SUBMISSION TO THE REVIEW OF THE

MEMBERS OF PARLIAMENT (STAFF) ACT 1984

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8 June 2022

I am an academic with over fifteen years' experience researching and publishing on the subject of Australian federal political staff. My research includes interviews with staff about their experiences of bullying and sexual harassment in the workplace. I have also investigated the employment frameworks and HR arrangements for political staff in a number of other countries. I draw on this expertise in making this submission.

Need for reform of the Act

There is a fundamental weakness regarding roles, powers and sources of authority in the *Members of Parliament (Staff) Act 1984* (MOPS Act) which limits the ability of the Commonwealth as the employer to maintain safe parliamentary workplaces and to create consequences for poor employment practices which lead to unsafe workplaces.

Many of the problems in the working conditions of the staff of MPs, Senators and Ministers arise from deficiencies in the Act. When the Act was passed in 1984 it created for the first time special powers for parliamentarians to employ staff outside of the public service, with maximum flexibility and control for them as employers. The Act has very few obligations for them as employers nor explanation of staff rights and obligations. In the almost 40 years since the Act was passed it has not been reviewed. It is no longer fit for purpose in terms of supporting a professional workplace or providing a strong regulatory framework for the employment of political staff. There are fundamental problems in the Act with regard to confusion of authority and lack of powers that must be addressed.

Some of the problems identified in the Human Rights Commission Report *Set the Standard* are:

- MOPS staff are in a highly vulnerable position in their employment because of the insecure nature of their employment contracts.
- MPs, Senators and Ministers, leading small- to medium-sized individual offices, lack the formal HR structures that would exist around them if they were managers within a large corporation or public service department.
- There is a relatively high turnover of MOPS staff, creating an inexperienced workforce which lacks institutional memory and needs an ongoing program of training and induction.

- While Department of Finance can advise, under the current MOPS Act parliamentarians cannot be directed to act on staff management issues nor to adopt employment practices commonly followed in other public sector workplaces. There is little collective oversight or accountability for behaviour.
- Many staff are not bound by codes of conduct and those who are (staff employed by ministers) have no formal and transparent accountability mechanisms.

Several strategies would help to create a safe and respectful workplace. These are:

- providing greater HR guidance to parliamentarians, ministers and their staff;
- improving management of the MOPS workforce by professionalising the workplace;
- providing greater oversight and accountability for employment practices and conduct in the workplace.

Alongside these, there are more fundamental changes needed to the Act to clarify roles and powers and to ensure appropriate accountability and transparency. I recommend six key reforms to the Act.

1. **Clarify sources of authority to employ staff under the MOPS Act by making better structural distinctions between legislative and executive staff.**

The distinction made in the Act between Part III staff and Part IV staff is confusing, and not related to function or appropriate sources of authority.

Staff referred to in Part II (ministerial consultants) have not been employed for some time and therefore this type of staff should be removed from the Act.

It is unusual for legislative staff (electorate officers and staff of non governing parties) and staff of the executive (ministerial staff) to be under one Act. This does not occur in other countries where there is a clear distinction made between advisory staff of the executive and support staff of the legislature. The staff of legislators and the staff of the executive are usually employed under different legal authority and their employment is administered in different organisations. Ministerial staff are commonly employed in temporary positions within the department their minister leads, under special clauses in public service legislation.

Keeping both legislative and executive staff within one federal MOPS Act is recommended as there are many similarities in their work contexts and conditions of employment; maintaining one HR administration allows a critical mass of HR staff to support them.

However these two types of staff should be employed under different sections of the Act. This would resolve the confusion where electorate staff are employed under both Parts III and Part IV of the Act (electorate staff employed by ministers and shadow ministers/party leaders are employed under Part III while electorate staff employed by Members/Senators are covered by Part IV). If *all* electorate staff were employed under one section this would avoid the movement of electorate staff from Part III to Part IV (and back) when their employing Senator or Member becomes, or ceases to be, a Minister, shadow minister or party leader.

This would also clarify that authority for determining terms and conditions of legislative staff reside with the Parliament (through the Presiding Officers) and similar powers and authority over ministerial staff reside with the Prime Minister. Such a distinction would recognise that

[redacted]

the Prime Minister does not exercise political authority over Members of Parliament, only over ministers. This would align with employment frameworks in other countries and States.

