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Codes of conduct for MPs: a step to enhancing trust

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Abstract

A key factor in public support for democratic governance is the trust that citizens place in their parliament. This in turn is a product of the conduct of the parliamentarians who constitute each house of the particular parliament.

This conduct is of two types:

- (i) the manner in which parliamentarians approach their responsibilities to represent, make or unmake government, legislate (including budget-making), scrutinise the Executive, and address grievances;
- (ii) the ethical standards that parliamentarians apply to their personal conduct whilst holding public office.

This conduct may be regulated through two forms of control:

- (iii) the common law public trust principle whereby parliamentarians are public officers entrusted with responsibility for the public trust; and,
- (iv) codes of conduct (and like instruments) which guide parliamentarians' personal conduct, provide for investigation of alleged breaches and enable sanctions for breaches.

This paper reports research into codes of conduct, provisions for investigations and sanctions adopted amongst the almost 200 houses of national and subnational Commonwealth parliaments. About one half of houses reported having a code of conduct. However, provisions for investigating allegations and imposing sanctions for breaches varied widely in design and application.

Recommendations are made for the design and enforcement of codes of conduct.

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Introduction

This paper examines codes of conduct for MPs as they affect trust in parliament in the contemporary world. We argue that the conduct for members of parliament (MPs) is a major factor affecting trust in parliament.

Trusting MPs with responsibility for the public trust

There are two relevant, distinct uses of the word “trust” in English language literature as it applies to parliaments and MPs, which it is important to distinguish. In the context of parliaments, the more common use relates to the relationship between the citizens and their MPs, summed up in a Guardian Poll as: “trust politicians to act with honesty and integrity” (Guardian, 2011).

The second usage relates to the public trust exercised by MPs i.e. powers entrusted in the MP or the institution of the parliament. The terms “public trust” and “entrusted” do not always translate into other languages with exactly the same meanings. The English language meaning is explained by Lusty in the following way:

The central thesis of the doctrine of representative government is that all powers of government are derived from, ultimately belong to, and may only be exercised for and on behalf of, the people. It follows that persons entrusted with such power owe a fiduciary “duty of loyalty” to the public. Indeed, it is widely accepted that public office is a “public trust” and public officials are “trustees” (Lusty, 2014, pp.337-8)

The concept of the public trust has some parallel in effect to the Napoleonic code’s application of the concept of *res communes (omnium)* (Bailey, Farrell, & Mattei, 2014) i.e. “the common heritage of all humankind, not subject to the appropriation by or sovereignty” (Fellmeth & Horwitz, 2009).

Codes of conduct are of course intended to guide and influence MPs behaviour, to curb behaviour that undermines public respect for offending MPs and by association MPs in general and hence the parliamentary institution. The underlying premise is that an awareness of ethical behaviour by members of parliament will enhance the “duty of loyalty” to the public exercised by parliamentarians.

The authors argue that ethical responsibility is both an individual responsibility and a collective

ethical norm. This understanding that responsibility may be a collective norm assists explanation of mass departures from ethical standards, such as the UK House of Commons "moats and dovecots" allowances scandal (The Telegraph, 2015, 2016).

It is this undermining of respect that derogates from the public's trust in the parliament. As parliament is the peak institution in parliamentary systems of government, a code of conduct applying to the members who constitute a parliament has the potential to be a key factor in public support for democratic governance.

Underpinning the functions of parliaments are the principles of fiduciary duty and public trust. According to these principles, the parliament must act in the best interests of the polity on whose behalf it acts. This extends to acting for the common social good, protecting wellbeing, and protecting assets held in common, such as waterways and the atmosphere to give but two obvious examples. By ratifying the United Nations Framework Convention on Climate Change (UNFCCC), countries have that accepted that they would be guided by principles including that they should 'protect the climate system for the benefit of present and future generations of humankind' (United Nations Framework Convention of Climate Change (UNFCCC), 1992).

In Commonwealth and many other jurisdictions, members of parliaments have been held to be public officers and hence legally obliged to uphold and discharge these principles.

