

The time is right! Why MPs need a code and oath fit for the 21st century

Think Piece 40: October 2022

This think piece forms part of the Institute's CivicsNZ project.



First official Cabinet photo after being sworn in, Government House 6 Nov 2020. Photo: Mark Mitchell

Wendy McGuinness

References are provided [here](#).

Citizens must have confidence in the actions of Parliament and parliamentarians. This think piece discusses two related issues: the oaths MPs take at the beginning of each parliamentary term and a code of conduct for MPs to abide by during their parliamentary term. The title of this think piece is adapted from a 12 July 2007 speech by the Speaker of the House of Representatives, Hon Margaret Wilson, titled: *A Code of Conduct for Members of Parliament – is the time ever right?*¹

This think piece aims to contribute to the discussions currently occurring in government, in the press² and around dinner tables on accountability, transparency, safety and the role and responsibility of MPs. It builds on the 2019 findings of the *Independent External Review into Bullying and Harassment in the New Zealand Parliamentary Workplace* (the *Francis Review*)³ and proposes a new code of conduct for MPs by MPs, and a new MP oath to improve policy debate and law making in the House.

This think piece responds to the comments made by Minister Kelvin Davis (Minister for Māori Crown Relations: Te Arawhiti, Children, and Corrections, and Associate Minister of Education (Māori Education), Deputy Leader of the Labour Party and MP for Te Tai Tokerau)⁴ in response to a proposal by ACT MP Karen Chhour (spokesperson for Child Poverty Reduction, Children and Social Development/Seniors; Chhour has Ngāpuhi whakapapa)⁵ in the House on 28 September 2022. Although several recent situations have raised similar issues, this specific instance involves a Minister of the Crown and Deputy Leader of the political party in power and illustrates the lack of checks and balances when politics become personal.

The incident

Minister Davis criticised Chhour's proposal to repeal a requirement in the Oranga Tamariki Act for the state agency to operate in accordance with Te Tiriti o Waitangi. Davis stated: 'What the member needs to do is cross the bridge that is Te Tiriti o Waitangi from her Pakehā world into the Māori world and understand exactly how the Māori world operates. It's no good looking at the world from a vanilla lens'. See excerpt in Box 1.⁶ Davis told reporters later that day: 'She [Chhour] does whakapapa to Māori, but she was raised in a Pakehā world. She needs to cross the bridge that is Te Tiriti o Waitangi, so she can understand her Māori world view better.'⁷ Davis apologised the next day by phone and Chhour accepted his apology.⁸

Box 1: Excerpt from Hansard Question No. 4 – Children⁹

Karen Chhour: For how much money was the contract recently signed between OT and John Tamihere's charity, and is the Minister reconsidering this contract in light of today's revelation that his charities are under investigation for bankrolling John Tamihere and the Māori Party's political campaigns for nearly half a million dollars?

Hon KELVIN DAVIS: I reject the premise of that question, but let me say that on Friday I was pleased to witness the signing of a partnership agreement between Oranga Tamariki and Waipareira Trust. This agreement supports wraparound, holistic services for whānau **under a by Māori, for Māori approach**. This agreement recognises the Treaty-based relationship between the trust and Oranga Tamariki under section 7AA of the Oranga Tamariki Act, an equity-focused section of the legislation I'm sure the member is familiar with. I'd also just like to thank her for allowing me to raise the issue of how much funding Oranga Tamariki has received since 2017. By the way, the relationship has been in place since 2008, so through the previous National-ACT Government as well. But Oranga Tamariki have received, since 2017, a measly \$2.8 million when other providers have received tens of millions of dollars a year.

Karen Chhour: So does the Minister agree with John Tamihere when he says his charity and Oranga Tamariki are in a partnership and not a contract, and if Te Whānau o Waipareira is struck off the Charities Register, will the Minister guarantee that this partnership will end?

Hon KELVIN DAVIS: What the member needs to do is **cross the bridge that is Te Tiriti o Waitangi from her Pākehā world into the Māori world and understand exactly how the Māori world operates. It's no good looking at the world from a vanilla lens.**

David Seymour: Point of order. The question is how the Government would respond if an event happened that, I think, would bring the contract into question. Now, unless, somehow, it's addressing the question to **attack the member and her world view**, then the question has not been addressed at all.

