's Legislative Assembly shortly.
[20] Members' Ethics and Parliamentary Privileges Committee, Report on a code of ethical standards for Members of the Queensland Legislative Assembly – Report No. 44, Tabled 5 September 2000.

> Significant consequences can result from sanctions imposed on a member by the Parliament, and those sanctions can often be more severe than those which would be imposed by an outside body.[21]

The Members of the Tasmanian House of Assembly are required (by standing orders) to subscribe to the Code of Ethical Conduct upon election. There is no explicit enforcement provisions attached to the Tasmanian House of Assembly code. While its inclusion in standing orders reflects the importance of the code it has been regarded as an educational tool to instruct new Members as to their obligations.

There appears to be little evidence of any real assessment of the effectiveness of any of the three means of enforcement in the Australian jurisdiction.

Committee Comment

The Committee has already made recommendations concerning the type of code it considers appropriate. Should the Assembly adopt a code in line with the Committees recommendations, it would be aspirational and embedded in the standing orders or as a resolution of continuing effect.

There is a strong argument that the enforcement of any code should be in the hands of an independent body. It is argued that an independent body would avoid politicising any matters raised, have an impartial judge and would provide natural justice to the accused. The Committee understands the argument for an impartial judge and independent body and notes that the public expects a code to be rigorously administered and enforced. However, the Committee is of the firm belief that those that work outside of Parliament do not fully appreciate the unique problems that Members face in the conduct of their duties. Its view is that allegations of a breach of a code of conduct should be investigated by those who best understand the pressures and situations that gave rise to the alleged breach. The Committee notes that a number of professional groups administer and enforce rules of conduct within their professions. Doctors, dentists and lawyers have set up internal mechanisms within their professional organisations for dealing with allegations of misconduct. In the case of an allegation against a Member of the Legislative Assembly, the Committee believes that the Assembly has the collective experience and knowledge to deal with the matter.

Furthermore, it is the Committee's view that formal sanctions are inappropriate when dealing with ethical or moral behaviour. It considers that in the area of ethical or moral conduct, formal punishment is neither usual nor necessary as political and peer-group pressure provides the sanction. As already stated, Members of the Legislative Assembly are already bound by a number of other obligations and legal requirements. In a small Parliament such as this Assembly, it is possible that Members are more exposed to scrutiny than Members in a larger Parliament. Members understand their position and take responsibility for their conduct. With this in mind, the Committee views the proposed code of conduct as essentially an educational tool to assist Members. Those who are in breach of the code will answer to the Assembly, the media and ultimately the people.

If further sanction was considered necessary, then the process could be strengthened if all misconduct was considered a breach of privilege. This would embed the code in an existing disciplinary and regulatory structure while at the same time according the code a

[21] *Ibid*., p.10.

relevant level of institutional recognition. The Assembly will need to consider this matter if a code is adopted.

Recommendation 5

The Committee recommends that if the Assembly adopts a code of conduct for Members, it should be administered and enforced by the Assembly itself and that the Assembly should consider how it will deal (if required) with any allegations raised.

SHOULD AN ETHICS ADVISOR (OR SIMILAR) BE APPOINTED?

The ACT Government's Proposal

As stated above, the Committee does not support an independent body to administer or enforce a proposed code of conduct for Members of the Legislative Assembly. However, the ACT Government has proposed the appointment by legislation of a Parliamentary Ethics Commissioner to provide strictly confidential advice to Members on an individual basis on ethical and related issues. Under the proposal the Commissioner would report on an annual basis to the Speaker and would also assist this Committee and the Chief Minister with advice on existing and proposed codes.

The Government stresses the need for confidentiality in its proposal noting that:

> Confidentiality is vital to the successful functioning of the Ethics Commissioner.[22]

The Government argues that such confidentiality is necessary to satisfy Members "… that they may seek advice without the risk of the advice being exposed to political or media debate"[23]. To reinforce this concept, the Government suggests that, except for criminal wrongdoing or to correct misinterpretation, the Commissioner's advice would have immunity from the power of the Assembly to call for persons papers and documents and would be exempt from the *Freedom of Information Act 1989*.