Available standards

The paper's argument is in the context of the one known international standard for parliaments and legislatures in general -the 2006 *Recommended Benchmarks for Democratic Legislatures*, developed by the Commonwealth Parliamentary Association, United Nations Development Programme, & World Bank Institute. The Benchmarks include:

ETHICAL GOVERNANCE

10.1 Transparency and Integrity

10.1.1 Legislators should maintain high standards of accountability, transparency and responsibility in the conduct of all public and parliamentary matters.

10.1.2 The Legislature shall approve and enforce a code of conduct, including rules on conflicts of interest and the acceptance of gifts.

10.1.3 Legislatures shall require legislators to fully and publicly disclose their financial assets and business interests.

(Commonwealth Parliamentary Association, United Nations Development Programme, & World Bank Institute, 2006).

This Benchmark is consistent with contemporary literature which suggests that Codes of conduct should “ensure the highest ethical standards, not only to guarantee the integrity of the office and public confidence in the assembly, but also to allow legislators freedom in their legislative activities” (National Democratic Institute for International Affairs (NDI), 2007, p. 64).

When these Benchmarks were adopted in 2006, there were no corresponding recommendations concerning the desirable features of Codes of conduct applying to the MPs who constitute a parliament, nor how Codes should be adopted or enforced.

Pressure for greater integrity continued to grow. Increased interest in the functioning of parliaments coincided with a wider concern with integrity in systems of government, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Organisation for Economic Co-operation and Development (OECD), 2019), the United Nations Convention Against Corruption (UNCAC) (United Nations, 2004).

The National Integrity System (NIS) applies a systemic approach (Transparency International, 2011). An NIS aims to facilitate ethical conduct and reduce risks of corrupt behaviour through a system of structural and behavioural features. An NIS explicitly includes the parliament as one of the system’s pillars.

The Open Government Partnership (OGP), is a initiative now involving 79 governments that includes a focus on integrity issues. OGP partner countries make commitments to specific reforms consistent with overarching principles that include: “Implement the highest standards of professional integrity throughout our administrations” (OGP, 2011). Reforms are implemented over a two year cycle. A number of parliaments are using OGP to make reforms that enhance their openness, transparency and integrity.

Codes

Codes of conduct for MPs were recommended in the 2006 Benchmarks for legislatures (Commonwealth Parliamentary Association, United Nations Development Programme, & World Bank Institute, 2006). This led the CPA Secretariat to commission my team to draft recommendations for codes of conduct. This reflects the CPA’s Statement of Purpose: it “connects, develops, promotes and supports Parliamentarians and their staff to identify benchmarks of good governance and the implementation of the enduring values of the

Commonwealth” (Commonwealth Parliamentary Association (CPA), 2018). The CPA has over 180 houses of parliament affiliated as Branches.

Stapenhurst and Pelizzo indicate that Codes

have generally taken two main forms: ethics codes and conduct codes. Ethics codes tend to be fairly general documents: they formulate broad principles of behavior but they do not define what is appropriate and what is inappropriate behavior, nor do they establish sanctions for violations of the code. By contrast, codes of conduct tend to contain very specific provisions with clear sanctions for those who violate the dispositions of the code (Stapenhurst & Pelizzo, 2004, Foreword).

This conduct addressed by codes is of two main types:

- (i) the manner in which parliamentarians approach their responsibilities to represent, make or unmake government, legislate (including budget-making), scrutinise the Executive, and address grievances; and
- (ii) the ethical standards that parliamentarians apply to their individual conduct whilst holding public office.

This conduct may be subject to two forms of control (i.e. regulation):

- (iii) the common law public trust principle whereby parliamentarians are public officers entrusted with responsibility for the public trust; and,
- (iv) codes of conduct (and like instruments) which guide parliamentarians’ personal conduct, provide for investigation of alleged breaches and enable sanctions for breaches.

