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Codifying Ethical Conduct for Australian Parliamentarians 1990–99

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In the closing decade of the twentieth century, increasing attention was given to the codification of ethical behavioural standards among public officials, internationally and throughout Australian jurisdictions. This paper describes, compares and provides a preliminary analysis of the limited Australian codification initiatives for elected public officials in State and federal Parliaments over this period, with particular focus on the New South Wales and Queensland legislatures. The paper shows that Members of Parliament are reluctant to adopt codes of ethics or conduct and forecasts that the focus on implementing codes alone, without a range of supporting ethics initiatives, is likely to be of little effect.

Australian attempts to introduce legislative ethics regimes in the past decade reflect the international pattern, especially from North America and the United Kingdom. These regimes emerge after the exposure of scandals involving legislators. This exposure usually leads to inquiries. In turn, these inquiries open the way for introducing measures to regulate the conduct of public officials. Generally, corresponding with this cycle there is widespread public disillusionment with political and administrative practice.

Surveys, political commentators and electoral results together provide irrefutable evidence that political parties and processes, together with politicians, as a class, are, rightly or wrongly, held in low esteem by a public which feels alienated from politics.[1] However, a more balanced estimate of this problem, from the Nolan

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[1] The noted Australian social researcher, Hugh Mackay, has reported this cynicism in various publications such as Mackay (1993). See also a report on various surveys in Warhurst (1996, 6–10). The electoral expression of disillusionment with politics is evident in the increasing vote of minor parties (notably the One Nation Party in the 1998 Queensland election), the election of independents across the nation, and the shock defeat of the Kennett government in Victoria in 1999.

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Committee which examined the British situation, is applicable to the Australian context.

> We cannot say conclusively that standards of behaviour in public life have declined. We can say that conduct in public life is more rigorously scrutinised than it was in the past, that the standards which the public demand remain high, and that the great majority of people in public life meet those high standards. But there are weaknesses in the procedures for maintaining and enforcing those standards. As a result people in public life are not always as clear as they should be about where the boundaries of acceptable conduct lie. This we regard as the principal reason for public disquiet. It calls for urgent remedial action. (Nolan Committee 1995, Report 1.3; see also Oliver 1995)

Lord Nolan's evaluation points to a discussion fundamental to the matters raised in this paper as well as in the development of parliamentary codes themselves: that is, the nature of politics as an ethical practice (Preston 1996b, 153–8) or, more precisely, an ethical understanding of the role of elected officials. Clearly, codes must be grounded in the practicalities and realities of political practice and be consistent with the multiple, and conflicting, roles of Members of Parliament. Politics remains an area where conscience and power meet, where the ethical and coercive factors of human life will interpenetrate and work out their tentative and uneasy compromises (Niebuhr 1963, 4). Precisely because politics is subject to the pressures, temptations and frustrations of conflicting and complicated interests, it is a practice requiring ethical judgement combining prudence and principle, though its amenability to rules as implied by codes is less clear (Hayden 1998).

The exercise of code development is inevitably subject to speculation about whether codes are effective in encouraging or enforcing ethical behaviour. The evidence, from outside Australia, is not clear or convincing. Furthermore, some commentators argue that, given the competing responsibilities to which politicians must respond, and the inevitable ethical compromises involved, politics is a pursuit requiring judgements that are not easily codified. Indeed, the American tendency to codification has caused some to object: 'The over-regulation of political life, too eagerly abetted by journalists, has reached the point where we are trying to take the politics out of politicians, like puritans rooting out sin' (*Seattle Weekly* 8 July 1992, cited in Rosenthal 1997, 214).

All this may be granted. Nonetheless, arguments can be sustained for codes as vehicles to initiate a conversation about legislative ethics, and to address the widespread dissensus between legislators (even in the same political party) regarding important ethical issues (Atkinson and Mancuso 1985; Mancuso 1995; Jackson 1993; Preston 1996a). Furthermore, codes are effective means leading to the adoption of other helpful and essential ethics stratagems, a package of measures supportive of politicians.[2] They may also be viewed as a public statement of standards to an electorate which increasingly demands ethical behaviour from its political representatives. In a very practical sense, codes may assist parliamentarians to resist unethical pressures they face by giving them a justification for rejecting improper influence and illegitimate demands.

There is little previous Australian research of legislative ethics.[3] This paper

[2] As Preston has argued in Preston (1998a, 149–51).