The Commissioner would have no investigative or determinative role.

Dr Brien in his submission describes that the proposal to limit the commissioner's power to the provision of confidential advice to individual Members and public discussion rather than grant "… investigative powers, or the power to issue a determination on a matter, or make a suggestion concerning a course of action a Member may take"[24] as "a deficiency"[25] He argues that "… such powers provides credibility to the office, provides some measure of assurance in the quality and completeness of the advice offered, and demonstrates publicly and clearly that the Assembly is serious about ethics."[26]. He goes on to argue that the Commissioner should have limited investigatory powers when a matter is specifically referred to him/her, reporting directly to the Assembly.

United Kingdom

The United Kingdom Parliament has an ethics commissioner with an investigatory role. The investigatory role of the Commissioner is subordinated to the role the Members have in judging their peers. Thus, the Commissioner's role is one of policeman. The House of Commons appoints the Commissioner in accordance with standing order 150. The standing order also sets out the Commissioner's responsibilities including, as well as an advisory role:

> To receive and, if he thinks fit, investigate specific complaints from Members and from members of the public in respect of –

[22] A Parliamentary Ethics Advisor for the ACT Legislative Assembly: A Discussion Paper, para 34, p.7
[23] Ibid**.**
[24] *Op cit*., Submission dated 23 July 1999, p 9
[25] *Ibid,* p. 9.
[26] Ibid p. 9.

(i) the registration or declaration of interests, or
(ii) other aspects of the propriety of a Members conduct,
and to report to the Committee on Standards and Privileges or to an appropriate subcommittee thereof.[27]

In practice the Commissioner is tasked with the responsibility of establishing the facts in an investigation and making an assessment as to whether of not the rules have been breached. He reports his findings to the Committee which, having ascertained that proper procedures were followed and that the conclusions are supported by evidence, makes recommendations as to any penalty required. The investigatory role sends a clear message that compliance to the code will be monitored and failure to act in accordance with it will be pursued.

New South Wales

In the New South Wales Parliament an Ethics Adviser has been appointed by an annual agreement between the Adviser and the Clerks of both Houses following a resolution in both Houses. The appointment may be extended for a further period upon the passing of a further resolution. The function of the Ethics Adviser is to:

> …advise any member of Parliament, when asked to do so by that member, on ethical issues concerning the exercise of his or her role as a member of Parliament (including the use of entitlements and potential conflicts of interest).**[28]**

All information remains confidential but may be made public at the request of the Member. The Adviser must also be aware of the provisions of the *Independent Commission Against Corruption Act 1988 (NSW)* with regard to corrupt conduct. The Adviser reports on an annual basis to the Parliament.

The Hon. Dr Meredith Burgmann, MLC in her speech as part of the Australian Senate's Occasional Lecture Series[29] indicated that the New South Wales experience of an ethics commissioner as an advisor had been hampered in two directions. It was evident from her experience that many Members of the New South Wales Legislature did not share the view that an Ethics Advisor was a useful, let alone a necessary part of the parliamentary culture. She also commented that the background of any advisor was critical to the level (indeed usefulness) of the advice. An appointee without an understanding of the culture that operated in a parliamentary sphere would not understand the dilemmas that face parliamentarians on a day to day basis.

Queensland

On 11 November 1999 the Legislative Assembly amended the *Public Sector Ethics Act 1994* to provide for the establishment of the position of Queensland Integrity Commissioner. The Integrity Commissioner has responsibility for advising "designated persons" (including Ministers, Parliamentary Secretaries and Chief Executives of government departments) about conflicts of interest.

