

30 July 2021

Ms Kate Jenkins
Sex Discrimination Commissioner
Australian Human Rights Commission
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Dear Ms Jenkins

Independent Review into the workplaces of Parliamentarians and their staff

I refer to the Commission's call for submissions to inform its Independent Review into Commonwealth Parliamentary Workplaces. I offer my submission in a professional capacity, as a political scientist, whose fields of expertise include executive governance, advisory systems, policy capacity and public policy. My research has traced the growth and evolution of Australia's ministerial staffing system.¹ It has identified the numerous dilemmas that the MOP(S) Act's inadequacy as a governance framework for the personal staff of ministers and other officer holders, and electorate office staff, poses for public administration and integrity in the Commonwealth jurisdiction.

In addition to my scholarly expertise, I have significant practical experience of these issues at all levels of Australian government and in other Westminster-style systems, including as an expert adviser and on Boards. As you know, I was among experts consulted by the [Review of the Parliamentary Workplace: Responding to Serious Incidents](#) process, led by Ms Stephanie Foster PSM, Deputy Secretary Governance in the Department of the Prime Minister and Cabinet (PM&C) (the Foster Review). I have also met with members of the legal team assisting your Review.

Like all Australians, I have been dismayed by revelations of widespread bullying, sexual harassment and sexual assault in our nation's parliament. However, and unfortunately, I have not been surprised. I am pleased that amidst the blizzard of reviews and inquiries the Prime Minister initiated in the wake of Ms Brittany Higgins' allegation that in March 2019, she was sexually assaulted by a senior colleague in the office of then Minister for Defence Industry, becoming public in February 2021, that you have been tasked with conducting an Independent Review with a broad Terms of Reference.

For the purposes of this submission, I confine my comments to the policies, processes, practices and operations of the MOP(S) Act – the fifth objective for your Review. My professional judgment is that the highly gendered and toxic culture of impunity it appears has developed in Commonwealth parliamentary workplaces, is grounded in problems inherent to the staffing system that have been extensively documented over the past 20 years, including by me. However, determined to protect executive privileges and the advantages of incumbency, successive governments have stubbornly resisted proposals to reform their staffing arrangements, despite clear evidence that the cost and consequences of the current framework now substantially outweigh its benefits. This is no longer tenable. I urge your Review to focus on important, unresolved constitutional and governance issues that are the root cause of the distressing accounts of bullying, sexual harassment and sexual assault being reported to the Commission in interviews

¹ A full list of publications is available at: annetiernan.com.au

and submissions; and that are evident in other worrying threats to integrity and accountability in Australian public administration – most recently the flagrant abuse of public expenditure revealed by the Australian National Audit Office (ANAO).²

It is critical that any recommendations the Commission might make to ensure that the people who work in parliamentary workplace are treated with dignity and respect and have access to clear and effective mechanisms to prevent bullying, sexual harassment and sexual assault, are underpinned by a governance and accountability framework that regularises the staffing system's role within the Australian core executive; and that is appropriate to a political institution of its size, complexity and cost to Australian taxpayers.

Unintended consequences and the accumulated legacies of reform hesitancy

My 2007 book *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard* (Sydney: UNSW Press) traced the development and evolution of the ministerial staffing system, including the MOP(S) Act. It identified four problems with ministerial staffing arrangements as they have developed. These are problems of accountability, conduct and behaviour, of management and 'fit' within a Westminster-style political system. It concluded that the position of ministerial staff – employed under Part III of the Act, is constitutionally anomalous; and that political practice had outstripped constitutional theory. It demonstrated that such problems are inherent to personal staffing systems internationally and were likely to persist unless and until ministers could be persuaded of the benefits of better governing what has effectively become a new political institution within Australia's core executive.

The relative lack of governance reflects the fact that the staffing system has developed organically, through accretion rather than design. It has been driven by ministers seeking support to cope with the complex and multifaceted demands of their jobs; the problem of 'ministerial overload'; to seek alignment from and assert political control over the bureaucracy and to function effectively in an increasingly competitive and professionalised 24/7 political and policy environment. Ministerial offices have become deeply engaged in public policy, public administration and governance processes, but remarkably few rules, conventions, supports or infrastructure guide their establishment and operation. Each government – indeed each minister – structures their own office according to their own or the Prime Minister's requirements or perceived needs. There are limited underlying systems and models made available, reflecting the lack of institutional memory and organisational learning between governments or ministers.³

There have been sporadic attempts to reform the staffing system, to improve the transparency of ministerial staffing arrangements and to address the vacuum of accountability that continues to surround them. Some proposals generated through two Senate Inquiries, reforms initiated by former Senator John Faulkner as Special Minister of State in the Rudd Labor government and an independent Review of Government Staffing by former senior public servant, Alan Henderson,⁴ have been adopted. For example, the Rudd government embraced a recommendation to publish an Annual Report on staff employed under the MOPS Act, however, this was discontinued by the Abbott government in 2013.

