

**SUBMISSION TO THE REVIEW OF THE
MEMBERS OF PARLIAMENT (STAFF) ACT 1984**

Andrew Podger AO

This submission focuses on the first objective of the Review, namely to identify legislative, policy or other changes or initiatives necessary to ensure the employment arrangements for the staff of parliamentarians are fit for purpose to support a professional, high-performing, safe and respectful workplace for all parliamentarians and their staff. The suggestions made should also contribute to the second objective, to prevent bullying, harassment, sexual harassment and sexual assault and address its impacts according to best practice.

I am a former Public Service Commissioner and Parliamentary Service Commissioner as well as a former departmental secretary with long experience working with ministers and ministerial staff. Since retiring from the APS in 2005, I have held various appointments at ANU where I am now Honorary Professor of Public Policy in the Research School of Social Sciences.

This submission addresses the four issues identified in the Review's terms of reference under its Scope, but not in the order they appear there. It draws extensively on the submissions I have made in recent years to the Thodey Review of the APS, the Senate Inquiry into the Current Capability of the APS and the Jenkins Review of the Parliamentary Workplace.

I should highlight that this Review of the MOP(S) Act, arising from the Jenkins Review, may need to interact with those working on implementation of other recommendations by Jenkins, particularly in relation to the proposed Office of Parliamentarian Staffing and Culture (OPSC) and Independent Parliamentary Standards Commission (IPSC). My suggestions below include some clarification and modification of those proposed arrangements.

A. Responsibilities, expectations and accountability of MOP(S) Act employees

Before addressing recruitment, it is important first to clarify the roles of different employees under the Act and associated responsibilities, expectations and accountability.

The current legislation distinguishes between ministerial consultants, staff of office-holders and staff of Senators and Members. I do not believe this classification is useful or properly reflects the different roles and lines of accountability of different MOP(S) Act employees. A more appropriate classification would distinguish between two groups:

- Employees of Ministers; and
- Employees of Senators and Members who are not part of the executive arm but represent the core of the legislative arm of government.

While our parliamentary system blurs the boundaries between the executive and the legislature, there remains considerable value in the degree to which the two sets of power are separated including the different lines of accountability that apply. This is recognised in the Public Service Act and the Parliamentary Service Act which have slightly different sets of values and employment principles respectively for APS employees and Parliamentary Service employees; the former, for example, are accountable under the system of ministerial accountability while the latter work within the legislature and come under the oversight of the Presiding Officers.



In practice, I believe the ministerial consultants provisions have rarely been used in recent decades. While they could therefore be deleted without immediate material impact, it is probably preferable to retain them within the category of employees of Ministers as a continued protection against any future pressures for political appointments to the APS (as was Labor Party policy before the Hawke Government instead introduced the MOP(S) Act).

Office-holders are defined in s3 (and s12) of the Act. Apart from Ministers, these are Senators and Members with particular duties in the Parliament and are not part of the executive. Accordingly, their staff may simply be included in the second group above.

I have no strong view as to whether the electoral office staff of ministers should be included in the second category or the first but am inclined to include them within the second category as their role is to support the Senator or Member as a parliamentarian not as a Minister (and their terms of appointment are exactly the same as those of employees of other Senators and Members).

Recommendation 1: The MOP(S) Act be amended to identify two distinct groups of employees, those working for Ministers and therefore in the executive arm of government, and those working for other Senators and Members and therefore in the legislative arm.

Recommendation 2: Provision for ministerial consultants should be retained, but within the category of staff working for Ministers.

The legislation was passed nearly forty years ago, before the reforms to public administration later in the 1980s and 1990s. Today, it should articulate the respective values and employment principles for the two categories drawing on the approach developed in the *Public Service Act 1999* and the *Parliamentary Service Act 1999*, and the amendments to these in 2014. Similarly the legislation should include codes of conduct for the two.

This would help to clarify both the common and the different roles and responsibilities of public servants, Parliamentary Service employees, ministerial staff and staff of other Senators and Members. They should require similar levels of personal integrity for anyone working for the Commonwealth, paid for by taxpayers and expected to be committed to serving the public. But there are important differences that need to be reflected in the statements of values, not only relating to lines of accountability but also to whether non-partisanship is required and the degree to which the merit principle should apply. Such clarification can only help build mutual respect for the different roles and responsibilities of all these Commonwealth employees who must regularly interact with each other.

Recommendation 3: The MOP(S) Act include statements of the values and employment principles, and codes of conduct, for the two sets of staff, drawing on the framework in legislation for the APS and Parliamentary Service.

