

# EXPLANATORY STATEMENT

Issued by the authority of the Presiding Officers

*Parliamentary Service Act 1999*

## ***Parliamentary Service Amendment (Independent Parliamentary Workplace Complaints Mechanism) Determination 2021***

### **Authority**

The Presiding Officers of the House of Representatives and the Senate make the *Parliamentary Service Amendment (Independent Parliamentary Workplace Complaints Mechanism) Determination 2021* (the **Amendment Determination**) under subsection 71(1) of the *Parliamentary Service Act* (the **Act**).

The Act establishes the Parliamentary Service. Subsection 71(1) of the Act provides that the Presiding Officers may make determinations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act. Subsection 71(1) of the Act specifies that the Presiding Officers may make determinations after consulting the Parliamentary Service Commissioner (the **Commissioner**).

### **Overview of the amendments**

The main purpose of the Amendment Determination is to amend the *Parliamentary Service Determination 2013* (the **Determination**) to confer additional functions on the Commissioner for the purposes of 40(1)(d) of the Act. Subsection 40(1)(d) of the Act provides that the Commissioner's functions include such other functions as are conferred on the Commissioner by the Act, the determination or any other law.

The Amendment Determination describes the functions conferred on the Commissioner to give effect to an independent parliamentary workplace complaints mechanism (the **mechanism**) for staff employed under the *Members of Parliament (Staff) (MOP(S)) Act 1984* (**MOP(S) Act employees**) and parliamentarians. These are to:

- establish and maintain a mechanism able to review and make recommendations in relation to complaints about serious incidents involving MOP(S) Act employees and parliamentarians in the course of their work;
- provide support to MOP(S) Act employees and parliamentarians in relation to serious incidents and other work health and safety-related matters that occur in the course of them performing their duties as MOP(S) Act employees or parliamentarians;
- provide education and information in relation to the mechanism, serious incidents and other work health and safety-related matters.

The Amendment Determination provides that the mechanism can review complaints about serious incidents that occurred after 18 May 2019, where the parties remain in MOP(S) Act employment or in parliament. Complaints can also be made by employees after they cease MOP(S) Act employment, so long as the subject of the complaint remains in parliament or in parliamentary employment.

The Amendment Determination provides that support and information may be provided at any time and irrespective of whether a person has ceased to be a MOP(S) Act employee or parliamentarian.

The Amendment Determination also provides that education may be provided to current MOPS Act employees and parliamentarians.

Further detail about the Amendment Determination is provided at [Attachment A](#) to this explanatory statement.

## **Reasons**

The Amendment Determination partly implements the *Review of the Parliamentary Workplace: Responding to Serious Incidents* (the **Review**) undertaken by Deputy Secretary Stephanie Foster PSM of the Department of the Prime Minister and Cabinet.

Deputy Secretary Foster's Review was tasked with providing recommendations on an independent complaints mechanism for MOP(S) Act employees in advance of the Sex Discrimination Commissioner Kate Jenkins reporting the findings of her independent review into the workplaces of parliamentarians and their staff.

The Review found that current procedures and processes are not designed or able to respond appropriately to serious incidents in the parliamentary workplace. Recommendation 4 of the Review outlines a proposed independent complaints mechanism to be established as a function of the Commissioner. The mechanism, known as the Parliamentary Workplace Support Service (**PWSS**), will provide support, advice and case co-ordination to parties affected by a serious incident in the course of their parliamentary employment, and a workplace review function, comprised of independent reviewers able to review complaints and provide recommendations for action where a complaint is substantiated.

The Amendment Determination articulates the position and role of the Commissioner in relation to process of the Independent Parliamentary Complaints Mechanism. The operation of the mechanism will be consistent with the recommendations provided in the Review. For example, in circumstances where a workplace review is conducted into the behaviour of a staff member, the complainant, the person subject of the allegation and the employing parliamentarian will be provided with a report upon completion of the review. Where a workplace review concerns the behaviour of a parliamentarian, a report would be provided to the complainant and the parliamentarian that is the subject of the complaint.

The Amendment Determination reflects the intention that the Commissioner not engage closely in the PWSS's operations but provide oversight and quality assurance over its organisational processes. The Amendment Determination also outlines the processes for escalation of matters by the Commissioner to the Presiding Officers.

