A CODE OF CONDUCT FOR MEMBERS OF PARLIAMENT?

*Christopher Finlayson**

The integrity of a government is largely judged by the conduct of its members. In recent times, it could be argued, that this has been wanting. The author argues that this is in part due to the lack of clarity in the rules of conduct applying to members of Parliament, and the lack of sanctions (and corresponding lack of adherence) to those rules which do exist. After examining the approach taken by the Ontario, Canadian and United Kingdom legislatures, a statutory code of conduct based on the Ontario model is advocated for New Zealand.

I INTRODUCTION

The purpose of this article is to consider whether the time has come in New Zealand for a code of conduct for Members of Parliament (MPs) which could also incorporate a register of members' interests (including liabilities). The article will consider the existing ethical requirements in New Zealand for members of the Executive and examine the Canadian position, in particular legislation recently passed in Ontario, the Members' Integrity Act 1994.[1] Brief mention will also be made of the position in England where the House of Commons has adopted a code of conduct and a register of members' interests. Finally the article will consider whether there is a case for enactment of legislation along the lines of the Ontario precedent or whether a self regulating code of conduct is adequate.

II THE NEW ZEALAND POSITION

The current New Zealand position is inadequate. There is currently no code of conduct for MPs. There are, however, certain statutory provisions dealing with bribery and corruption of both Ministers and MPs. Standing Orders of the House of Representatives also require MPs to take certain steps in the event of a conflict of interest. In addition, the Cabinet Office Manual establishes guidelines for members of the Executive.

* BA, LLM, Honorary Lecturer in Law Victoria University of Wellington, partner, Bell Gully Buddle Weir Wellington.

1 Formerly the Members' Conflict of Interest Act 1988.

The Crimes Act 1961 contains certain provisions relating to bribery and corruption. Section 102 provides that any member of the Executive who corruptly accepts or obtains any bribe is liable to imprisonment for a term not exceeding 14 years, and anyone who tries to bribe a Minister is liable for a term of imprisonment not exceeding seven years. Section 103 is in very similar terms and relates to MPs. An MP is liable to imprisonment for a term not exceeding seven years who corruptly accepts or obtains any bribe, and anyone endeavouring to bribe an MP is liable to imprisonment for a term not exceeding three years. Strangely, no-one shall be prosecuted for an offence against either section without the leave of a High Court judge first being obtained, and any person whom it is intended to prosecute shall first have an opportunity to be heard against the application. It seems singularly inappropriate that any Minister or MP charged with corruption should first have an opportunity of explaining himself or herself before any prosecution is commenced. No similar opportunity is given to members of the judiciary charged with corruption, nor to those about to be charged with a multitude of other serious offences.[2]

The Standing Orders of the House of Representatives[3] state that a member must declare a pecuniary interest which is defined as follows:

> 168 Pecuniary interests
>
> (1) A pecuniary interest is a direct financial benefit that might accrue to a member personally, or to any trust, company or other business entity in which the member holds an appreciable interest, as a result of the outcome of the House's consideration of a particular item of business.
>
> (2) A pecuniary interest -
>
> (a) includes a pecuniary interest held by a member's spouse or domestic partner or by any child of the member who is wholly or mainly dependent on the member for support, but
>
> (b) does not include any interest held by a member or any other person as one of a class of persons who belong to a profession, vocation or other calling or who hold public offices or an interest held in common with the public.

The Speaker will make a final decision on any dispute as to whether a member has a pecuniary interest. Any member who fails to disclose a pecuniary interest before

---

2 See ss 100 and 101 of the Crimes Act 1961.

3 Standing Orders of the House of Representatives, New Zealand, 1996 (brought into force 20 February 1996 and amended 22 August 1996).

participating in the consideration of any item of business commits a contempt of the House.[4]

The Cabinet Office Manual relates only to Ministers (both in and outside Cabinet) and to Parliamentary Under-Secretaries. The purpose of the guidelines is to protect the integrity of the decision-making process of executive government by: [5]

- placing on record those personal interests which might be seen to influence decision-making by Ministers and Parliamentary Under-Secretaries;
- requiring Ministers and Parliamentary Under-Secretaries to avoid situations from which they gain remuneration or other advantage from information acquired only by reason of their office; and
- reinforcing the premise that holding office as a Minister or Parliamentary Under-Secretary is expected to be a full-time occupation.

In order to fulfil their duty, Ministers and Parliamentary Under-Secretaries are expected to devote their time and talent to carrying out their official business, both as members of the Executive and as MPs representing their constituents.[6] The guidelines make it clear that holding office is regarded as a full-time occupation and is remunerated as such. It is not permissible for a Minister or Parliamentary Under-Secretary to accept any additional payment for doing anything that could be regarded as part of his or her normal portfolio responsibility. Accepting payment for any other activities requires the prior approval of the Prime Minister.[7]

Conflicts of interest are dealt with in some detail. Ministers and Parliamentary Under-Secretaries must ensure that no conflict exists or appears to exist between their public duty and their private interests. The guidelines illustrate ways in which a conflict of interest may arise both in individual performance of their portfolio responsibilities and as members of Cabinet. The guidelines provide that Ministers "must conduct themselves at all times in the knowledge that their role is a public one; appearances of propriety can be as important as actual conflicts of interest in establishing what is acceptable behaviour."[8] Within two months of appointment to office, all Ministers and Parliamentary Under-

---

4 Standing Order 399.

5 *Cabinet Office Manual*, (Cabinet Office, Wellington 1996) para 2.75.

