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Benchmarks for Codes of Conduct

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BENCHMARKS FOR CODES OF CONDUCT

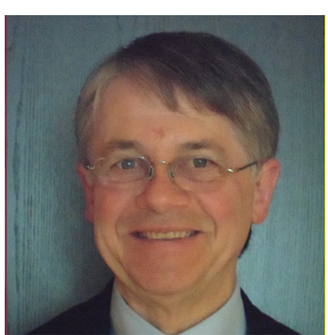
Parliamentary Codes of Conduct and Ethics are increasingly used by parliaments, both national and provincial or state, to regulate the behaviour of members.

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A code for members is the mark of modern Commonwealth parliaments according to research which is leading to benchmarks to guide parliaments in the design or revision of codes of conduct. This research and development project began in mid-2014, funded by the CPA and conducted by a research team based at Monash University (Melbourne, Australia). The CPA's branches include around 200 houses of parliament (i.e. some are bicameral) which were surveyed as the first stage of the project. A large majority responded; of those, about two-thirds reported that they have some form of code to guide the behaviour of the members of their House.

Parliamentarians and Clerks from a large cross-section of houses were then interviewed at the 60th Commonwealth Parliamentary Conference (Yaoundé, Cameroon, October 2014) to get a deeper understanding of how codes operate in practice. This led to draft benchmarks which were published on Commonwealth Connects and circulated in February for comment by parliamentarians, clerks and other experts, leading to a workshop in April, to be followed by publication of Recommended Benchmarks for Codes of Conduct.



Dr Abel Kinyondo

Key research findings

The first key observation is that a code forms an important part of the Parliamentary Integrity System of a parliament (discussed in "Conduct, Ethics and Codes" *The Parliamentarian*, Issue One, 2014)

A second key finding was the strong view from parliaments with more rigorous codes that their parliaments were better as a result. The reasons for that seem to go to

the very heart of democracy.

Parliament is a public office and members of any parliament are public officers. As such, parliamentarians have a fiduciary relationship with the people of the nation, province, state, or territory served by their parliament. By fiduciary relationship we mean that parliamentarians must put the public interest – the interests of the people in aggregate – ahead of all personal interests or, for example, the interests of family, friends or business associates. Even political parties exist to serve the public interest. This responsibility to exercise power solely on behalf of the people is known as the public trust principle.

It follows from the public trust principle that each parliamentarian should have guidance and direction on which he or she can draw whenever doubt arises about the correct thing to do when faced with a decision or action. In the same way, the parliament should be able to intervene if and when it appears that the public interest and hence the parliament's constitutional role may have been subverted by a parliamentarian's action.

A parliament with a strong code of conduct that is rigorously enforced reduces the risk of unethical, illegal or otherwise corrupt behaviour by parliamentarians and is more likely to reflect the public trust principle in the decisions and actions of individuals and the institution. Conduct in accordance with the public trust principle supports the very concept of democracy.

What do codes include?

Codes to guide the conduct of parliamentarians came in a variety of forms in different parliaments according to our survey and interviews. Titles and forms include: Code of Conduct (e.g. House of Commons, UK); Code of Official Conduct; Code of Ethics (e.g. Malta); Conflict of Interest Code (e.g. Canadian parliaments); rules of procedure (e.g. Standing Orders); and Act of parliament.

Some of these differences are important whilst others simply reflect the ways in which terms are used in those parliaments. For example, Codes of Conduct and Codes of Ethics are often distinguished in the study of codes.

In the case of codes of ethics, they: "are usually products of professional associations. They serve as a quality assurance statement to society and provide a set of standards for appropriate conduct for members of the profession that issues the code. Codes of ethics for those in government service challenge employees to identify with shared professional values that describe appropriate actions about acting rightly in the service of the public good," according to Willa Bruce (1996, p.23).