The issue of ministerial staff interactions with, and impact on the traditionally bilateral relationship between ministers and senior officials, has been the subject of intense public debate in Australia,⁵ and a

² See, for example, ANAO (2020) [Report of Funding under the Community Sport Infrastructure Program](#). Auditor-General Report No. 23 of 2019-20. See also ANAO (2021) [Administration of Commuter Car Park Projects within the Urban Congestion Fund](#). Auditor-General Report No 47 of 2020-21.

³ Tiernan, A. (2016) ['Beyond the nadir of political leadership'](#). *Griffith Review* 51: Fixing the System. Brisbane: Text Publishing.

⁴ For a detailed summary, see Tiernan, A. and Weller, P. (2010) *Learning to Be a Minister: Heroic Expectations, Practical Realities*. Carlton: MUP, pp. 253-295. And for an overview of reforms proposed post the 'Children Overboard' controversy, see Tiernan, A. (2007) *Power Without Responsibility*. Sydney: UNSW Press, pp. 233-243.

⁵ Former Departmental Secretary and Prime Ministerial Chief of Staff Dr Don Russell has been a frequent contributor, most recently in his 2021 book *Leadership*. Clayton Vic: Monash University Press. This debate is canvassed in Tiernan, A.,

recurrent theme of successive reviews of the Australian Public Service (APS).⁶ The recent [Independent Review of the APS](#), chaired by David Thodey, recommended the MOP(S) Act be amended to ‘to establish a legislated code of conduct, with appropriate enforcement provisions, for advisers’; and that the government ‘set guidance for ministerial offices to have at least half of ministerial policy advisers with public service experience’ (Recommendation 11). Prime Minister Morrison rejected this (and three other recommendations) as unnecessary, because he argued, the government already ‘expects all ministerial staff to uphold the highest standards of integrity’.⁷

The prime minister continued the reflex of successive Australian governments to determinedly resist calls to reform the staffing system – perhaps out of concern that to do so would somehow constrain their prerogatives.⁸ Australian ministerial offices are among the largest and most pervasive in any of the Westminster-style systems and are distinctive for being large, politicised and separate from the public service. The Thodey Review traced a 32% increase in the numbers of ministerial staff from 2000-2019.⁹ This has grown by a further 3.4% in the period since, to a total of 463.8 staff.¹⁰ It is a constitutional fiction that these staff are surrogates of, and act with the explicit, delegated authority of the ministers they serve. Staff do important and legitimate work within the Australian core executive, but their absence from expectations of accountability and integrity that apply to other publicly-funded institutions, and the paucity of governance arrangements pertaining to their jobs, presents an unacceptable risk to individuals, to their employers and to the public service, as well as to the quality of decision-making and public administration.

The growth in size and complexity of the staffing system has created new and unintended demands to coordinate and manage their activities, and growing recognition that ‘organisational capacity’ is a crucial dimension of prime ministerial effectiveness.¹¹ This is something that the pathway to leadership in the Australian parliament fails to adequately prepare them for. In practice, the task of organising and managing advisory and support arrangements – including recruiting, selecting and managing staff is delegated, often to the Chief of Staff. This is a critical and developing role within the Australian core executive, which should be recognised and regularised, including within an appropriate framework of accountability. These and other proposals have been extensively canvassed – including in the recent Thodey Review. Its recommendations, especially those that the Prime Minister recently rejected, should be the starting point for reforms proposed by this Review.

Resetting the balance: the constitutional stewardship imperative

Several decades of experience has demonstrated the Executive’s unwillingness to cede the institutional resources and incumbency benefits it believes the staffing system provides. Ministers and prime ministers consider partisan personal staff essential to their capacity to fulfil the ‘heroic expectations’ conferred on them by Australia’s Westminster-style system of government. However, and as is evident in the events that have catalysed this Review, and the earlier Foster Review, the costs and consequences of inadequate

Holland, I. and Deem, J. (2019) ‘Being a trusted and respected partner: the APS’ relationship with Ministers and their offices. ANZSOG Research Paper for the APS Review Panel, March. Retrieved from:

<https://www.apsreview.gov.au/sites/default/files/resources/being-trusted-respected-partner-aps-relationship-ministers-offices.pdf>

⁶ For a useful overview of the trajectory of these debates, see Davis, Glyn (2021) ‘The first task is to find the right answer...: Public service and the decline of capability. The Jim Carlton Annual Integrity Lecture. 7 May. Retrieved from:

<https://www.accountabilityrt.org/the-first-task-is-to-find-the-right-answer-public-service-and-the-decline-of-capability/>

⁷ Quoted in Davis 2021, p. 10.

