

The Senate

Finance and Public Administration
Legislation Committee

Parliamentary Service Amendment Bill 2012

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43rd Parliament

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TABLE OF CONTENTS

MEMBERSHIP OF THE COMMITTEE	iii
Parliamentary Service Amendment Bill 2012.....	1
Introduction	1
Conduct of inquiry.....	1
Overview of the Bill	1
Comparison of provisions of the Parliamentary Service Amendment Bill 2012 with the Public Service Amendment Bill 2012	4
Other matters raised.....	15
Conclusion.....	17
APPENDIX 1	19
Submissions received by the Committee	19

Parliamentary Service Amendment Bill 2012

Introduction

1.1 On 29 November 2012, on the recommendation of the Senate Selection of Bills Committee, the Senate referred the Parliamentary Service Amendment Bill 2012 (the Bill) to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 5 February 2013. The reason for referral was to compare the provisions of the Bill with the Public Service Amendment Bill 2012.¹

Conduct of inquiry

1.2 The inquiry was advertised in *The Australian* on 5 December 2012 and through the Internet.

1.3 The committee received four submissions relating to the Bill and these are listed at Appendix 1. The submissions may be accessed through the committee's website at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fapa_cte/psa_bill2012/submissions.htm

1.4 The committee did not hold a public hearing for this inquiry.

Overview of the Bill

Purpose of the Bill

1.5 The Bill proposes to amend the *Parliamentary Service Act 1999* (ParlS Act) to reflect, where relevant to the Parliamentary Service, those changes to the *Public Service Act 1999* (PubS Act) which are contained in the Public Service Amendment Bill 2012 (PubS Bill). The proposed amendments will maintain alignment of the two services. The Bill also contains a small number of amendments relating to the Parliamentary Service only; amendments to bring the ParlS Act into alignment with existing provisions of the PubS Act; and amendments to clarify existing sections of the ParlS Act where necessary.

1.6 The President of the Senate, Senator the Hon. John Hogg, in his second reading speech stated that the Bill:

...ensures that the Parliamentary Service will continue to provide professional support of the highest calibre to all parliamentarians, independent of the executive government of the day.

In a number of sections, provisions have been strengthened and clarified to ensure that this continues. A number of items have been clarified and, where appropriate, brought into line with the revised Public Service Bill.

1 Senate Selection of Bills Committee, Report No.16 of 2012, Appendix 13, 29 November 2012.

All parliamentarians depend on a professional, non-partisan parliamentary service. After more than a decade since the Parliamentary Service was first created, this bill will ensure that the service can continue to provide a high level of support and advice which will ultimately benefit the wider Australian community.²

Background to the Bill

1.7 As noted by the President, the Parliamentary Service was created over a decade ago. In 1999, a new Public Service Act was passed to replace the *Public Service Act 1922*. At that time, it was considered that the Parliamentary Service should be established by its own legislation. The Clerk of the Senate noted that 'separate legislation was seen as an important recognition of the independence of the Parliament from the executive government'.³ The ParlS Act was passed with provisions following, as far as possible, the provisions of the new PubS Act but reflecting the unique character of the Parliamentary Service and its differing role in serving the Parliament. The Clerk of the Senate noted:

The principal area of commonality between the two services is the employment framework, while the principal differences are in the orientation and values of the two services and the independence of the various statutory offices created. The independence of such offices as the Clerks and the Parliamentary Librarian, in turn, reflects the independence of the Houses and the constitutional functions of members of Parliament.⁴

1.8 In March 2010, the Advisory Group on Reform of Australian Government Administration published the report of its review of the Australian Public Service (APS) entitled *Ahead of the game: Blueprint for the reform of Australian Government administration*. The report outlined a reform agenda to strengthen APS performance and identified four components of a high-performing public service as:

- meeting the needs of citizens;
- providing strong leadership and strategic direction;
- containing a highly capable workforce; and
- operating efficiently and at a consistently high standard.⁵

1.9 The Blueprint report recommended nine interdependent reforms, supported by 28 specific action areas, to provide a strategy to achieve a high performing APS. On

2 Senator the Hon. John Hogg, President of the Senate, *Senate Hansard*, 28 November 2012, p. 10077.

3 Clerk of the Senate, *Submission 1*, p. 1.

4 *Submission 1*, p. 2.

5 Advisory Group on Reform of Australian Government Administration, *Ahead of the game: Blueprint for the reform of Australian Government administration*, 2010, pp viii–ix.

8 May 2010, the Government accepted all of the recommendations of the report.⁶ The PubS Bill, which passed the House of Representatives on 20 August 2012 and was introduced into the Senate on 22 August 2012, amends the PubS Act to implement recommendations of the report which require legislative change as well additional amendments including whistleblower provisions.