Willa Bruce argues that codes of conduct are quite different. They "… are more concrete and practical … for they represent executive orders or legislatively defined and enforceable behavioural standards with sanction for violation. They contain a list of the kinds of behaviour required in a given set of circumstances and provide direction to those whose conduct they govern. Codes of conduct contain minimalistic prohibitions to unquestionably subversive or criminal acts. They are designed to protect the government employee, the client, and/or the public at large," (1996, p.24).

In practice, those distinctions have little significance. Some parliaments use the term code of ethics for codes that have similarities to codes of conduct.

Not only do the forms of codes vary, so does the manner in which they are made and their legal status. The weakest basis for a code is a simple resolution of the House. Unless determined otherwise, a resolution lapses when the parliament is prorogued or dissolved. At the other end of the spectrum, a code introduced by an act of parliament is permanent and can be enforced according to processes and penalties incorporated into its provisions. Where an act of parliament is used, it is usually an act dealing with a number of parts of the parliamentary integrity system, such as also creating a commissioner's office. It typically includes the code as part of the main text of the act or as a schedule to the act.

An intermediate form is to include provisions within rules of procedure (e.g. Standing Orders). However, codes of conduct are much broader and about much more than rules for the conduct of debate and deliberation. As a result, if it forms part of the Standing Orders or other procedural rules, there is a risk a code will be limited to narrowly conceived matters related to procedure.

We find that codes are best developed as separate documents.

Whether a code should be an Act of parliament depends on several factors, one of the most important being whether the parliament is bicameral. If so, the Act would bind both Houses equally. However, the autonomy of each House would be compromised; neither House would be able to have a code with features specific to it, or at least could not avoid any of the provisions then applying to both.

It would of course be possible to supplement the common code with an additional code including provisions specific to only the House which adopted them. However, that would be a messy solution as parliamentarians and others would need to refer to two documents, one of which appeared to have lesser status.

The potential difficulties of a common code for a bicameral parliament were revealed in the Australian Parliament in 2011. After extensive deliberations in House of Representatives and Senate committees and informal liaison between them, the provisions of a code of conduct were agreed to by the House of Representatives. However, the Senate Committee "was not convinced that an aspirational, principles-based code would necessarily improve perceptions of parliamentarians and their behaviour". Further consideration lapsed.

Life is simpler for unicameral parliaments; an Act of parliament is a simple, familiar and appropriate way for them to adopt a code.

However, there may be other reasons for adopting a code through a resolution rather than an Act. For example, a resolution does not require any action by the head of state. Even where established convention ensures that the head of state acts only as advised, the symbolism of the House alone determining the code regulating its members' conduct, as is the case with rules of procedure, may be important.

Variety of provisions

Our research has found a wide range of provisions in codes affecting the conduct of members. These range from mild provisions more concerned with etiquette and treating fellow parliamentarians (and the House in session) with courtesy, respect, and dignity. Whilst these are of course desirable, they make little contribution to reducing the risks of improper, unethical or illegal conduct.

We have identified several key provisions believed to be important to a code contributing to an effective Integrity System. The features include: underlying principles;

defining of acceptable conduct; conflict of interest; providing advice for Members complaints procedures; provision for investigation of facts, decision-making on allegations; sanctions and penalties; how to prepare, review and revise a code; and, a culture of ethical conduct.

The underlying principles supported by the parliamentarians and Clerks whom we interviewed align with the standards in public life developed by the Nolan Committee. These reflect the fiduciary relationship between parliamentarians and citizens and the responsibilities of parliamentarians as public office holders and are widely respected. They provide:

1. Selflessness Members should act solely in terms of the public interest.
2. Integrity Members must avoid placing themselves under any obligation to people or organisations that might try, inappropriately, to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.
3. Objectivity Members must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.
4. Accountability Members are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.
5. Openness Members should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.
6. Honesty Members should be truthful.
7. Leadership Members should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.