In its report, MEPPC raised a number of concerns in relation to the apparent overlap of responsibilities between the Integrity Commissioner and the committee, and the potential

[27] House of Commons Standing Orders, Standing Order 150
[28] NSW Legislative Assembly, Votes and Proceedings (Extract) 30 November 2000
[29] "Constructing Legislative Code of Conduct", Friday, 23 July 1999

for conflict regarding advice of the Commissioner on one hand and the MEPPC and the Clerk of the Parliament on the other. The committee's concerns centred on the fact that the role of the Integrity Commissioner could be construed as being to advise members (other than ministers and parliamentary secretaries), amongst other things, in respect of ethical standards set by the Parliament for its members. The report states:

> In advising members, the Integrity Commissioner will necessarily be required to interpret standards set by Parliament. There is, therefore, potential for the interpretations given by the Integrity Commissioner to be at variance with interpretations given by the Clerk, the MEPPC and the House itself, particularly given the fact that the Integrity Commissioner is unlikely to be aware of the history, practice and procedure of such rules.[30]

MEPPC's was further concerned that the Integrity Commissioner was seen as an extra-parliamentary officer, independent from but in a real sense appointed by the executive, to advise members of Parliament in respect of the application of the Parliament's *Code of Ethical Standards*. While the Queensland Premier allayed some of these concerns, in a detailed response to MEPPC that stated that the Commissioner could only advise on conflict of interest issues, MEPPC has decided to monitor these arrangements and report its findings to the Assembly.

Committee Comments

One of the Committee's terms of reference on the inquiry to develop a code of conduct for all Members is to specifically consider a complaints and investigation procedure. Clearly the appointment of an Ethics Commissioner could provide such a mechanism.

The United Kingdom model enables investigations to be carried out by an impartial officer of the parliament. This model can be seen as engendering trust in the system as frivolous or politically motivated complaints can be disposed of while complaints that have merit can be investigated. Privacy can be assured in appropriate cases, yet wrongdoing exposed. The responsibility for a penalty or a response to a finding rests with the members of the institution. This model has much to recommend it in a Parliament, which has over 600 Members and large majorities. Obviously with such a large number of Members, the appointment of an independent investigating officer provides clarity and distance from the hurly burly of politics.

Clearly MEPPC of the Queensland Legislative Assembly had some concerns on the role of the Integrity Commissioner in that State. MEPPC makes the point that the Bill establishing the Commissioner was introduced by the Premier, "without formal consultation with the committee"[31].

The New South Wales model closely resembles that proposed by the ACT Government. In considering this model, the Committee notes that the NSW Parliament consists of 135 Members in two Houses.

The Legislative Assembly for the ACT presently consists of 17 Members. If for no other reason than the fact that there are so few of them, these Members are in the public eye, their actions are closely scrutinised and any wrong doing can be quickly exposed. It is the view of the Committee that Members of the Assembly are already well aware of what constitutes ethical behaviour, take responsibility for their conduct and understand their

[30] MEPPC, Report No. 44., p. 12.
[31] *Ibid*.

obligations. If a code is adopted, then it will assist Members become more aware of their obligations. While a code is yet to be introduced and its value assessed, the appointment of an ethics commissioner would appear, in the view of the Committee, to be premature.

It is therefore considered that the appointment of an independent ethical commissioner is not warranted in the Legislative Assembly for the ACT but that the issue be reconsidered once a code has been in place for a reasonable time and its value assessed.

Recommendation 6

The Committee recommends that an Ethics Commissioner not be appointed for the Legislative Assembly of the ACT at this time.

Mr Greg Cornwell MLA
Presiding Member
August 2001

APPENDIX A

PROPOSED CODE OF CONDUCT FOR ALL MEMBERS OF THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Preamble

Members of the Legislative Assembly acknowledge their diversity of background and personal beliefs and that of Australian society, and maintain their loyalty to the Commonwealth of Australia and the people of the Australian Capital Territory.