[3] See the New South Wales studies reported in Jackson and Smith (1995) plus the various official reports cited in this paper.

explores one dimension only of legislative ethics measures. However, it is conceded, and indeed it is maintained, that the implementation and content of codes must take into account relevant Parliamentary Standing Orders, rulings on Parliamentary Privilege, disclosures in Registers of Interests, and the establishment of ethics committees. Arguably, codes require supplementary measures such as education and training, sanctions, ethics advisers and parallel mechanisms adopted by political parties, measures which together constitute a non-minimalist approach to legislative ethics (Preston 1998a). Here, these matters are mentioned only as part of the context for the codification process in some cases. Also, this study does not interrogate the development and content of the various ministerial codes of ethics in place in most Australian jurisdictions.[4] Likewise it is not concerned with codes developed for politicians in local government. The focus is parliamentary codes, whether they are termed 'codes of ethics' or 'codes of conduct'.[5]

Code Development in Australian Parliaments

There is variability amongst Australian jurisdictions in their development of legislative ethics regimes. However, there are also common features. Registers of Pecuniary Interests have been adopted by all Australian legislatures, while other accountability mechanisms are widespread, though not universal: for instance, the disclosure of campaign funding, freedom of information laws, whistleblower protection measures, anti-corruption bodies, parliamentary ethics committees, and a citizens' right to reply to parliamentary debates.[6] Codes of conduct for Members of Parliament (MPs) are not so common. While there has been unprecedented consideration of codes for MPs in Australia in the past decade, only the New South Wales Parliament has finalised an exhaustive inquiry into parliamentary codes in this time by adopting a code with a certain prescriptive detail.

National Developments

In November 1989, the government and Opposition in the Australian Senate defeated a motion by Democrat Senator Michael Macklin aimed at setting up a Joint Select Committee on the Ethical Behaviour of Members of Parliament. In April 1991, Ted Mack, Independent Member of the House of Representatives,

[4] For further information on ministerial ethics and accountability, see, for example, Simms and Keating (1999) and Uhr (1998b). Generally, ministers are subject to the Pecuniary Interests Registers applying to all MPs as well as any special provisions of ministerial codes.

[5] This paper does not canvass the prior questions: What is a code for? Is it to be aspirational, leaving virtually no capacity for assessment of particular behaviours, or is it to be prescriptive containing such detail that it may be a basis for public sanctions? Are we to differentiate between a code of ethics and a code of conduct? Is the code primarily a public relations exercise, a point of self-evaluation for individuals, a focus for role clarification and induction into the parliamentary institution, an educative device, or all of the above?

[6] The fact that these measures are widespread does not imply that they are implemented satisfactorily. A more precise judgement on that question lies outside this study. Ethics committees as such exist as standing committees in the Parliaments of New South Wales and Queensland. Whistleblower statutes exist in South Australia, New South Wales, Queensland and the Australian Capital Territory. Significant anti-corruption bodies exist in New South Wales (Independent Commission Against Corruption), Queensland (Criminal Justice Commission), Western Australia (Anti-Corruption Commission) and nationally there is the National Crime Authority.

raised the possibility of the Commonwealth government following the lead of the New South Wales legislature in moving to develop a code of conduct for members. Subsequently, Prime Minister Bob Hawke wrote to both the House Speaker and the Senate President suggesting they appoint a working party of members from all political parties to examine the matter. Finally, on 21 June 1995, both the Speaker and the President tabled in their respective chambers, and commended to their colleagues, a Framework of Ethical Principles for Members and Senators. The discussion which followed, such as it was, was driven by the enthusiasm of a minority of MPs, an Independent and the Australian Democrats, and prompted by the political difficulties created for the Hawke government by 'the so-called Marshall Islands and Sports Rorts Affairs and the Speaker's bicycle incident' (Beahan 1998, 132).[7] At the initiative of the Democrats, the Senate subsequently debated the report, inconclusively. The impending 1996 federal election stalled any further discussion and the report has not surfaced since.

The working group's framework was guided by the majority view that there was little to be served by producing a detailed and prescriptive document. The centrepiece of the two-and-a-half page framework was a list of 'fundamental principles and minimum standards': 'Loyalty to the Nation and Regard for its Laws', 'Diligence and Economy', 'Respect for the Dignity and Privacy of Others', 'Integrity', 'Primacy of the Public Interest', 'Proper Exercise of Influence' and 'Personal Conduct'. It pointed to a range of other statutory documents which members should take as guidance for their behaviour, such as section 73A of the Crimes Act 1914 and the Parliamentary Entitlements Act 1990. Finally, the working group's document alludes to the possibility of this framework being further developed to reflect its interpretation, case by case, as ethics matters are raised and resolved in the Senate and the House of Representatives. However, significantly, the working party did not even suggest an ongoing Ethics Committee to facilitate this process.