6 Above n 5, para 2.76.

7 Above n 5, para 2.76.

8 Above n 5, para 2.77.

Secretaries must lodge with the Registrar of Ministers' Interests (who is also Secretary of Cabinet)[9] a schedule of the following items: [10]

as at 31 December

i remunerated directorships and other employment;

ii substantial minority or controlling interest in a business enterprise or professional practice;

iii minority ownership of company shares of beneficial interest in a trust;

iv ownership of all real property;

v holding of mortgage or debt instruments.

A description of the business activity under (i)-(iii) is to be given unless the businesses concerned are listed as public companies.

for the previous year

(applicable after a full year in office and annually thereafter):

i overseas visits not paid for personally, or by immediate family members, or from New Zealand public funds (the countries visited are to be listed, together with the purpose of the visit, a note of who met the costs and confirmation of the Prime Minister's prior approval);

ii gifts received as a Minister or Parliamentary Under-Secretary during the year which have an estimated value of over NZ $500 (type of gift, and its source);

iii payments received for any outside activities (receipt of the Prime Minister's prior approval must be confirmed).

This register of interests is tabled by the Prime Minister in the House each year. The most recent register of Ministers' interests and assets was dated 31 January 1997.[11] One Minister recorded a nil return while several other Ministers appeared to own virtually nothing. This register may be a start on the road to accountability but it is quite inadequate when compared with registers in other countries. Indeed the register has gaping holes. For example, there is no requirement for members of the Executive to list their liabilities. So, for example, a Minister need not disclose liabilities arising out of a judgment being entered

---

9 Currently Marie Shroff.

10 Above n 5, para 2.78.

11 Register of Ministers' Interests and Assets as at 31 January 1997.

against him or her. So if, hypothetically, a Minister had a liability to pay damages to someone he or she had defamed, and some third party paid the damages for that Minister, there would be no obligation for the Minister to disclose whether he or she was helped in this regard and, if so, by whom. At the very least, the following information concerning liabilities should be contained in the register:

- Debts owed by the Minister which are secured by mortgage or charge;
- Persons to whom debts are owed and assets on which debts are secured;
- Unsecured debts;
- The person or persons to whom unsecured debts are owed;
- Liabilities the Minister expects he or she will be obliged to meet within the period of 6 months beginning from the date of the statement;
- The persons to whom the Minister expects to be obliged to pay money during the period of 6 months beginning on the date of the statement in discharge of liabilities;
- Debts or liabilities of the Minister discharged by a third party.

The Cabinet Office Manual contains very detailed requirements about declarations of interest where a conflict is likely to arise.[12] A declaration will always be necessary if a Minister or Parliamentary Under-Secretary has a direct financial interest. A declaration is not required for an interest held as one of a class of persons or held in common with the public. The example given is that of education issues where the Minister has school age children.[13] Ministers and Parliamentary Under-Secretaries are also subject to the Standing Orders referred to above.[14]

The Manual acknowledges that the exchange of gifts during official government visits is an accepted practice.[15] Ministers and Parliamentary Under-Secretaries may retain gifts if the estimated value is under NZ $500.00. Gifts which exceed that value may be retained while in office but must be relinquished on giving up office unless the express permission of the Prime Minister to retain them is given. Presumably the gifts given to Ministers and Parliamentary Under Secretaries in 1997 were not worth retaining or the exchange of gifts has now ceased to be an accepted practice, because in the latest register only the former Prime Minister (J B Bolger) listed any gifts.

---

12 Above n 5, para 2.80-2.82.

13 Above n 5, para 2.80.

14 Above n 5, para 2.82.

15 Above n 5, para 2.83.

Finally, the Cabinet guidelines provide guidance on outside activities. In order to keep the public informed about important issues of the day, Ministers and Parliamentary Under-Secretaries are expected to speak at conferences or other gatherings. In such a circumstance, the government is expected to meet expenses and no fee is expected or accepted. If any fee is offered and approved by the Prime Minister, it must be declared in that person's schedule of interests. However it is expected that unsolicited payments should be returned, or where fees are offered they may, with the agreement of the Prime Minister, be donated directly to a recognised charity.[16]

Rather strangely there is a reference to product endorsement. No Minister or Parliamentary Under-Secretary is permitted to endorse on television or in other media any product or service.[17] They may, however, appear on television to endorse themselves and their party in a party political advertisement. Ministers may not take any active part in day to day management or routine operation of any business enterprise as it is expected that they are required to devote their time and talent to official business. Given these guidelines, it is not clear how John Banks MP, when Minister of Tourism, could have conducted his Sunday show on Radio Pacific. However, provided no conflict of interest arises, there is nothing preventing a Minister or Parliamentary Under-Secretary from continuing to retain a certificate to practise law. Nor is there a requirement to dissolve any professional partnership or dispose of a business.[18] Ministers may also continue to advise in relation to family trusts or similar matters of personal interest.[19]

The public interest is partially served by the present regime but it is inadequate and, in relation to the register of Ministers' interests and assets, fails to disclose important information like liabilities. As has already been mentioned, however, there are at least some requirements for Ministers.[20]

The real cause for concern is that in New Zealand there is no disclosure framework for MPs other than Ministers nor is there any code of conduct or register of members' interests. The behaviour over the last 12 months of certain MPs would appear to justify at least a very careful inquiry about whether a code of conduct should be established. The MP for Eastern Bay of Plenty (A Ryall) recently argued in favour of a register of members' interests. He contended that there are three main arguments in favour of a register of

