

EXPLANATORY STATEMENT

Issued by the authority of the Presiding Officers

Parliamentary Service Act 1999

*Parliamentary Service Amendment (Independent Parliamentary Workplace Complaints Mechanism)
Determination 2022*

Authority

The Presiding Officers of the House of Representatives and the Senate make the *Parliamentary Service Amendment (Independent Parliamentary Workplace Complaints Mechanism) Determination 2022* (the **Amendment Determination**) under subsection 71(1) of the *Parliamentary Service Act 1999* (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 expand the functions conferred on the Commissioner for the purposes of paragraph 40(1)(d) of the Act. Paragraph 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 determinations or any other law.

The Amendment Determination expands 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) Act 1984* (the **MOP(S) Act**) and parliamentarians. The functions conferred on the Commissioner by section 112B of the Determination include the functions 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 (the **workplace review function**);
- provide trauma-informed support services, and early intervention and resolution services (the **support services**) 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 those persons performing their duties as MOP(S) Act employees or parliamentarians; and
- provide education and information in relation to the mechanism, serious incidents and other matters related to work health and safety.

The mechanism is operated under the name of the Parliamentary Workplace Support Service (the **PWSS**).

The Amendment Determination expands the PWSS by:

- permitting the PWSS to provide support services and education to all Commonwealth parliamentary workplace participants in relation a range of matters connected with their duties; and
- permitting historical complaints to be reviewed as part of the workplace review function.

The PWSS has also been expanded through the creation of a clear pathway for the PWSS to receive anonymous complaints, including through a digital platform.

The Amendment Determination also clarifies that the PWSS can handle all allegations of sexual assault, assault, sexual harassment, harassment, bullying at work (within the meaning of the *Fair Work Act 2009*) or an instance of a person behaving unreasonably towards another person in a way that creates a risk to work health or safety. This clarification is to ensure potential complainants are not dissuaded from making a complaint if they are unsure of whether the conduct is of a serious nature.

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

Reasons

The Amendment Determination is made in response to Recommendation 20 of the *Report on the Independent Review into Commonwealth Parliamentary Workplaces* conducted by the Sex Discrimination Commissioner, Kate Jenkins (the **Set the Standard Report**). Recommendation 20 has five elements:

- make [the PWSS] available to all Commonwealth parliamentary workplace participants;
- include all allegations of bullying, sexual harassment and sexual assault;
- establish a clear pathway for anonymous reporting, including through a digital platform;
- publish additional information on what happens with anonymous and bystander disclosures; and
- include [historical] complaints of bullying, sexual harassment and sexual assault and those relating to people who have left the workplace.

The Amendment Determination and other actions taken address each of these recommendations.

The Amendment Determination does not expand the scope of the workplace review function to include complaints concerning the conduct of, or complaints made by, persons other than, current or former, parliamentarians or MOP(S) Act employees. This approach reflects the need to maintain the PWSS's high quality of service provision and to allow sufficient time to build the necessary arrangements with other workplaces in the parliamentary environment that have existing processes to manage workplace complaints, in order to avoid fragmentation and duplication for PWSS clients.

Other Commonwealth parliamentary workplaces participants can continue to access existing arrangements in their workplaces, as well as the expanded support services provided by the PWSS. This could include therapeutic supports and early intervention, and, on a voluntary basis, the PWSS facilitating the informal resolution (eg by assisting a client to raise an issue directly in the workplace, facilitating informal discussion or conducting mediation).

This approach recognises that the functions of the PWSS are not only to review and remedy individual incidents but to provide individuals with support, direct them to appropriate avenues for a remedy where available, and actively promote a safe and respectful parliamentary workplace, particularly where a work health and safety risk has been identified. Where an issue can be more appropriately addressed by another body or service, the PWSS will support individuals to access that body or service. It is envisaged that the PWSS will enter into arrangements with appropriate bodies to facilitate the effective referral and resolution of such issues.

It is envisaged the PWSS will continue to operate in this capacity until the proposed establishment of the Independent Parliamentary Standards Commission (see Recommendation 22 of the *Set the Standard Report*), which the Report proposed would incorporate the PWSS.

The scope of conduct the PWSS may review includes all serious incidents or misconduct involving MOP(S) Act employees and parliamentarians - that is, all alleged incidents of bullying (within the meaning of the *Fair Work Act 2009*), assault, sexual assault, harassment and sexual harassment, and other unreasonable behaviour and conduct that creates a risk to work health and safety. Expanding the

term *serious incidents to serious incidents or misconduct* ensures potential complainants are not dissuaded from making a complaint if they are unsure of whether the conduct is of a serious nature.