Altogether, this attempt at ethics codification was a half-hearted, reactive, minimalist exercise which was always doomed for political limbo. The possibility of a code for Members of the Australian Parliament is only likely to be revived by the combination of a major scandal, leadership from the government of the day and/or in circumstances where there is a minority government beholden to progressive Independents. Another influential factor may be the demonstration of worthy and workable ethics models in one or more of the State Parliaments.

Developments in States and Territories[8]

For nearly two decades the Victorian Parliament was the only Australian legislature with a code for members. In 1974 the Qualifications Committee of the Victorian Parliament published a report recommending a code. This was eventually enshrined in the Members of Parliament (Register of Interests) Act 1978. This code has been considered in this study despite its development prior to the period under study; its

[7] Beahan (1998) and Kernot (1998) describe the process in the federal Parliament from the viewpoint of sitting federal MPs at the time. The incidents themselves are explained in Kernot (1998, 142, n. 10).

[8] Verification of the situation in these jurisdictions was through contact with the Clerk's or Speaker's office in each of the respective Parliaments. The Northern Territory is not discussed because no moves have been taken toward a code for members.

consideration is useful for comparison and completeness. As a brief code it focuses on conflicts of interests and includes the statutory requirements for disclosure of interests (including any direct pecuniary interests). There are also two clauses pertaining to members who are ministers. The code has not been revisited or revised since 1978. It contains penalties for any 'wilful contravention' of the Act as 'a contempt of the parliament'. However, in 1996, when Victorian Premier Jeff Kennett was accused of confusing private and public interests in his wife's acquisition of 50,000 shares in Guandong Corporation (*Age* 15 May 1996; *Weekend Australian* 18–19 May 1996), the code enshrined in this Act was ineffective (except as a reference) in the political debate surrounding allegations of the Premier's misuse of office.

After pressure from the minority Greens (who held the balance of power) and a recommendation from the Reform of Parliament Committee (in its June 1994 report), Tasmania adopted a code via the device of Standing Orders.[9] This code came into force after the 1996 election and consists of a preamble or statement of commitment followed by a nine-clause Declaration of Principles. The Tasmanian code does not, however, indicate any sanctions or disciplinary actions that will occur if it is not followed.

South Australia, Western Australia, the Australian Capital Territory and the Northern Territory have not developed codes of conduct at this stage though (with the exception of the Northern Territory) interest and activity to that end has been generated in these jurisdictions. In April 1996, the Legislative Review Committee of the South Australian Legislative Council issued a discussion paper calling for submissions on a code of conduct for Members of Parliament. To date no report has emerged or subsequent action been taken. In 1999, following urgings by the Commission on Government, Western Australia's Assembly Privileges and Procedures Committee began reviewing the question of a members' code with the intention of tabling a report and draft code.[10]In the Australian Capital Territory there has been a history of active interest in the possibility of a code for members, dating back to 19 September 1990 when the then Leader of the Opposition (Ms Follett) moved unsuccessfully to establish a Standing Committee on Ethics for Members. The question of developing a code was raised again and debated in 1996 when, on 26 September, the Legislative Assembly referred the matter to the Standing Committee on Administration and Procedures. The committee has taken submissions but has not yet reported (Davis 1999).[11]

New South Wales

The impetus leading to a process for developing a code for members in the New South Wales Parliament came from the so-called Greiner-Metherell affair (Tanner 1998; NSWLCSCPPE 1996; Laffin and Painter 1995, ch. 4). This matter led to the resignation of Premier Nick Greiner after an adverse ruling by the Independent Commission Against Corruption (ICAC). The subsequent judicial findings

[9] Standing Rules and Orders, amendment agreed to by the House of Assembly on 22 May 1996.
[10] Correspondence from the Deputy Clerk, 30 August 1999. The Commission on Government Report's third report, issued in April 1996, recommended that a code be developed (COGWA 1996).
[11] The Chief Minister until October 2000, Kate Carnell, and the Independent Minister, Michael Moore, have been strong public advocates of ethics measures.

identified the need for a parliamentary code spelling out the types of behaviour that would be grounds for a member's or minister's dismissal or resignation. Introducing a code became a cause taken up by Independents in the New South Wales Parliament resulting in 1994 in amendments to the ICAC Act of 1988. These amendments provide for the establishment of two Standing Committees in Ethics (one for the Legislative Assembly and the other for the Legislative Council) with the specific purpose of drafting codes of conduct for New South Wales MPs. Section 9 of the ICAC Act was changed to read: 'in the case of conduct of a Minister of the Crown or a member of a House of Parliament a substantial breach of an applicable code of conduct'.