In so doing, Members agree to respect and uphold the law, not discredit the institution of Parliament, and maintain their commitment to the public good through personal honesty and integrity in all their dealings.

<u>Duties as Members of the Assembly</u>

Members should avoid any decision or action which may depreciate the reputation of the Assembly and, endeavour to reasonably adhere to the Assembly's code of conduct to ensure that their personal conduct meets generally accepted standards and does not discredit or call into question their office or the Assembly.

Members acknowledge that they have an obligation to electors to make decisions on their behalf and as such place emphasis on their dedication to this obligation. As elected representatives, Members will act honestly in all their dealings to maintain the public trust placed in them.

CODE OF CONDUCT

Conflict of interest

Members have an obligation to use the influence conferred upon them in the public's interest and not for personal gain.

Notwithstanding the provisions set out in section 15 of the *Australian Capital Territory (Self-Government) Act 1989* and standing order 156 of the Legislative Assembly, Members are individually responsible for preventing personal conflicts of interest or the perception of a conflict of interest, and must endeavour to arrange their private affairs to prevent such conflicts arising or take all reasonable steps to resolve any conflict that does arise.

(i) A conflict of interest exists where a Member participates in or makes a decision in the execution of his or her office knowing that it will improperly and dishonestly further his or her private interest or will improperly and dishonestly further the private interest of another person.

(ii) A conflict of interest does not exist where the Member or other person benefits only as a member of the general public, or a broad class of persons.

Disclosure of pecuniary interests

The actions and decisions taken by Members are accountable through the Assembly to the people of the Australian Capital Territory. Member's actions and decisions should be transparent and bolster public confidence in the Assembly and the legislative process. In accordance with this transparency, Members are required to disclose their pecuniary interests pursuant to the resolution of the Assembly "Declaration of Private Interests of Members" agreed to on 7 April 1992 (as amended 27 August 1998).

Receipt of any gifts, payments, fee or reward

Members must register all gifts, payments, fees or rewards valued at more than $250 received from official sources, or at more than $100 where received from other than official sources. This does not include gifts, payments, fees or rewards received by Members, the Member's spouse, immediate family or personal friends in a purely personal capacity, unless it may pose a conflict of interest. Registration should be made in accordance with the Member's Statement of Registrable Interests.

Advocacy/Bribery

In accordance with the provisions of section 14 of the *Australian Capital Territory (Self-Government) Act 1989,* Members must not solicit, accept or receive any remuneration, benefit or profit in exchange for services rendered in the Assembly or one of its committees other than the remuneration and allowances provided for pursuant to section 73 of the Act.

Use of confidential information

Members are reminded of their obligations pursuant to the standing orders concerning the publication of confidential information.

Members in the course of their duties often are also the recipients of information which is either confidential or unavailable to the general public. Members are privileged to receive this information. It is provided to assist them in their decision making for the benefit of the Territory. The status of this information should not be compromised.

Members are not to misuse any confidential information received , particularly for personal gain or the personal gain of others.

Use of entitlements

Members have a personal duty to ensure that entitlements and allowances of office pursuant to Remuneration Tribunal Determinations and as summarised in the Member's Guide are used appropriately in the service of the people of the Australian Capital Territory and not for personal gain.

Members should familiarise themselves with the entitlements available and must ensure the accuracy of all claims made in accordance with the guidelines outlined in the Members' Guide.

Use of public resources/property or services

Members must ensure that the resources provided to them at a public expense as Members of the Legislative Assembly for the ACT, are only used for legitimate parliamentary and electorate purposes. Members must not misuse or permit the misuse by any other person or body of these resources.
Members shall not misuse monies allocated for official purposes.

Continuing support

This code of conduct has been established to assist Members as they serve and represent the people of the Australian Capital Territory. The Legislative Assembly respectfully requests that former Members support the spirit of this code as private citizens.