1.10 The Bill was introduced in the Senate on 28 November 2012 and, as noted above, the Bill amends the ParlS Act to reflect, as far as it is relevant to the Parliamentary Service, some of the proposed changes contained in the PubS Bill. The committee notes that the Bill also contains a small number of proposed amendments which are not directly related to the PubS Bill changes. The Bill was developed jointly by the Parliamentary Service departments (prior to the establishment of the Parliamentary Budget Office) in consultation with the Parliamentary Service Commissioner.⁷

Provisions of the Bill

1.11 The Explanatory Memorandum (EM) to the Bill provides a detailed summary of the proposed amendments, which include:

- strengthening the Parliamentary Service Values and Parliamentary Service Code of Conduct, and the establishment of a set of Employment Principles for the Parliamentary Service;
- inclusion of a statement setting out the role of the Parliamentary Service;
- revision of the role for the Senior Executive Service and expansion of the role and responsibilities of Secretaries;
- establishment of provisions for making, and dealing with, whistleblower reports;
- clarifying that the Parliamentary Service Merit Protection Commissioner (ParlS MPC) will be able to personally conduct a review of a Parliamentary Service action;
- introduction of new provisions for the protection of information relating to the Parliamentary Service Commissioner's and ParlS MPC's functions, including protections for a Secretary or Parliamentary Service employee who provides information in relation to those functions;
- moving the provisions relating to immunity from suit for the Parliamentary Service Commissioner and the ParlS MPC from determinations to the ParlS Act;

6 The Hon. Kevin Rudd, MP, Prime Minister and Senator the Hon. Kim Carr, Minister for Innovation, Industry, Science and Research, *Joint media release*, 8 May 2010.

7 *Submission 1*, p. 1; Department of the House of Representatives, Department of Parliamentary Services and Parliamentary Budget Office, *Submission 2*, p. 1.

- amending relevant provisions to reflect the requirements of the *Legislative Instruments Act 2003*;
- revision of provisions dealing with acting arrangements for statutory office holders;
- enabling the Parliamentary Service Commissioner and the ParlS MPC to delegate powers and functions;
- enabling the Presiding Officers' determinations to vary the scope or application of the Parliamentary Service Values and Parliamentary Service Employment Principles; and
- miscellaneous amendments which update, clarify and strengthen existing, and remove redundant provisions, and remove ambiguity.

Financial impact and regulation impact

1.12 The financial impact statement included in the EM states that the proposed amendments in the Bill 'are either cost-neutral or are expected to be met from the existing resources of the parliamentary departments'.⁸

1.13 The EM advises that no regulation impact statement is required for the Bill.⁹

Statement of compatibility with human rights

1.14 In accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the EM includes a statement of the Bill's compatibility with human rights and freedoms recognised or declared in relevant international instruments. This statement includes a comprehensive discussion of the human rights implications of the Bill and concludes that:

This Bill is compatible with human rights because the Bill promotes a number of human rights and, to the extent that the Bill limits human rights, it does so in a reasonable, necessary and proportionate way.¹⁰

Comparison of provisions of the Parliamentary Service Amendment Bill 2012 with the Public Service Amendment Bill 2012

Scrutiny of Bills Committee

1.15 The Bill was introduced in the Senate eight months after the PubS Bill was introduced and after amendments were made to the PubS Bill in the House of Representatives. The Senate Scrutiny of Bills Committee, in its Fifth and Twelfth Reports of 2012, commented on provisions of the PubS Bill. The Clerk of the Senate

8 *Explanatory Memorandum*, p. 3.

9 *Explanatory Memorandum*, p. 3.

10 *Explanatory Memorandum*, p. 8.

noted that the parliamentary departments had the benefit of the comments of the Scrutiny of Bills Committee in the preparing explanatory materials for the ParlS Bill for approval by the Presiding Officers. The Clerk stated that consideration had been given to addressing some other matters in the ParlS Bill, but the Bill eventually proceeded without them. The Clerk concluded:

It therefore covers the same territory as the PubS Bill, but the opportunity has been taken to provide a more comprehensive explanatory memorandum in an attempt to address the issues raised...¹¹

1.16 The Scrutiny of Bills Committee examination of the PubS Bill pointed, in its Fifth Report, to concerns about inappropriate delegation of legislative power in relation to Items 70, 75, 76 and 79 and, in its Twelfth Report, the retrospective effect of Item 44 of Schedule 1 of the PubS Bill. The following provides an outline of the concerns raised and the response from the Minister.