In other countries, such as the UK, the electorate staff employed by ministers are placed in the same category as electorate staff of other parliamentarians. This recognises that their function is to support ministers in their role *as parliamentarians*, rather than in their role as ministers. This approach makes more sense than the current arrangement under the MOPS Act. It recognises that all electorate staff play similar roles. However the need to better distinguish electorate staff and ministerial staff in the Act is not only about their functions; it goes to the appropriate source of authority for their employment.

Under the current MOPS Act Part I (s 3) both *electorate staff and personal staff* of the following groups – defined as 'officeholders' – are under Part III of the Act:

- Ministers
- the Leader and Deputy Leader of the Opposition in the House of Representatives and the Senate
- the Leader and Deputy Leader of other recognised political parties
- former Prime Ministers
- Additionally, under s 12 the Prime Minister can also empower other Senators and members as officeholders, such as Presiding Officers, Shadow Ministers, Whips, and Independent Senators and members.

Yet apart from ministers (and former PMs whom I will not refer to) these actors are legislative officeholders. In other countries, personal staff performing these roles would be referred to as 'parliamentary' staff (as opposed to electorate staff and ministerial staff).

There are three different types of staff employed under the MOPS Act and it would be better if these three types were distinguished in the Act:

- ministerial staff
- electorate staff (of *all* parliamentarians including ministers)
- parliamentary staff (personal staff of leaders of non government parties, independents, Whips etc)

The latter two categories are legislative staff and therefore should be placed in the same section of the Act. Staff working for the executive (ministerial staff) should be in a different section of the Act.

This distinction is important as it relates to different sources of authority for employing staff and different sources of authority over parliamentarians as employers. It needs to be clear that the source of authority in the employment of ministerial staff is the Prime Minister, while the source of authority of the employment of electorate and parliamentary staff is the Parliament, through the Presiding Officers.

For example, the authority and powers of Presiding Officers are seen in the NSW *Members of Parliament Staff Act 2013 No 41.* Sections 14 -20 of the Act indicate the authority to employ staff for Members of Parliament derives from Presiding Officers and the Presiding Officers have powers in the employment relationship:

[redacted]

"14 Members of Parliament may employ staff

(1) A member of Parliament may, on behalf of the State, employ a person under a written agreement to assist the member in exercising his or her functions as a member of Parliament.

16 Staff to be employed subject to arrangements approved by Presiding Officers

(1) The power of a member of Parliament to employ staff under this Part may be exercised only in accordance with arrangements approved by the relevant Presiding Officer and the exercise of that power is subject to such conditions as are determined by the relevant Presiding Officer.

19 Conditions of employment

(1) The relevant Presiding Officer may from time to time determine the conditions of employment of persons employed under this Part.

20A Termination by relevant Presiding Officer of employment for misconduct

(1) The employment of a person under this Part by a Member of Parliament may be terminated by the relevant Presiding Officer after consulting the Member of Parliament if the relevant Presiding Officer is satisfied that the staff member has engaged in misconduct."

Section 20A is important as it indicates that the Presiding Officers have the power to terminate the employment of a staff member who has engaged in misconduct, avoiding the situation (currently faced under the federal MOPS Act) where the only party able to act in cases of staff misconduct is the employing parliamentarian.

Clarifying that it is Parliament (through the Presiding Officers) which authorises the employment of electorate and parliamentary staff, and that it is the Prime Minister who authorises the employment of ministerial staff, will enable more effective regulation and accountability in staff employment.

Recommendations:

- *The Act should distinguish between electorate and parliamentary (legislative) staff and ministerial (executive) staff and establish the different sources of authority for their employment*
- *Staff referred to in Part II (ministerial consultants) should be removed from the Act*

2. Entitlement to employ staff under the Act must be made conditional on adherence to professional workplace standards, on commitment to policies and values (such as respectful workplace behaviour) and on cooperation with monitoring and compliance undertaken by the Office of Parliamentarian Staffing and Culture (OPSC).

The MOPS Act does not mandate professional employment practices. In my research, some MOPS staff report having no job description and little or no induction, training, performance

management or career development. Professionalising the parliamentary workplace is important, as it will increase diversity and opportunity, improve performance and prevent conduct such as bullying and sexual harassment. The current lack of professional practices arises from missing powers in the MOPS Act and lack of accountability.