APPENDIX B

CODES IN OTHER PARLIAMENTS

Codes of conduct for members of parliament have been extensively examined in some jurisdictions. To date, only four Australian Parliaments (Victoria, New South Wales, Queensland and Tasmania) have a written code of conduct.

QUEENSLAND

NEW SOUTH WALES

TASMANIA

VICTORIA

QUEENSLAND LEGISLATIVE ASSEMBLY
STATEMENT OF FUNDAMENTAL PRINCIPLES
Adopted 17 May 2001

The following six fundamental principles draw together the various concepts underpinning the duties of and obligations on a member of Parliament, to assist members to better understand their representative role and responsibilities.

1. Integrity of the Parliament
The public's confidence in the institution of Parliament is essential. Members are to strive at all times to conduct themselves in a manner which will tend to maintain and strengthen the public's trust and confidence in the integrity of Parliament and avoid any action which may diminish its standing, authority or dignity.

2. Primacy of the public interest
Members are elected to act in the public interest and make decisions solely in terms of the public interest. Members also have a continuing duty to declare any private interests relating to their public duties as they arise, and to take steps to avoid, resolve or disclose any conflicts arising in a way that protects the public interest.

3. Independence of action
Parliamentary democracy requires that members make decisions, and be seen to make decisions, in accordance with the public interest and not because they are under any financial obligation or influence. Therefore, members are not to place themselves under any financial obligation to outside individuals or organisations, including the executive government, that might influence them in the discharge of their duties and responsibilities, and must act at all times in accordance with rules set down by the Parliament for outside appointments.

4. Appropriate use of information
In the course of their duties members often receive information which is either confidential or prized (that is, not available to the general public). Members are not to misuse any confidential or prized information, particularly for personal gain.

5. Transparency and scrutiny
It is vital to parliamentary democracy that the public have confidence in the integrity of the decision-making process of Parliament. To ensure transparency, public scrutiny and public confidence, it is necessary that each member disclose their pecuniary interests on a continuing and ad hoc basis when the need arises.

6. Appropriate use of entitlements
Members are provided certain entitlements to assist them to discharge their duties and responsibilities. Members are to ensure that they comply with any guidelines for the use of these entitlements.

STANDING RULES AND ORDERS OF THE HOUSE OF ASSEMBLY TASMANIA

PART 2

PROCEEDINGS ON THE MEETING OF A NEW PARLIAMENT

Proceedings on the meeting of a new Parliament.

2. On the first day of the meeting of a new Parliament, the House having met at the time and place appointed -

(a) The Governor's Proclamation shall be read by the Clerk of the House;
(b) The Writ of Election of each Member, with the Return endorsed thereon, shall be produced by the Clerk of the House, and laid upon the Table;
(c) Members shall then be sworn or make affirmation as prescribed by law;
(d) Members will then subscribe to the Code of Ethical Conduct contained in Standing Order No. 2A;
(e) Members will then subscribe to the Code of Race Ethics contained in Standing Order No. 2B;
(f) The House shall then proceed to the election of a Speaker;
(g) Prior to such election the Clerk shall act as Chair to the House.

2A.

CODE OF RACE ETHICS

FOR MEMBERS OF THE HOUSE OF ASSEMBLY

As Members of the Tasmanian Parliament we agree:-

(1) To act in a manner which upholds the honour of public office and the Parliament.
(2) To respect the religious and cultural beliefs of all groups living within Australia in accordance with the Universal Declaration of Human rights.
(3) To uphold principles of justice and tolerance within our multicultural society making efforts to generate understanding of all minority groups.
(4) To recognise and value diversity as an integral part of Australia’s social and economic future.
(5) To help without discrimination all persons seeking assistance.
(6) To speak and write in a manner which provides factual commentary on a foundation of truth about all issues being debated in the community and the Parliament.
(7) To encourage the partnership of government and non-government organisations in leading constructive and informed debate in the community.
(8) To promote reconciliation with indigenous Australians.