Hon Chris Hipkins: Speaking to the point of order, Mr Speaker. The question actually contained a number of parts, including some assertions. The member has addressed the question; he does not have to answer to the satisfaction of the member.

SPEAKER: Yeah, thanks. The question was hypothetical and it did contain an assertion. If members ask such questions, I've tended to allow them on the basis that members know full well the type of answer that they might get. [bold added.]

That would have been the end of the matter if it was not for three things:

1. The Speaker of the House has remained quiet on the matter. The Speaker, the Rt Hon Adrian Rurawhe, did not intervene on hearing the Minister's comments (see Box 1). Importantly, the Speaker is the highest officer elected by the House and must show no preference or disrespect to any political party, the Government, or the Opposition while chairing proceedings in the House.¹⁰ The Speaker's silence implies he considers Davis's comments were appropriate.
2. The Minister made a public statement in the house, but the apology was delivered in private by phone – so the apology is not recorded in Hansard.
3. Prime Minister Jacinda Ardern said Davis's response to Chhour was 'too personal': 'There is the cut and thrust of the House, but we do need to make sure we are debating the policy, not the personal.'¹¹ While this guidance seems highly appropriate, it is not mentioned in any code for MPs. For example, we reviewed key documents such as the *Cabinet Manual 2017*,¹² the *Labour Party Code of Conduct (2019)*,¹³ and the *Behavioural Statements for the Parliamentary Workplace (2020)*,¹⁴ and did not find any such suggestion.

Further, if the Minister had not apologised to Chhour of his own free will, we were interested to see whether there were there any checks and balances in the existing system that might have required an apology. Three questions become apparent:

Q1: Could the Minister's comments be a violation of the *Cabinet Manual*?

A: No, because the *Manual* lacks sufficient detail on what good or bad conduct looks like. It however clarifies that Ministers are accountable to the Prime Minister for their behaviour. See paras 2.55 and 2.56, Conduct of Ministers, *Cabinet Manual 2017* (excerpted in the references to this document).

Q2: Could the Minister's comments be a violation of the *Labour Party Code of Conduct*?

A: Arguably no; see for example 'Bullying' in 4.2.4, which mentions 'constant humiliation, ridicule and belittling remarks'. The Minister made the comments once in the House and once in the media within a 24-hour period. It would be hard to argue it was 'constant'. Notably the *Code* specifically mentions that it includes Members of Parliament.

Q3: Could the Minister's comments be a violation of the *Behavioural Statements for the Parliamentary Workplace*?

A: Arguably, no. The first principle is 'Show that bullying and harassment, including sexual harassment, are unacceptable.' On page 2 it states, 'Harassment is a pattern of behaviour directed at someone which makes that person feel distressed or unsafe.' Karen Chhour said: 'It wasn't just the hurt that it made me feel, it's the hurt that it made my children feel and it's the hurt that it made my foster mother feel.'¹⁵ Although the Minister's comments clearly caused distress for Chhour and her whānau, the *Behavioural Statements* define bullying as 'unreasonable and repeated behaviour towards

a person or group that can lead to physical or psychological harm'. Although Davis's two comments may be considered unreasonable and were largely repetitive in content, the fact he apologised the next day raises questions over whether they constitute bullying. Further the *Behavioural Statements* provide no clarity over when criteria has been met, what penalties exist and who will hold poor behaviour by MPs to account.

Previous attempts to establish a code

Two earlier attempts to create a code of conduct for MPs are mentioned in Hon Margaret Wilson's 2007 speech. Wilson notes that from 2001, Ross Robertson (Labour MP 1987–2014) argued for the adoption of a code of ethics for members of Parliament.

