



Kerri Hartland
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Parliamentary Leadership Taskforce

Dear Ms Hartland

We request that this letter be made available to members of the Parliamentary Leadership Taskforce in its implementation of the recommendations of the *Set the Standard* report.

We made several submissions to the Review of the MOPS Act and provide this response to the Review report.

We are happy to provide further information about this response if members of the taskforce are interested.

Yours sincerely

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RESPONSE TO MOP(S) ACT REVIEW RECOMMENDATIONS

We were disappointed that parliament had no formal role in the Review of the MOP(S) Act conducted by Department of Prime Minister and Cabinet. As the Review report is being considered by the Parliamentary Leadership Taskforce there is an important opportunity for parliamentarians to influence and guide reforms to the MOP(S) Act.

Overall comments

While the Review includes thoughtful discussion of some key issues and its recommendations would be an improvement, it fails to address some of the fundamental anomalies and deficiencies in the Act. It does not go far enough in recommending changes to the power relations in the legislation, which are at the heart of many of the problems exposed in the *Set the Standard* Report. These include the power of the Prime Minister to control the number and conditions for parliamentary staffing, and the power of parliamentarians in the employment relationship with their staff.

The MOP(S) Act is out of step with arrangements in other countries and in the states, and the Review does not recommend bringing it into line with practice elsewhere. In responding to the PM&C Review, the Taskforce has an important opportunity to reform the Act to improve its operation going forward.

Set the Standard argued that professionalisation of the parliamentary workplace was a critical measure to improve safety. While the Review suggests some useful changes, they do not include mandating practices such as probation, induction or performance review. They also do not require vacant positions to be advertised externally (a measure suggested in several submissions to the Jenkins Review), which would bring more diversity into the parliamentary workplace. Nor does the review recommend that entitlement to employ staff be tied to compliance with professional practice as an employer.

Most concerningly the Review does not recommend any change to the anomalous power of the Prime Minister over all aspects of parliamentary staffing.

Critical role of the OPSC

We note that Department of Prime Minister and Cabinet is also developing a proposal for the OPSC.

Establishing an effective OPSC, and defining its role and powers in legislation, will be critical in creating safe parliamentary workplaces. We urge the taskforce to ensure that the OPSC has sufficient powers to operate effectively to ensure professional workplaces, and is not relegated to an advisory role, similar to that currently held by the Department of Finance. The advisory nature of the role of Department of Finance strongly limits its ability to protect staff who experience harassment and bullying and to ensure professional and safe workplaces for MOP(S) staff. It is concerning that in the Review report PM&C refers to the role of OPSC as to provide 'advice and education to parliamentarians and MOP(S) Act employees', to 'build the skills of parliamentarians' and to be 'a central hub for operational HR support'. It is vital that the OPSC be given the role and powers to drive the development of a professional workplace, to create binding frameworks and to conduct



monitoring and compliance activity which will enable accountability for poor practices and lack of professionalism in parliamentary workplaces.

Our detailed response to the Review's recommendations is below.

Recommendation 1 – Employee categories. The MOP(S) Act should be simplified by merging Parts III (Staff of office-holders) and IV (Staff of Senators and Members) into one part and reflecting three categories of MOP(S) employees: electorate employees; personal employees – ministerial; and personal employees – other.

Response

We support this recommendation.

The three categories of employees will facilitate the important distinction between employees working for the executive (personal employees – ministerial) and those working for the legislature (electorate employees and personal employees – other).

The Report however does not make sufficient use of this distinction in other recommendations as indicated below.

We also suggest that ministerial consultants (if that category of staff is retained) be included amongst those working for the executive for the purposes of those other recommendations.

Recommendation 2 – Employer duties. The MOP(S) Act should provide greater clarity over employment roles and responsibilities by setting out the specific duties of parliamentarians, the OPSC and the Prime Minister, and include an express power to delegate. The OPSC should have powers to require specified training, and report on the administration of the Act.

Response

We support this recommendation, subject to clarifying the role and responsibility of both the OPSC and the Prime Minister, and also of the Presiding Officers.

