

31 July 2021

Dear Commissioner Jenkins,

## **Submission to the Independent Review into Commonwealth Parliamentary Workplaces**

Thank you for the opportunity to make a submission to the Independent Review into Commonwealth Parliamentary Workplaces (**Review**). This Review is an important step toward making our nation's Parliament a safe and respectful workplace, where gender-based violence is not tolerated in any form.

The Human Rights Law Centre works at the intersection of human rights abuses and issues of political integrity, extending to any misconduct that undermines public trust in our elected representatives. We have spoken with a number of organisations and individuals with expertise and lived experience of bullying, sexual harassment and sexual assault in our nation's Parliament. From those conversations, we believe that two discrete reform proposals that relate to political misconduct, broadly understood, are highly relevant to this Review:

1. the need for an enforceable code of conduct that applies to all elected members of federal Parliament; and
2. the need to ensure whistleblower laws protect parliamentary workers.

### **The need for an enforceable code of conduct for all federal parliamentarians**

Codes of conduct are the norm in Australia for people who hold positions of public trust, like doctors and teachers. This extends to the staff that keep Parliament running, who are subject to a legislated code,<sup>1</sup> and yet there is no code of conduct that binds federal politicians' behaviour. Ministers are required to observe the Statement of Ministerial Standards, but these standards do not have the status of law, regulation, or any formal parliamentary authorisation. They can be changed at the whim of the Prime Minister, and enforcement of the standards is his or her sole domain. Unsurprisingly, enforcement has been inconsistent and highly politicised.<sup>2</sup>

This makes our federal Parliament an outlier — the UK, Canada and Scotland have codes of conduct for elected members that explicitly include bullying, harassment and sexual harassment. In Australia, all parliaments except South Australia have a code of conduct for

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<sup>1</sup> *Parliamentary Service Act 1999* (Cth).

<sup>2</sup> Recently, an investigation into alleged breaches of the Standards' post-employment cooling off period by two former Government Ministers became highly politicised: Finance and Public Administration References Committee, *Compliance by former Ministers of State with the requirements of the Prime Minister's Statement of Ministerial Standards*, September 2019.

elected members, and a review into harassment in South Australia's Parliament recommended one be implemented.<sup>3</sup>

The recent *Review of the Parliamentary Workplace: Responding to Serious Incidents (Foster Review)* concluded that this politicised environment creates a significant barrier for victim/survivors wanting to come forward with a complaint about bullying, sexual harassment and sexual assault:<sup>4</sup>

“One of the challenges consistently highlighted in consultations is the perception that a serious incident will be ‘swept under the rug’ and that there are no clear consequences for parliamentarians who tolerate, or contribute to, serious incidents in the workplace”.

Even with a trauma-informed, victim/survivor-centric complaints process to address allegations between political staffers, final resolution of a complaint will ultimately remain with their employer, the elected member. Without proper accountability measures in place, elected members may continue to seek to minimise the political cost from complaints by silencing the issue. However, if there was a risk of an adverse finding from an independent parliamentary standards commissioner, and sanction by the relevant House, elected members would be more motivated to support a trauma-informed process for addressing complaints of serious misconduct in their offices.

In addition, there have been multiple reports of elected members perpetrating bullying, harassment and sexual assault, including from people outside Parliament. In such cases, the only avenues currently open to victim/survivors are to seek review by an internal party process, which is not authoritative or necessarily independent, or to go to the police, which may not be appropriate or sufficient for the victim/survivor.<sup>5</sup>

A review into harassment in South Australia's Parliament completed in February this year, recommended a code of conduct for elected members “with robust processes and sanctions attached” be introduced.<sup>6</sup> In New Zealand, a 2019 independent review into bullying and harassment of parliament staff concluded that “a code of conduct is a basic minimum requirement to reset culture and behavioural expectations. It is perhaps the most commonly used and proven tool in complex cultural transformations”.<sup>7</sup>

The Foster Review, focussed as it was on things that can be done in the short term to meet the most immediate needs, did not make a recommendation with respect to introducing a

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<sup>3</sup> South Australian Equal Opportunity Commission, Review of Harassment in the South Australian Parliament Workplace, February 2021, 110, available at <https://www.eoc.sa.gov.au/documents/Report-Review-of-Harassment-SA-Parliament-Workplace.pdf>.

<sup>4</sup> Stephanie Foster, *Review of the Parliamentary Workplace: Responding to Serious Incidents*, 4 June 2021, at 9.

<sup>5</sup> A system that requires referral to police may result in fewer people accessing support, as a forced referral may be re-traumatising and detract from safety and confidence in the process: Stephanie Foster, *Review of the Parliamentary Workplace: Responding to Serious Incidents*, 4 June 2021, 43.