The MOPS Act states that an MP, Senator, Minister or officeholder may employ a person on behalf of the Commonwealth, by an agreement in writing. But while staff are employed by the Commonwealth, the only party who can act in the employment relationship is the MP, Senator, Minister or officeholder. The Commonwealth bears the liability if employment laws are breached, yet cannot compel parliamentarians to act, even in cases where misconduct has been found. Parliamentarians enjoy wide powers, but little accountability as employers (except through general employment, health and safety and anti discrimination laws).

The current MOPS Act gives the Prime Minister powers to set conditions for the employment of staff under the Act. However the Prime Minister has not used these powers to ensure good employment practices or to compel action in cases of misconduct. In its HR support role, Department of Finance has been limited to providing advice, guidance and recommendations to employing Members of Parliament, rather than directions. This has undermined the confidence of MOPS staff in the current arrangements for handling workplace issues.

Entitlement to employ staff under the Act must be made conditional on adherence to professional workplace standards, on commitment to policies and values (such as respectful workplace behaviour) and on cooperation with monitoring and compliance undertaken by the OPSC. Since MOPs Act employment is a type of public sector employment such expectations are not unreasonable.

These requirements should be stated in the Act in such a way that it is clear that if parliamentarians do not adhere to these requirements they would lose the ability to employ staff under the Act. It is important that parliamentarians are able to fulfil their roles as an elected representatives. However losing the entitlement to employ staff under the MOPS Act would not undermine their ability to undertake core representative functions (though it would make them more difficult).

By mandating professional practices in this way, Parliament will gain a role in managing the employment conditions of the staff of its members and increase its ability to manage Parliament as a workplace.

Whether these policies are specified in the Act or stand outside the Act itself (in an Annex or Determination), it is important that they be a condition of entitlement to employ staff under the Act. Examples would be commitment to a *Respectful Workplace Behaviour Policy* or a *Prevention of Bullying and Sexual Harassment Policy*. Required HR procedures could be specified in a *Good Employment Practices* document (which would specify such practices as open and formal recruitment, induction, training and performance management). Establishing reportable and measurable HR practices would enable monitoring and accountability for compliance.

Recruitment of staff should be open and formalised, especially for senior staff. In my research some MOPS staff reported having no duty statement, selection criteria or formal selection process. Often jobs were not advertised publicly. Female staff complained that often they only heard that a senior position was vacant when a male colleague announced he had

been ‘tapped on the shoulder’ for the job. Such informal recruitment processes hindered their ability to advance to senior positions, limited the diversity of staff and contributed to a problematic workplace culture for women. Requiring vacant positions to be publicly advertised and filled using formal processes is likely to significantly improve diversity and opportunity in the parliamentary workplace.

Developing, monitoring and mandating professional practices will require roles and powers to be placed in the Act. This should ideally be the responsibility of an independent office holder such as the statutory head of the OPSC or the Parliamentary Service Commissioner, who would report to the Presiding Officers. If the Parliamentary Service Commissioner took on this role, it would need to be separated from the Public Service Commissioner role (which reports to a member of the executive - a minister). The Act could possibly be amended in the following way:

> ‘The Parliamentary Service Commissioner may issue directions in writing to an office-holder, Senator or Member of the House of Representatives relating to employment matters and the management of staff under this Act. These matters include engagement and termination.
>
> If Office-holders, Senators and members do not comply with the Directions they will not be entitled to employ staff under this Act.’

Recommendations:

- *Professionalising the parliamentary workplace is important, as it will increase diversity and opportunity, improve performance and prevent conduct such as bullying and sexual harassment*
- *Entitlement to employ staff under the Act must be made conditional on adherence to professional workplace standards, on commitment to policies and values (such as respectful workplace behaviour) and on cooperation with monitoring and compliance undertaken by the OPSC*
- *Required HR procedures could be specified in a Good Employment Practices document referred to in the Act. Establishing reportable and measurable HR practices would enable monitoring and accountability for compliance*
- *Developing, monitoring and mandating professional practices will require roles and powers to be placed in the Act*
- *Recruitment of senior staff should be open and formalised*

3. Decisions about staff allocation should not solely be a function of the Prime Minister but subject to independent review, with greater flexibility for parliamentary parties to determine staffing.