Wilson also describes a second attempt. On 12 June 2007, four minor parties – the Greens, Māori Party, United Future and ACT – held a press conference and announced they were signing a Code of Conduct. They strongly urged other MPs to also sign. The Code was to be voluntary but the intention was that if enough MPs signed, then the Code of Conduct could be adopted by Parliament and included in the Standing Orders. Importantly, the Code was intended to help ensure all MPs' voices were heard and to provide the public with the ability to judge the behaviour of MPs against a predetermined standard of behaviour. Wilson indicated no other MP (other than those from the small parties) signed the Code, but as Speaker, she agreed to be the repository of the Code for the minor parties, although she made clear she had no authority to enforce it.

Hon Margaret Wilson's 2007 speech concludes that '[s]hort of the issue becoming the subject of a coalition agreement, it is unlikely that the New Zealand Parliament will be subject to a formal code of conduct'.

In 2018 the Speaker, Trevor Mallard, launched an *Independent External Review into Bullying and Harassment in the New Zealand Parliamentary Workplace* (the *Francis Review*) largely due to a series of issues arising around Parliament.¹⁶ The 2019 report made 85 recommendations, including a recommendation to develop a code of conduct.

Box 2: Excerpt from the *Francis Review*

Recommendation 4. I recommend agency and Party leaders work with staff (through their unions and elected representatives) and caucuses to develop and agree a Parliamentary Workplace Code of Conduct.

Interestingly the resulting *Behavioural Statements* (the new title for the Parliamentary Workplace Code of Conduct) were drafted by the Parliamentary Culture Committee (a subcommittee of the Parliamentary Service Commission) with assistance from the Office of the Clerk and the Parliamentary Service.¹⁷ Chhour currently sits on the Parliamentary Culture Committee, which provides advice to the Commission on the outcomes of the *Francis Review*.¹⁸

Even though recommendation 4 was implemented, the Davis/Chhour incident still happened. What is concerning is that none of the people who have spoken on this issue, including the leader and deputy leader of the Labour Party (the Prime Minister and Davis), the leader of ACT (Seymour), the MP that was harassed (Chhour) and the media, have referred to the

Behavioural Statements for the Parliamentary Workplace. Arguably even more concerning is that the Speaker remains silent on the incident. The *Behavioural Statements*, and arguably the *Francis Review*, have failed to deliver any significant buy-in by the key players.

Notably, another *Francis Review* recommendation was recently implemented (recommendation 77). In August 2022, then Speaker Trevor Mallard announced the establishment of an Independent Commissioner for Parliamentary Standards (beginning in 2023). The *Protocol for the Commissioner for Parliamentary Standards* states that its role is ‘to receive and inquire into complaints from any person who works within the Parliamentary precinct or any Electorate and Community Office about members’ conduct that does not appear to be consistent with the principles set out in the *Behavioural Statements for the Parliamentary Workplace*. [italics added]. Note: The *Behavioural Statements* are seven statements, not principles.¹⁹

In our view there exists a clear power imbalance between Davis and Chhour. Especially as the Speaker did not comment on the incident, it is highly unlikely that a female MP in her early 40s from a small party would make a complaint against a male Minister of the Crown in his mid-50s, the deputy leader of the largest party in power. Even if the Independent Commissioner was in operation, the chance that they would have received a complaint from Chhour is very low, and if they did receive a complaint, it would be hard to argue the incident was harassment under the definition in the *Behavioural Statements*. (see Q3 above). In the end, the apology came down to a matter of conscience; another MP might not have realised their mistake.

This example illustrates that the *Behavioural Statements* lack sufficient ownership and detail to deliver the necessary culture change required to make Parliament a safe and healthy workplace, and in so doing to attract and retain the very people we need to debate and shape effective public policy.²⁰

Below we suggest two new ways to strengthen our democracy: firstly by MPs establishing their own unique code of conduct, and secondly by strengthening our oaths.

Proposal 1: Establish a Code of Conduct by MPs, for MPs

Keep the *Behavioural Statements* for parliamentary staff but ask MPs to jointly write their own code (MP Code) at the beginning of each parliamentary term for the Speaker to implement, and under which the Independent Commissioner for Parliamentary Standards can receive and inquire into complaints. This could easily be actioned by the existing Parliamentary Culture Committee (mentioned earlier), provided the Māori Party joined the committee (currently the Speaker and all other political parties are represented). Importantly, the Department of the Prime Minister and Cabinet (DPMC) does not²¹ (and in our view should not) hold responsibility for the conduct of MPs. As with any professional body, that responsibility should fall on MPs alone.