---

16 Above n 5, paras 2.85-2.88.

17 Above n 5, para 2.89.

18 Above n 5, para 2.91.

19 Above n 5, para 2.91.

20 Above n 5.

members' interests.[21] First, to help restore public confidence in the political system. Second, to enable the media and the public to attach due weight to the views of the member. Third, to protect members from claims and criticisms of self interest. Similar points have been made by the Leader of the Opposition and even the former Prime Minister, Mr Bolger, who indicated he would not be averse to a code of conduct for MPs Responding in the House to a question on the subject from the Leader of the Opposition, following the Tuku Morgan "cash for interviews" affair, Mr Bolger said that he saw merit in the idea of developing fuller guidance for the conduct of Members of Parliament..[22]

In October 1997 the Government Administration Committee of the House of Representatives sought the authority of the House to undertake an inquiry into some of these questions.[23] The terms of reference proposed by the Committee for the inquiry were to consider the relationship between the role of members and their outside interests, including the following: [24]

- The need, if any, for a Code of Conduct for MPs;
- The need, if any, for a register of members' interests;
- The form, scope and content of any Register of Members' Interests.

In its report to the House, the Committee acknowledged that this work could also be undertaken by the Standing Orders Committee but thought that committee would benefit from another committee also looking at these issues. Furthermore, the Committee submitted it was a timely inquiry of fundamental importance to the House.

The Committee emphasised in its report the desirability of investigating the need for a code of conduct which would encompass a wider range of issues than simply the private interests of MPs. The Committee said that: [25]

> It could extend to the professional conduct and behaviour of Members. There exists a compelling case for work to be done in this area. Many new Members, when they enter Parliament (especially those that arrived in such large numbers following the last general

---

21 "MPs Should be Required to Disclose Financial Affairs", *New Zealand Herald*, Auckland, New Zealand, 9 July 1997, 15.

22 NZPD Questions for oral answer on Tuesday, 10 June 1997, 2175.

23 *Special report of the Government Administration Committee Seeking Authority from the House to Undertake an Inquiry into the Relationship Between the Role of Members of Parliament and their Outside Interests*, presented to the House of Representatives, October 1997 (1.5B).

24 Above n 23, 4.

25 Above n 23, 4.

election) expect there to be some form of job description. As there is none, many seek guidance in an ad hoc way concerning the norms and rules of conduct and behaviour that are appropriate in and outside the House.

The report of the Government Administration Committee investigated the position in the British House of Commons and Australia. While the House of Commons has a code of conduct applicable to its members,[26] the Australian House of Representatives, like its New Zealand counterpart, does not have such a code.[27]

The Committee also considered the need for a register of members' interests to act as a deterrent against improper behaviour on the part of members, to restore public confidence in the political system, to cope with the advent of mixed member proportional representation (MMP) and to facilitate the general desire for more openness and transparency with regard to political processes. It referred to the guidelines to which Ministers are subject, and said there were a number of advantages which might flow from the establishment of a register of members' interests including providing a check against corruption and protecting members against charges of self interest. It acknowledged, however, that such a register may prove overly intrusive and act as a disincentive to those considering life in politics.[28] The scope of a register was not discussed in any detail, although reference was made to a statement in the House by Mr Ryall, MP, who suggested the register should detail the following financial information:

- Shareholdings, trusts, real estate, business directorships and partnerships.
- Substantial sources of income.
- Gifts, sponsored travel and entertainment, memberships of organisations.
- Liabilities.
- Financial interests of spouses.

The report also referred to overseas experience and noted that approximately 37 parliaments throughout the Commonwealth have in place measures akin to registers of members' interests. [29]

---

[26] However there are detailed requirements about disclosure of Members' interests in the Australian House of Representatives. See further Standing Order 28A of the Standing Orders of the House of Representatives, Australia, published as Appendix B to the Special Report of the Government Administration Committee presented to the New Zealand House of Representatives in 1997, above n 23.

[27] Above n 26, 9.

[28] Above n 26, 9.

[29] See also G Carney *Conflict of Interest : A Commonwealth Study of Members of Parliament, Legal Division,*

The report concluded that New Zealand had recently undergone a fundamental political reform in the shape of MMP and that there was a desire on the part of many politicians and the public for certain standards and rules to be more clearly identified, and this could warrant the creation of a code of conduct for parliamentarians.[30]

III THE ONTARIO POSITION

The Members' Integrity Act 1994,[31] which came into force on 6 October 1995, is comprehensive yet concise legislation applying to all members of the Ontario Legislative Assembly. There are also specific additional guidelines for Executive members. The Act's key features are: first, Ontario chose to legislate in this area, rather than create a self-imposed code of conduct for its elected members; second, an Integrity Commissioner is responsible for overseeing the Act's administration. Though an officer of the Assembly, the Commissioner is considered to be a more separate and independent party than someone appointed from the Assembly; third, the Act and therefore the Commissioner oversees the conduct of all elected members, including those in the Executive.[32]

It is not entirely clear why Ontario chose to deal with this subject by way of legislation rather than a self regulating code. The legislation received all three readings and the Royal Assent within 24 hours, and there is nothing in the Hansard of the Legislative Assembly to indicate why legislation was preferred to a code.[33] The Act was said simply to put into effect recommendations from the then Conflict of Interest Commissioner, Justice Gregory Evans, who was authorised to administer the former Members' Conflict of Interest Act. Justice Evans had reviewed the workings of the earlier legislation and worked with legal counsel representing all three parties in the Legislative Assembly to draft the bill.[34] The purpose of the amendments was said to broaden the scope of the Act to deal with parliamentary tradition as well as conflict of interest in the economic sense. In moving the

---

report prepared for the Commonwealth Secretariat, December 1992. This is a comparative study of conflict of interest legislation and guidelines within the Commonwealth in relation to MPs and was commissioned by the Commonwealth Secretariat for the Commonwealth Parliamentary Association in 1988. Mr Carney is Associate Professor of Law at Bond University, Queensland, Australia.