Under the scrutiny of the ICAC and the media, these committees (the Legislative Assembly Committee chaired by Mr Peter Nagle MP and the Council Committee by Dr Meredith Burgmann MLC) pursued the question vigorously through research, several public hearings and various reports—all of which gave some impetus to an interest in MPs' codes in other Australian jurisdictions. Draft versions of two different codes (one from each House) were published in 1996 and 1997 (NSWLCSCPPE 1996; NSWLASCPPE 1997). The Legislative Assembly and Legislative Council codes were markedly different, and indeed there was considerable tension between the two committees. The Council code was more extensive, giving guidance on several topics untouched by the Lower House code (eg post-employment restrictions). Furthermore, the Legislative Council Committee proposed a more extensive ethics regime to support the code, with detailed proposals for ethics education supported by an appointed ethics commissioner. The failure of the two committees to come to agreement reflects several factors such as:

(i) the different perceptions about the role of MPs in each Chamber, with some in the Lower House Committee claiming that its members need more flexibility to engage the rough and tumble of constituency representation;
(ii) the committees were composed rather differently with the Lower House Committee including three community representatives;[12] and
(iii) differing political ideologies in the leadership of both committees, Mr Nagle being associated with the ALP Right-wing faction and Dr Burgmann with the Left.

In any event, despite the merits of the respective codes, this disagreement not only fuelled doubts amongst members regarding the codification exercise, but also provided a justification for executive intervention in the process. On 31 March 1998, the premier and his Upper House-based Attorney General released their version of a code of conduct (Carr 1998). It was a less discursive document than either committee had released. There are suggestions that this minimalist approach reflected the government's concern to have a code which avoided alleged legal pitfalls and yet responded to the ICAC pressures. The response of the Legislative Council Privilege and Ethics Committee was detailed and full of concern about the government's action (NSWLCSCPPE 1998). The Legislative Assembly Committee's response (NSWLASCPPE 1998) was less critical of the government proposal, although one of its members, Independent Dr Peter McDonald, recorded

[12] See Burgmann (1998). In the Legislative Assembly Committee there are eight parliamentary members supplemented by the three community members chosen by at least five parliamentary members after public advertising for nomination to the community panel. The Chair of the Committee must be an MP.

his strong objection to this intervention in the Parliament's processes and the resulting dilution of the content of the code as proposed by the premier.

Finally, on 1 July 1998, following the endorsement in the Lower House of what became known as the 'Premier's Code', the Legislative Council approved that code as an amendment to section 9 of the ICAC Act. The code as adopted covers six topics: disclosure of conflict of interest, bribery, gifts, use of public resources, use of confidential information, duties as a Member of Parliament.

The major concern of government members in the Labor Caucus discussion of the Premier's Code was the need to protect members from accusations that they were in violation of the code if they used public resources for party-political purposes. As a result, the code's clarification of the duties of an MP now reads: 'Organised parties are a fundamental part of the democratic process and participation in their activities is within the legislative activities of Members of Parliament.' In its June 1998 response to the Government Code (NSWLCSCPPE 1998, 12), the Legislative Council Committee identified eight topics which its code included but which were omitted by the Premier's Code:

- Use of Public Office for Private Gain
- Travel (which clarified when travel expenses from private resources can be accepted by Members)
- Use of Official Resources for Personal Gain
- Post Employment Restrictions
- No Unjustified Discrimination
- Freedom of Speech
- Spirit and Letter Provisions
- Additional Responsibilities of Parliamentary Office Holders

The Legislative Council Ethics Committee recommended that its (the committee's) code be accepted as guidelines for members' conduct, to be read alongside the official code.

Under Dr Burgmann's leadership, the Upper House Committee argued forcefully that a code and an Ethics Committee need the support of an Ethics Commissioner similar to the position of Parliamentary Standards Commissioner in the United Kingdom Parliament implemented after the Nolan Report. Subsequent to the adoption of a code in New South Wales, both Houses (the Assembly on 23 September 1998 and the Council on 24 September 1998) resolved to appoint a Parliamentary Ethics Adviser.[13] No clear picture has emerged about the impact of the Premier's Code, though it is apparent that clearer procedures for the making and processing of complaints under the members' code are needed. Currently, the Lower House Ethics Committee under its chair, John Price MLA, is proceeding to review the code.