The MOPS Act confers discretionary powers on the Prime Minister to allocate staff numbers and determine staffing configurations, but these are not exercised in a transparent way. There is a lack of flexibility for parliamentarians, who must choose from only two possible configurations in staffing their electorate offices. The Opposition is allocated a certain number of staff positions, rather than a staffing budget (as is done in other countries), limiting

flexibility in deciding its staffing structure. The staffing entitlement of the Opposition and other party leaders is decided by convention and negotiation, rather than independent analysis. This means staffing increases are decoupled from evidence of need.

The lack of transparency in how staffing entitlements are calculated means there is no way of knowing if they are sufficient, and that staff are not faced with unreasonable demands or excessive working hours, leading to unsafe workplaces. In the UK the staffing entitlements of MPs are established by an independent body (the Independent Parliamentary Standards Authority). In NSW the number of staff for Members of Parliament is determined by the Parliamentary Remuneration Tribunal (s 18 *Members of Parliament Staff Act 2013 No 41)*.

The only independent investigation into the adequacy of federal MOPS staffing in Australia was the Henderson Review in 2009,[1] which reviewed the workloads and working hours of ministerial staff and recommended that staff numbers increase. In recent years, when Senators ask ministers the reason for increases in staff numbers during Senate estimates, the only answer given is that 'it is a decision of the Prime Minister'. This lack of transparency undermines public confidence that current staffing levels are appropriate, necessary and safe.

In other countries non government parliamentary parties are allocated a staffing budget and can decide how it should be spent. In Canada parliamentary parties are entitled to operate parliamentary 'research bureaux' whose staffing they control. The convention by which increases in Opposition personal staff numbers are automatically linked to increases in government personal staff numbers is pernicious as it deters parties from scrutinising and criticising increases in government staffing numbers. This creates the impression of a collusion between political parties in ever increasing, and unjustified, staff numbers.

An independent review similar to the Henderson Review should be conducted whenever it is proposed to increase the numbers of MOPS staff. As these are taxpayer-funded positions, it is important that citizens are confident about the justification for this expense. It should not be treated as a private matter for the Prime Minister. This formal method of determining staffing levels should be stated in the Act.

Recommendations:

- *The appropriate number of staff should be determined independently and this requirement should be referred to in the Act*
- *The Opposition, minor parties and independents should be allocated a budget and have flexibility in determining their staffing configurations*

4. Codes of conduct for legislative and ministerial staff, and commitment to workplace policies, should be referenced in the Act

Unlike public servants, MOPS staff are not bound by a set of values, employment principles or a code of conduct established in the MOPS Act. There is a separate *Statement of Standards for Ministerial Staff* (referred to in their contracts) which may not be legally binding. There is no transparent process for handling breaches of these standards. For other

[1] Alan Henderson, *Review of Government Staffing*, 2009

MOPS staff – those employed by parliamentarians who are not ministers - there is no code of conduct or guiding values.

Codes of conduct – different for legislative and ministerial staff – should be developed and referred to in the Act. For example, the ACT Legislative Assembly has distinct code of conduct provisions for staff of ministers and staff of other officeholders (ie parliamentary staff supporting other political parties).[2] The Act could state that employees must carry out their duties in accordance with the Codes of Conduct relevant to their position.

A code of conduct to which ministerial staff are subject, and which should be referenced in a revised MOPS Act, is the federal *Lobbying Code of Conduct*. Under the *Lobbying Code of Conduct* a person who was previously employed in the office of a Minister or Parliamentary Secretary under the MOPS Act at adviser level or above:

> 'must not, for a period of 12 months after the person ceases such employment, engage in lobbying activities relating to any matter that the person had official dealings with in the person's last 12 months of that employment.'

Regulation of the post-employment activities of political staff is a matter of very strong concern across many countries, as there is increasingly a 'revolving door' where political staff move directly into lobbying jobs, making use of their contacts and knowledge and risking the distortion of policymaking and decision-making in favour of private interests. Most countries have cooling off periods and strong restrictions on the employment of former ministerial staff. The ACT and States such as Qld, SA and Victoria impose lobbying restrictions on former ministerial staff for one to two years post-employment.