30 Above n 23, 11. The Committee suggested its work could inform the Standing Orders Committee when that committee comes to consider amendments to the Standing Orders.

31 Formerly the Members' Conflict of Interest Act 1988.

32 The first Ontario Commissioner was the Hon Gregory T Evans and, after some partisan debate within the Provincial Assembly, a new Commissioner, the Hon Robert C Rutherford, has now been appointed.

33 The full debate is contained in the Official Report of Debates (Hansard) in the Legislative Assembly of Ontario (3rd Session, 35th Parliament) Thursday 8 December 1994, 8453, 8459-8515.

34 Above n 33, 8453: the speech of the Hon Brian A Charlton, Chair of the Management Board of Cabinet and Government House Leader in introducing the Bill.

first reading, the Hon Brian A Charlton said that it was hoped the amendments would clarify members' responsibilities and "take the partisan political wrangling out of conflict of interest issues".[35]

The first of four points in the preamble to the Members' Integrity Act 1994 states:

> "It is desirable to provide greater certainty in the reconciliation of the private interests and public duties of members of the Legislative Assembly, recognising the following principles:
>
> 1 The Assembly as a whole can represent the people of Ontario most effectively if its members have experience and knowledge in relation to many aspects of life in Ontario and if they can continue to be active in their own communities, whether in business, in the practice of a profession or otherwise.

This first principle is very important and deserves close consideration. It emphasises the need for politicians to have experience and knowledge about the outside world and to continue to be active in their communities. A common complaint made about politics both here and elsewhere is that the political class has narrowed increasingly in recent years and that this should be a source of major concern. This concern was expressed very well by the former British Foreign Secretary, Douglas Hurd, now Lord Hurd of Westwell, when he said about Westminster:[36]

> 40 years ago there was no ladder which went upwards from university or school directly into national politics. In practice, a young man or woman interested in politics had to go and do something else for 15 years before they could seriously be considered as an MP. That has changed. The palace of Westminster is thronged with eager young men and women who have done nothing but politics all their lives. The highly professional politician is particularly vulnerable to the single issue and the pressure groups. They have not learned in practical work-a-day careers how to balance conflicting interests before they reach a decision. The number of MPs with outside experience who could provide a counter-weight to the more professional politicians has greatly reduced, even in my political lifetime. This narrowing of experience also threatens to unbalance the relationship between Ministers and civil servants. A Minister should complement the analytical skills of the permanent officials. He should not be an official with an ideology.

---

[35] Above n 33, 8453.

[36] Douglas Hurd, "The Whig Illusion", *Prospect*, London, England, February 1997, 3. (Also available at [http//www.prospect-magazine.co.uk/highlights/whig_illusion/index.]).

Lord Hurd also referred to the report by Lord Nolan on standards in public life[37] and contended that quite unwittingly as a result of that report, the House of Commons may be moved further in the wrong direction: [38]

> If as a matter of principle we insist on full time MPs - in order to avoid the problem of sleaze associated with outside interests - then we are consenting to this narrowing of the political class. Politicians will get more like civil servants and, perhaps, vice versa. I would greatly prefer to see a substantial minority of the House of Commons spending part of their time on outside activity and bringing to the House of Commons, under strict rules and with total transparency, up to date insights and experience from the real world.

The same dangerous developments which Lord Hurd identified as happening in Westminster are also occurring in Wellington. The political class is starting to narrow in this country notwithstanding the recent change to New Zealand's electoral system and the enlargement of the House of Representatives. The issue is not whether there are more women and minorities represented in Parliament, but whether there are more experienced people who are leaders in commerce, the professions and other walks of life who can make a real contribution to public life. If anything Parliament has less of these types of people than ever, and more MPs who fall into the category of professional politicians. It seems contrary to experience and commonsense to accept that someone who makes his or her career as a full time politician spending other people's money and dictating rules is really capable of serving the public good or the national interest.

The first part of the Ontario legislation contains provisions which apply to all members of the Assembly. There are specific provisions dealing with conflicts of interest, the use and communication of insider information, the wielding of influence so as to further a member's private interest or improperly further another person's private interest. [39] There are also specific requirements about gifts and their disclosure (including the treatment of such benefits as travel points); [40] rules regarding Government contracts with members; [41] and finally, a detailed procedure which is required to be followed in the case of conflicts of interest. A member of the Assembly who has reasonable grounds to believe that he or she has a conflict of interest in a matter which is before the Assembly or the Executive Council

---

37 *First Report of the Committee on Standards in Public Life* (1995) Cm 2850.

38 Above n 36, 3. On professional politicians and their dubious contribution to the public good, see also P Johnson *A History of the Modern World*, (Weidenfield and Nicolson, London, 1983) 729.