Inappropriate delegation of legislative power

1.17 Item 70 of the PubS Bill inserts new Part 10A into the PubS Act that provides for the protection of information provisions relating to the Public Service Commissioner's and the Public Service Merit Protection Commissioner's functions. The Scrutiny of Bills Committee raised concerns that under proposed section 72E regulations may authorise the use or disclosure of personal information. The EM to the PubS Bill notes that the circumstances for the release of such information are authorised by law for the purposes of the *Privacy Act 1988*.¹² The Scrutiny of Bills Committee was concerned with the delegation of legislative power in this provision and sought advice as to why the primary legislation could not deal with this issue.

1.18 In responding to this concern, the Minister noted that disclosure of personal information in specific circumstances is authorised by regulations under current section 76 of the PubS Act. The proposed new section 72E, inserted by Item 70, largely replicates section 76 and also broadens the regulation-making provision to encompass regulations authorising the 'use' as well as the 'disclosure' of personal information in specific circumstances.¹³ The Minister further elaborated on why regulations were appropriate in specifying the circumstances for the use and disclosure of personal information including that the provision could be amended more easily by the Parliament and provide flexibility to deal with unforeseen needs more effectively than if these provisions were in the primary legislation.¹⁴

11 *Submission 1*, p. 3.

12 Public Service Amendment Bill 2012, *Explanatory Memorandum*, p. 32.

13 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2012*, 9 May 2012, p. 186.

14 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2012*, 9 May 2012, pp 186–187.

1.19 Items 75, 76 and 79 contain notes to clarify that the disallowance and sunset provisions of legislative instruments do not apply to the legislative instruments referred to. As the explanatory memorandum did not address why this is appropriate, advice was sought by the Scrutiny of Bills Committee. The Minister responded that the instruments referred to in those Items are all currently exempt from the disallowance and sunset provisions of the Legislative Instruments Act and the inclusion of these notes is 'simply intended to clarify the current situation by including cross references to the relevant provisions' of the Legislative Instruments Act.¹⁵

1.20 The Scrutiny of Bills Committee requested that key information relating to Items 70, 75, 76 and 79 be included in the EM.

Retrospective effect

1.21 The Scrutiny of Bills Committee addressed the retrospective effect of Item 44 of Schedule 1 of the PubS Bill in its Twelfth Report. This item inserts proposed subsection 15(2A) into the PubS Act to make it a breach of the Code of Conduct for an APS employee to fail to 'behave honestly and with integrity' before being engaged as an APS employee in connection with the person's engagement. The proscribed conduct includes providing false or misleading information and wilfully failing to disclose relevant information. The EM to the PubS Bill notes that this provision is intended to be dealt with in the same way as a suspected breach of the Code of Conduct.¹⁶

1.22 The Scrutiny of Bills Committee commented that the 'policy justification for the proposed requirement is apparent to the Committee', but it was concerned that the provision could have an unfair detrimental retrospective effect. In particular, that conduct that did not amount to a breach of the code at the time of a person's engagement as an APS employee may, by the operation of proposed subsection 15(2A), be taken to be a breach of the code. The Scrutiny of Bills Committee concluded 'thus sanctions for a breach of the code may be imposed on the basis of an obligation which was not part of the code at the time of the impugned behaviour'. Advice was sought from the Minister as to the justification for applying this requirement retrospectively as this matter was not addressed in the EM.¹⁷

1.23 The Minister responded that it was:

It is essential to the delivery of government services that the public has trust in the public service and confidence in the way public servants exercise the authority given to them by the Government on behalf of the public. Hence, the standards of conduct and character expected of APS employees are high. In this regard included within section 13 of the *Public Service Act 1999* is the requirement to behave with honesty and integrity in the course

15 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2012*, 9 May 2012, p. 188.

16 Public Service Amendment Bill 2012, *Explanatory Memorandum*, p. 23.

17 Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2012*, p. 427.

of APS employment and, in section 10 of that Act, to demonstrate the highest ethical standards.