The PWSS has appropriate support and referral procedures in place where the conduct alleged is criminal (eg sexual assault and assault). The PWSS will not formally 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 may need to cease so as not to interfere with the operation of the criminal justice system. 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 and no findings would be made that a person has engaged in criminal conduct. The power to make such findings is to be reserved to the courts. The review 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 MOPS Act set out by the Minister for Finance and communicated to MOPS staff members and parliamentarians, and what action is necessary to protect the safety of other employees.

The PWSS will be able to review complaints made by former parliamentarians, and complaints concerning former parliamentarians and MOP(S) Act employees, irrespective of the time the conduct occurred (ie complaints concerning conduct that occurred prior to 18 May 2019 may be reviewed). The PWSS will assess whether a complaint warrants a formal review and, where it does so, to conduct a review, and make findings and recommendations in relation to the relevant conduct.

A review will not be conducted of a complaint made by a person who was not a parliamentarian or MOP(S) Act employee at the time the serious incident or misconduct occurred. This reflects the fact that the review function is only available in relation to conduct that involves parliamentarians and MOP(S) Act employees. Other Commonwealth parliamentary workplace participants may access support services where appropriate.

Reports may be made to the PWSS anonymously, including through the PWSS website, and may be made by either the person affected by conduct or another person (eg a bystander). The information collected in anonymous reports will be reviewed by a case coordinator and treated seriously and confidentially. The level of information supplied in an anonymous report will impact what action will be taken.

PWSS may conduct a preliminary assessment of complaints it receives. The PWSS may then decide that a complaint warrants a formal review. The PWSS may also decide that a formal review is not warranted, or it is otherwise impractical or undesirable in the circumstances.

The review 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 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.

Where a workplace review substantiates a breach of the duties and responsibilities and recommends proportionate action, it is expected that the relevant parliamentarian acts on the recommendation. The Determination prescribes a pathway for appropriate parliamentary action, facilitated by the Commissioner, where a parliamentarian fails to act on a recommendation. The Commissioner has 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 ensuring the PWSS is trusted and an environment in which people feel safe to report inappropriate conduct is maintained.

While ongoing training for parliamentarians and their staff will remain the responsibility of the Department of Finance, the PWSS will have a role in providing education and information where

there is a connection with the operation of the mechanism. Recognising this, the Amendment Determination provides for the education of people who are Commonwealth parliamentary workplace participants, in relation to the mechanism, serious incidents or misconduct involving MOP(S) Act employees, parliamentarians, or both, in the course of their work and other matters relating to work health and safety.

Consultation

The Parliamentary Service Commissioner was consulted during the preparation of the Amendment Determination.

Regulatory impact assessment

No regulation impact statement is required for the measures contained in the Amendment Determination. RIS reference ID: 01533.

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 it is registered.

Clause 3 specifies the authority for making the Amendment Determination under subsection 71(1) of the Act.

Clause 4 provides that Schedule 1 amends the Determination.

Item 1—Review function

Item 1 of Schedule 1 amends subparagraph 112B(1)(a)(i) to reflect the change of the defined term *serious incident* to *serious incident or misconduct*.

This addresses Recommendation 20(b) of the Set the Standard Report, which recommended that the scope of the PWSS be expanded to include all allegations of bullying, sexual harassment and sexual assault.

Adding the word ‘misconduct’, in addition to ‘serious incident’, is intended to clarify that while all incidents of assault, sexual assault, harassment, sexual harassment, bullying (within the meaning of the *Fair Work Act 2009*), and other unreasonable behaviour and conduct that creates a risk to work health and safety is of a serious nature potential complainants should not be dissuaded from making a complaint about such conduct. This addresses concerns raised in the Set the Standard Report that ‘the term serious incident imposes an unreasonably high threshold, which may in turn act as a barrier to reporting’, by clarifying that the conduct within the scope of the PWSS is in relation to serious incidents or misconduct.

Item 2—Expansion of support services

Item 2 of Schedule 1 repeals and replaces subparagraph 112B(1)(a)(ii) to expand the support function of the PWSS to current or former Commonwealth parliamentary workplace participants.

The PWSS may provide support services to a Commonwealth parliamentary workplace participant in relation to serious incidents or misconduct and other matters relating to work health and safety in the course of performing duties in a Commonwealth parliamentary workplace, or in the course of performing duties as a Commonwealth parliamentary workplace participant.

This broadens the scope of the previous support service that was confined to parliamentarians and MOP(S) Act employees.

Support services could include therapeutic supports and, on a voluntary basis, the PWSS facilitating the informal resolution of complaints through assisting a client to raise an issue directly in the workplace, or otherwise facilitating discussions. The precise nature of the support available to a particular Commonwealth parliamentary workplace participant will depend on the nature of the issue in relation to which the participant has sought support.

