



Review of the Members of Parliament (Staff) (MOPS) Act 1984

1 JULY 2022

Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600
AUSTRALIA

Review of the Members of Parliament (Staff) (MOPS) Act 1984

The Community and Public Sector Union (CPSU) is the major union for Commonwealth Public Service employees and for staff employed under the Members of Parliament (Staff) Act 1984 (MOPS Act.)

We are committed to providing a strong voice for our members on work health and safety and industrial matters. We strongly support the comprehensive review of the operation and effectiveness of the MOPS Act, as recommended by the Sex Discrimination Commissioner in the Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces (the Jenkins Report.)

The CPSU welcomes the opportunity to make a submission to the Review of the Members of Parliament (Staff) Act 1984. As identified in the Jenkins Report, the ambiguous nature of their employment relationship under the MOPS Act presents a serious risk for workers when it comes to workplace safety and there is an urgent need to examine the operation of the MOPS Act and assess its effectiveness in consideration of contemporary employment practices. The CPSU supports all meaningful action to ensure safe and respectful workplaces for MOPS Act employees.

The CPSU surveyed MOPS Act staff about their experience of having their employment regulated by the MOPS Act. The results of this survey have been used to form the basis of this submission. We note that many of the issues raised in relation to the MOPS Act have been addressed in the Jenkins report; we will refer to specific recommendations made in the Jenkins Report where relevant.

Complex employment arrangements for MOPS Act employees

Under the current framework, both parliamentarians and the Department of Finance (Finance) hold employer responsibilities. MOPS Act employees are employed by individual parliamentarians on behalf of the Commonwealth. Finance provides human resources support for employing parliamentarians and their staff via its Ministerial and Parliamentary Services (MaPS) department, including work health and safety guidance. Finance is responsible for some of the Commonwealth's legal employment obligations to MOPS Act employees.

The disconnect between the MOPS Act and the responsibilities of MaPS and the Independent Parliamentary Expenses Authority (IPEA) when it comes to who holds the authority in managing MOPS employment is widely acknowledged and was covered extensively in the Jenkins report.

Our survey results reiterated that the delineation of responsibility between the employing parliamentarian, Finance and other stakeholder agencies is not clear. 81% of respondents agreed that there is a lack of clarity around who is responsible for their employment and 95% of respondents stated that they believe the MOPS Act should be explicit about the role of MaPS in managing MOPS Act employment.

A major criticism of this employment arrangement is the lack of human resources oversight and consistency of employment practices across parliamentary offices. Moreover, many respondents hold the view that MaPS is not empowered to enforce good employment practices on parliamentarians, leaving staff often feeling unsupported in their employment.

Establishment of the Office of Parliamentarian Staffing and Culture

In response to the issues outlined above, the CPSU supports recommendation 11 of the Jenkins Report to establish an Office of Parliamentarian Staffing and Culture (OPSC) to provide centralised human resources support to parliamentarians and their staff.

The Jenkins Report proposes that the OPSC be independent of Government, headed by a statutory officer with legislative provision to employ staff and report to the Presiding Officers. It proposes several of the OPSC's core functions that would be legislated, including to govern high performance learning and development culture and undertake strategic initiatives to drive values, culture and diversity in consultation with the consultative parliamentary body and Presiding Officers. Additionally, the OPSC would have a role to resolve non-compliance with WHS obligations and employment matters such as non-completion of mandatory training and provide guidance and education about WHS obligations to parliamentarians and MOPS Act staff. It is proposed the OPSC be legislatively empowered to refer matters to the Independent Parliamentary Standards Commission (IPSC) for consideration under any proposed Codes of Conduct if resolution is unable to be achieved.

Importantly, the Jenkins Report indicates that while the OPSC can receive HR concerns and queries it would not deal with reports of bullying and harassment, sexual harassment and sexual assault. Such reports and complaints are to be referred to the IPSC for confidential resolution or investigation. The OPSC would also have no role in investigating complaints of misconduct, stating that the structural separation of HR and the complaints handling function

is critical to ensuring confidentiality and trust in Commonwealth parliamentary workplaces and creating frameworks to support safe and respectful workplaces.

The CPSU supports in principle the recommendations to amend the MOPS Act to create the OPSC and set out its core functions and responsibilities to parliamentarians and staff. The CPSU supports in principle the separation of responsibilities for complaints handling and investigation of misconduct, bullying and harassment, sexual harassment and sexual assault by the IPSC.