Here are a few thoughts MPs might like to include in their Code:

1. Refer to the *Cabinet Manual 2017*, which requires Ministers ‘to act lawfully and to behave in a way that upholds, and is seen to uphold, the highest ethical standards’ (para 2.56).
2. The Independent Commissioner can receive and inquire into complaints about any MP’s conduct, from any MP, member

of staff who works within the Parliamentary precinct or any Electorate and Community Office. They can also receive complaints about any MP from any member of the public, and inquire into that complaint at their discretion (this option enables an incident to come before the Commissioner even when an MP decides not to register a complaint). Any report prepared by the Commissioner should then be tabled in the House. The Speaker can decide how to respond and action the suggestions in the report.

3. The Prime Minister’s observation that MPs should debate policy, not the personal,²² should become common practice within the House.
4. Both the error of judgement and the apology should be documented in the same place. For example, when a statement in the House results in the need for an apology, then that apology is also made in the House and becomes part of the public record in Hansard. This did not happen in the Davis/Chhour incident.
5. There should be clarity over the distinction between misconduct and serious misconduct²³ and what is to happen if the Code is contravened (e.g. apology in the House, stood down for a short or long time, a fine etc). MPs need to know in advance the implications of poor behaviour.
6. Political parties should be required to have their own Code of Conduct and this should be tabled in the House at the beginning of Parliamentary term and made public on the party website and the Parliamentary website. This should explain how complaints can be made, that a register is kept and that the leader of the party is responsible for ensuring all complaints are inquired into (e.g. see the *Labour Party Code of Conduct*).
7. Political parties should be required to include in their own Code of Conduct a responsibility to adhere to the proposed MP Code and take into account the four existing codes that shape their working life: the *Behavioural Statements for the Parliamentary Workplace*, the *Code of Conduct – How things are done at the Office of the Clerk of the House of Representatives*, the *Parliamentary Service Code of Conduct*, and the *Standards of Integrity & Conduct* (a code of conduct for the public service issued by the Public Service Commissioner).²⁴

The Institute is currently preparing a working paper that will review national and international codes of conduct with a view to providing a more detailed list of topics for consideration by MPs who wish to develop a code of conduct for MPs.

Proposal 2: Strengthen our oath system

Democracy requires our ongoing care and consideration. Sixty-five years have passed since the Oaths and Declarations Act 1957 became law and the text of the oaths has not changed.

In 2022, New Zealanders are now discussing issues such as a ‘by Māori, for Māori’ approach (see for example Box 1) and a co-governance approach. For some, the discussion has raised concerns about how these approaches fit alongside our current democratic approach – ‘by New Zealanders, for New Zealanders’. Our proposal is that we modify the oaths to reaffirm MPs’ commitment to all New Zealanders.

Option (i) Oath of Allegiance to Her [or His] Majesty

The oath forms part of the swearing-in process; members take the oath before taking their seats in Parliament. This can happen after a general election or by-election. As noted in s 11 of the Constitutional Act 1986, it is not possible to become a Member of Parliament without taking the Oath (or Affirmation) of Allegiance.

Changes to the Oath of Allegiance (s 17) were attempted in 2016 under the Oaths and Declarations (Endorsing the Principles of the Treaty of Waitangi) Amendment Bill. On 10 August 2016, Marama Fox, co-leader of the Māori Party, introduced a Bill to change the wording to include a commitment to the principles of Te Tiriti. However, Hon Chris Finlayson opposed this, successfully arguing that as the Oath of Allegiance includes the term ‘according to law’, it automatically infers the principles of Te Tiriti.²⁵ The addition would simply complicate what is already complex (what he referred to as ‘piling Ossa on Pelion’). Finlayson’s argument helps illustrate why we need to keep the Oath simple and to work within the constraints of a complex ecosystem.

However, the current Oath does not specifically speak to the need to govern for all New Zealanders. This is understandable, given the Oath of Allegiance is used by other entities (not just MPs).