The conferral of the function as described on the Commissioner represents an administrative solution to the need for a complaints mechanism for parliamentarians and MOP(S) Act employees, and guarantees two key elements lacking in present arrangements for responding to serious incidents in the parliamentary workplace: independence and accountability.

Establishing the PWSS and the workplace review service as a function of the Commissioner ensures the mechanism is independent of parliamentarians as the employers of MOP(S) Act employees, political parties and government. The reviewability of conduct arises from the outline of the current duties and responsibilities of parliamentarians and their staff employed under the Members of Parliament (Staff) Act 1984 (MOP(S) Act) set out by the Minister for Finance and communicated to MOP(S) Act employees and parliamentarians. Where a workplace review substantiates a breach of the duties and responsibilities in relation to a serious incident and recommends proportionate action, it is expected that the employing parliamentarian (or parliamentarian, if they are the subject of the complaint) acts on the recommendation.

The Amendment Determination prescribes a pathway for appropriate parliamentary action, facilitated by the Commissioner, where a parliamentarian fails to do so. The Commissioner will have no power to compel or sanction parliamentarians. The design of the Commissioner's function in this way balances the need for accountability with respect for the parliament. Independence and certainty that there will be consequences for unacceptable behaviour in the workplace are critical to a mechanism that is trusted and an environment in which people feel safe to report serious incidents.

'Serious incident' has been defined to include sexual assault, assault, sexual harassment, harassment, a person being bullied at work (within the meaning of the *Fair Work Act 2009*) or an incident of a person behaving unreasonably towards another person in a way that creates a risk to work health or safety.

The definition recognises applicable federal and state legislation and extends to categories of behaviour that are likely to cause serious harm to a person. It recognises that a serious incident may relate to either a pattern of behaviour or a single incident that is so unreasonable as to cause serious harm.

The mechanism will have appropriate support and referral procedures in place where the conduct alleged is criminal (i.e. sexual assault and assault). The mechanism should not review criminal allegations; where a workplace review has commenced but it becomes clear that the allegation is criminal in nature, the workplace review into that activity should cease. Where it may be appropriate to consider a workplace review where the conduct is clearly a workplace matter, with strong connections to employment, such a review would not be an investigation into the criminal allegation, it would consider whether the person has breached a workplace policy or the outline of the current duties and responsibilities of parliamentarians and their staff employed under the Members of Parliament (Staff) Act 1984 (MOP(S) Act) set out by the Minister for Finance and communicated to MOP(S) Act employees and parliamentarians, and what action is necessary to protect the safety of other employees.

The mechanism may receive reports and provide support in relation to non-serious incidents, but will not be able to review them, these matters may be referred to the Department of Finance as appropriate.

The Amendment Determination provides that the mechanism can review complaints about serious incidents that occurred after 18 May 2019, where both parties are either a MOP(S) Act employee or a parliamentarian. It also provides that a former MOP(S) Act employee may make a complaint and it can be reviewed where the subject of the complaint is still either a MOP(S) Act employee or a parliamentarian. If the review of a complaint commences and the subject of the complaint ceases to be a MOP(S) Act employee during the course of the review, the review may continue to finalisation.

The Amendment Determination also provides that a former parliamentarian may not have a complaint reviewed after they leave the parliament. The scope of the mechanism has been designed this way to address issues in current offices rather than having to manage the complexity associated with reviewing historical reports, particularly where they relate to offices that no longer exist.

However, support and information in respect of serious incidents and other work health and safety-related matters relating to the performance of duties as a MOPS Act employee or Parliamentarian, may be provided at any time and irrespective of whether a person has ceased to be a MOP(S) Act employee or parliamentarian. This recognises that the function of the mechanism is not only to review and remedy individual incidents but to provide individuals with support, direct them to appropriate avenues for redress where they may be available, and actively promote a safe and respectful parliamentary workplace, particularly where a known risk to work health and safety exists.

While ongoing training for parliamentarians and their staff will remain the responsibility of the Department of Finance, the mechanism will have a role in providing education where there is a connection with the operation of the independent complaints mechanism. Recognising this, the Amendment Determination provides for the education of people who are current MOP(S) Act employees and Parliamentarians, in relation to the mechanism, serious incidents and other matters relating to work, health and safety that arise in the course of performing duties as a MOP(S) Act employee or parliamentarian.