As noted above, the OPSC must be given powers to create binding frameworks and establish accountability for parliamentarians for their actions as employers of their staff.

We believe the OPSC would be better placed under the Parliamentary Service Commissioner who reports to the Presiding Officers. This would provide firm statutory leadership of the OPSC and useful links between the Parliamentary Service and MOP(S) Act employees. With such an arrangement, we recommend the current practice of having the APS Commissioner also appointed the Parliamentary Service Commissioner cease.

While the Prime Minister should have authority regarding the employment of “personal employees – ministerial”, we firmly believe the source of authority for employing staff working for the legislature should be the Presiding Officers (advised by the Parliamentary Service Commissioner and OPSC). This distinction is made in all other countries we have studied and in the state governments. For example in the *NSW Members of Parliament Staff*



Act 2013 No 41 the authority to employ staff for Members of Parliament derives from Presiding Officers and the Presiding Officers have powers in the employment relationship.

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. Because the federal parliament lacks this authority in the Act, it cannot currently determine staff allocations, set conditions or enact consequences for staff in its workplace. The reform of the MOP(S) Act presents an opportunity to establish appropriate authority for staffing and bring the Act into line with practice elsewhere.

We agree there needs to be power to delegate authority and that training of delegates should be mandated; the training should generally be provided by the OPSC.

Recommendation 3 – Resourcing of parliamentarian offices. The OPSC should undertake a review of the factors affecting workloads, particularly in electorate offices, including support systems and processes, and external factors such as the adequacy of government services and electorate composition, to inform an evidence-based consideration of office and staffing resources. The review should recommend principles to be considered by the Prime Minister in determining staffing allocations.

Response

The Review report suggests the OPSC consider principles that may inform staffing allocations but these will not be binding on the Prime Minister.

While we support a review by the OPSC that informs an evidence-based consideration of office and staffing resources and recommends principles for determining staffing allocations, we disagree that the Prime Minister should retain sole authority to determine staffing allocations.

The power of the Prime Minister to allocate staff numbers, not just for ministerial staff but for all parliamentarians, is anomalous compared to other countries and the states, where they are determined by independent bodies. In Canada, for example, the House of Commons determines the resources needed for fulfilling parliamentary duties.

In the Australian parliament, the allocation to crossbenchers of parliamentary staff has been closely related to potential balance-of-power status, rather than parliamentary function, and its rationale has not been transparent.

With regard to the allocations of staff who work for the legislature, we believe a more independent process is needed. Options include an independent authority or the Prime Minister being constrained by the advice of a Parliamentary Committee (for example, the House of Representatives Standing Committee on Appropriations and Administration or the Senate Standing Committee on Appropriations, Staffing and Security. Chaired by their respective Presiding Officer, they are already enabled to meet jointly under their *Standing Orders*).



With regard to the allocations of staff working for the executive (including ministerial consultants), we agree the Prime Minister should retain authority but be required to explain to the Parliament the allocation against the principles developed by the OPSC.

Recommendation 4 – Transparency of staffing allocations. The MOP(S) Act should be amended to require the allocation of staff to be transparent through annual reporting arrangements.

Response

We support the recommendation. However the Review suggests only that the outcomes of staffing allocation be transparent; we argue the *rationale* for staffing allocation must also be transparent.

Recommendation 5 – Modernising the Act. The MOP(S) Act should be modernised by including an objects clause to reflect the purposes of the Act, and amending provisions relating to superannuation and consultants to better reflect contemporary settings.

Response

We support the recommendation in principle.

The ‘object’ suggested on page 62 should include a first general clause along the lines of the object in the Public Service Act, such as ‘MOP(S) Act employees support Members of Parliament to meet their responsibilities’. The clauses on page 62, while important, are really subsidiary to such an overarching object.