This paper reports research into codes of conduct, provisions for investigations and sanctions adopted amongst the almost 200 houses of national and subnational Commonwealth parliaments.

Research Approach

As indicated, the research was in two stages. Stage One led to the adoption of the *Recommended Benchmarks for Codes of Conduct Applying to Members of Parliament* (Coghill, Neesham, & Kinyondo, 2015); Stage Two is continuing to develop recommendations for enforcement.

The process

Stage One involved three steps. Firstly, a review of the literature on codes of conduct in general (Brief, Dukerich, Brown, & Brett, 1996; Erwin, 2011; Guardian, 2011; Long & Driscoll, 2008; Sacconi, 1999; Schwartz, 2004; Sethi & Emelianova, 2006; Weaver, Trevino, & Cochran, 1999) and applying to MPs in particular (Baker, 2014; Gay, 2011; Hadden, 2002; Kellam & Integrity Commission (Tasmania), 2011; King Prajadhikok's Institute, 2009; Martini & Chene, 2013; Mawer, 2003; McKeown, 2012; Rozzoli, 1992; Stapenhurst & Pelizzo, 2004; Rick Stapenhurst & Riccardo Pelizzo, 2006; R. Stapenhurst & R. Pelizzo, 2006; Transparency International, 2013; Williams & European Centre for Parliamentary Research and Documentation (EPCRD), 2001).

The second step was a survey sent by email to all CPA branches, by the CPA Secretariat with a supporting letter from the Secretary General. Responses were requested in relation to each house of bicameral parliaments – 197 houses in total.

The majority of these houses of parliament – 141- responded, of which 104 reported that they had some form of code in place.

Provisions for investigating allegations and imposing sanctions for breaches varied widely in design and application. Virtually all had provision for some mild form of action such as admonition, censure, rebuke or reprimand, most allowed withdrawal of mandate (i.e. expulsion from the House) or imprisonment, and some codes provided for both.

Approximately 40 interviews with MPs and Clerks were conducted on the sidelines of the 60th Commonwealth Parliamentary Conference (October 2014, Yaounde, Cameroon). This interview data was then taken into account in drafting benchmarks.

The initial literature review and analysis of questionnaire data, documents and interview data were used to develop a consultation draft Benchmarks for Codes of Conduct for Parliamentarians. This was emailed to CPA parliaments and experts in the fields of legislative studies and legislative strengthening. Respondents made several important suggestions that were incorporated in the draft.

In step three, the final draft was debated in a three-day international workshop and adopted without dissent.

The content

The Benchmarks for Codes commence by highlighting the roles and functions of the parliament

and its MPs as public officers in a democracy. It sets out the principles on which a code should be founded. These principles draw on the 'Nolan' Principles of Standards in Public Life and certain other principles that complement them. The Nolan Principles are: selflessness; integrity; objectivity; accountability; openness; honesty; and leadership (Committee on Standards in Public Life (UK), 1995). This background then provides the context for the actual Benchmarks which provide guidance to a house on provisions to include in a new or revised Code of Conduct.

The Benchmarks are structured to: indicate the types of conduct to which a code would apply; provide for ethics advice; indicate processes for complaints; suggest appropriate sanctions, indicate processes for making and amending codes; and canvas sustaining a culture of ethical conduct.

FINDINGS

The research process outlined above yielded a wide range of findings that have been grouped and summarised into: types of conduct; institutionalisation of ethics advice; references to culture; advice on making and re-making a code; and advice on complementary provisions, enforcement and sanctions.

1. Types of Conduct

The types of conduct affected focus on MPs giving precedence to the interests of the polity ahead of interests of self, family, friends, businesses, campaign donors, political party, donors of foreign travel or any other source of influence. A code should require all MPs to immediately and continuously disclose all assets, income, liabilities and gifts. These continuous disclosures are to be published by the parliament and should be liable to verification if doubts arise as to their accuracy.