### **Regulatory impact assessment**

No regulation impact statement is required for the measures contained in the Amendment Determination. RIS reference ID: 44193.

### **Statement of compatibility with human rights**

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the *Legislation Act 2003* applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out at [Attachment B](#) has been prepared to meet that requirement.

## Notes on clauses

### Operative clauses

**Clause 1** sets out the name of the Amendment Determination.

**Clause 2** provides that the Amendment Determination commences on the day after registration.

**Clause 3** specifies the authority for making the Amendment Determination.

**Clause 4** provides that Schedules 1 and 2 amend the Determination.

### Schedule 1

**Item 1 of Schedule 1** inserts a new clause 112B. Clause 112B describes new functions conferred on the Commissioner for the purposes of giving effect to the independent parliamentary workplace complaints mechanism (the **mechanism**); provides for the scope of the mechanism, and; defines MOP(S) Act employee, parliamentarian and serious incident.

Subclause 112B(1) confers functions on the Parliamentary Service Commissioner under paragraph 40(1)(d) of the Act.

Subclause 112B(1)(a) confers a function on the Parliamentary Service Commissioner to establish and maintain a complaints mechanism. The mechanism will:

- review and make recommendations in relation to complaints about serious incidents involving MOP(S) Act employees, parliamentarians, or both; and
- provide support to MOP(S) Act employees and parliamentarians in relation to serious incidents that occur in the course of their work and other matters relating to work health and safety in the course of performing duties as a MOP(S) Act employee or parliamentarian;

Subclause 112B(1)(b) confers a function on the Parliamentary Service Commissioner to provide education and information in relation to the complaints mechanism; and serious incidents and other matters relating to work health and safety.

Subclause 112B(1)(c) confers a function on the Parliamentary Service Commissioner ensure the independence and quality of the complaints mechanism.

Subclause 112B(1)(d) confers a function for the Parliamentary Service Commissioner, that where a complaint is upheld following review, to receive a report of the review and where the report makes recommendations in relation to parliamentarian, subclause 112B(1)(e) confers a function for the Commissioner to engage with a parliamentarian in relation to implementing any recommendations.

Subclause 112B(1)(f) confers a function on the Parliamentary Service Commissioner that where recommendations made to a parliamentarian are not implemented, the Commissioner will refer the report to the relevant Presiding Officer in accordance with any procedure that applies under the mechanism.

Subclause 122B(2)(a) provides that the mechanism will not review complaints that have occurred before 18 May 2019. Subclause 122B(2)(b) provides that the mechanism will not review complaints made after the person who is the subject of the complaint has ceased to be a MOP(S) Act employee or parliamentarian. Subclause 112B(2)(c) provides that the mechanism will not review complaints made by a person about a serious incident that occurred while the person was a parliamentarian, if the person has ceased to be a parliamentarian since the incident occurred.

Subclause 112B (3) clarifies the operation of subclause 112B(2)(c) by providing that subclause 112B(2)(c) applies regardless of whether the person is subsequently re-elected or enters into MOP(S) Act employment. In this circumstance the person will not be able to have a complaint related to a previous term reviewed.

Subclause 112B(4) defines:

- MOP(S) Act employee as a person employed under Part III or Part IV of the *Members of Parliament (Staff) Act 1984*;
- a parliamentarian as a Senator or Member of the House of Representatives; and
- a serious incident as sexual assault, assault, sexual harassment, harassment, a person being bullied at work (within the meaning of the *Fair Work Act 2009*), or an incident of a person behaving unreasonably towards another person in a way that creates a risk to work health and safety

**Item 2 of Schedule 1** amends Schedule 1 by inserting a cross reference to the definition of MOP(S) Act employee, parliamentarian and serious incident into the determination.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

*Parliamentary Service Amendment (Independent Parliamentary Workplace Complaints Mechanism)  
Determination 2021*

### Overview of the Legislative Instrument

The main purpose of the *Parliamentary Service Amendment (Independent Parliamentary Workplace Complaints Mechanism) Determination 2021* (the **Amendment Determination**) is to amend the *Parliamentary Service Determination 2013* (the **Determination**) to confer additional functions on the Commissioner for the purposes of subsection 40(1)(d) of the Act. Subsection 40(1)(d) of the Act provides that the Commissioner's functions include such other functions as are conferred on the Commissioner by the Act, the determination or any other law.