We recommend that the MOPS Act be amended to reference the unique relationship between the employing parliamentarian and the OPSC and clarify all entities involved in MOPS Act employment, including the IPSC.

The MOPS Act should be explicit about the functions and powers of each of the OPSC and IPSC. Further consultation with MOPS Act employees and their union is required in order to determine these precise functions and powers. Additional guidance should be available to staff about each of the OPSC and IPSC's roles, responsibilities and powers with clearly documented procedures for referral of complaints, compliance and conduct matters by OPSC to IPSC.

The CPSU notes the Jenkins Report's recommendation to establish a consultative parliamentary body for the purpose of providing guidance to, and making requests of, the OPSC and to make recommendations to Presiding Officers on the advice of the OPSC. The mechanism to establish the body is not outlined in the Jenkins Report and suggests this would be a matter for Government consideration. Regardless of how the body is formed, the CPSU seeks that the OPSC would engage and consult with employees and their union on any policies, procedures and/or workplace related matters relevant to staff.

Values and employment principles

The *Public Service Act 1999* (APS Act) and *Parliamentary Services Act 1999* (PS Act) articulate employment principles and values that guide employment decisions and behaviour, and that reflect the professionalism of public sector workers. While broadly similar, the values in each Act are also distinct due to their context, i.e., for the APS Act, the public service's accountability to the Executive and links to ministerial responsibility, and for the PS Act, the parliamentary services accountability to the Legislature and accountability via the Presiding Officers.

Despite the fact that MOPS Act employees undertake work of a public service nature and that their positions are publicly funded, there are no equivalent values or employment principles in the MOPS Act to reflect the professionalism of these workers, their service to the Australian community and their employment arrangements.

The Review should consult relevant stakeholders on the relevance of introducing and/or developing legislated values and employment principles to reflect MOPS Act employees' roles and responsibilities, guide behaviour and engender safe and respectful workplace cultures. Whilst the Act should create a clear framework for MOPS Employment, the review should not seek to legislate rights and conditions that should be negotiated with workers in enterprise

bargaining, such as performance management processes or changes to material conditions of their employment.

Merit-based recruitment

The MOPS Act currently provides parliamentarians with absolute authority to employ their staff. There is no formal recruitment process or requirement for an open selection process involving a panel of decision-makers, action to increase gender balance and diversity or for the successful candidate to be selected based on merit. It is not uncommon for staff to be chosen based on existing relationships or through the parliamentarian's own networks.

CPSU members have been critical of the lack of transparency in past recruitment and selection processes. 83% of survey respondents hold the view that the MOPS Act should include provisions relating to the requirement for selection based on merit. We note that in the most recent recruitment process applications were open to the public at large; the CPSU commends this as an improvement on previous recruitment practices and an important first step in implementing a fair and transparent process. The CPSU supports in principle merit-based selection and promotion in the employment of MOPS Act employees as a legislated requirement. The CPSU emphasises that not all APS and PS Act requirements may be appropriate or practical for MOPS Act employees and further consultation with stakeholders will be required as to an appropriate model for this context as distinct from the APS and PS models.

Recruitment should also recognise the diversity of the Australian community and foster diversity in the workplace. Recommendation 6 of the Jenkins Report requires specific action to advance gender equality, diversity and inclusion among MOPS Act employees. The CPSU supports meaningful action to achieve a gender balance and increase the representation of First Nations people, people from CALD backgrounds, people with disability and LQBTQIA+ people within parliamentary workplaces.

Standards of conduct and accountability

The MOPS Act does not mandate behavioural principles or standards of conduct for employees and employees are not bound by a commonly applicable set of values. This is addressed in Recommendation 21 of the Jenkins Report which calls for the establishment of clear and consistent standards of conduct for both Parliamentarians and MOPS Act employees, and recommends the inclusion of a Code of Conduct for Parliamentarians' Staff in the MOPS Act. The CPSU supports this recommendation in principle.

95% of survey respondents agree that a Code of Conduct for MOPS Act staff should be enshrined within the MOPS Act. It is essential that staff and their union are central to the process of developing and implementing these behavioural standards. There must be meaningful consultation with MOPS Act staff and their union as to the development of the Code, including in providing feedback in the drafting process.