Gifts (including hospitality) are a particularly interesting category, as it is often claimed that the exchange of gifts is customary and that to decline a gift may cause offence. The solution is to require disclosure in all circumstance in which a gift may be perceived to risk influencing behaviour. Some parliaments may find it appropriate to allow a low threshold below which disclosure is not mandatory.

Other types of conduct covered by the Codes benchmarks include the misuse of public property and inducements such as cash for questions or other payment for performing a MP's roles.

2. Ethics Advice

Members of parliaments are likely to be faced with ethical issues that are uncommon or unknown in their prior occupations. Our research suggests that the adviser should be independent of any partisan or executive influence, should be appointed by a non-partisan process, safe from unjustified removal and be barred from investigating complaints about the conduct of any member.

The ethics adviser should be readily available and accessible, so that talking to him or her is something routine and unremarkable rather than raising suspicions that the MP is confronting a serious ethical problem.

Ethics advisors should be offering formative advice and should not take part in any enforcement mechanisms.

3. Significance of Culture

As discussed above, there is widespread acceptance that the culture among MPs is fundamental to compliance with acceptable standards of conduct. Stapenhurst & Pelizzo argue for the significance of cultural factors stating:

... that one of the success factors is whether the individuals that the code (...) regulates actually share the same ethical standards, have a common understanding of what is appropriate behavior and a common understanding of what constitutes misconduct (Stapenhurst & Pelizzo, 2004).

In one large parliament, some MPs encouraged each other to apply for allowances for expenses that were of dubious merit. Some other members of the same parliament regarded some such expenditure as ethically unjustifiable and declined opportunities to apply for the allowance (Interview 1 (HoC UK), 2014).

Recommendations

The recommendations for codes of conduct were published in 2015 (Coghill, Neesham, & Kinyondo, 2015). As will be seen, the recommendations propose that codes should combine features of both forms identified by Stapenhurst and Pelizzo (2004). The research is continuing in order to make further recommendations concerning enforcement.

The recommendations strongly advise that a Code must include:

1. Introductory and continuing education to assist Members to enhance their skills in ethical deliberation.
2. Induction which includes mentoring and experience-sharing activities involving both new and experienced Members.
3. Exemplary behaviour by those in leadership roles.
4. Endeavours to detect and act to deter even minor breaches from which serious breaches may develop.
5. Members being encouraged to consult with the Ethics Advisor before acting on a matter that raises ethical issues.
6. Each Member acknowledging and accepting provisions of his/her House's Code of Conduct when swearing an Oath or making an Affirmation.
7. Publishing and making available the Code to both Members and the public.
8. Ensuring that newly elected members receive induction in the Code of Conduct, and engaging in self-assessment of their individual ethical competence.
9. Encouraging discussions with the ethics adviser which shall be treated as routine and normal, with frequent informal contact between the ethics adviser and Members.
10. Requiring every Member to participate in activities to enhance their ethical competence on a regular basis. These activities could be online, if resources permit.
11. Requiring Members to provide evidence on a regular basis that they have read and understood the provisions of the Code
12. Endeavouring to adapt the Code to changing expectations of society with regard to ethical conduct (e.g. sexual harassment).

1. Making and Re-making a Code

The Codes benchmarks indicate that the Code should be developed with opportunities for every MP to participate and be adopted by resolution of the House. It should also be reviewed periodically as a matter of course and revised accordingly, again involving all MPs. This would have the effect of reminding MPs of provisions and the reasoning underpinning them, thus helping to sustain a culture of ethical conduct amongst MPs.

2. Complementary Provisions

The Benchmarks recognise that a Code of Conduct for Parliamentarians is part of a broader integrity system and accordingly notes a number of measures that lie outside the Code proper.

3. Enforcement

Codes of conduct require effective mechanisms for investigation of complaints alleging breaches of the Code. The major problem that arises is the temptation for MPs to defend members of their own political party or other close affiliation, making it difficult for an allegation to be dealt with.

Here one or more investigators must be fully independent and appointed by a non-partisan

process. All complaints must be directed to the Investigator and remain confidential. The Investigator must determine the facts of the allegation and if s/he finds evidence of a breach, it must be reported to the parliament.