As a first step, the requirement to adhere to the *Lobbying Code of Conduct* should be referred to in the MOPS Act. This would address the major problems identified by the ANAO in its 2020 audit of the management of the Code - that there is a lack of awareness amongst those it binds and a lack of compliance with the Code.[3]

However I believe regulation of the post-employment of ministerial staff should be also strengthened and aligned with practice in other countries. In Canada most former exempt staff (equivalent to ministerial staff) are subject to a five year ban on lobbying, either as professional consultant lobbyists or on behalf of organisations and corporations (*Lobbying Act 2008*). In the UK Special Advisers are subject to the Business Appointment Rules, under which they are required to submit an application to the Head of their former Department for any new appointments or employment they wish to take up after leaving their post, for one to two years (depending on seniority).[4] In the European Parliament senior political staff are required to notify Parliament if they intend to engage in any kind of paid or unpaid activity after they leave their positions and must obtain prior authorisation (under Article 16 of the *Staff Regulations).* If that activity is related to work carried out during their last 3 years in service it may not be approved or it can be approved, subject to conditions. Senior officials are in principle prohibited, in the 12 months after leaving service, from engaging in lobbying

[2] Legislative Assembly (Members' Staff) *Code of Conduct for Ministerial Staff and Staff of Other Office-holders* Determination 2015
[3] ANAO, *Management of the Australian Government's Lobbying Code of Conduct — Follow-up Audit,* June 2020
[4] UK Cabinet Office, *Model Contract for Special Advisers,* September 2019

or other advocacy on matters for which they were responsible during their last 3 years in service.[5] By requiring prior authorisation for taking up new positions, these regimes are more effective and transparent and do not rely on self-regulation.

In addition to binding codes, the MOPS Act could also refer to commitment to important policies that underpin safe workplaces. For example, it could be stated in the Act that employment is dependent on commitment to policies such as a Respectful Workplace Behaviour Policy. In Canada, the *Respectful Workplace Policy—Office of the Prime Minister and Ministers' Offices* must be signed by all ministerial staffers. It states that 'Harassment, violence and discrimination will not be tolerated, condoned or ignored.'[6] Every newly hired employee and individual acting on behalf of a minister signs and dates the policy to acknowledge that respecting this policy constitutes a condition of their employment. The following requirement appears at the end of the policy document:

> "Acknowledgment and understanding
>
> I, _____ (print name) have carefully read this policy. I understand it and I understand that I may contact any complaint resolution officer (including members of the Respectful Workplace Office) if I have questions about this policy. I understand that compliance with this policy constitutes a condition of my employment and that any violation of this policy will lead to corrective measures, which may include disciplinary measures up to and including dismissal.
>
> _____
>
> Signature
>
> _____
>
> Date"

To support a similar practice, the MOPS Act could state that 'On commencement, staff employed under the Act must indicate their commitment to maintaining a safe workplace by signing the Respectful Workplace Behaviour Policy.'

Recommendations:

- *Codes of conduct – different for legislative and ministerial staff – should be developed and referred to in the Act*
- *Post-employment restrictions for ministerial staff should be referred to in the Act. They should also be strengthened, in line with international best practice*
- *On commencement, MOPS staff should be required to indicate their commitment to key workplace conduct policies*

[5] *Communication on the Publication of Information Concerning the Professional Activities of Former Senior Officials After They Have Left the Service* (Article 16, third and fourth paragraphs, of the Staff Regulations) 2021 Annual Report

[6] Treasury Board Secretariat, 2020. *Respectful Workplace Policy—Office of the Prime Minister and Ministers' Offices*

5. Public reporting of MOPS employment should be required under the Act

Under s 31 of the MOPS Act, the Prime Minister is required to prepare a report on ministerial consultants annually and to table that report in parliament. This practice continues - despite the lack of engagement of ministerial consultants - because it is legislated.

The current secrecy surrounding the employment of staff under the MOPS Act is not warranted and, as argued in the Human Rights Commission Report, public reporting on a range of data about MOPS staff will track progress on increasing diversity, expose issues in workplace conditions and help drive culture change. Data which should be reported would be: gender and diversity indicators, staff turnover, induction and training completions, HR interventions, staff survey results and disciplinary action.

From 2007-2012 an Annual Report was prepared on staff employed under the MOPS Act. However, without any explanation, this practice ceased in 2013. For this reason the requirement to report annually on MOPS employment must be placed in the Act. This report should be made by either the statutory head of the OPSC or the Parliamentary Service Commissioner (if a role in oversight of MOPS employment is created for them, as discussed in section 2).