The New South Wales legislative ethics experiment certainly breaks new ground in the Australian context, and the results of this action of the nation's first Parliament will be influential on how ethics initiatives develop in other Australian legislatures. If the New South Wales experiment is to be seen as a favourable model for other Parliaments, it will need to be demonstrated that it has actually

[13] A retired, former auditor-general, Mr Ken Robson, was appointed to this part-time position for a term of 12 months, which may be renewed. Mr Robson has since resigned from the post on health grounds. He was replaced by a former electoral commissioner, Mr E.I. Dickson.

assisted MPs who are conscientious in the ethical pursuit of their tasks. The stand-off between the Upper and Lower House Committees, and the subsequent intervention by the executive in a matter that requires not only the support of political leaders but also a high degree of parliamentary consensus, are instructive to those who advocate a code of conduct for politicians. The appointment of an ethics adviser was potentially one of the more significant developments in New South Wales. It appears, however, that the role was shaped and resourced in a way that limits the capacity of the person proactively to develop, with the Ethics Committees, the legislative ethics agenda, certainly as envisaged by Dr Burgmann's Upper House Committee (Burgmann 2000). This appointment is not to be compared with the Ethics Commissioner appointments in many North American legislatures and, now, in the United Kingdom with its Parliamentary Commissioner of Standards. They are better resourced and supported by detailed legislation.

Queensland

The original catalyst for the development of a code of conduct for Queensland parliamentarians was the publication by the Electoral and Administrative Review Commission (EARC) of its *Report on the Review of Codes of Conduct for Public Officials* in 1992 (EARC 1992). The EARC is one of the reform commissions established after the Inquiry by Commissioner Tony Fitzgerald into 'Possible Illegal Activities and Associated Police Misconduct' (Fitzgerald 1989), the other being the Criminal Justice Commission. EARC's report recommended a Public Sector Ethics Bill to mandate codes of conduct for elected and unelected officials, and included an extensive draft code for elected representatives. The Parliamentary Committee considering this report endorsed it. Subsequently, the Public Sector Ethics Act 1994 was passed, requiring the development of agency-specific codes under a set of fundamental ethical obligations, or principles, enshrined in the Act.[14] This legislation was silent about the development of a code for MPs.

In 1995 the passage of the Parliamentary Committees Act established the Members' Ethics and Parliamentary Privileges Committee (MEPP). Section 16 of the Act provided that the committee's area of responsibility includes:

1 (a) recommending to the Legislative Assembly a proposed code of conduct for members (other than members in their capacity as Ministers);
(b) recommending to the Assembly a procedure for complaints about a member not complying with the code of conduct adopted by the Assembly, including, for example, the persons who may make complaints, or the persons who must refer complaints, to the committee; and
(c) considering complaints against particular members for failing to comply with the code of conduct, reporting to the Assembly about complaints and recommending action by the Assembly.
2 In recommending a proposed code of conduct for members to the Legislative Assembly, the committee must have regard to:
(a) the ethics principles and obligations set out in the Public Sector Ethics Act 1994; and

[14] These obligations or principles are: Respect for the Law and the System of Government; Respect for Persons; Integrity; Diligence, Economy and Efficiency.

(b) the desirability of consistency between standards in the code of conduct and the ethics principles and obligations, to the extent the principles and obligations are relevant to members and their functions.

Section 16(3) of the Act specifies that a complaint about a member not complying with the code of conduct for members may be considered only by the Legislative Assembly or the Committee.

The Parliamentary Committee began its work on a code of conduct in late 1995. However, the legislation establishing the MEPP Committee also required it to undertake a review of the Members' Register of Interests. This task was given priority by the committee and its report, 'Review of the Register of Members' Interests of the Legislative Assembly', was tabled in Parliament on 30 October 1996 (MEPP 1996).