Where an issue concerns or includes matters that can be more appropriately addressed by another body or service, the PWSS will support individuals to access that body or service. It is envisaged that the PWSS will enter into arrangements with appropriate bodies that have a role in Commonwealth parliamentary workplaces to facilitate the effective referral and resolution of such issues.

In relation to serious incidents or misconduct, support services may be provided to a complainant, a respondent or another person while the complaint is being assessed, while a workplace review is underway, after a review is concluded or when a review is not conducted.

Items 3, 4 and 5—Education and information

Item 3 of Schedule 1 amends paragraph 112B(1)(b) to expand the Commissioner’s function of providing education and information in relation to the PWSS and the matters it deals with. This amendment expands the scope of the Commissioner’s function to reflect the expanded scope of the PWSS, by allowing education and information to be provided to Commonwealth parliamentary workplace participants.

Item 4 of Schedule 1 amends subparagraph 112B(1)(b)(ii) to reflect the change of the defined term *serious incident* to *serious incident or misconduct*. This subparagraph allows for education and information to be given to Commonwealth parliamentary workplace participants in relation to serious incidents or misconduct involving MOP(S) Act employees, parliamentarians, or both, in the course of the MOP(S) Act employee or parliamentarian’s work.

Item 5 amends subparagraph 112B(1)(b)(iii) to ensure education and information can be given to in relation to matters relating to work health and safety that may arise in the course of performing duties in a Commonwealth parliamentary workplace, or in the course of performing duties as a Commonwealth parliamentary workplace participant.

Ongoing training for parliamentarians and their staff will remain the responsibility of other entities including the Department of Finance and the relevant parliamentarian.

Item 6—Limitations

Item 6 of Schedule 1 repeals subclauses 112B(2) and (3) of the Determination.

The PWSS may review historical complaints

Previous subclauses 112B(2) and (3) imposed limitations on the ability of the PWSS to review historical complaints, specifically complaints:

- about incidents that occurred before 18 May 2019;
- made after the person who is the subject of the complaint had ceased to be a MOP(S) Act employee or parliamentarian; and
- made by a person about an incident that occurred while the person was a parliamentarian, if the person has ceased to be a parliamentarian since the incident occurred.

In accordance with Recommendation 20(e) of the Set the Standard Report, to permit the review of historical complaints, each of these limitations has been removed. The Report notes there are a number of benefits to reviewing historical complaints, including that a review can provide complainants with a mechanism to be heard and acknowledged, and addresses past trauma; can provide some form of justice; and may act as a deterrent to those who could otherwise engage in harmful behaviour.

The PWSS will have the discretion to assess the circumstances of each individual complaint and advise as to what action may be taken along a graduated spectrum of resolution.

The ability to review a historical complaint will depend on the circumstances of the complaint and may not be practicable in all cases. The PWSS will work with individual complainants to ensure they are aware of what they can expect from the complaints process.

Items 7, 8, 9, 10 and 11—Definitions

Items 7, 8, 9, 10 and 11 either insert, or repeal and replace, the definitions of a number of terms used in amended clause 112B.

Commonwealth parliamentary workplace

The first of these terms is *Commonwealth parliamentary workplace*. This definition includes the area defined as the Parliamentary precincts, as defined in subsection 3(1) of the *Parliamentary Precincts Act 1988*. These precincts include certain grounds around Parliament House. The definition of *Commonwealth parliamentary workplace* also includes an office provided or made available under the *Parliamentary Business Resources Act 2017*. This may include an electorate office or a Commonwealth Parliamentary Office located in a capital city, as well as other offices used by Commonwealth parliamentary workplace participants.

Commonwealth parliamentary workplace participants

Item 7 of Schedule 1 also defines *Commonwealth parliamentary workplace participant*, which describes the class of persons who can access the expanded PWSS support services. The following persons are Commonwealth parliamentary workplace participants who can access the support service:

- MOP(S) Act employees;
- parliamentarians;
- Parliamentary Service employees;
- COMCAR drivers;
- any other person who works in a Commonwealth parliamentary workplace.

The final limb of this definition would include, for example, a Press Gallery journalist.

A person may work in a Commonwealth Parliamentary workplace in any capacity, including as an unpaid volunteer. All such persons would be able to access the expanded support service.

Paragraph (d) of this definition is intended to have the effect that references to the duties of COMCAR drivers are references to those duties that relate to Commonwealth parliamentary workplace participants. This reflects the fact that other clients do not have a connection to Commonwealth parliamentary workplaces and the functions of the PWSS.

MOP(S) Act employees

The term *MOP(S) Act employee* is expanded to include consultants engaged under Part II of the MOP(S) Act. The definition continues to include persons employed under Parts III and IV of that Act.