Termination of employees

The employment of MOPS Act staff is inherently insecure due to the electoral cycles, leadership changes and political priorities. The MOPS Act provides parliamentarians with the ability to terminate their staff at any time and is silent on the reasons for termination of employment. It is the view of CPSU members that the termination provisions of the MOPS Act provide minimal protections to employees in the event of dismissal, with 74% of survey respondents believing that the MOPS Act does not have sufficient protections for staff against dismissal.

The CPSU supports amendments to the MOPS Act contained in the *Parliamentary Workplaces Reform Act (2022)* that insert reference to the *Fair Work Act (2009)* and other relevant industrial instruments.

The CPSU recommends the MOPS Act require that an employee be provided with detailed written reasons for dismissal prior to termination of their employment. The CPSU also recommends that the OPSC establish written procedures for effecting termination of MOPS Act employees. Those procedures should have due regard to procedural fairness and be publicly available and must meet the requirements of the *Fair Work Act (2009)* including ensuring the termination is not unfair or unlawful.

Additionally, the Review may consider and consult with stakeholders on establishing limited grounds for dismissal within the MOPS Act, as provided in the APS Act. Grounds for dismissal must be clearly articulated and understood by employing parliamentarians.

At present, possible grounds for termination of MOPS Act employees provided by Finance include unsatisfactory performance or conduct, office restructures or that the employing parliamentarian has 'lost trust or confidence' in the MOPS Act employee. Significant work is required to establish just and reasonable process to ensure dismissal on these grounds is fair, such as developing a fair and reasonable performance management process and Code of Conduct for MOPS Act employees, the establishment of the IPSC to enforce the Code and make recommendations about sanctions that may include termination and ensuring a requirement for employers to consult with staff on workplace changes including restructures prior to making a decision to cease their employment.

The Jenkins Report notes that 'loss of trust or confidence' is not an express legal right arising under the MOPS Act or the Enterprise Agreement, however it appears on the MaPS 'Ceasing employment' webpage as a possible reason for dismissal without any information as to what circumstances or conduct would give rise to loss of trust or confidence sufficient to justify termination.

The CPSU notes the findings of the Jenkins Review that MaPS guidance regarding dismissal on the grounds of office restructure and 'loss of trust or confidence' are ill-defined and potentially inconsistent with the *Fair Work Act (2009)*. It is important that both parliamentarians and staff are informed, consistent with the recent Fair Work Commission decision, that merely advising an employee that they are being dismissed for 'loss of trust or confidence' or asserting such loss is not of itself enough to show a valid reason for dismissal, and that 'sufficient evidence and reasoning to support this loss of trust or confidence' is required¹.

¹ *Mammarella v Victorian Department of Parliamentary Services* [2019] FWC 6340.

Annual public reporting and accountability

The CPSU's submission to the Jenkins Review made extensive comments about the importance of transparency and reporting to better understand the issues in MOPS Act workplaces, whether in relation to the nature of engagement, gender breakdown, diversity of workforce, WHS incidents, levels of attrition or hours of work. Recommendation 7 of the Jenkins Report outlines annual reporting requirements and criteria to be included.

When asked if the MOPS Act should be revised to ensure mandatory reports on MOPS Act employment be tabled in parliament on an annual basis, 90% of respondents said yes. CPSU supports mandatory annual reporting including reporting on workplace composition (ongoing, non-ongoing, casual, consultants), classifications of staff, gender and diversity data (including First Nations people, people from CALD backgrounds, people with disability and LGBTQIA+ peoples) as well as WHS incidents and reports to IPSC with deidentified outcomes.

In addition, there must be policy consideration for collection of data by OPSC relating to other relevant workplace related matters for the purpose of better understanding the issues faced by workers such as hours of work, use of flexible work arrangements and access to such arrangements.

Similar to the APS Act, the OPSC must be able to compel parliamentarians to provide whatever information the Commissioner requires for purpose of preparing the annual report (see APS Act s 44 re State of Service Report).

Conclusion

The CPSU supports amendments already made to the MOPS Act in the *Parliamentary Workplaces Reform Bill (2022)* to clarify interactions between MOPS Act employment and existing industrial relations, work health & safety and anti-discrimination legislation.

The CPSU supports measures to increase accountability, transparency and clarity in MOPS Act employment as detailed in this submission, provided that such measures are carried out in consultation with MOPS Act workers and their employee representative bodies.

For further information, please contact [REDACTED]

Yours faithfully,

[REDACTED]

Michael Tull
Assistant National Secretary