A new MEPP Committee was formed after the 1996 election though the Member for Bundaberg, Clem Campbell, remained as its Chair. Following the by-election in early 1997, which led to a change of government, the Member for Barron River, Lyn Warwick, assumed the Chair of MEPP. The inquiry into a code included a call for submissions from the public, public hearings and research study tours.[15] The committee's report was finally tabled in May 1998, just prior to the 48th Parliament being prorogued, and at that time further submissions on the report were invited. The 49th Parliament elected a MEPP Committee under the leadership of the newly elected Member for Logan, John Mickel. (Clem Campbell had retired from Parliament and Lyn Warwick was defeated in the 1998 election.) Two years later, on 5 September 2000, the MEPP Committee published its report after the receipt of further submissions (MEPP 2000).[16] Clearly, one factor contributing to the lengthy five-year gestation period before the finalisation of the report was the committee's changing membership.[17]

The approach adopted in the report published in 1998, and reaffirmed in the final report of September 2000, is for a code which articulates and consolidates existing provisions, ie it is 'built around pre-existing, although generally unknown, obligations on members' (MEPP 1998, Part A, 15) together with an aspirational preamble which includes a Statement of Fundamental Principles:

- Integrity of the Parliament
- Primacy of the public interest
- Independence of action
- Appropriate use of information
- Transparency and scrutiny
- Appropriate use of entitlements

Alongside these principles, the MEPP Committee's final report proposes a change to Standing Orders to provide for a Statement of Commitment to be assented to after MPs take their Oath of Office at the commencement of each new Parliament. Also, in the light of recommendations from the Auditor-General[18], the final report

[15] Twenty-three submissions were received from the public.

[16] As at 1 October 2000, the Queensland Parliament is still to adopt a code of conduct for its members, and awaits the response of the government to the MEPP Committee's final report.

[17] The research staff and Research Director, Mr Neil Laurie, remained constant through this five-year period. Not one MP has remained as a continuing member from its inception in 1996 to the finalisation of the code process.

[18] As a result of an audit during 1999 in relation to matters associated with the issue of an interactive gambling licence to GOCORP Limited ('the Net Bet affair'), the MEPP Committee received submissions from the Auditor-General relating to the development of the draft code for MPs. The committee outlines its examination of these matters in Report no. 43 (MEPP 1999).

suggests changes to the proposed Parliament of Queensland Bill to provide for 'the continuing and ad hoc declaration of the interests of members and related persons' in parliamentary debates. The rest of the code, as finally recommended to Parliament, details 'the obligations and requirements of Members of the Legislative Assembly', and brings together items from a range of sources which already apply to Queensland MPs. In other words, apart from suggesting the introduction of ad hoc conflict of interest declarations, the proposed code creates no new substantive obligations regarding MPs' conduct.

An examination of this draft Code of Ethical Standards for MPs suggests that, despite its apparent comprehensiveness, there are matters which, as a result of simply adopting existing stated provisions, are dealt with too restrictively for such a code. For instance, practical guidelines on 'the relationships of members of parliament with unelected public officials' are almost non-existent. So, nothing is said about the impropriety of the appearance, or actuality, of MPs giving instructions to public officials employed in the executive arm of government.[19]

Nonetheless, read in conjunction with the 1998 report, the code document represents a significant and cohesive manual of the conduct expected of Queensland MPs. Part A of the 1998 report provides discussion of the issues canvassed in the MEPP Committee's inquiry. It surveys the value of education in ethics. The final report also stresses the importance of educating members regarding the code, though it appears to limit that to the induction of new members.

The final report was issued after other steps taken during the Beattie government's term with a bearing on the implementation of a code for members. The Register of Pecuniary Interests has been revised. In addition, during the 1998 State election, the Labor government proposed a 'Good Government' policy. Among the several initiatives promised was the appointment of an Integrity Commissioner to advise ministers, their staff and senior public servants on conflicts of interest and other ethics questions. In fact, the Integrity Commissioner appointed in August 2000 has statutory authority to advise government backbench members. The MEPP Committee has indicated some reservations about this move and has reasserted the committee's responsibility to advise MPs on ethics matters. The final MEPP report therefore appears to have retreated from the position adopted in the 1998 MEPP report on the question of a Parliamentary ethics adviser who is not an MP:

> The committee sees considerable merit in members of the Queensland Legislative Assembly having access to independent advice concerning ethical matters. However, the committee believes that it is premature at this stage to make any decision on this matter because the code of conduct has not been implemented or evaluated (MEPP 1998, Part A, 57).

Comparing Australian Codes

In only three Australian State Parliaments (Victoria, Tasmania, New South Wales) are codes of conduct declared and put into effect, while in Queensland an inquiry

[19] This matter is not taken up in other Australian codes for MPs. It is to be noted that it was raised by the Queensland MEPP Committee in its discussion paper on Parliamentary Privilege, though its final report on this question has not been completed. The only matters which may involve the MEPP in complaints and their resolution are breaches of Standing and Other Orders of the House and matters of Privilege or Contempt of Parliament.

process has been completed and a draft code has been published. Its adoption and implementation is imminent.[20]

The New South Wales and Queensland codes fit the pattern of an inquiry-driven development though, unlike the Queensland process where the Parliament (through its committees) has been totally in charge of the exercise, the New South Wales Parliament's process has been tied to its obligations to the ICAC. Earlier, in Victoria, the code inserted in the Members of Parliament (Register of Interests Act) 1978 was also the result of public concern regarding conflicts of interest in the Hamer government.