In the case of the APS, the APS Commissioner gives directions in respect of the relevant values and employment principles; in the case of the Parliamentary Service, its Commissioner does likewise. I believe the Parliamentary Service Commissioner is best placed to give directions or issue guidelines about the values and employment principles for the MOP(S) Act employees working for Senators or Members. It may be that the IPSC being established as recommended by Jenkins is envisaged to play this role. My strong recommendation (further below) is that the IPSC be incorporated within the Parliamentary Service Commission's office, or report to the Joint Standing Committee on



Parliamentary Standards through the Parliamentary Service Commissioner who would give directions and issue guidelines.

Most of the directions and guidance for employees of Senators and Members would apply equally to employees of ministers, and should be incorporated in guidance from the Prime Minister to ministerial staff. That guidance should include additional requirements, for example, highlighting the importance of respect for the APS and the fact that ministerial staff do not have the power to direct.

Both sets of directions and/or guidelines should be tabled in the Parliament.

Recommendation 4: The Parliamentary Service Commissioner be empowered to give directions and issue guidance with respect to the values and code of conduct for staff of Senators and Members, the directions and guidance to be tabled in the Parliament.

Recommendation 5: The Prime Minister be responsible for issuing guidance for ministerial staff which incorporates relevant guidance from the Parliamentary Service Commissioner to other MOP(S) Act employees, such guidance to be tabled in the Parliament.

Accountability for all MOP(S) Act employees should remain, first, to their employing Minister, Senator or Member and then, through them, to the Parliament and public given the public money involved. This needs to be made much more clear in particular to address the apparent accountability gap where a Minister, Senator or Member does not take responsibility for the actions of an employee and the employee is not subject to any external scrutiny. In the past, with small numbers of such staff, it may have been feasible in theory for Ministers in particular to say they accepted all responsibility for the actions of their staff and to do so before any parliamentary forum. That is not the case today and there have been many incidences of 'plausible deniability' where no-one takes full responsibility.

I believe ministerial staff should appear before parliamentary committees in the same way as public servants. In doing so, as with public servants, there would be limits to the information they might be required to provide including exemption from providing information regarding any policy advice given to a Minister. I do not see any need for exemptions beyond those applying to public servants.

In the case of staff of Senators and Members, I think the new complaints system (the proposed IPSC) provides sufficient supplementary support for accountability (ministerial staff will also have access to the new complaints system). I note, however, that the Jenkins proposal does not explicitly place the IPSC under the Parliamentary Service Commissioner as recommended by the Foster Report. I am not convinced that a separate Commission is needed and recommend the complaints organisation come under the Parliamentary Service Commissioner, perhaps within an Office or a Parliamentary Service Commission.

Recommendation 6: MOP(S) Act employees should continue to be held accountable primarily to their employing MP, this arrangement supplemented in the case of ministerial staff by acceptance that they may be required to appear before parliamentary forums and in the case of staff of Senators and Members by the complaints system being established.

Recommendation 7: Instead of a stand-alone IPSC, the new complaints system should come under the Parliamentary Service Commissioner.

B. Recruitment of MOP(S) Act staff

While the emphasis on merit which applies to the APS and the Parliamentary Service (drawing on the 1854 Northcote-Trevelyan Report) may not extend fully to MOP(S) Act employees, it is vital that



the public can be confident of the competence of the employees they pay for and that appointments are not based on nepotism or involve other forms of conflict of interest.

Appointments should remain the prerogative of the employing MP, but should be subject to important constraints. Positions should have clear statements of duties and the skills, qualifications and/or experience required to meet them. These should be consistent with the arrangements established by the Prime Minister (in the case of ministerial staff) or the Parliamentary Service Commissioner (in the case of staff of Senators and Members). The employing MP should be held responsible for ensuring the selected staff meet the relevant selection criteria and are able to perform the relevant duties.

The role I recommend here for the Parliamentary Service Commissioner would involve the Commissioner having responsibility for the Office of Parliamentarian Staffing and Culture proposed by Jenkins. The Jenkins Report has that Office reporting directly to the Presiding Officers: I suggest it would be better placed within an Office of the Commissioner, or a Parliamentary Service Commission. This would avoid the fragmentation of responsibilities I fear the Jenkins proposals would introduce, but without in any way diluting the measures. (Concern about fragmentation and associated inefficiencies was a key focus of my 2003 Report on the Administration of the Parliament that led to the consolidation of responsibilities into three departments.)