39 Sections 3 and 4.

40 Section 6.

41 Section 7.

is required to disclose the general nature of the conflict and withdraw from the meeting without voting or participating in the consideration of the matter. [42]

Given the first principle in the preamble, section 9 is significant. It provides:

> 9 Nothing is this Act prohibits a member of the Assembly who is not a member of the Executive Council from, (a) engaging in employment or in the practice of a profession; (b) receiving fees for providing professional services under the Legal Aid Act; (c) engaging in the management of a business carried on by a Corporation; (d) carrying on a business through a partnership or sole proprietorship; (e) holding or trading in securities, stocks, futures and commodities; (f) holding shares or an interest in any corporation, partnership, syndicate, cooperative or similar commercial enterprise; (g) being a director or partner or holding an office, other than an office that a member may not hold under another Act.

Current and former members of the Executive Council (Ministers) are held to an even higher standard than regular MPs. Ministers are required to follow certain rules of conduct even after their term in office has expired. [43]

Provisions within the Act govern a number of aspects of a Minister's life. These include a prohibition on outside activities (including the practice of a profession, management of a business or holding a directorship or office); a restriction on investments (a member may not hold or trade in securities, stocks, futures or commodities); partnerships and sole proprietorships (a member may not carry on business through a partnership or sole proprietorship); or even acquisition of land (a member shall not, directly or indirectly, acquire an interest in real property, except for residential or recreational use by the member or a person who belongs to his or her family). A member may, however, entrust his or her assets to one or more trustees on terms which shall be approved by an officer of the Assembly known as the Integrity Commissioner.[44] This person is critical to the successful operation of the Act. He or she shall be appointed for a term of five years by the Lieutenant Governor of Ontario. There are a number of routine provisions in the Act requiring the Commissioner to report annually to the Office to the Speaker. That report may summarise advice given by the Commissioner, but shall not disclose any confidential information which could identify the person concerned. The Commissioner also has the

---

[42] Section 8.

[43] Section 18.

[44] Sections 10-17.

power to provide opinions and recommendations on request or, at his or her initiative, conduct inquiries. [45]

There are a number of restrictions applicable to former members of the Executive Council. For example, during the 12 months after the date a member has ceased to hold office, he or she may not accept a contract or benefit which is awarded, approved or granted by the Executive Council, one of its members or an employee of the Ministry. A former member also may not take part in ongoing transactions for negotiations which began while he or she held office. Anyone doing so is guilty of an offence and is liable, on conviction, to a fine of not more than $50,000. [46]

The third part of the Act deals with the all important question of disclosure. Within 60 days of being elected and thereafter once a year on a date to be established by the Commissioner, every member must file a private disclosure statement which shall: [47]

(a) Identify the assets and liabilities of the member and his or her spouse and minor children, and state the value of the assets and liabilities;

(b) State any income the member and his or her spouse and minor children have received during the preceding 12 months or are entitled to receive during the next 12 months, and indicate the source of the income;

(c) State all benefits the member, his or her spouse and minor children, and any private company in which any of them has an interest, have received during the preceding 12 months or are entitled to receive during the next 12 months as a result of a contract with the Government of Ontario, and describe the subject matter and nature of the contract;

(d) If the private disclosure statement mentions a private company:

  (i) include any information about the company's activities and sources of income that the member is able to obtain by making reasonable inquiries, and

  (ii) state the names of any other companies that are its affiliates, as determined under subsections 1(2)(6) of the Securities Act;

(e) List all corporations and other organisations in which the member is an officer or director or has a similar position; and

---

45 Section 31. Note that the Commissioner may elect to exercise the powers of a commissioner under the Public Inquiries Act 1980, the equivalent of the Commissions of Inquiry Act 1908 (NZ).

46 Section 20(3).

47 Section 20(4).

(f) Include any other information that the Commissioner requires.

Once the private disclosure statement has been filed the member, and the member's spouse if available,[48] are required to meet with the Commissioner to ensure that adequate disclosure has been made.[49] Members have an ongoing obligation to advise of any material change.[50]

Having received this information, the Commissioner is required to prepare a public disclosure statement on the basis of information provided by the member. The statement states the source and nature, but not the value of the income, assets and liabilities of the member. It also lists the names and addresses of all the persons who have an interest in those assets and liabilities, and identifies any contracts with the Government of Ontario, describing their subject matter and nature. Where a member of the Executive Council is concerned, the provisions are even more stringent.[51]

Certain private interests are excluded, such as assets or liabilities worth less than $2,500, a principal residence and cash on hand.[52] The Commissioner may also withhold information from the public disclosure statement if, in his or her opinion, the information is not relevant or a departure from the general principle of public disclosure is required.[53]

There are very detailed provisions about enforcement. A member of the Assembly who has grounds to believe that another member has contravened the Act or Ontario Parliamentary convention (a term often referred to in the Act but not defined) may request the Commissioner to give an opinion as to the matter.[54] The request is to be in writing and set out the grounds of the belief and the contravention alleged. The request is then tabled and referred to the Commissioner by the Assembly or the Executive Council, whereupon the Commissioner may conduct an inquiry after giving reasonable notice to the member

---

48 As defined in s 1. It does not include a person from whom the member is separated.

49 Section 20(3).

50 Section 20(4).

51 Section 21(3).

52 Section 21(4).

53 Section 21(5).

54 See generally s 30.

whose conduct is the subject of investigation.[55] A copy of the Commissioner's opinion is given to the member whose conduct is concerned.[56]

The Commissioner need not conduct an inquiry where the matter is frivolous, vexatious or not requested in good faith or where there are no grounds or insufficient grounds.[57] The Commissioner may recommend that no penalty be imposed, that the member be reprimanded, that the member's right to sit and vote in Assembly be suspended for a specified period or until a condition imposed by the Commissioner is fulfilled, or even that the member's seat be declared vacant.[58]