While the proposed changes to the wording around ministerial consultants (‘procuring’ rather than ‘engaging’) may seem to better fit modern processes, some clarification would still be needed to define the controls involved not only in terms of funding and/or numbers but also in terms of being subject to the relevant code of conduct. This is not a trivial issue: if a consultant is employed by an external company, they will have obligations to that company and requiring them to uphold any statement of values and code of conduct for MOP(S) Act employees may be problematic as the APS has found. It may be better to define ministerial consultants more restrictively as equivalent to engaged employees.

Recommendation 6 – Increase transparency for terms and conditions. Transparency of employment arrangements should be enhanced by including in the MOP(S) Act:

- A. A requirement that determinations made under the MOP(S) Act about terms and conditions be published except in circumstances where individuals may reasonably be identified
- B. A provision for the continuity of employment and employer powers when a seat becomes vacant, including between the date of dissolution of parliament and the date a poll is declared.

Response

We support the recommendation.

Recommendation 7 – Recruitment. The MOP(S) Act should require parliamentarians to recruit staff against specified position descriptions and undertake an assessment of a candidate’s capacity to



successfully perform the prescribed role. The OPSC should develop policies and guidance to support this, including consideration of the use of self-declarations and pre-engagement checks.

Response

We believe this recommendation needs strengthening.

We agree parliamentarians should be required to recruit staff against specified position descriptions and to undertake an assessment of a candidate's capacity to successfully perform the prescribed role, but that they should also be required to provide a copy of the assessment to the OPSC.

Indeed, we suggest the Act make provision for regulations issued by the Presiding Officers (on advice from the Parliamentary Service Commissioner and the OPSC) with respect to those recruited to positions in the legislature, and by the PM with respect to those recruited to ministerial staff positions, similar to the provisions now in the Public Service Act and Parliamentary Service Act. The regulations might require not only job descriptions but also selection criteria, provision for some independent advice, security and other vetting, induction and training.

There should also be provision for the Presiding Officers, on the advice of the Parliamentary Service Commissioner (and the OPSC), to deny recruitment of a candidate for a position serving the legislature; and for the PM to deny recruitment of a candidate for a position serving the executive.

Not addressed in the Report is any provision for the recruitment of APS or Parliamentary Service employees. Such recruitment should generally be welcomed, as it enables parliamentarians to employ people with experience in government and parliamentary business who have gained that experience through formal merit processes. There needs to be provision, either in the MOP(S) Act or the Public Service Act and Parliamentary Service Act (possibly through regulations) for the return of such staff to the APS or Parliamentary Service:

- To ensure confidence that the returning employee will act impartially and be non-partisan, as required by the legislated Values of the APS and Parliamentary Service (such a provision applies in Canada for example);
- To allow fair consideration of the returning employee's placement (role and level) consistent with the merit principle which applies in both the APS and the Parliamentary Service (the usual practice is to return to the same level immediately prior to secondment, but there is occasionally a case for a more senior position).

Recommendation 8 – Work health and safety of non-MOP(S) workers. Visibility and protection of non-MOP(S) Act workers should be increased by requiring parliamentarians to notify the OPSC when any person not engaged under the MOP(S) Act commences working in their office (e.g. volunteers and interns).



Response

We support the recommendation.

Recommendation 9 – Employment principles. The MOP(S) Act should be amended to include employment principles to professionalise the employment framework and provide legislative support to underpin broader implementation of the recommendations made in *Set the Standard* and this Review.

Response

We support this recommendation. A requirement to adhere to the employment principles must be part of the codes of conduct for MPs, ministers and MOP(S) staff.

Recommendation 10 – Parliamentary obligations. The MOP(S) Act should list the requirements of a parliamentarian as employer, including to: provide a safe and respectful workplace; make recruitment decisions based on an assessment of capability and provide procedural fairness in termination.

Response

We believe this recommendation needs strengthening. It also needs to be complemented by the code or codes of conduct for MPs and ministers.

As we suggest in response to Recommendation 7, the MOP(S) Act should make provision for regulations issued by the Presiding Officers and the PM (related to employment of staff in the legislature and executive respectively) that could set out processes for discipline of staff and handling of grievances.