Given that, there is no strong argument to protect current employees of the APS who have attained that employment through an act of dishonesty from an action under the Code of Conduct.¹⁸

1.24 The Minister noted that the proposed provision is also consistent with elements of the Criminal Code and concluded that 'it would be extraordinary for an employee to be able to be found guilty of a criminal offence for providing false or misleading information on recruitment, while an agency head is unable to take misconduct action for the same reason'.¹⁹

1.25 The Minister also advised that additional material describing the justification for, and scope of, retrospectivity of the proposed provision would be included in the EM to the PubS Bill.²⁰

1.26 Notwithstanding the Minister's detailed response, the Scrutiny of Bills Committee remained concerned about the retrospective operation of this provision. While acknowledging the importance of public confidence in the integrity of APS employees, the Scrutiny of Bills Committee maintained the view that:

...neither the belief that impugned conduct was or should have been recognised as inappropriate at the time of the conduct, nor the possible applicability of criminal offences concerning the provision of false or misleading statements to the Commonwealth, are sufficient reasons to retrospectively impose an additional penalty.²¹

1.27 The committee notes that the matters raised by the Scrutiny of Bills Committee have been addressed, where applicable, in the EM to the Bill. The reasoning for the application of retrospectivity for Item 30 of Schedule 1 of the ParlS Bill (the equivalent provision to Item 44 of the PubS Bill) is provided in the EM.²² The provisions of Item 70 of the PubS Bill are reflected in Item 44 of the Bill. Item 44 provides that the Presiding Officers' determinations may specify the circumstances in which personal information may be used or disclosed. The EM to the Bill provides an explanation of why delegated legislation is considered an appropriate framework for the handling of personal information.²³

1.28 Item 75 of the PubS Bill has no direct counterpart in the Bill while Items 51 and 53 of the Bill make similar clarifications to those contained in Items 76 and 79 of

18 Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2012*, p. 428.

19 Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2012*, pp 428–429.

20 Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2012*, p. 429.

21 Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2012*, p. 430.

22 *Explanatory Memorandum*, pp 18–19.

23 *Explanatory Memorandum*, p. 29.

the PubS Bill. A note is provided in the Bill at the end of the relevant subsection to indicate that the Classification Rules/instruments made under that subsection are not subject to disallowance and sunset provisions under the Legislative Instruments Act. The EM to the Bill provides further explanation of the notes.²⁴

Comparison of the bills

1.29 In comparing the bills, the committee notes that many of the provisions of the PubS Bill are reflected in the Bill. However, there are a range of provisions in the Bill which are not reflected in the PubS Bill as the provisions:

- relate specially to the Parliamentary Service;
- were included in earlier amendments to the Public Service Act and are now being inserted in the ParlS Act; and
- clarify existing provisions of the ParlS Act.

1.30 There are also a range of provisions contained in the PubS Bill which are not replicated in the Bill including provisions relating to transitional arrangements for the PubS Bill. The following discussion highlights the more significant matters raised in submissions which compared the provisions of Schedule 1 of the Bill with the PubS Bill.

Provisions in the Bill not reflected in the Public Service Amendment Bill

1.31 Part 12, Items 56–67, of the Bill does not reflect provisions in the PubS Bill. Part 12 repeals provisions dealing with acting arrangements for statutory office holders under the ParlS Act. Acting appointments will continue to be authorised under the ParlS Act but the rules for such appointments are already contained in the *Acts Interpretation Act 1901* and have general application. The proposed amendment inserts a cross reference to the Acts Interpretation Act. The offices concerned are the Acting Parliamentary Service Commissioner, the Acting ParlS MPC, Acting Secretary, Acting Parliamentary Librarian and Acting Parliamentary Budget Officer. Submissions noted that similar amendments have already been made to the PubS Act and that this approach reflected a more efficient drafting approach.²⁵

1.32 The Bill also contains miscellaneous amendments which are not reflected in the PubS Bill, but are required to ensure consistency with relevant sections of the PubS Act. Item 68 provides for an extension of the definition of Parliamentary Service employee to include persons moved to the Parliamentary Service under section 72 of the PubS Act, and provides consistency with the existing definition of 'APS employee' in the PubS Act. Item 76 of the Bill extends to the Parliamentary Librarian the provisions for forfeiture of non-Commonwealth remuneration for performing the

24 *Explanatory Memorandum*, p. 32.

25 *Submission 1*, p. 4; *Submission 2*, p. 11, Parliamentary Service Commissioner, *Submission 3*, p. 6.

duties of a Parliamentary Service employee, and rectifies a drafting omission from the ParlS Act.²⁶