The Assembly has an obligation, once it has received the report, to consider and respond to the report within 30 days. The Assembly may approve the recommendation and order the penalty be imposed, or reject the recommendation, in which case no penalty shall be imposed. The Assembly does not have the power to inquire further into the contravention, to impose a penalty if the Commissioner has recommended that none be imposed, or impose a penalty other than the one recommended. The Assembly's decision is final and conclusive.[59]

An interesting question is whether or not a person in the position of the Commissioner can be the subject of an application for judicial review.[60] Recent authority from the English Court of Appeal would indicate that a person in the position of the Commissioner should not be able to be judicially reviewed. In *R v Parliamentary Commissioner for Standards, ex parte Al Fayed,* Mohammad Al Fayed sought leave to apply for judicial review in relation to a report by the House of Commons Parliamentary Commissioner for Standards.[61] Al Fayed contended that Michael Howard, a former Secretary of State for Home Affairs as well as an MP, received a corrupt payment.[62] The Parliamentary Commissioner for Standards

---

55 Inquiry of the Office of the Integrity Commissioner indicates that this power had not, at the time of writing, been exercised.

56 See generally s 31.

57 Section 31(5).

58 Section 34(1).

59 Section 34(5). Note also very importantly s 34(4) - Notwithstanding the powers contained in s 46 of the Legislative Assembly Act, the Assembly does not have power to inquire further into any contravention, to impose a penalty if the Commissioner has recommended that none be imposed, or to impose a penalty other than the one recommended by the Commissioner.

60 Inquiry of the Office of the Integrity Commissioner indicates that such an application had not, at the time of writing, been brought.

61 *R v Parliamentary Commissioner for Standards, Ex parte Al Fayed* [1998] 1 All ER 93.

62 Michael Howard is said to have been the worst Home Secretary in the history of that office - see I Gilmour and M Garnett *Whatever Happened to the Tories* (Fourth Estate, London 1997) 384.

concluded that Howard had no case to answer. Al Fayed applied for judicial review. In his submissions for Al Fayed, Pannick QC suggested that there were strong similarities between the position of a Parliamentary Commissioner for Standards and the Ombudsman. The Court having concluded that the Ombudsman was subject to judicial review, he submitted it would be inconsistent for the Parliamentary Commissioner for Standards not to be subject to the supervision of the Court on an application for judicial review.

The Court of Appeal disagreed. It recognised the similarity between the two officers but also saw a significant distinction which it regarded as critical: [63]

> The activities of the Ombudsman are in relation to what I will call loosely the "administration"; they are not in relation to the activities of Parliament. The Ombudsman investigates the activities of government. Activities of government are the basic fare of judicial review. Activities of Parliament are not the basic fare of judicial review.

The Court of Appeal said it was not concerned with what it was alleged Howard had done, but rather the nature and the role of the Parliamentary Commissioner for Standards. What he was doing was directly related to what happened in Parliament. It was that which highlighted the distinction in the role between the Parliamentary Commissioner for Standards and the Ombudsman. Whereas the Ombudsman was looking at what happens in relation to the administration by government: [64]

> [t]he focus of the Parliamentary Commissioner for Standards ... is on the propriety of the workings and the activities of those engaged within Parliament. He is one of the means by which the Select Committee set up by the House carries out its functions, which are accepted to be part of the proceedings of the House. This being the role of the Parliamentary Commissioner for Standards, it would be inappropriate for this Court to use its supervisory powers to control what the Parliamentary Commissioner for Standards does in relation to an investigation of this sort. The responsibility for supervising the Parliamentary Commissioner for Standards is placed by Parliament, through its Standing Orders, on the Committee of Standards and Privileges of the House, and it is for that body to perform that role and not the courts.

Accordingly, any member of the general public aggrieved by the decision of a person in the position of the Integrity Commissioner or Parliamentary Commissioner for Standards would be required to complain to Parliament and not seek redress in the courts.[65]

---

[63] Above n 62, 96.

[64] Above n 62, 97.

[65] Presumably this would apply even if the Commissioner exercised his or her power to conduct a public

IV THE OTTAWA POSITION

A different approach has been taken to the subject in Ottawa. In March 1996, the Senate and House of Commons adopted resolutions which included the following: [66]

> That a special committee of the Senate and the House of Commons be appointed to develop a code of conduct to guide Senators and Members of the House in reconciling their official responsibilities with their personal interests, including their dealings with lobbyists;
>
> That the committee be directed to consult broadly and review the approaches taken with respect to these issues in Canada and in other jurisdictions with comparable systems of government.

As in New Zealand, there were several existing provisions regarding conflicts of interest and conduct for parliamentarians. These rules were not consolidated in a single statute like in Ontario, but were found in the Parliament of Canada Act, the Criminal Code, the Rules of Senate, the Standing Orders of the House of Commons and the Conflict of Interest in Post Employment Code for Public Office Holders.[67] The Joint Committee considered that many of these provisions were antiquated and dealt only with limited situations. It recognised that more up-to-date and relevant rules were required, both to guide politicians and to ensure the Canadian public that high standards of conduct applied.[68]

The Joint Committee did not recommend a legislated code as in Ontario. They considered the best option to regulate the conduct of parliamentarians was to establish a code of official conduct which was non-legislated and self-imposed.