There should be provision for the Presiding Officers, on the advice of the Parliamentary Service Commissioner (and the OPSC), to remove an MP's right to employ staff under the Act in the event of not meeting their obligations as an employer. In other words, entitlement to employ staff under the Act should be dependent on meeting these obligations.

Recommendation 11 – Employee obligations. The MOP(S) Act should list the requirements of an employee including to: contribute to a safe and respectful workplace; act in accordance with any applicable codes of conduct; and exercise delegations in accordance with legal obligations.

Response

We believe the Act should include the codes of conduct for both those working for the legislature and those working for the executive. These would be very similar, and also similar to the code for Parliamentary Service employees that is set out in the Parliamentary Service Act (a very similar code is in the Public Service Act).

We also believe the Act should include a statement of values for both sets of employees in a similar approach to that used in both the Parliamentary Service Act and the Public Service Act.



Andrew Podger in his submission to the Joint Select Committee on Parliamentary Standards illustrates how this could operate.

The values and code of conduct for employees would be complemented by the employment principles for the employing MPs proposed in Recommendation 9 (a slight variation to the approach in the Parliamentary Service Act and the Public Service Act which involves values, employment principles and a code of conduct, all applying to the relevant employees).

The requirement to exercise delegations according to the law could be incorporated within the codes of conduct.

Provision could also be included for regulations (as is the case in the PS Act and Parliamentary Service Act) along the lines suggested above under Recommendations 7 and 10.

Recommendation 12 – Annual reporting. The OPSC should collect the information identified in Recommendations 7 and 19 of *Set the Standard* and any additional data required to provide a transparent account of the MOP(S) Act employment framework in its annual report to Parliament.

Response

We support the recommendation.

The current secrecy surrounding the employment of staff under the MOP(S) Act is not warranted and, as argued in *Set the Standard*, public reporting on a range of data about MOP(S) staff will track progress on increasing diversity, expose issues in workplace conditions and help drive culture change.

As the Review notes, in most countries and some states the names of senior ministerial staff are published (and they were previously published in the Commonwealth Government Directories). In her submission to the Review Maria Maley argues the names of senior ministerial staff should be made public in the same way as the names of SES officers in the public service (in www.directory.gov.au). The current secrecy around senior ministerial staffing has allowed a lack of accountability for conduct and a sense of entitlement to develop, which *Set the Standard* argues contributes to the incidence of sexual harassment and bullying of staff.

Recommendation 13 – Termination. The MOP(S) Act should be amended to improve the certainty and fairness of termination processes, including provisions that:

- A. A parliamentarian must consult the OPSC on best practice prior to effecting any termination
- B. The employing parliamentarian may suspend the employment of a MOP(S) Act employee
- C. The OPSC may suspend the employment of a MOP(S) Act employee in cases of immediate risk, including on advice from the Independent Parliamentary Standards Commission.



Response

As we suggest in response to Recommendations 7 and 10, we believe the Act should have provision for regulations relating to termination (issued by the Presiding Officers and the PM for those in the legislature and those in the executive, respectively).

We also believe the third provision should be strengthened to allow the Presiding Officers, on the advice of the OPSC, to terminate the employment of an employee. This would address the situation of an employee breaching the relevant code of conduct in a serious way and the employing MP being unwilling to take the action necessary to protect other staff or the public interest. (Such situations were exposed in *Set the Standard*). This power exists in the NSW MOP(S) Act, after consultation with the employing parliamentarian.

Recommendation 14 – Automatic termination provisions. The automatic terminations provisions in the MOP(S) Act should be amended to improve job security and increase clarity for staff by:

- A. Retaining the existing high level automatic terminations triggers, but allowing for determinations to clarify specific circumstances
- B. Providing that automatic termination provisions for electorate staff employed under Part III only apply where the employing parliamentarian ceases to have a personal staffing allocation.

Response

We support the recommendation.

Recommendation 15 – Five year review. The MOP(S) Act should be reviewed for effectiveness, in the context of broader changes to the parliamentary workplace, within five years of the amendments to the Act.

Response

We support the recommendation.