⁸ For analysis of ministerial resistance to reform proposals, see Tiernan (2007), pp. 239-241.

⁹ Our Public Service, Our Future. Report of the Independent Review of the Australian Public Service, p. 134. Retrieved from: <https://pmc.gov.au/sites/default/files/publications/independent-review-aps.pdf>

¹⁰ Personal Employee Positions as at 1 May 2021. Senate Finance & Public Administration Legislation Committee, Tabled Document No. 13, 27 May 2021. Retrieved from: https://www.aph.gov.au/-/media/Estimates/fpa/bud2122/tailed_docs/Tabled_Document_13_-_Department_of_Finance_-_Personal_Employee_Positions.pdf?la=en&hash=0DB40F2B0BFE86C28BF2EC3E4407926A1D8BEBA4

¹¹ See Rhodes, R.A.W. and Tiernan, A. (2014) *Lessons in Governing: A Profile of Prime Ministers’ Chiefs of Staff*. Carlton: MUP.

governance of the staffing system – in terms of the government’s time and energy, reputation and political capital, and on individuals impacted by poor behaviour and performance, clearly outweigh the benefits of what hitherto has been relatively unfettered executive power. It is time for the Australian Parliament to embrace a proactive role in ‘constitutional stewardship’ – ensuring the long-term health of the institutions of Australian democracy, including the staffing system.

Strengthening Parliament’s role

Australia’s is not the only Westminster-style system grappling with the implications of the trend to centralisation within a large and increasingly powerful political executive, and challenged, and some argue, diminished Parliament’s oversight role and its capacity to hold governments to account. In the United Kingdom, concerns have been raised about the extent to which unwritten rules (‘conventions’) intended to guide political practice - which are premised on those holding power exercising self-restraint in the long-term public interest, are now sufficient to ensure appropriate standards of behaviour and respect for constitutional norms. There, and particularly since the Brexit referendum in 2016, a series of ‘constitutional abuses’ has occurred ‘[that] have touched upon many of the main government organs: the Cabinet, the Civil Service, Parliament, the judiciary, the devolved institutions, and even the monarchy’,¹² has brought into question whether the ‘good chap’ theory that has underpinned the British political tradition (and also informs ours), remains a sufficient bulwark against an overweening executive.

The flexibility of an unwritten constitution based on restraint and mutual respect for governing norms, have served Britain well, but Andrew Blick and Peter Hennessy argue that for the system to work, ‘ministers must exercise [their] power responsibly and be willing to cooperate with oversight mechanisms to an appropriate extent’. They argue that ‘if general standards of good behaviour among senior politicians can no longer be taken for granted, then neither can the sustenance of key constitutional principles’.¹³ More effective ways need to be found to promote a culture of good behaviour among office-holders and to discourage them from flouting fundamental principles for short-term political gain. This may include formally codifying expectations of behaviour and safeguards to protect the rule of law and to strengthen the institutions of governance, including the Civil Service, Parliament and the judiciary.

Conventions are under pressure here too. In the Australian context, the Foster Review – whose recommendations have been accepted in full by the government,¹⁴ has flagged a stronger role for the Presiding Officers and the Parliamentary Service Commissioner, in the reporting and management of serious workplace incidents. The principle of parliamentary sovereignty looms large in the Foster Review’s recommendations. As the report notes and as has played out in the case of a staffer facing criminal charges who is currently employed by an independent MP, ‘there is currently no capacity to enforce action by a parliamentarian in relation to a workplace review, either in relation to their own behaviour or in management of their staff’.¹⁵ Only the Parliament can sanction an elected representative. The legislative branch’s responsibility to ensure accountability and maintain standards of conduct assumes particular significance in the absence of a Federal Integrity Commission with appropriately wide-ranging powers, including to investigate historical complaints.