<sup>6</sup> South Australian Equal Opportunity Commission, Review of Harassment in the South Australian Parliament Workplace, February 2021, 6, available at <https://www.eoc.sa.gov.au/documents/Report-Review-of-Harassment-SA-Parliament-Workplace.pdf>.

<sup>7</sup> D Francis, *Bullying and Harassment in the New Zealand Parliamentary Workplace*, External Independent Review, May 2019, at 68.

code of conduct. Nonetheless, the report's observations are highly relevant: "a consistent theme in consultations was the importance of independence – from the employer, political parties and the executive government".<sup>8</sup> Best practice models insulate reports of a serious incident in order to ensure complete confidentiality and focus on the wellbeing of the person coming forward.<sup>9</sup> A code of conduct enforced by an independent parliamentary standards commissioner is the most robust way of achieving independence and insulating the complaint.

### **How a code of conduct for elected members would work**

At first instance, victim/survivors should have access to adequately trained support persons, ideally within their office or party. Only where the victim/survivor chooses to escalate a complaint about an elected member should the parliamentary standards commissioner be engaged. Grounds for a complaint should include where an elected member has:

- i. engaged in bullying, harassment or sexual assault;
- ii. failed to offer an appropriate process to a victim/survivor after having made a complaint about bullying, harassment or sexual assault;
- iii. discouraged, disrupted or intervened in the appropriate process;
- iv. taken reprisals against a victim/survivor for making a complaint; or
- v. failed to adequately respond to the findings of an appropriate process.

There are various models for how a code of conduct could be enforced,<sup>10</sup> but the gold standard, insofar as it sets up a robust process that is independent and accountable, is that contained in Helen Haines' *Commonwealth Parliamentary Standards Bill 2020* (Cth). That Bill establishes:

- (i) a legislated code of conduct that sets out parliamentary values and duties;
- (ii) the office of a parliamentary standards commissioner, established as an independent office of federal Parliament, with powers to investigate suspected contraventions of the code of conduct. Referrals may be made to the parliamentary standards commissioner by any person, and may be made anonymously;
- (iii) after completing an inquiry, the parliamentary standards commissioner must provide a report with their findings, evidence relied upon and recommendations to the relevant Privileges Committee of the House or Houses;
- (iv) with respect to wilful breaches of the code of conduct, the relevant House may require an apology, a two month suspension from the House, or such other penalty deemed appropriate; and
- (iv) a separate ethics advisory commissioner, from whom elected members may seek advice on ethical matters they face.

In the context of allegations of bullying, harassment, sexual harassment or sexual assault, an additional step is required: the parliamentary standards commissioner should employ the

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<sup>8</sup> Stephanie Foster, *Review of the Parliamentary Workplace: Responding to Serious Incidents*, 4 June 2021, at 8.

<sup>9</sup> Stephanie Foster, *Review of the Parliamentary Workplace: Responding to Serious Incidents*, 4 June 2021, at 8.

<sup>10</sup> For instance in the UK, both the House of Commons and the House of Lords have Commissioners empowered to investigate alleged contraventions of their respective Codes. These Commissioners can also recommend sanctions. Claims brought in relation to the Behaviour Code, Bullying and Harassment Policy, and Sexual Misconduct Policy are determined by an Independent Expert Panel.

services of experts who can inform and guide the process to ensure it is trauma-informed and victim/survivor centric.<sup>11</sup>

### **What should be in the code of conduct?**

Codes of conduct need to be sufficiently broad to be usable in a wide range of situations, but ideally there would also be specific rules addressing bullying, sexual harassment and assault. For instance in the UK, the Code of Conduct for Members of Parliament includes general principles as well as specific rules. Additional policies relating to bullying, sexual harassment and sexual misconduct apply to the entire parliamentary community.

A consultation process to determine the precise scope and wording for a code of conduct applying to federal MPs could be led by a steering group of the presiding officers of each House and party leaders, and involve broad consultation.

### **Protecting parliamentary workers under whistleblower laws**

This Review focuses attention on the absence of whistleblower protections for many parliamentary workers under the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**), including those coming forward with complaints of bullying, sexual harassment and sexual assault. Political staffers are left almost uniquely vulnerable in speaking up, whether as the target of wrongdoing or as a bystander.

The PID Act has a twofold exclusion of parliamentary workers: from its protections, and from its scope.