Provisions in the Public Service Amendment Bill not reflected in the Bill

1.33 The PubS Bill contains a number of provisions which are not replicated in the Bill and include:

- *Annual review of performance of secretaries:* Item 2 of the PubS Bill provides for an annual review of the performance of a secretary in the APS. No similar provision is included in the ParlS Bill for a similar annual review for secretaries in the Parliamentary Service;²⁷
- *Secretaries Board:* Items 3 and 4 of the PubS Bill establishes the Secretaries Board to replace the existing Management Advisory Committee and provides for a range of stewardship, leadership and development functions for the APS. The Bill does not provide for a similar body for the Parliamentary Service 'in recognition of the different constitutional status of that service and the independence of the two Houses';²⁸
- *Special Commissioner:* Items 25 and 26 of the PubS Bill inserts provisions for the appointment of Special Commissioners by the Governor-General to assist the Public Service Commissioner in undertaking specified systems review or special reviews. Such reviews are not proposed for the Parliamentary Service as 'there is no comparable requirement...given its small size relative to the public service';²⁹
- *Machinery of government changes:* Items 64–69 of the PubS Bill insert provisions relating to machinery of government changes which are not applicable to the Parliamentary Service;³⁰
- *Repeal of the Public Employment (Consequential and Transitional) Amendment Act 1999:* This Act is not relevant to the Parliamentary Service;³¹ and
- *Amendment of other Acts:* Schedule 3 of the PubS Bill amends a number of the Acts which do not appear to be relevant to the Parliamentary service.³²

26 Submission 1, p. 9; Submission 2, pp 11–12; Submission 3, pp 6–7.

27 Submission 3, p. 1.

28 Submission 1, p. 5.

29 Submission 1, p. 5.

30 Submission 1, p. 5.

31 Submission 1, p. 5.

32 Submission 1, p. 5.

*Provisions in the Bill comparable to provisions in the PubS Bill*Secretaries and Senior Executive Service

1.34 Part 1 of Schedule 1 of the Bill expands the description of the roles and responsibilities of secretaries in the Parliamentary Service. It is comparable to Item 1 of the PubS Bill but has been adapted to the Parliamentary Service to reflect the principle that the Parliamentary departments serve the Parliament rather than the Executive Government.³³ The equivalent item in the PubS Bill also includes provisions dealing with appointments and termination of secretaries in the APS to provide a role for the Governor-General. As Secretaries of Parliamentary departments are appointed and terminated by the Presiding Officers, the current ParlS Act remains unchanged in this regard.³⁴

1.35 Part 2 of Schedule 1 of the Bill expands the definition of Senior Executive Service (SES) role to include strategic leadership of the highest quality and the promotion and cooperation within and between departments. Part 2 also clarifies the application of section 37 of the ParlS Act, which provides a framework for incentive to retire to Parliamentary Service SES employees whether or not they have reached minimum retiring age, reflecting Schedule 1, Part 3 of the PubS Bill.³⁵

Parliamentary Service Commissioner and Parliamentary Service Merit Protection Commissioner

1.36 Part 3 of Schedule 1 of the Bill, provides additional functions for the Parliamentary Service Commissioner:

- to inquire into whistleblower reports after notifying the Presiding Officer;
- other functions as are conferred on the Commissioner by the Act, the determinations or any other law; and
- anything incidental to or conducive to performance of any of the Commissioner's functions.

1.37 These provisions are similar to those provided for in Part 4 of the PubS Bill which expand the role of the Public Service Commissioner. However, the proposed changes under the PubS Bill are more extensive than those contained in the Bill, and include the power for the Public Service Commissioner to conduct system reviews or special reviews at the direction of the Prime Minister, and allow the Public Service Commissioner to inquire into an alleged breach of the Code of Conduct by an agency head, and more generally, allowing the Prime Minister to request that a breach of the Code be investigated.³⁶ It was noted in submissions that much of the new framework

33 *Submission 1*, p. 6; *Submission 2*, p. 4; *Submission 3*, p. 1.

34 *Submission 2*, p. 4; *Submission 3*, p. 1.

35 *Submission 1*, p. 6; *Submission 2*, p. 5; *Submission 3*, p. 1.

36 *Submission 1*, pp 6–7.

for the Public Service Commissioner contained in the PubS Bill is not required/appropriate for the Parliamentary Service Commissioner.³⁷ Thus, as is currently the case, the functions of the two commissioners under the amended provisions will not be identical.³⁸ The Clerk of the Senate further noted that 'the existing Parliamentary Service Act already provides widely-framed functions for the Parliamentary Service Commissioner'.³⁹

1.38 Items 8 and 9 of Schedule 1 of the Bill enable the Parliamentary Service Commissioner and the ParlS MPC to delegate certain powers and functions. These provisions are broadly consistent with Item 23 of the PS Bill with respect to the Public Service Commissioner, and with existing provisions in the PubS Act in respect to the Public Service Merit Protection Commissioner.⁴⁰

Parliamentary Service values and employment principles

1.39 Part 4 of Schedule 1 of the Bill amends the Parliamentary Service Values to replace the existing 15 values with a more concise set of five values which provide that the Parliamentary Service is committed to service, is ethical, is respectful, is accountable and is impartial. Part 4 also provides a statement of the role of the Parliamentary Service in serving the Parliament. The revised Parliamentary Service Values are consistent with those contained in Item 28 of the PS Bill with some variation to reflect the different roles of the two services.⁴¹