The key features of the Code are first the creation of, a parliamentary officer, known as the Jurisconsult, who is appointed jointly by the Senate and the House.[69] Like the Commissioner in Ontario, this individual would be responsible for receiving disclosure from parliamentarians, preparing the public disclosure documents, advising parliamentarians on matters related to the code of official conduct, investigating complaints regarding conduct, and referring matters requiring an inquiry to the Joint Committee.[70] The second key feature of the Code is that the Jurisconsult would be under

---

inquiry under the Public Inquiries Act 1980 - the Ontario equivalent of the Commissions of Inquiry Act.

[66] The Second Report of the Special Joint Committee of the Senate and House of Commons, 1 [http://www.parl.gc.ca/committees352/sjcc/reports/02_1997-03/sjcc-02-cov-e.html].

[67] Above n 66.

[68] Above n 66.

[69] Above n 66, 10.

[70] Above n 66.

the direction of a new Joint Committee of the Senate and House on official conduct.[71] The Committee would have the authority to deal with all matters related to the Code and both the Senate and House would be responsible for determining any penalties for non-compliance. Thus, the Jurisconsult would have much less independence from the House of Commons and Senate than the Commissioner in the Ontario Assembly.[72] The Jurisconsult's role would likely be limited to dealings with regular MPs rather than with Ministers, public officers and other Executive members. As with the Ontario Act, the Code contains detailed provisions requiring all parliamentarians to disclose confidentially their financial assets, liabilities, sources of income and positions.[73] Senators and members of the House would also be required to disclose confidentially the financial affairs of their spouses and dependants and there would be detailed rules on the receipt of gifts and personal benefits; and rules regarding undue influence, insider information and parliamentarians furthering their private interests.[74]

As with the Ontario legislation, there is recognition in the report of the special Joint Committee of the desirability of MPs maintaining a wide variety of activities outside Parliament to enable parliamentarians to reflect better the communities from which they come and to maintain expertise in their chosen fields. Thus there is nothing in the proposed Code which prevents a parliamentarian or a public office holder from engaging in employment or the practice of a profession, carrying on a business or being a director or partner, so long as the parliamentarian continues to be able to fulfil his or her obligations under the Code.[75]

The Bloc Québecois dissented from the Committee's majority report and complained about the fragmented piecemeal approach to the issue of parliamentary ethics. It said that only a global approach dealing with all issues would be satisfactory, and was particularly critical that the proposed code of conduct was not associated with legislation on the democratic funding of political parties or on the need for the reform of the Lobbyists Registration Act.[76]

---

71 Above n 66.

72 He or she may be removed at any time on a joint resolution of the House and the Senate.

73 Code of Official Conduct, Ottawa, 8.

74 Above n 73.

75 Above n 66, 4.

76 Above n 73, dissenting report, 1.

V THE ENGLISH POSITION

On 24 July 1996 the House of Commons approved a code of conduct together with a guide to the rules relating to the conduct of its members.[77] The purpose of the code was said to be to assist members in the discharge of their obligations to the House of Commons, their constituents and the public at large.[78] The code itself is not a long document, and is supplemented by the guide which is designed to assist members to discharge the duties placed upon them by the code. There are two key parts to the code of conduct. The first part emphasises the duty members have to act in the interests of the nation as a whole; and a special duty to their constituents.[79] The second part of the code addresses issues of personal conduct and emphasises that members are required to base their conduct on a consideration of the public interest, avoid conflict of interest situations, and conduct themselves at all times in a manner which will strengthen the public's confidence in Parliament. Accordingly, no member shall, for example, act as a paid advocate in any proceeding of the House and will be required to comply with the requirements of the House in respect of registration of interests.[80] The main purpose of the register of members' interests is "to provide information of any pecuniary interest or other material benefit which a member receives which might reasonably be thought by others to influence his or her actions, speeches or votes in Parliament, or actions taken in his or her capacity as a Member of Parliament". There are 10 categories of registrable interests: [81]

- Remunerated directorships in public and private companies;
- Remunerated employment, office or profession which is remunerated or in which the member has any pecuniary interests. (This includes Lloyds memberships).
- Any sponsorship prior to an election where, to the members' knowledge, the financial support in any case exceeded 25% of the election expenses, and other form of sponsorship or support as an MP which involves any personal payment, benefit or advantage. This category deals with sponsorship by companies, trade unions, and professional bodies.
- Gifts, benefits and hospitality.

---

77 The Code of Conduct, together with The Guide to the Rules Relating to the Conduct of Members, approved by the House of Commons on 24 July 1996 Available at: [http://www.parliament.the-stationery-office.co.uk/pa/cm199697/cmselect/cmstand/688/codefc.htm].

78 Above n 77,1.

79 Above n 77.

80 Above n 77, 2.

81 Above n 77, 1.

- Overseas visits where the cost was not wholly borne by the member or by United Kingdom public funds.
- Overseas benefits and gifts.
- Any land or property, other than any home used for the personal residential purposes of the MP or his or her spouse, which has a substantial value or from which a substantial income is derived.
- Shareholdings (either personally, or with or on behalf of the MPs' spouse or dependent children).
- Any relevant interest, not falling within one of the above categories, which nevertheless falls within the definition of the purpose of the register which is to "provide information of any pecuniary interest or other material benefit which a member receives which might reasonably be thought by others to influence his or her actions, speeches, or votes in Parliament, or actions taken in his or her capacity as a Member of Parliament," or which the member considers might be thought by others to influence his or her actions in a similar manner, even though the member receives no benefit.