Firstly, protection under the PID Act is conditioned on the discloser being a current or former “public official”: see s. 26. That phrase is defined at s. 69, and is drafted in a way that deliberately excludes members of parliament and staff employed pursuant to *Members of Parliament (Staff) Act 1984* (Cth). In contrast, all APS employees, including “Parliamentary Service employees”, are included within the scope of “public official”. This means that individuals working under the same roof have vastly different levels of legal protection if they speak up about wrongdoing, including sexual harassment. If a parliamentary service employee makes a complaint that they have been sexually harassed by their supervisor, they will be protected against any reprisal. A political staffer in the same situation has no protections from reprisal under the PID Act.

Secondly, the conduct of elected members of parliament and their staff is carved-out from the PID Act, because “disclosable conduct” is conditioned on the perpetrator being a public official. Consequently someone reporting misconduct of a member of parliament or their

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<sup>11</sup> This could be done by a body like the Workplace Review Panel recommended by the Foster Review, for instance. In the UK, the Independent Complaints and Grievance Scheme (ICGS) was established to provide an avenue for complaints from staff regarding their employing Member of Parliament. The ICGS uses independent external experts to undertake investigations for alleged breaches of the Behaviour Code. The Commissioners for Standards – independent officers in both Houses responsible for advice, oversight and investigation of the conduct of their respective Members – assess and action the findings of independent investigations regarding parliamentarians and have the power to impose sanctions.

staff has no PID Act protection, even if they are otherwise within the coverage of the law and the conduct is of a nature otherwise constituting disclosable conduct.

It is entirely unsatisfactory that the level of legal protection available to workplace participants in Parliament in the event that they are sexually harassed depends almost entirely on (a) their own employment status; and (b) the employment status of the perpetrator.

We note that including elected members and their staff within the scope of whistleblowing law is the norm. Such an approach is adopted by every Australian State and Territory, and was recommended by a 2009 report on whistleblower protections by the House of Representatives Standing Committee on Legal and Constitutional Affairs. The current exclusion of elected members and their staff from the PID Act is anomalous and should be addressed.

### **Observations from the Moss Review of the PID Act**

In 2016, the PID Act was reviewed by Philip Moss AM. Mr Moss considered the situation of elected members and their staff, and observed:<sup>12</sup>

The PID Act has relied upon linking together existing oversight regimes to provide protection for individuals who seek to report concerns about wrongdoing through the appropriate channels. As neither the conduct of members of Parliament nor their staff can be subject to scrutiny and sanction by an independent body outside or within the Parliament, this approach is ill-adapted to extending the protections of the PID Act to Senators, Members and their staff, as it would not be clear upon whom the obligation to investigate disclosures would be bestowed, and it would impose a bureaucratic process upon political roles.

If an independent body is created with the power to scrutinise alleged wrongdoing by members of Parliament or their staff, such as a comprehensive federal integrity body, the Review recommends that consideration be given to extending the application of the PID Act to these groups.

We note that the Moss Review has been accepted by the Government and we understand that draft amendments are currently being prepared.

If the present Review is to recommend an independent parliamentary standards commissioner be established, such a body may well be able to place the oversight role envisaged by Moss, such that PID Act coverage would be appropriate.

The absence of such a body, however, does not preclude the potential expansion of the PID Act's protections. The PID Act explicitly envisages reporting pathways that do not trigger an investigative framework, but nonetheless give rise to protections, such as disclosures to the media: s. 26. It would be possible to amend the PID Act to increase the coverage of its protections and the scope of disclosable conduct, to remedy the two major shortcomings identified above, even in the absence of a new oversight body.

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<sup>12</sup> Philip Moss, *Review of the Public Interest Disclosure Act*, 15 July 2016, at 63.

## Recommendations

1. That the Review recommend the Government introduce legislation creating a code of conduct that will bind all elected members. The legislation should:
  - a. set out a code that is sufficiently broad to be usable in a wide range of situations, but also include a pathway to developing specific rules that address bullying, sexual harassment and assault;
  - b. have an independent parliamentary standards commissioner to oversee the code of conduct;
  - c. state that the parliamentary standards commissioner should have reporting lines to both Houses of Parliament (either directly or via the relevant Privileges Committee);
  - d. ensure that a breach of the code should attract proportionate sanctions, recommended by the parliamentary standards commissioner and carried out by the relevant House;
  - e. include an appropriate mechanism to ensure complaints involving bullying, harassment, sexual harassment or sexual assault by the elected member themselves, is trauma-informed and guided by independent experts.
2. That the PID Act be amended to support complaints made by elected members and their staff to the parliamentary standards commissioner;
3. That, even in the absence of a parliamentary standards commissioner, the PID Act be amended to include political staff within the coverage of the PID Act's protections, and to include political staff and members of parliament within the scope of "disclosable conduct".

We would be pleased to provide you with any further information that might be of use.

Yours sincerely



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