1.40 The introduction of a set of Parliamentary Service Employment Principles in Item 15 of the Bill which incorporate a number of the existing Values, to govern employment in the Parliamentary Service, replicates the APS Employment Principles contained in Item 28 of the PubS Bill.⁴²

1.41 Item 16 of the Bill amends section 11 of the ParlS Act and adds new section 11A to enable (rather than require) the Parliamentary Service Commissioner to give advice to the Presiding Officers on the Values and to enable (rather than require) the Presiding Officers to make determinations on the Values. This amendment reflects Item 29 of the PubS Bill which makes the Public Service Commissioner's directions on the Values discretionary, rather than mandatory. Item 16 also allows the Presiding Officers to make determinations to vary the scope or application of the Values and Employment Principles. This change will reflect an existing power of the Public Service Commissioner.⁴³

37 *Submission 2*, p. 5.

38 *Submission 3*, p. 2.

39 *Submission 1*, p. 7.

40 *Submission 3*, p. 2.

41 *Submission 1*, p. 7; *Submission 2*, p. 6; *Submission 3*, p. 3.

42 *Submission 1*, p. 7; *Submission 2*, p. 6; *Submission 3*, p. 3.

43 *Submission 2*, p. 7.

Code of Conduct

1.42 Both Bills contain a number of parallel amendments relating to the Code of Conduct. Item 23 of the Bill replicates Item 37 of the PubS Bill by broadening the application of the first four elements of the Code of Conduct by amending those elements to apply where there is a 'connection with' employee's employment rather than in 'the course of' their employment.⁴⁴

1.43 Item 24 of the Bill is consistent with Item 38 of the PubS Bill and adds the requirement that Parliamentary Service employees uphold the integrity and good reputation of their department and the uphold the new Parliamentary Service Employment Principles, in addition to the existing requirement under subsection 13(11) to behave in a way that upholds the integrity and good reputation of the Parliamentary Service and the Parliamentary Service Values.⁴⁵

1.44 Both Bills clarify the application of the Code of Conduct to include statutory office holders, in addition to Secretaries and Agency Heads. In the case of the Parliamentary Service, this would include the Parliamentary Librarian. Items 25 and 26 of the Bill reflect Items 39 and 40 of the PubS Bill respectively in this regard.⁴⁶

1.45 Section 20 of the ParlS Act, dealing with general directions to Secretaries, is amended by Item 31 of the Bill which clarifies that a Secretary is not subject to direction by the Presiding Officers in relation to matters concerning breaches of the Code of conduct and whistleblower reports. This amendment reflects Item 45 of the PubS Bill.⁴⁷

1.46 Items 32 and 33 of the Bill will add to the ParlS MPC functions the ability to conduct a Code of Conduct investigation at the request of a Secretary and with the agreement of the Parliamentary Service employee, or former employee. The supporting provisions for this amendment will require the ParlS MPC to establish procedures for inquiry and may include different provisions for different categories of employees. These proposed changes are consistent with Items 46 and 47 of the PubS Bill.⁴⁸

1.47 As discussed above, Item 30 of the Bill substantially reflects Item 44 of the PubS Bill to allow for action to be taken against a Parliamentary Service employee or former employee, who may have knowingly provided false or misleading information, wilfully failed to disclose relevant information, or otherwise failed to behave honestly and with integrity in connection with engagement as a Parliamentary Service

44 *Submission 2*, p. 7; *Submission 3*, p. 3.

45 *Submission 2*, pp 7–8; *Submission 3*, p. 3.

46 *Submission 2*, p. 8; *Submission 3*, p. 4.

47 *Submission 2*, p. 8; *Submission 3*, p. 4.

48 *Submission 2*, p. 8; *Submission 3*, p. 4.

employee. The retrospective application of this amendment in the PubS Bill raised concern from the Scrutiny of Bills Committee and the Minister subsequently amended the PubS Bill's EM to address those concerns. The Bill's EM includes a justification for the retrospectivity of the proposed provision:

When enacted, this provision will cover all current and former Parliamentary Service employees and will apply to conduct which is alleged to have occurred before or after the commencement of time of the provision. This element of retrospectivity is necessary in light of the serious nature of the proscribed conduct. It is imperative that Senators, Members and the public have confidence in the way Parliamentary Service employees carry out their duties, and the standards of conduct expected of a Parliamentary Service employee are correspondingly high.