Towards a more effective framework

Parliament’s stewardship of staffing arrangements could be strengthened by establishing an appropriately resourced, independent Parliamentary Office of Personnel Management with responsibility for the

¹² Blick, A. and Hennessy, P. (2019) *Good Chaps No More? Safeguarding the Constitution in Stressful Times*. The Constitution Society. Retrieved from: <https://consoc.org.uk/publications/good-chaps-no-more-safeguarding-the-constitution-in-stressful-times-by-andrew-blick-and-peter-hennessy/> p. 3.

¹³ Blick and Hennessy (2019, pp. 16-17; 30).

¹⁴ <https://www.abc.net.au/news/2021-07-26/parliamentary-workplace-review-brittany-higgins-training-safety/100323610>

¹⁵ *Review of the Parliamentary Workplace: Responding to Serious Incidents 2021*, p. 73. Retrieved from: <https://pmc.gov.au/sites/default/files/publications/review-parliamentary-workplace-responding-serious-incidents.pdf>

allocation, employment, conduct, capability and performance of staff employed under the MOP(S) Act. The Parliamentary Budget Office, which has achieved broad acceptance across the parliament, offers a potential model for such an arrangement. Advantages include: that Members and Senators (via an appropriate parliamentary committee) rather than the prime minister, would determine the level of resourcing and allocation of staff – reducing the potential for incumbents to bargain over, or limit staff resources available to the opposition, minor parties and independents and bringing consistency, transparency and fairness to staffing arrangements. This could occur at the beginning of a parliamentary term, and should be informed by an independent review of the staffing needs of ministers and other office holders, MPs and Senators to develop a baseline. Establishing an independent Parliamentary Office of this kind would relieve demands on the Departments of Finance and PM&C, whose roles could revert to service provision and general guidance, respectively.

Parliament would also be responsible for establishing a Code of Conduct for MOP(S) Act staff. Preferably, it would be a set of values, not dissimilar to the [APS Values](#), perhaps framed in terms of [Principles of Public Life](#), developed through some kind of deliberative process to achieve a shared commitment to what is agreed. The Code of Conduct/Statement of Values should be supported by induction, education and professional development; and a disciplinary process for dealing with breaches administered independently and impartially through the Parliament. With respect to induction and continuing professional development, it is likely the [APS Academy](#), now based at the Museum of Australian Democracy at Old Parliament House, could develop an expanded remit, using its networked model to create a suite of offerings for MOP(S) Act staff in key categories, perhaps with support from an Advisory Group of former ministers and staffers – like the [Reference Panel on Strengthening Ministerial and APS Partnerships](#), recently convened by the Public Service Commissioner.

These proposals beg the question of how best to manage staff recruitment and selection. As noted, the Thodey Review recommended a return to the practice of a high proportion of staff being recruited from the public service. This has a range of advantages, not least that APS positions are subject to merit selection. Working in a department or agency develops foundational skills in working in organisations and the business and processes of government that many (particularly young) staffers and those from media/primarily political backgrounds sometimes lack. It supports development of networks and career pathways for staff post-politics, reducing the temptation for ministers to see government agencies and Commonwealth corporate entities as outplacement services for partisan loyalists. The opposition, minor parties and independents are likely to welcome the potential to have access to support from skilled and experienced officials, seconded to their offices.

Such an approach also creates the potential to reset expectations about the ministerial staff role, which was never intended to become a career. It was envisaged as a developmental pathway – essential grounding for career officials seeking higher posts, for international organisations and policy advocacy. Political parties can be expected to vehemently resist proposals to limit their discretion in staff selection. One way to limit such concerns would be for the proposed Parliamentary Office to design processes that develop pools of qualified applicants in key staff categories. There are ways to do this that do not unreasonably impinge on the ambition to have people ministers and office-holders ‘know and trust’ in their offices. It merely requires them to demonstrate their qualifications and suitability for an ideally narrowed range of senior staff positions; to accept that such staff need to be part of the framework of accountability; and to acknowledge that staff are a mark of their employer.

Conclusion

As the Commission considers its recommendations, it might reflect on the fate of the many strongly-evidenced and persuasively argued expert reports that have preceded it, which have sought in good faith to address the persistent and recurrent issues canvassed in my submission and their accumulated consequences. Reform is urgent and overdue, but it will happen only when a sufficient number of our nation’s leaders acknowledge and embrace their obligations as institutional and constitutional stewards

and accept the need for mutuality and restraint in their pursuit and exercise of power and authority – and also demand it from those who purport to act in their name.

I thank you for the opportunity to make a submission and look forward to the Commission's final report.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Anne Tiernan".

Dr Anne Tiernan
Adjunct Professor