Parliamentarians

The definition of *parliamentarian* is expanded beyond members and senators to include other persons who act in similar roles to parliamentarians and are responsible for the engagement of MOP(S) Act employees. These additional classes of person are:

- senior office holders, within the meaning of the *Parliamentary Business Resources Regulations 2017*. This includes the President of the Senate, the Speaker of the House of Representatives, a Minister and the Leader or Deputy Leader of the Opposition in a House of the Parliament; and
- former Prime Ministers, who continue to be responsible for the employment of MOP(S) Act employees; and
- former parliamentarians during an election period—when the person is not a parliamentarian only because the relevant House is dissolved. These persons may continue to be entitled to remuneration and be responsible for the employment of MOP(S) Act employees (see section 49 of the *Parliamentary Business Resources Act 2017*).

Serious incident or misconduct

Item 10 repeals the definition of *serious incident* and item 11 introduces a new definition of *serious incident or misconduct*. Serious incident or misconduct means:

- a sexual assault or assault;
- sexual harassment;
- harassment;
- bullying;
- an instance of a person behaving unreasonably towards another person where that behaviour creates a risk to work health or safety.

Items 12, 13 and 14—Consequential amendments

Item 12 of Schedule 1 adds the new definitions of *Commonwealth parliamentary workplace* and *Commonwealth parliamentary workplace participant* to the Dictionary in Schedule 1 to the Determination.

Items 13 and 14 repeal the definition of *serious incident* and insert the definition of *serious incident and misconduct*.

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 2022*

Overview of the Legislative Instrument

The main purpose of the Amendment Determination is to amend the *Parliamentary Service Determination 2013* (the **Determination**) to expand the functions conferred on the Commissioner for the purposes of paragraph 40(1)(d) of the Act. Paragraph 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 determinations or any other law.

The Amendment Determination expands 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) Act 1984* (the **MOP(S) Act**) and parliamentarians. The functions conferred on the Commissioner by section 112B of the Determination include the functions 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 (the **workplace review function**);
- provide trauma-informed support services, and early intervention and resolution services (the **support services**) 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 those persons performing their duties as MOP(S) Act employees or parliamentarians; and
- provide education and information in relation to the mechanism, serious incidents and other matters related to work health and safety.

The mechanism is operated under the name of the Parliamentary Workplace Support Service (the **PWSS**).

The Amendment Determination expands the PWSS by:

- permitting the PWSS to provide the support services and education to all Commonwealth parliamentary workplace participants in relation a range of matters connected with their duties; and
- where appropriate, permitting historical complaints to be reviewed as part of the workplace review function.

Human rights implications

The determination does not introduce or abrogate any existing rights. Rather, by expanding the scope of the PWSS, it builds on and continues to support the ability of Commonwealth parliamentary workplace participants to seek support for, and the review of, incidents relating to a range of unreasonable or harmful conduct 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 PWSS will provide support and review for a range of 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 or pregnancy. A number of 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* (the **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* (the **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* (the **ICERD**), the *Convention on the Elimination of all Forms of Discrimination against Women* (the **CEDAW**) and the *Convention on the Rights of Persons with Disabilities* (the **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 expanded PWSS assists in ensuring that the rights discussed above are upheld.

The right to work and rights in 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 a range of incidents, including harassment, in the course of employment, and ensuring more broadly that work health and safety obligations are met, the expanded PWSS will advance the enjoyment of full and productive employment under just and favourable conditions.

The right to privacy and reputation

Article 17 of the ICCPR provides that no person should be subjected to arbitrary or unlawful interference with their privacy, nor to unlawful attacks on their reputation, and that every person has the right to the protection of the law against such interference or attacks.

By providing an avenue for individuals to receive confidential support and, should they choose to, make anonymous complaints, the expanded PWSS will support the privacy of Commonwealth parliamentary workplace participants and the protection of reputation during the process of seeking advice and support.

The right to freedom of expression

Article 19 of the ICCPR recognises the right of all persons to hold opinions without interference and the right to freedom of expression.

By providing an avenue for review of incidents relating to a range of unreasonable or harmful incidents, and acting as a deterrent to an environment that tolerates bullying and harassment, the PWSS will advance the ability of Commonwealth parliamentary workplace participants to freely express their opinions without fear of repercussions.

The right to an effective remedy

Article 3 of the ICCPR obliges State Parties to ensure that any persons whose rights or freedoms recognised under the Covenant are violated shall have an effective remedy, determined and enforced by a competent authority.

By providing an avenue for review of incidents that engage or support rights under the Covenant, the expanded PWSS will provide Commonwealth parliamentary workplace participants with an avenue to seek an effective administrative remedy.

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, and in Commonwealth parliamentary workplaces more generally, 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 expanded PWSS 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.