Each of the codes contains provisions regarding: the primacy of a duty to the public interest; disclosure of gifts and conflicts of interest; guidance in the use of confidential information; and, an exhortation to act in ways that do not bring dishonour to the institution of Parliament. However, each document differs considerably in style and yet each, in different ways, combines elements that are aspirational with those that are prescriptive or compliance oriented.

Victoria's code, the oldest and the only operational code prescribed by statute, contains six clauses referring mainly to conflicts of interest. In contrast to some other States (eg NSW), the ad hoc declaration of pecuniary interests is confined to matters raised in Parliament.[21]

Tasmania's has a two-sentence preamble, an aspirational statement of commitment and a list of nine general declarations about a range of issues. Unique among the four codes, the Tasmanian document has a statement regarding 'post-employment', declaring that members, 'when they have left public office, must not take improper advantage of their former office'.

The New South Wales code has a three-clause preamble followed by a code which fits its six topics neatly on one page. In contrast to the other four codes, the New South Wales statement affirms that membership of political parties and party activity are legitimate, reflecting the concern in that State that the ICAC may use the code to disqualify party-political activity undertaken by MPs using their privileges and resources as members.[22] At the same time, enforcement of the code rests ultimately with the relevant House, though obviously influenced and pressured by any ICAC finding.

The proposed Queensland code differs again. It is the longest and includes a short statement of purpose, six ethical principles, followed by the code of conduct proper which summarises the existing obligations and requirements covering MPs' conduct. It is this last feature that makes the Queensland document very different in style and content. This approach results in the inclusion of several topics not covered in the other Parliaments' codes, eg obligations under the State electoral laws and dealings with executive government. The Queensland approach also documents procedures for handling complaints under the code and, in some cases, indicates sanctions.

None of the codes indicates a precise process or specific timeline for review and amendment. In Queensland and New South Wales, the codes will operate under the

[20] As at 1 October 2000. When the Queensland Parliament was prorogued for the election of 17 February 2001, this matter had not been finalised.

[21] In many States this matter is dealt with in Standing Orders. For a full explanation of pecuniary interest declarations across jurisdictions, see Carney (2000).

[22] Queensland travel guidelines allow MPs to use this entitlement to attend to party-political activities. To an extent these guidelines defuse the issue of party-political activity which uses public resources.

guidance of an Ethics Committee and, in New South Wales, with the help also of an Ethics Counsellor. There is no Ethics Standing Committee in Tasmania or Victoria to supervise the implementation of the code. Furthermore, it is only in New South Wales and Queensland that it is envisaged that the codes will be supported by some education process initiated through the Parliamentary Committee. Arguably, the Queensland document, which has the broadest scope, with its accompanying discussion materials (MEPP 1998, Part A), provides the most promising basis for education.

It is apparent that none of these codes attempt to elaborate in detail every conduct contingency that might raise ethical decisions for an MP. To make that attempt would be futile. At the same time, none of the codes takes account of the different responsibilities which particular MPs undertake: for instance, the different roles played out by a government MP who chairs a Parliamentary Standing Committee and one who is an Opposition frontbencher create differing accountabilities and ethical perspectives. As John Uhr (1998a, 20) has correctly maintained: 'Simply in terms of raw political power, not all elected members have equal opportunities to influence government or citizens, just as they do not face equal temptations to make inappropriate use of political power.'

Nonetheless, there are omissions in the four codes analysed here which, arguably, refer to vexatious issues warranting clearer direction even in a short or minimalist code. One such issue is the obligation of MPs to be law-abiding, when some members, in conscience, may interpret their public duty as requiring defiance of the law in certain circumstances. In fact, the New South Wales Legislative Council Committee's draft code addressed this matter affirming the right of conscientious objection for MPs. Another difficult matter is what codes should say about the personal conduct of MPs. Admittedly, some clauses of the codes analysed give a pointer on this matter but none elaborate specific guidance (see, for example, EARC 1992, 66).