Further, the Act should require that the names of senior staff be made public in the same way as the names of SES officers in the public service (in www.directory.gov.au). The names of ministerial staff were previously published in the Commonwealth Government Directories until 2002. No reason has been given for this information being removed from the public domain and there appears to be no justification for suppressing the names. In most countries around the world the names of ministerial staff are available publicly. The shadowy nature of MOPS staff leads to public concern and undermines the legitimacy of their work. The increased role and importance of senior MOPS staff in government, and the fundamental need for transparency in a democracy, makes this an important reform. However if such reporting is not required under the Act, it is unlikely to occur.

Recommendations:

- *The requirement to report annually on MOPS employment must be placed in the Act. This should include data about gender and diversity indicators, staff turnover, induction and training completions, HR interventions, staff survey results and disciplinary action*
- *The Act should require that the names of senior staff be made public in the same way as the names of SES officers in the public service (in www.directory.gov.au)*

6. Termination provisions in the Act should be reconsidered

Temporary and insecure employment is typical for political staff around the world. However the temporary nature of MOPS employment and the ability of parliamentarians to terminate employment at any time creates a significant power differential between staff and employers which can make staff reluctant to report misconduct.

Currently under the MOPS Act employment ceases automatically when the MP, Senator or minister loses or relinquishes their job or dies. Their employment can also be terminated at

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any time by the MP, Senator or minister by notice in writing (s16(3) or s23(2)). Possible reasons for termination currently in use include that the office is restructured (because a different set of skills are needed) or that they have lost the 'trust or confidence' of their employer. There is no avenue for reviewing these decisions except through a claim of unfair dismissal under the *Fair Work Act*.

Parliamentarians can facilitate the termination of a staffer's employment by restructuring their offices. For their electorate offices, parliamentarians have the option of an electorate office structure with either classifications AABC or ABBB. A parliamentarian can choose to change from one classification pattern to another, and in doing so they can make certain jobs disappear. For ministerial staff, while ministers do not control the classifications of positions, they are able to define the duties of those positions. Redesigning a job description can result in a staff member being no longer eligible to hold the position. In this way employers often terminate staff contracts rather than dealing with staffing issues and performance management in their offices. This denies staff the opportunity to respond or to improve.

While retaining flexibility for parliamentarians is important, some changes to the Act to improve conditions for staff could be considered:

- Do not terminate ministerial staff automatically where their minister simply changes jobs. The Act could state that employment continues while the minister retains a commission as a minister. Ministerial staff report that the insecurity of their employment is emphasised by the fact it ceases automatically when the minister changes job title, providing many opportunities to not be re-employed if they have made complaints.
- The Act could require employers to consider redeployment opportunities on termination, as in New Zealand.[7] This would put the onus on political parties to consider better managing staff resources and staff careers.
- The termination justification 'loss of trust or confidence' (currently stated by Department of Finance to be reasonable under the *Fair Work Act)* could be removed, requiring more specific reasons to be given for termination. In NZ this reason for termination is known as a 'breakdown in relationship clause'. In 2020 it was removed from contracts for MPs' staff, giving them greater security of employment.[8]

Recommendations:

- *A number of possible amendments to termination provisions in the Act should be considered, with the aim of reducing the insecurity of employment while maintaining the flexibility and control of parliamentarians*

[7] Debbie Francis, *Independent external review into bullying and harassment in the New Zealand parliamentary workplace: Final Report,* 2019, p 20.
[8] Parliamentary Service, *New Agreement improves employment conditions for parliamentary staff*. Press release 14 September 2020, 2020. https://www.scoop.co.nz/stories/PA2009/S00126/new-agreement-improves-employment-conditions-for-parliamentary-staff htm

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Conclusion

Codes of conduct, good employment practices, reporting requirements and workplace policies need to be referred to in the Act to ensure they are implemented and given force in MOPS employment. The current absence of requirements in the MOPS Act has led to poor conduct, limited accountability, lack of professionalism and unsafe workplaces. In order to protect staff and build public confidence in the Parliament as a workplace, important requirements must be transparent, enforceable and aligned with international best practice. Appropriate regulation of this employment will not occur through good will or convention, but only through improved legislation and public scrutiny.