The boundaries of acceptable behaviour are clear from the research, but there is a range of views about some of the detail. There is general agreement that parliamentarians should to treat each other and the Parliament with respect, dignity and courtesy. Some argue that a dress code should be incorporated but it seems this is rarely an issue. Few would argue against a provision that a parliamentarians must not assault, harass, or intimidate another person, sexually or otherwise.

It is also widely accepted that a Member should not accept any item, gift, hospitality or favourable treatment that a reasonable person might think could give rise to a conflict of interest. As this general proviso relies on an interpretation of 'reasonable', it is desirable to include some guidance on the threshold values (adjusted for inflation) of gifts etc. that a parliamentarian could accept.

Conflict of interest is one of the most important aspects of a code. It is widely accepted that sources of income, assets or liabilities could make a parliamentarian feel that his or her personal interests could suffer if he or she acted in the public interest or conversely, could be advantaged if personal interests were put ahead of the public interest. For that reason, many houses of parliament require parliamentarians to disclose their sources of income, their assets and their liabilities; these are published so that the public can check any allegations that a parliamentarian has failed to respect his or her obligations as a public officer.

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A sensitive aspect is the values of interests. Ideally, these should be part of the disclosures. Whilst is may seem intrusive, it is genuinely in the public interest to know whether a parliamentarian's sudden, unexplained increase in the value of his or her assets has been acquired legitimately (e.g. inheritance from deceased parent) or from some mysterious source at the time of say, a government grant to a business.

There should be continuous disclosure of each parliamentarian's sources of income, assets and liabilities (including updates), wherever suitable modern technology is available, in a similar way to disclosures by businesses whose shares, stocks or securities are publicly traded. Technically, it is simple for an adjustment to be advised and published on the business day on which it occurs, but it is reasonable to allow slightly longer period. Where such IT technology is not available, the parliament should use the best technology it has to register and publish parliamentarians' interests (including updates) as quickly and as frequently as practicable.

These disclosures must respect the reality that interests held by a parliamentarian's spouse or children could also create a conflict of interest; they should likewise be disclosed. Whilst this may appear to intrude on the privacy of family members, the underlying principle is disclosure of interests with the potential to compromise the parliamentarian's performance of his or her public duty.

It goes without saying that no parliamentarian should accept, or offer another parliamentarian, a bribe or other inducement to cast a vote, ask a question or act on behalf of any person, whether a constituent or otherwise. Whilst there may be common law or criminal law covering bribery, etc. and parliamentarians should be subject to the normal operation of the law, it is desirable that the code also cover such matters.

Advice on ethical conduct

Parliamentarians, new and long-serving, often find themselves facing dilemmas about the ethics of decisions or actions. Recently elected parliamentarians especially may find themselves faced with ethical questions quite different to the types of decisions they had to make in their previous occupations. Even for many of those who were public officers in the public service or elsewhere (e.g. teachers), it would have been rare to have to think about respecting the public trust principle. Likewise for those who previously worked in business or served in trade unions, the interests of their organisations, workforce or membership would have been their legitimate

primary concerns rather than the public interest.

Ethics advice is valuable to parliamentarians and should form an integral part of a code of conduct. Some parliaments have successfully established positions and even whole offices to support parliamentarians in relation to meeting the standards of ethical behaviour expected under a code. However, the models vary widely, ranging from a single person appointed part time (e.g. New South Wales Ethics Adviser) to a full time commissioner with support staff responsible for not only ethics advise to parliamentarians but also the disclosure of parliamentarians interests and the investigation of complaints (e.g. UK Commissioner for Parliamentary Standards).

The scope and scale of an office providing ethics advice must have regard to the size and resources available to the parliament. That office's budget in some large parliaments in wealthy countries is larger than the entire budget for many smaller parliaments. For that reason our proposals set out principles rather than recommending a specific model.

Breaches of the Code

Proper investigation of complaints is a key to the effectiveness of a code. This must begin with the process for making a complaint where a breach is suspected.