A further comparative aspect of these codes is the degree of 'methodological rigour' applied in their development. Certainly, the New South Wales and Queensland codes resulted from an extensive research process (although in NSW the code was finally drafted by persons not involved in the Committee's research). However, from a conceptual or philosophical perspective, there is no evidence that these codes have been derived from an ethical critique of the basic rationale for political practice in a democracy. Not surprisingly, a pragmatic approach, focused on what *is* acceptable rather than what *ought* to be acceptable, guided the process. The discerning reader searches in vain for a teleological methodology concerned that 'codes for political practitioners find their legitimacy and source in the historically developed purposes of our political institutions' (Preston 1998b, 4).

Concluding Discussion

The Australian story of the development and enactment of parliamentary codes of conduct is a saga of avoidance, delay, resistance and doubt. That story is, of course, far from complete. Only two Parliaments (New South Wales and Tasmania) have actually accepted codes of conduct in the 1990s, though a third (Queensland) is reportedly close to adopting a code. Moreover, there is virtually no history in the use of codes to analyse. Whatever may be said of how these four codes read on paper, nothing can as yet be claimed about their efficacy in the cut and thrust of

politics. The record of implementation is, at this point, too limited to draw conclusions on their effectiveness.

A question which emerges from this study is: why are Australian legislatures reluctant to frame and implement a code?

Some Members and Officers of Parliament offer the explanation that developing a code is an inconsequential and ineffective step. It is more likely that the reluctance stems from a fear that a code could embarrass members and their colleagues, fuelled by a belief that a code is more likely to adversely affect the unwitting but well intentioned, while the truly cunning and unethical members still get round its provisions. Furthermore, many claim that a code will do nothing to alter public perceptions about political standards. Some politicians assert that a code will only give the media and their political opponents a further instrument to attack them unfairly. Yet others claim that parliamentarians are a special case compared to professions which have codes; after all, their ultimate accountability is at the ballot box. Another reason offered for the resistance to code development among parliamentarians is that it is difficult to reach consensus between MPs (even of the same party) about appropriate ethical standards. It appears much easier to arrive at a cross-party consensus that the adoption of a code is altogether too problematic.

The lack of interest in codes from political leadership seems also to be a factor, although, as reported above, in New South Wales the Premier intervened to ensure the adoption of a particular code. However, in this case that intervention was an instance of reaction. On the one hand, to the impasse between the code proposals from the Assembly and Council Committees and, on the other hand, to the possibility that the Independent Commission Against Corruption might impose its own code on the State's parliamentarians. In the case of Queensland, the protracted process of code development—effectively since the Electoral and Administrative Review Commission recommendation of 1992—is evidence of a lack of interest from the leaders of both sides of politics. By and large, governments are more inclined to use their numbers to tough out ethical crises than to facilitate ethics reforms such as the adoption of a code of conduct.

The Australian experience confirms the view that, to overcome the resistance to codes of conduct, extra-parliamentary forces (such as a scandal or ethics crisis exposed by the media or a watchdog body like the ICAC) are usually required. The New South Wales and Tasmanian cases also indicate that the actions of MPs outside the major parties may be critical. This, in turn, raises the question often asked by Ted Mack, former federal Independent MP and advocate of codes, as to whether the basis for ethical malaise in the Australian political system is the adversarial two-party system (Mack 1995). Certainly, it is significant that the final adoption of a code in New South Wales hinged around an agreement to include a protective clause for party-political activity. Of course, it can be argued that the Australian two-party system, with its binding control of MPs, provides a protection from corruption, unlike the United States of America where the loose party allegiance of legislators leaves them isolated and vulnerable to unsavoury pressures. Nonetheless, in the Australian context there is evidence, which occasionally becomes public, that (for instance, in the pre-selection of candidates) party-political activity often leads to behaviour that is ethically dubious.[23] The implication seems

[23] See, for example, Richardson (1994) and *Courier Mail* 19 August 2000 for the recent Queensland case which reached the criminal courts. These examples belong to the ALP, but problems of misconduct within political parties such as 'branch-stacking' apply to both sides of politics.

to be that, if codes are desirable for Members of Parliament, they are necessary for the political parties from which they emerge.

Such an assertion is consistent with a non-minimalist model of legislative ethics, though the case for it in the Australian attempts at legislative ethics awaits confirmation in a further study. The hypothesis to be tested is that the efficacy of parliamentary codes of conduct requires that they are embedded in a more comprehensive and proactive ethics regime including an Ethics Committee (around which case-law develops as guidance), an education program and especially an Ethics Adviser who is not a serving MP. It remains to be seen whether any Australian Parliament will provide the data for such a future study, for, to date, none have implemented this non-minimalist model.

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