Given this, it is appropriate that this provision operate to apply to existing Parliamentary Service employees who may have acted dishonestly or without integrity during the employment process. Noting the current and long-standing standards required of a Parliamentary Service employee (see section 10 and section 13 of the Act), it would be anomalous to protect current employees of the Parliamentary Service who had attained their employment through dishonesty from action under the Code of Conduct. Further, this provision is consistent with section 137.1 of the *Criminal Code Act 1995*, which provides that it is an offence for a person to provide false or misleading statements to the Commonwealth. It would seem incongruous for an employee to be able to be found guilty of a criminal offence for providing false or misleading information during his or her recruitment process, but for the head of a parliamentary department to be unable to take action for the same reason under the Code of Conduct. In practice, it is likely that the proposed provision will affect only a limited number of employees, and it is consistent with changes made to the framework for the Australian Public Service in the PS Bill.⁴⁹

1.48 The Clerk of the Senate reiterated 'the element of retrospectivity is necessary to make sure that action can be taken in respect of the serious nature of the alleged conduct'.⁵⁰

Whistleblower reports

1.49 Items 37 to 39 revise the provisions for receiving and dealing with whistleblower reports and substantially reflect Items 52 to 54 of the PubS Bill.⁵¹ These provisions provide for the Secretary to establish procedures for whistleblower reports. They also provide that Presiding Officers' determinations may prescribe procedures for a Parliamentary Service employee to make a whistleblower report to the Parliamentary Service Commissioner or the ParlS MPC, or a person authorised by

49 *Explanatory Memorandum*, pp 18–19.

50 *Submission 1*, p. 7.

51 *Submission 1*, p. 8; *Submission 2*, p. 9; *Submission 3*, p. 4.

either to receive such a report, and provide for discretion to decline to conduct a whistleblower inquiry.⁵²

Review of actions

1.50 The proposed amendment under Item 40 of the Bill allows the ParlS MPC to review a Parliamentary Service action personally. Currently, only a person nominated by the ParlS MPC or a three member committee may conduct such a review. This amendment reflects Item 55 of the PubS Bill.⁵³ The PubS Bill also provides a further amendment to this section of the PubS Act to expand the definition of an 'APS action' to include action by the Public Service Commissioner when the Public Service Merit Protection Commissioner is inquiring into whether a person has breached the APS Code of Conduct.⁵⁴

Non-ongoing employees

1.51 Items 41 to 43 of the Bill make minor changes to provisions in the ParlS Act dealing with non-ongoing employment and replicate Items 61 to 63 of the PubS Bill. The Clerk of the Senate in her submission notes that, although the drafting approach is different, the intention of the proposed amendments is the same, that delegated legislation will be able to prescribe grounds for the termination of the employment of non-ongoing employees.⁵⁵

Confidentiality of information

1.52 Item 44 of the Bill introduces new provisions in the ParlS Act for the protection of information relating to the Parliamentary Service Commissioner's and ParlS MPC's functions, rather than in the determinations where they are currently located.⁵⁶ The proposed amendments are consistent with Items 70 and 71 of the PubS Bill. However, the Clerk of the Senate noted that there are differences between the Bills in regard to the purpose for which information may be sought, recognising that, if amended, there will be more inquiry powers under the PubS Act than the ParlS Act.⁵⁷

Immunity from suit

1.53 Item 46 of the Bill moves provisions dealing with immunity from suit from the determinations to the ParlS Act. The provisions provide protection for the Parliamentary Service Commissioner and ParlS MPC, and those assisting them, from civil proceedings in relation to anything done, or not done, in good faith by the person

52 *Explanatory Memorandum*, p. 22.

53 *Submission 1*, p. 8; *Submission 2*, p. 9; *Submission 3*, p. 5.

54 *Submission 1*, p. 8.

55 *Submission 1*, p. 8.

56 The Hon John Hogg, President of the Senate, *Senate Hansard*, 28 November 2012, p. 57.

57 *Submission 1*, p. 8.

in connection with the performance of their duties.⁵⁸ These amendments are broadly consistent with Item 72 of the PubS Bill. The Parliamentary Service Commissioner however noted that the Bill contains does not include immunity from suit for a delegate of the ParlS MPC, which is provided for in relation to the Public Service Merit Protection Commissioner in the PubS Bill.⁵⁹

Legislative instruments

1.54 Items 47 and 48 of the Bill deal with the Parliamentary Service Commissioner's advice and the Presiding Officers' determinations in relation to employment matters. The provisions are similar to those contained in Item 74 of the PubS Bill, with the difference being that the Public Service Commissioner 'may issue directions' but the Parliamentary Service Commissioner 'may give advice' to the Presiding Officers.⁶⁰

