

Submission to the Review of the *Members of Parliament (Staff) Act 1984* (Ch)

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and

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Introduction

1. We are putting this submission forward in our capacities as observers of the Australian federal political process going back to the 1970s. We consent to this submission being made public under our names.

2. The balance of this submission consists of three parts. The first addresses certain deficiencies in the *Members of Parliament (Staff) Act 1984* ("the Act") as it currently stands. The second sets out a number of principles which should be reflected in the employment of staff in parliamentary offices. The third contains several specific recommendations.

3. In all of what follows, it needs to be borne in mind that the Act is a relatively recent feature of federal public administration, and that for the bulk of the time since federation, support for the work of Members of Parliament was provided by officers or staff of the Australian Public Service. To the extent that the Act may have been intended to prevent "politicisation" of the Public Service, it has arguably been countered by other developments pushing in the opposite direction, notably relating to the appointment of Departmental Secretaries.ⁱⁱⁱ In addition, it can reasonably be argued that the taxpayers should not be expected to fund partisan or factional activities on the part of parliamentary staffers which, if undertaken by public servants, would amount to unacceptable politicisation; and that this is so regardless of the legislation under which they are employed. The Act may also have had the unintended consequence of emboldening even quite junior staff, purporting to act in the name of a minister, to make "political" demands of public servants.^{iv}

Deficiencies in the Act

4. The Act as it currently stands has at least the following defects.

Absence of clear guiding principles

5. The Act does not reflect any clear, explicit understanding of what should be the appropriate role of parliamentary staffers. In particular, it makes no effort to distinguish between support for a parliamentarian in the pursuit of his or her official functions, and support for a parliamentarian's personal, electoral, partisan or factional interests.



Staffer positions as a step in a political career

6. Probably for that reason, work as a parliamentary staffer has increasingly come to be a stepping stone for a future parliamentary career.^v One prominent commentator, John Daley, has observed that as at July 2021, “Over half of all federal politicians had worked as an adviser at some time before they were elected.”^{vi} In the longer term, the availability of such positions, able to be filled at MPs’ and Senators’ discretion by party or factional operatives, has the effect of sustaining the existence of a class of political “insiders”. On that, Daley also notes that:

... an increasing number of ministerial staffers today have strong party affiliations, little if any experience in the public service, often little experience beyond student politics, and aspirations either for pre-selection or a career in various forms of government advocacy.^{vii}

7. This has significant implications for public trust in government. The longitudinal Australian Election Study has found that the percentage of respondents who believe that “People in government look after themselves” rose from 57% in 2007 to 75% in 2019.^{viii}

Power imbalance

8. The right of parliamentarians to select and fire staff - albeit now constrained to some extent by the provisions of the *Fair Work Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* - creates a power imbalance which has attracted much comment in the last two years. On that, we would simply observe that notwithstanding any formal employment rights which a staffer may enjoy, there will always be a disincentive to pursue them, even in cases when that would be fully justified, if doing so will have the potential to destroy a complainant’s future political aspirations.

Decisions on resourcing

9. As has been highlighted by recent controversies, the Prime Minister has considerable powers under the Act to determine the staffing which will be available to MPs and senators, including political opponents or parliamentarians whose votes may be needed. This creates an undesirable conflict of interest. On the one hand, a Prime Minister might wish to disadvantage his or her political opponents by reducing staff allocations. On the other hand, a Prime Minister might wish to curry favour with certain MPs or Senators by increasing staff allocations. Both scenarios are plainly unsatisfactory, as they involve prioritising partisan advantage over public interest.

Principles which the Act should reflect

10. We would argue that the Act should explicitly state and fully embody the following principles.



Principle 1 - The role of publicly funded parliamentary staffers is exclusively to advance the public interest in the existence of an effective system of representative government, not to advance the personal, political or electoral interests of particular MPs or Senators, nor to support in any way their broader political/partisan/factional activities.

11. This not only expresses a notion for which there would undoubtedly be overwhelming public support, but also reflects basic criteria for democratic government based on free and fair elections, according to which the resources of the state should not be able to be used to advance the political interest of incumbents.^{ix}

12. We would note here that the representational functions of an MP or Senator include:

- (1) seeking the views of voters in the electorate, and where appropriate, putting them in the public domain;
- (2) making representations on constituents' behalf to assist them in their dealing with government;
- (3) voting on, debating, proposing amendments to, or drafting, bills and parliamentary resolutions;
- (4) using the mechanisms of the Parliament, including questions on notice or without notice, debates or committees, to hold the executive government to account; and
- (5) serving within the executive government as Ministers, Assistant Ministers, and Parliamentary Secretaries.

13. Other things being equal, the more effectively a representative can perform these functions, the more likely it is that he or she will be re-elected. That of course does not imply that staff support for performance of these functions should be excluded.