The powers of the Commissioner and the Prime Minister respectively to determine recruitment procedures should be included in the legislation, requiring a formal determination to be tabled in the Parliament; in the case of the PM's arrangements, there should be no option not to make such a determination.

In addition, the Prime Minister's arrangements for ministerial staff may include processes for identifying potential recruits who have the requisite skills, providing pre-employment checks and vetting Ministers' preferred appointments to confirm their capacity and ensure their legitimacy. Similarly, the Parliamentary Service Commissioner should provide pre-engagement checks for proposed recruitment by Senators and Members and also offer support regarding appointments including through advertising positions and recommending appointments where Senators or Members seek such support (the Commissioner should not, however, have power to vet appointments). Political parties may, of course, choose to establish additional processes for recruitment of staff for their Senators and Members including staff of shadow ministers.

Recommendation 8: MPs should retain the right, as the employer, to make appointments but should be subject to restraints set out by the Prime Minister's or the Parliamentary Service Commissioner's arrangements aimed to ensure recruits can perform the required duties and appointments are not based on nepotism or involve other forms of conflict of interest.

Recommendation 9: The proposed OPSC should be placed under the Parliamentary Service Commissioner in an Office of the Commissioner or a Parliamentary Service Commission.

Recommendation 10: The powers to determine recruitment procedures by the Commissioner and the Prime Minister respectively should be included in legislation and the determinations tabled in the Parliament.

While the nature of the role of employees of Senators and Members, and of the people involved, does not seem to have shifted greatly over the years, there have been more noticeable changes amongst ministerial staff. Fewer are public servants on secondment, fewer are advisers with



particular policy expertise and more are strongly politically attuned seeing ministerial staff positions as part of their political career. This shift, and the fact that Australia has many more such politically-aligned staff (including at State/Territory level) than New Zealand or the UK, raises a number of questions, and various proposals have been made in recent years in response. The Thodey Report on the APS suggested a return to having more public servants in these positions; others have suggested reducing the number of such staff and reviewing the role of Departmental Liaison Officers.

I am not convinced that the large number of ministerial staff who are effectively apprentice politicians paid for by the taxpayer is in the public interest. Ministers do need support that is not strictly non-partisan, but such support should enhance the quality of government, working collaboratively with the public service to assist Ministers meet their responsibilities. While this might be enhanced by a return to having more public servants on secondment, it is important to manage the risk that such public servants might be seen subsequently to be partisan, inconsistent with APS Values. This risk would best be managed by a formal process when the public servant returns to the APS to demonstrate non-partisanship (this might involve setting limits to the length of such secondments). This, however, might further discourage Ministers from appointing public servants to ministerial staff positions.

My own strong preference, applying the practice I used as a Secretary, is to enhance the role and status of departmental liaison officers by including a senior DLO at SES level. Such enhancement would also add to the case for reducing the number of ministerial staff positions.

In any case, the number of ministerial staff positions should be properly and openly justified, not just left to the Prime Minister.

Recommendation 11: Governments should provide public justification for the number of ministerial staff explaining clearly their roles and contribution.

Recommendation 12: Ministers should be encouraged to draw on the public service for staff on secondment, recognising such staff need to maintain their reputation for non-partisanship on return to the APS.

Recommendation 13: The APS Commission should establish some guidelines and processes for demonstrating non-partisanship of public servants returning after secondment to MOP(S) Act positions.

Recommendation 14: Departmental Secretaries should enhance the role of DLOs including by appointing a senior DLO at SES level.

Recommendation 15: The number of ministerial staff should be significantly reduced.

C. Procedural fairness for the terms, conditions and termination of employees under the MOP(S) Act

Terms and conditions for MOP(S) Act employees should be set by the Prime Minister's arrangements for ministerial staff and the Parliamentary Service Commissioner's arrangements for staff of Senators and Members. The current bargaining process for setting remuneration should be reviewed if and when changes are made to the way public service remuneration is set (the Incoming Government may, for example, revisit the Thodey Report recommendation in this regard).



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- Employees of Senators and Members who are not part of the executive arm but represent the core of the legislative arm of government.

While our parliamentary system blurs the boundaries between the executive and the legislature, there remains considerable value in the degree to which the two sets of power are separated including the different lines of accountability that apply. This is recognised in the Public Service Act and the Parliamentary Service Act which have slightly different sets of values and employment principles respectively for APS employees and Parliamentary Service employees; the former, for example, are accountable under the system of ministerial accountability while the latter work within the legislature and come under the oversight of the Presiding Officers.