Miscellaneous amendments

1.55 The Bill's provisions dealing with miscellaneous amendments in Part 13 of Schedule 1 reflect some of those contained in the PubS Bill, while some are specific to the Parliamentary Service. The items which are similar in both Bills concern the clarification that a Secretary/Agency Head may reduce the classification of an employee in specified circumstances, provisions linking the amounts payable by the Presiding Officers in certain circumstances to the amount prescribed by PubS Act regulations for that purpose, and provisions to allow the Parliamentary Service Commissioner and ParlS MPC to engage consultants.⁶¹

Application, saving and transitional provisions

1.56 The application, saving and transitional provisions contained Schedule 2 of the Bill and Schedule 4 of the PubS Bill are broadly consistent with the differences as a result of the different frameworks established by the two Acts.⁶²

Other matters raised

1.57 In its submission to committee, the Department of Parliamentary Services (DPS) proposed an additional amendment to the ParlS Act relating to how DPS is referred to in the ParlS Act.⁶³

58 *Submission 1*, p. 8; *Submission 2*, p. 10; *Submission 3*, p. 5.

59 *Submission 3*, p. 5.

60 *Submission 1*, p. 9; *Submission 2*, p. 10; *Submission 3*, p. 5.

61 *Submission 1*, p. 9.

62 *Submission 1*, p. 9.

63 Department of Parliamentary Services, *Submission 4*.

1.58 DPS was established in 2004 by resolution of both Houses of Parliament in accordance subsection 54(2) of the ParlS Act. The following year, the ParlS Act was amended to define 'joint Department' as meaning:

- (a) the Department of the Parliamentary Services; or
- (b) if another Department is designated as the joint Department by the Presiding Officers – that other Department.⁶⁴

1.59 In addition, section 54 of the ParlS Act was amended to provide for the joint Department to include the Parliamentary Librarian, who is neither a Secretary nor a Parliamentary Service employee. Further references to the 'joint Department' are used in the ParlS Act where appropriate.

1.60 DPS argued in its submission that it would be desirable, both for clarity and to reflect arrangements in place since 2004, if references to 'joint Department' in the current provisions were amended to 'Department of Parliamentary Services'.⁶⁵ DPS further commented that the proposed amendment:

...would not alter the existing powers or reporting arrangements of DPS or limit the administrative flexibility in the existing section 54 of the Act to create additional parliamentary services as required.⁶⁶

1.61 The committee notes that the definition of 'joint Department' in section 7 of the ParlS Act includes DPS. The committee considers that the current provisions of the ParlS Act provide the Parliament with great flexibility to alter the joint Departments by resolution of both Houses to ensure that the best administrative arrangement is available to support the Parliament. Were 'Department of Parliamentary Services' substituted for 'joint Department' in the ParlS Act, any new arrangements for DPS, including a change of name, could not be implemented until the Act was amended.

1.62 The committee also notes that the explanatory memorandum for the Parliamentary Service Bill 2005 states, in relation to the proposed amendments to section 7, that:

This amendment inserts a definition of joint Department. The joint Department is the department in which the Parliamentary Librarian will be located. Currently the Department of Parliamentary Services is the only joint Department in the Parliamentary Service, but this amendment ensures that the location of the Parliamentary Librarian after any reorganisation of the Parliamentary departments would be addressed without further amendment to the PS Act.⁶⁷

64 *Parliamentary Service Act 1999*, section 7.

65 *Submission 4*, p. 1.

66 *Submission 4*, p. 2.

67 *Parliamentary Service Amendment Bill 2005, Explanatory Memorandum*, p. 3.

1.63 The committee considers that the amendment proposed by DPS is counter to the flexibility currently provided in the Act and therefore does not support any additional amendments to the ParlS Act at this time.

Conclusion

1.64 The Committee considers that the amendments proposed in the Bill make the necessary changes to the Parliamentary Service Act to maintain its alignment with the relevant provisions of the Public Service Act as amended. The proposed amendments will ensure that the framework of both services, particularly in relation to employment conditions and professional standards, are comparable but appropriate modifications have been incorporated to ensure that the independence of the Parliamentary Service in serving the Parliament is preserved.

Recommendation 1

1.65 The committee recommends that the Parliamentary Service Amendment Bill 2012 be passed.

Senator Helen Polley
Chair

APPENDIX 1

Submissions received by the Committee

Submissions

- 1 Clerk of the Senate
- 2 Department of the House of Representatives, Department of Parliamentary Services and Parliamentary Budget Officer
- 3 Parliamentary Service Commissioner
- 4 Department of Parliamentary Services