The determination describes the functions conferred on the Commissioner to give effect to an independent parliamentary workplace complaints mechanism (the **mechanism**) for staff employed under the *Members of Parliament (Staff) (MOP(S)) Act 1984* (**MOP(S) Act employees**) and parliamentarians. These are to:

- establish and maintain a mechanism able to review and make recommendations in relation to complaints about serious incidents involving MOP(S) Act employees and parliamentarians in the course of their work;
- provide support to MOP(S) Act employees and parliamentarians in relation to serious incidents and other work health and safety-related matters;
- provide education and information in relation to the mechanism, serious incidents and other work health and safety-related matters.

### Human rights implications

The determination does not introduce or abrogate any existing rights. Rather, by giving effect to the mechanism, it introduces a new process whereby MOP(S) Act employees and parliamentarians can seek support for and review of serious incidents in the course of their work. It may therefore be seen to advance the enjoyment of certain rights, discussed below.

#### ***Rights to equality and non-discrimination***

The mechanism will provide support and review for serious incidents, which are defined to include harassment. Harassment as defined in federal and state and territory discrimination laws generally means treating a person less favourably on the basis of a particular protected attribute, such as a person's sex, race, disability, marital status, sexual orientation, pregnancy or political opinion. A number of the core treaties create rights that explicitly or implicitly guarantee freedom from harassment on the basis of a protected attribute.

Article 1 of the International Covenant on Civil and Political Rights (ICCPR) provides that all people have the right to freely pursue their economic, social and cultural development. Article 2 obliges State Parties to respect all people and guarantee them the rights contained in the Covenant irrespective of distinctions similar to those contained in legislative definitions of harassment. Article 3 obliges State Parties to guarantee men and women's equal access to the rights contained in the Covenant. The

International Covenant on Economic, Social and Cultural Rights (ICESCR) similarly provides that all people should be able to pursue their economic, social and cultural self-determination irrespective of distinctions.

The International Covenant on the Elimination of all Forms of Racial Discrimination (ICERD), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD) each create rights that, by necessity, guarantee freedom from harassment on the basis of race, gender and disability respectively.

By providing support and an avenue for review of incidents of harassment in the workplace, the mechanism assists in ensuring that the rights discussed above are upheld.

### ***The right to work***

Article 6 of the ICESCR recognises the right to work and the obligation of State Parties to implement measures that allow for full and productive employment under conditions that safeguard fundamental political and economic freedom to the individual. Article 7 of the ICESCR recognises the right of all people to just and favourable conditions of work, including ensuring in particular safe and healthy working conditions.

Article 5 of the CERD recognises the right of all people, irrespective of race, to work and to just and favourable conditions of employment. Article 11 of the CEDAW provides that State Parties take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure equality in respect of rights, in particular the right to protection of health and safety in working conditions. Article 27 of the CRPD recognises the right of people with disabilities to work on an equal basis with others, including the right to work in an environment that is open, inclusive and accessible to persons with disabilities, and the obligation of State Parties to protect the rights of people with disabilities to just and favourable conditions of work, including safe and healthy working conditions.

By providing support and an avenue for review of serious incidents, including harassment, in the course of employment, and ensuring more broadly that work health and safety obligations are met, the mechanism will advance the enjoyment of full and productive employment under just and favourable conditions.

### ***Participation in public life***

Article 7 of the CEDAW obliges State Parties to eliminate discrimination against women in the political and public life of the country and in particular to ensure women are equally able to participate in the formulation and implementation of government policy. Article 29 of the CRPD obliges State Parties to ensure that people with disabilities can effectively and fully participate in political and public life on an equal basis with others

Working as a MOP(S) Act employee or parliamentarian represents significant participation in the political and public life of the country and close involvement in policy-making. By promoting a safe and respectful workplace free of harassment, the mechanism will ensure that all people are able to participate in the political and public life of the country on an equal basis and to the best of their abilities.

### **Conclusion**

The creation of a safe and respectful workplace free from harassment advances the enjoyment of the rights discussed above. The Amendment Determination is therefore compatible with human rights



because it advances the protection of human rights. The Amendment Determination does not limit human rights any further than previously limited.