4. Sanctions

The Code must include graduated sanctions (penalties). The Code must provide that where the Investigator has found a breach to have occurred, the parliament must decide on the appropriate sanction. Typically, sanctions range from an admonition to loss of mandate (i.e. expulsion from the parliament) although some extend to imprisonment.

Effects on Trust

Enhancing trust in parliament is a major reason for the introduction of Codes of conduct applying to MPs.

While we find no direct evidence to link sanctions for breaches of Codes of conduct with an increase in trustworthiness of MPs, the existence of a Code is a necessary but not sufficient condition for enhanced conduct.

We note that Members of the Canadian House of Commons felt that a rigorously enforced Code of conduct led to a more effective parliament (Interview by author 1, 2014). Accordingly we believe that the contribution of sanctions to establishing or reinforcing norms of ethical conduct is likely to improve perceptions that MPs are trustworthy. This in turn contributes to enhancing the public's trust in parliaments.

Conclusion

In the aftermath of reports from time to time of misconduct by Members of Parliament, our findings, the standards set by the Commonwealth Parliamentary Association (CPA) benchmarks and the emergence of the Open Government Partnership (OGP) are more relevant than ever. The most recurrent breaches seem to be those related to misuse of MP entitlements by claiming private expenses to be covered by public funds. Despite steady efforts to clarify the principles and rules for work-related claims and reimbursements, setting and enforcing sanctions are still areas in need of improvement.

Two broad attitudes or approaches seem to characterise the positions that MPs take when ethical issues in MPs' behaviour are revealed. The first (and perhaps most immediate) reaction is to call for tougher sanctions for non-compliance, in order to provide a deterrent example for

current and future MPs. This is, for example, what was commonly said in the Victorian Parliament when the case of Geoff Shaw (then MLA for Frankston) was exposed and discussed in November 2017.

It has also been noticed, however, that in a strict compliance culture, professionals confronted with ethical issues to resolve (especially in cases of conflicts of interest) will not come forward to discuss such matters with any ethics advisers if they feel at risk of punishment (Neesham & Azim, 2017). Preventive advice is also essential for preserving and fostering an ethical climate. If communication on ethical problems and solutions does not occur at the time it is most needed, then the effectiveness of the ethics regime (including its most direct compliance mechanisms) can be seriously impaired. Hence, a second approach recommends focus on solving ethical problems in a proactive manner, based on open communication, lack of pre-judgment and mutual trust.

Participation in the CPA and the OGP both offer opportunities to exchange information and learn for the experience of other parliaments. Both forums provide evidence of the application of both approaches and their potential to reinforce each other and to support an effective ethics regime for MPs and for the institution of parliament. Accordingly, Codes of conduct for parliaments should include not only principles and rules for professional and ethical conduct for parliamentarians but also (1) provisions outlining sanctions for breaches as well as procedures and allocations of duties for the enforcement of such sanctions; and (2) provisions encouraging MPs to confidentially approach parliamentary ethics advisers and expect to receive non-judgmental, supportive, solution-oriented professional advice.

These commendable features, found in more recent new and revised Codes of conduct, are steps towards enhancing trust in parliaments.

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APPENDIX 1. Codes of Conduct - Frameworks (Houses of Commonwealth parliaments)

Category of provisions	Sub-category of provisions	Specific provisions	Number of codes with such provision
Framework for regulation (Gay 2008) i.e. provision for application to Members of:	Parliamentary privilege		14
	Parliamentary immunity		12
	Criminal law		11
	Filtering of Complaints		8
	Statutory		15
	Statutory regulation of donation		16
	Codes of conduct		54
	Legal Processes		25
	Investigation		20
	Investigative Procedure		21
	Ombudsman role		15
	Procedures for Commissioners/ Advisers		43
	Enforcement Powers for Inquiries		23
	Code proposed but NOT adopted		21