The receipt and investigation of complaints is at severe risk of being compromised by partisan considerations if controlled by parliamentarians with a party-political interest in the outcome. For the reason, we have recommended that complaints should be automatically referred for independent investigation to determine the facts in almost all circumstances. The only exception would be where there is evidence that the complaint itself is an abuse of process, intended to tarnish the reputation of a falsely accused person. The complaints process should enable such complaints to be rejected without publicity. This is crucial as the public can easily mistake an investigation with guiltiness rendering the final investigation decision (say not guilty) inconsequential and thus unfairly damaging.

Investigation must be separated from partisan influence but the precise mechanism will depend on local structures and circumstances. In some cases, there are existing, effective anti-corruption bodies well-suited to undertake the task in accordance with the code; in other cases, there may need to be a new provision.

Once the facts have been established, these should be presented to the parliament in a public report and must be referred for prosecution if the evidence suggests the accused could be convicted of a legal offence. If in other cases a breach has been found, the House should determine what sanction should be applied. The code should indicate the available sanctions and penalties which might range from a humiliating public reprimand to expulsion from parliament. In extreme cases, a serial offender could be debarred from contesting elections.

If a complaint is not upheld, the accused parliamentarian should be publicly exonerated from the allegation.

Culture of ethical conduct

The extent to which a code is respected and observed depends on both its provisions and the attitudes towards it by ordinary parliamentarians and by leading members of the House. Note that types of codes range from permissive all the way to prohibitive, with some hybrids between the two. While some (e.g. Deloitte & Touche LLP, 2015) suggest that permissive codes are more likely to enhance compliance in organisations, our aim is to combine the best features of both approaches. We nevertheless suggest several measures that could contribute to the code working in practice:

- All parliamentarians should be vigilant in detecting and acting to deter even minor breaches from which serious breaches may develop.
- Consultation with the ethics adviser should be routine and normal, with frequent informal contact between the ethics adviser and parliamentarians.
- Parliamentarians should offer fellow parliamentarians peer-support for ethical conduct and counsel against unethical conduct.
- The code should be published and readily available in print, and online (including via smartphone) if resources permit.
- Newly elected parliamentarians should receive induction, including in the code of conduct and self-assessment of their individual ethical competence.
- Every parliamentarian should participate in activities to enhance their ethical competence at least once annually. These activities could be online, if resources permit. He or she should sign a declaration or provide evidence confirming having done so.
- The code of conduct should be renewed following each general election, through debate of a resolution re-committing the House to the code and making any necessary updates.

Does size matter?

Listening to parliamentarians talk about ethical conduct in their Houses, there seems be a tendency for smaller Houses to believe that unethical conduct is less likely to occur as unethical sub-cultures are less likely to develop. The small size of these houses seems to make it easy for parliamentarians to monitor each other's conduct (which may act as a disincentive to breaches). The lack of a party system in most of the smallest houses necessitates that parliamentarians work through consensus which allows them to identify with one another more closely. We don't want to over-emphasize this observation as it has yet to be thoroughly researched. However, it does alert us to a possible advantage that smaller Houses may have and to a factor which larger Houses may need to take into account in designing and implementing their codes.

Making and re-making a code

Finally, how does a parliament, or a house, make or review a code? The code and any revisions must be the outcome of debate and deliberation in which all of the House's parliamentarians have genuine opportunities to participate.

In addition, we believe that it would be valuable to appoint an advisory panel comprised of retired parliamentarians and retired superior court judges to review the code from time to time and report to the parliament on its operation immediately following each general election, in response to requests by the Presiding Officer and at such other times as it wishes.

Whilst it is appropriate to look to other parliaments for inspiration, a code is essentially a matter for each individual House and a reflection of its commitment to enhancing the Integrity System of their nation, province, state or territory.

The Benchmarks now being recommended for codes of conduct are an important opportunity for every parliamentarian, Clerk or Secretary General and other member of staff to contribute to strengthening the integrity of their parliament and to improve its performance in serving the public interest.