Principle 2 - The personal political views of a staffer or potential staffer are irrelevant to his or her qualification for the job, and should not be taken into account when determining merit

14. This is a logical consequence of Principle 1. It was also the approach adopted by Australia's longest-serving prime minister, Sir Robert Menzies.

Principle 3 - Appropriate staffing levels for various identifiable categories of MPs and senators are to be independently determined

15. Such an approach would reflect that already taken in relation to MPs' and Senators' remuneration, which is now independently determined by the Remuneration Tribunal.



Recommendations

16. We would offer the following recommendations.
- (1) The three principles stated above should be included in the Act, and made binding, not just stated as aspirations.
 - (2) Consistent with those principles, the power to hire and fire parliamentary staffers should be taken away from MPs and Senators. Instead, a Parliamentary Staffing Branch should be established within an appropriate Department such as Prime Minister and Cabinet, or Finance. Staffing of the Branch would be through merit selection, reflecting Principles 1, 2 and 3, and be undertaken by the Public Service. Staff would be employed under the *Public Service Act 1999*, enjoy all the rights associated with such employment, and be bound by the APS Code of Conduct, modified only as necessary to the extent that it would otherwise inhibit the provision of legitimate support for the functions listed at paragraph 12.
 - (3) The Act should explicitly forbid staff of the Parliamentary Staffing Branch from engaging in any activity a significant element of which is to advance the personal political or electoral interests of MPs or Senators, or to support in any way whatsoever their broader political/partisan/factional activities.
 - (4) Staffing levels for MPs and senators should be determined independently, either by the Remuneration Tribunal or by some other appropriate independent body. Such a determination should also take into account the extent to which there could be scope for resources of the Parliamentary Staffing Branch to be shared by a number of parliamentarians. For example, some recent public discussion of staffing levels has highlighted the possibility that a reduction in them may compromise the ability of parliamentarians to draft Private Members' or Senators bills. One possible approach could be to constitute within the Parliamentary Staffing Branch a unit specifically mandated to undertake such drafting, in much the way that the Office of Parliamentary Counsel (OPC) provides drafting services across government. Indeed, it would be logical for such a unit to work closely with OPC, since effective drafting often requires not just an understanding of a single statute or policy area, but a sense of how laws or amendments may have implications across the Commonwealth statute book.
17. These recommendations, if adopted in full, would largely deal with all of the defects of the Act set out at paragraphs 5 to 9 above. Clearly in the implementation of new arrangements such as those we have proposed, there would be many points of detail which would require elaboration. None of those should however present insurmountable difficulties, not least because, as noted at paragraph 3 above, the broad approach we recommend proved to be workable for the majority of the federal Parliament's history.

Endnotes

ⁱEmeritus Professor Maley served as Professor of Diplomacy at the ANU from 2003-2021, and was Foundation Director of the Asia-Pacific College of Diplomacy from 1 July 2003 to 31 December 2014. He taught for many years in the School of Politics, University College, University of New South Wales, Australian Defence Force Academy, and has served *inter alia* as a Visiting Fellow at the Centre for the Study of Public Policy at the University of Strathclyde, and a Visiting Research Fellow in the Refugee Studies Programme at Oxford University. He was admitted as a Barrister of the High Court of Australia in 1982, and has also served as Review Editor of the *Australian Journal of Political Science*. He was the co-author of *The Theory of Politics: An Australian Perspective* (Longman Cheshire, 1990).

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ⁱⁱⁱSee Andrew Podger, "What Really Happens: Department Secretary Appointments, Contracts and Performance Pay in the Australian Public Service", *Australian Journal of Public Administration*, vol.66, no.2, June 2007, pp. 131-147.

^{iv}See Andrew Podger, *The Role of Departmental Secretaries: Personal reflections on the breadth of responsibilities today*, ANU Press, 2009, p.32.

^vFor a general discussion of the way in which the career characteristics of MPs and Senators have changed over time, see Jan Pakulski and Bruce Tranter, *The Decline of Political Leadership in Australia? Changing Recruitment and Careers of Federal Politicians*, Palgrave Macmillan, 2015, chapter 4.

^{vi}John Daley, *Gridlock: Removing barriers to policy reform*, The Grattan Institute, July 2021, pp.47-48.

^{vii}*Ibid.*, p.47.

^{viii}Sarah Cameron & Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study*, Australian National University, December 2019, p.15.

^{ix}For a discussion of this in the context of the 2019 federal election, see Marian Sawer and Michael Maley, "The Rules of the Game", in Anika Gauja, Marian Sawer and Marian Simms (eds), *Morrison's Miracle: The 2019 Federal Election*, ANU Press, 2020, pp.55-58.