Recommendation 15: Terms and conditions for MOP(S) Act employees should be set in the Prime Minister's arrangements for ministerial staff or the Parliamentary Service Commissioner's arrangements for other staff, with the pay-setting process reviewed if and when the process for public servants' pay is varied.

Should an employee have concerns about actual practice regarding terms and conditions, the new complaints handling process under the Parliamentary Service Commissioner should be used.

The Parliamentary Service Commissioner should also offer support to the employing MPs regarding regular two-way feedback between employers and employees including with respect to performance. Such a pro-active approach could draw on the successful strategies of the Independent Parliamentary Expenses Authority.

Under amendments to legislation earlier this year, the fact that MOP(S) Act employees come under the Fair Work Act was highlighted. This provides an avenue for ensuring procedural fairness in the case of terminations of employment. It is important nonetheless for MPs to be able to act quickly in the event of seeking to replace someone with whom they no longer have full confidence. A pro-active role by the Parliamentary Service Commissioner's office, drawing on the efforts of the Finance Department in recent years, to provide advice on assessments and proposed terminations might help in this regard.

Recommendation 17: The Parliamentary Service Commissioner should take a pro-active approach to supporting MPs in their responsibilities as employers, including in respect of proposed terminations.

D. Appropriate public reporting and accountability of the administration of the MOP(S) Act

As indicated above, the Parliamentary Service Commissioner should not only have responsibility for handling complaints by MOP(S) Act employees but have broader responsibilities including to explain and promote the values and employment principles that apply and exercise general oversight of administration of the Act reporting through the Presiding Officers to the Parliament. The Commissioner's responsibilities would relate primarily to staff of Senators and Members, but the Commissioner could also have some reporting responsibility with regard to administration of the Act in respect of ministerial staff. Because, as recommended above (Recommendations 4 and 9), the Prime Minister would be responsible for issuing guidance for ministerial staff and for setting recruitment procedures etc., whoever the Prime Minister delegates those responsibilities to should report on their administration. Such a report could nonetheless be included within the Parliamentary Service Commissioner's overall report on the administration of the Act.

The additional responsibilities proposed for the Commissioner require the establishment of a small office whose staff should be employed under the Parliamentary Service Act. Some staff would work on the Commissioner's responsibilities for the Parliamentary Service while others would work on MOP(S) Act administrative matters (including the complaints mechanism). The Australian Public Service Commissioner should no longer be appointed the Parliamentary Service Commissioner. It may still be possible for the Parliamentary Service Commissioner to undertake the duties involved on a part-time rather than full-time basis. The Parliamentary Service Act should be amended to clarify the additional responsibilities of the Commissioner with details set out in the MOP(S) Act.

Recommendation 18: The Parliamentary Service Commissioner should have responsibility for oversight of administration of the MOP(S) Act reporting to the Parliament through the Presiding Officers; the Commissioner's report should include a report by the Prime

Minister's delegate responsible for guidance and administration in respect of ministerial staff; appropriate amendments should be made to the Parliamentary Service Act and the MOP(S) Act.

Recommendation 19: A small office of the Commissioner should be established and the Commissioner should no longer simultaneously hold the position of Australian Public Service Commissioner.

This arrangement should ensure that, while MOP(S) Act employees may be partisan, their oversight would be independent by officials subject to the values and employment principles in the Parliamentary Service Act, and accountable to the Parliament via the Presiding Officers.

Under the current legislation, only the appointment of ministerial consultants is subject to reporting to the Parliament. In future, the Parliamentary Service Commissioner should report, separately from their report on the state of the Parliamentary Service, on the administration of the MOP(S) Act and, as recommended above (Recommendation 18), such a report should incorporate a distinct report by the delegate of the Prime Minister responsible for administration of ministerial staff. These reports should draw on the experience of reports on the state of the APS and the state of the Parliamentary Service and include:

- The numbers of employees by category and classification;
- Demographic data (gender, age, ethnicity etc.);
- Staff turnover (recruitment, resignation, termination etc.);
- Numbers and nature of complaints;
- The Commissioner's views on capability, culture, performance and any other related issues.

Recommendation 20: The Parliamentary Service Commissioner's annual report on the administration of the MOP(S) Act, incorporating a report on administration of ministerial staff by the Prime Minister's delegate, should include significant detail on the numbers and profiles of the different groups of employees as well as the Commissioner's views on capability, culture and performance.

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