We consider that there are two options:

1. Maintain the status quo Oath of Allegiance to Her [or His] Majesty (but instead focus on the Executive Councillor’s oath, see option (ii) below).
2. Create a new and specific oath for all MPs that outlines a commitment to New Zealand and New Zealanders. Here is our suggestion, amending the current oath:

I, [specify], swear that I will be faithful and bear true allegiance to Her [or His] Majesty [specify the name of the reigning Sovereign, as thus: Queen Elizabeth the Second], Her [or His] heirs and successors, according to law **and work hard to improve outcomes for all New Zealanders and New Zealand.** So help me God. [added text in bold]

Option (ii) Executive Councillor’s Oath of Allegiance

A Minister of the Crown is expected to behave to a higher standard than an ordinary MP. Para 5.24 of the *Cabinet Manual 2017* states: ‘The principle of collective responsibility underpins the system of Cabinet government. It reflects [the] democratic principle: the House expresses its confidence in the collective whole of government, rather than in individual Ministers.’ Put another way, any Minister holds a unique and privileged role in their ministerial capacity as steward for our democracy.

Before taking this oath an MP will have taken their Oath of Allegiance to Her (or His) Majesty (above), hence this additional public declaration is very special as it forms the basis of our relationship between the House of Representatives and the Governor-General – that together create Parliament.

While MPs debate policy in the House, those selected to be Ministers govern. They have direct responsibility for the direction of New Zealand and New Zealanders. The *Cabinet Manual 2017* emphasises in its introduction that the underlying principle is democracy: (i) the Sovereign reigns, (ii) the government rules, (iii) but the government rules only if it has the support of the House of Representatives (p. 3).

This Oath is made in front of the Governor-General, usually before the start of each new Parliament but sometimes during the parliamentary term when the Prime Minister decides to promote an MP to the role of Minister. See the official photo in the banner above of the newly appointed executive on 6 November 2020. Although Ministers are selected by the Prime Minister, it is the Oath that in effect creates the working relationship between the Governor-General, the Executive Council, and the House of Representatives; and by doing so, establishes our unique form of government.²⁶

Given the above discussion, we suggest that the current oath might be amended to echo Michael Cullen’s 2000 speech about being ‘a government for all New Zealanders’.²⁷ This also aligns well with Article 3 of the Treaty of Waitangi and the *Cabinet Manual 2017* (see p. 2 for a discussion of the Treaty of Waitangi). Here is our suggestion:

I, [specify], being chosen and admitted of the Executive Council of New Zealand, swear that I will **govern for all New Zealanders and** to the best of my judgment, at all times when thereto required, freely give my counsel and advice to the Governor-General for the time being, and the good management of the affairs of New Zealand. That I will not directly nor indirectly reveal such matters as shall be debated in Council and committed to my secrecy, but that I will in all things be a true and faithful Councillor. So help me God. [added text in bold]

It is a small change but one that would, in combination with the *Cabinet Manual 2017* (see Paras 1.25–1.28, 2.17, 2.20, also excerpted in the [references to this document](#)), add a further obligation on Cabinet to provide some care, consideration and safety for all New Zealanders. We would be surprised if an MP disagreed with this sentiment, but feel at a time of significant cultural change that it could provide a keel (rather than an anchor) for the journey our nation is currently embarking upon.

To conclude

We see these proposals as helping to future-proof democracy, as MPs navigate the country’s future during the difficult times ahead. Although they both relate to an MP’s role and behaviour over the Parliamentary term, they can be implemented separately. The two proposals aim to make our system of government more durable by helping ensure all New Zealanders have a shared sense of belonging (via an oath system for MPs and Ministers), as well as requiring MPs to behave to a high standard when under pressure (under a new MP code of conduct). Together they will help deliver a more stable and trusted platform to shape the discourse to 2040 and beyond.



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McGuinness Institute, Level 2, 5 Cable Street, PO Box 24-222, Wellington 6142
Phone: +64 4 499 8888 Email: wmcg@mcguinnessinstitute.org
Website: www.mcguinnessinstitute.org