There are very clear rules prohibiting paid advocacy.[82] The guideline states that it is wholly incompatible with the advocacy rule that any member should take payment for speaking in the House. Nor may a member, for payment, vote, ask a parliamentary question, table a motion, introduce a bill or table or move an amendment to a motion or bill or urge colleagues or Ministers to do so.

---

[82] Above n 7, Part 3 of the Guide. On 6 November 1995 the House of Commons had agreed to the following resolution relating to paid advocacy:

> It is inconsistent with the dignity of the House, with the duty of a member to his constituents, and with the maintenance of the privilege of freedom of speech, for any member of this House to enter into any contractual agreement with an outside body, controlling or limiting the member's complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body in relation to any matters to be transacted in Parliament; the duty of a member being to his constituents and to the country as a whole, rather than to any particular section thereof; and that in particular no member of the House shall, in consideration of any remuneration, fee, payment or reward or benefit in kind, direct or indirect, which the member or any member of his or her family has received is receiving or expects to receive (i) advocate or initiate any cause or matter on behalf of any outside body or individual, or (ii) urge any other member of either House of Parliament, including Ministers, to do so, by means of any speech, question, motion, introduction of a bill or amendment to a motion or a bill.

Finally, a procedure is specified for complaints.[83] They are to be addressed in the first instance to the Parliamentary Commissioner for Standards. If the Commissioner is satisfied there is a prima facie case, he or she will ask the member to respond to the complaint and will then conduct a preliminary investigation. If it is found after some inquiry that there is no prima facie case, that conclusion will be reported to the Select Committee. If on the other hand, there is a prima facie case, the Committee will be advised of this fact. The Committee on Standards and Privileges has power to send for persons, papers and records; to order the attendance of any member before it; and to require that specific documents in the possession of a member relating to its inquiries or to the inquiries of the Commissioner be laid before it. The Committee will then make recommendations to the House on whether further action is required.[84]

VI WHICH WAY FOR NEW ZEALAND?

The tide of opinion appears to be running in favour of a code of conduct for MPs and rightly so. Because of the extraordinary number of allegations made about ethical standards in the last 12 months, it is essential for a positive step to be taken for the reasons given by Mr Ryall MP. The public is entitled to expect the highest standards from its MPs, and in many cases, it is not getting that. A self regulated code of conduct is inadequate. In 1992, MPs were asked by a bipartisan group of their colleagues to sign a code of conduct aimed at restoring public respect. That code committed each MP, among other things:[85]

- to conduct himself or herself at all times in the Chamber in a manner which will enhance public respect for Parliament;
- to extend courtesy to other MPs and the public at all times within the precincts of Parliament;
- to exercise restraint in all references to persons outside the House, and in particular to respect any order made by a court restraining references to a person on a matter before the court;
- not to interject in an abusive or disruptive fashion;
- to behave courteously when asking questions of Ministers in the House; and
- to provide courteous and substantive Ministerial answers to questions.

---

[83] Above n 7, Part 4 of the Guide.

[84] Above n 77, para 73.

[85] "MPs asked to make a pledge on conduct", *New Zealand Herald*, 8 August 1992, 5.

Nothing further has been heard about the code of conduct although the sentiments expressed in it are very important and should be observed. Since the new MMP Parliament convened, there has been no mention of a similar code of conduct for the new MMP world. Unfortunately voluntary codes of this nature are dependent on the goodwill and enthusiasm of individual MPs and this is an insufficient basis upon which to raise standards in Parliament.

Any code should be incorporated in legislation. That part of the code which deals with disclosure of member's assets and liabilities should ideally be administered by an independent commissioner as in Ontario, appointed by the Governor-General in Council for a term of five years and should only be able to be removed on those grounds applicable to Judges of the High Court. Any code of conduct should also address the issues of conduct raised in the 17 point code referred to above and issues relating to the way in which an MP carries out his or her functions, including appearing on radio programmes and issues relating to travel expenses.

One immediate response to this call for a code will be that it is all too difficult and one should rely on the good judgment of the individual parliamentarians concerned. As to the latter, recent experience has shown one cannot rely on individuals to behave properly. Laments about the difficulty of introducing such a code are reminiscent of the never ending debate within the New Zealand Council for Legal Education about the so-called difficulties of requiring law students to undertake a course in ethics and professional responsibility as a pre-requisite for admission to the Bar. After much debate, and over the objections (surprisingly) of several of the deans of the law faculties, the Council late last year resolved that ethics and professional responsibility will become a compulsory course for those wishing to be admitted to the Bar after 30 June 2000. A working group is now finalising the curriculum for the new course. Once a commitment is made, many of the supposed difficulties then evaporate.

The change to MMP was supposed to herald a new and kinder Parliament. If anything, the institution is held in lower regard than ever. Putting aside the question about whether many MPs are competent and experienced enough to do the job, one must say there are real questions about whether some MPs know what is expected of them and whether they need the guidance of a code of conduct to help them improve their performance. It is also a source of some regret that, when considering a code, one must also consider once again questions about courtesy and exercising restraint in and around the House. Including such matters in a code of conduct may make the code seem pompous and even pious but certain incidents which have occurred in the last 12 months would indicate they are necessary.

The Members' Integrity Act 1994 of Ontario provides excellent guidance on the way forward, and it is submitted that it is the model which should be adopted by New Zealand politicians who need to improve their performance in a number of respects and act with

the integrity and courtesy which is expected of those who are privileged enough to serve in public life.