APPENDIX 2. Codes of Conduct – Disclosure Requirements (Houses of Commonwealth parliaments)

Category of provisions	Sub-category of provisions	Specific provisions	Number of codes with such provision
Rules on Registration and Declaration (Stapenhurst & Pelizzo 2008)	Tax returns	Tax returns	17
	Wealth &/or income sources	declaration of pecuniary interests	82
		declaration of criminal history	75
		conflict of interest (undefined)	98
		Fees and honoraria	17
		Retainers	21
		Sources of patrimonial income	28
		Financial interests of spouse.	30
		Names of immediate family members	26
		Private employer or nature of private employment	33
		Identification of trusts by trustee	28
		Identification of trusts by beneficiary	32
		Professional services rendered	33
		Real estate interests	30
		Ownership interest in a business	38
		Investments	39
		Offices and/or directorships held	35
		Sources of income of business of a partner or shareholder	39
		Deposits in financial institutions	41
		Cash surrender value of insurance	37
	Debt	Creditor indebtedness	37
	Private donations	Reimbursement of travel expenses from private sources	42
	Benefits from public entities	Compensated representation before public entities	41
Leases and other contacts with public entities		39	
Regulated occupational licences	Professional or occupational licenses held	44	
Other (describe)		38	

APPENDIX 3. Codes of Conduct – Restricted Activities (Houses of Commonwealth parliaments)

Category of provisions	Sub-category of provisions	Specific provisions	Number of codes with such provision
Restricted activities include the following items (Stapenhurst & Pelizzo 2008)	Obtaining undue advantage	use of public position to obtain personal benefit	52
		competitive bidding	49
		nepotism	50
		outside employment or business activities by public officials or employees	53
	Offering and accepting bribes	providing benefits to influence official actions	63
		receipt of gifts by officials or employees above a certain value	65
		receipt of fees or honoraria by public officials or employees	60
	Acting against the public interest	representation private clients by public officials or employees	57
		political activity by employees	56
	Misuse of confidential information	use of confidential government information	63
	Using public property for personal gain	travel payments from non government services	53
	Gain of post-MP employment by political means	post-governmental employment for 2-years	53
	Obstructing the course of justice (hiding information, providing false/misleading information, destroying evidence, obstructing investigators/ investigations)		61
	not declaring conflicts of interest	financial conflicts of interest	72
	not declaring private interests		84
misuse of freedom of speech		68	
Other (describe)		57	

APPENDIX 4. Codes of Conduct – Sanctions for Breaches (Houses of Commonwealth parliaments)

Category of provisions	Sub-category of provisions	Specific provisions	Number of codes with such provision
Sanctions (Stapenhurst & Pelizzo 2008)	Private letter to the member concerned drawing attention to the breach and advising the member to avoid such conduct in the future	Private letter to the member concerned drawing attention to the breach and advising the member to avoid such conduct in the future	
	Public report or statement giving details of the breach but not recommending any further sanction	Public report or statement giving details of the breach but not recommending any further sanction	
	Rectification (MP to deal with complaint)	Rectification (MP to deal with complaint)	
	Apology demanded	Apology demanded (Victoria 2014)	56
	Warning/ Caution	Warning/ Caution	69
	Admonition/ censure/ rebuke/ reprimand	Remark	58
		Censure	61
		Reprimand	62
		Admonition; Admonition to abide the standards of conduct	60
		Rebuke	61
	Admonition to refrain from presenting at the House for a certain period of time; suspension (from office)	Admonition to refrain from presenting at the House for a certain period of time; suspension (from office)	64
	Severe rebuke	Severe rebuke	63
	Fine	Fine	76
	Loss of salary	Loss of salary	72
	loss of seniority	loss of seniority	69
	Order to withdraw	Order to withdraw	72
	Disqualification from membership on ground of defection	Disqualification from membership on ground of defection	80
	Expulsion	Expulsion	81
	Loss of mandate	73	
Committal	Committal	74	
Imprisonment	Imprisonment	83	
Other (describe)		73	

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