

# INDEPENDENT REVIEW INTO COMMONWEALTH PARLIAMENTARY WORKPLACES

**Comcare Submission**

16 August 2021

## Introduction

Comcare welcomes the opportunity to provide this submission to the Independent Review into Commonwealth Parliamentary Workplaces (the Jenkins Review).

Comcare promotes the object of the *Work Health and Safety Act 2011* (WHS Act) including to protect workers and other persons against harm to their health and safety through the elimination or minimisation of risks arising from work. The focus of this submission is to advise on matters that could contribute to higher standards of work health and safety in parliamentary workplaces.

Parliamentary workplaces include Parliament House, parliamentary offices, electorate offices, home-based work and places where activities in support of the functioning of parliament are performed. These workplaces are complex and duties and duty holders under the WHS Act are often unclear. Comcare also notes the challenges of co-ordinating multiple WHS management systems across parliamentary departments and workplaces.

Comcare's submission draws on observations made by Comcare since the WHS Act was introduced on 1 January 2012 and from Comcare's experience with managing workers' compensation claims related to parliamentary workplaces.

Comcare acknowledges the findings of the *Review of the Parliamentary Workplace: Responding to Serious Incidents* and notes that the Review's recommendations focus on immediate practical steps to ensure support to parliamentary workers who experience serious incidents.

Data on workplace incidents and workers' compensation claims related to parliamentary workplaces is not included in this submission. Comcare is responding separately to a data request from the Jenkins Review.

This submission does not refer to any Comcare work health and safety inspections currently examining safety systems in parliamentary workplaces.

## Recommendations

To give better effect to WHS management systems across parliamentary workplaces, Comcare makes the following Recommendations to the Jenkins Review:

1. That a clear articulation be made by the relevant PCBU<sup>1</sup> of all the duty holders and their respective duties in parliamentary workplaces including those who have due diligence requirements under the WHS Act. This would provide more certainty for PCBUs and other duty holders in understanding and complying with their duties and obligations under the WHS Act.
2. That the other arrangements that form part of the broader safety system(s) operating in and around parliamentary workplaces are reviewed to ensure that they are integrated, align with, and do not create doubt or ambiguity relative to, WHS Act duties and obligations and expected standards of behaviour.

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<sup>1</sup> Person conducting a business or undertaking.

## Comcare's role

Comcare is a statutory authority established under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and has powers and functions conferred under the WHS Act and SRC Act.

Comcare's jurisdiction under the WHS Act includes workers in Commonwealth parliamentary workplaces, including workers under the *Members of Parliament (Staff) Act 1984* (MOP(S) Act), Parliamentary Service workers, contractors, labour-hire workers, volunteers and interns. Comcare undertakes compliance and enforcement activities under the WHS Act that combine proactive and reactive components. Comcare's approach to its regulatory functions and powers under the WHS Act are set out in its [Compliance and Enforcement Policy](#) and [Regulatory Guides](#).

Under the SRC Act, Comcare is the workers' compensation insurer for Commonwealth departments and agencies and is claims manager for workers' compensation for most Commonwealth departments and agencies, including for MOP(S) Act employees.<sup>2</sup> The Comcare workers' compensation scheme is a no-fault, long-tail scheme with Comcare and its delegates responsible for determining claim eligibility and ongoing claims management including the determination of incapacity and medical treatment benefits.

Comcare also administers the Parliamentary Injury Compensation Scheme (PICS), established by the *Parliamentary Injury Compensation Scheme Instrument 2016*, which provides injury compensation coverage for Australian Government parliamentarians and the Prime Minister's spouse.

## Duties and duty holders under the WHS Act

The WHS Act places duties and obligations on persons, including PCBUs and individuals.<sup>3</sup> Duty holders at a workplace may change depending on the work being undertaken at the relevant workplace at any given time. More than one PCBU or person can concurrently have the same duty for a matter, and each must comply with that duty to the standard required under the WHS Act. Each retains responsibility for their duty and must discharge their duty to the extent to which they have the capacity to influence and control the matter.<sup>4</sup>

Parliamentary workplaces, which includes electorate offices, are complex with multiple duty holders. From Comcare's experience working with parliamentary workplaces, there is a need for a clear articulation by the relevant PCBUs of all the duty holders and their respective duties in parliamentary workplaces including those who have due diligence requirements under the WHS Act. This would provide more certainty for PCBUs and other duty holders in understanding and complying with their duties and obligations under the WHS Act.

This would also enable PCBUs and other duty holders to consult, co-operate and coordinate activities, as required under the WHS Act.

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<sup>2</sup> The Federal Court confirmed that MOP(S) Act workers are engaged on behalf of the Commonwealth. MOP(S) Act workers meet the definition of an employee under section 5(1) of the SRC Act and are therefore eligible for workers' compensation under the SRC Act.

<sup>3</sup> See Part 2 of the WHS Act – Health and safety duties.

<sup>4</sup> See Section 16 of WHS Act – More than one person can have a duty.

Without limiting the scope or application of duties, Comcare generally considers that work health and safety duties in parliamentary workplaces may be held by:

- Parliamentary Departments (Department of Parliamentary Services, Department of the Senate, Department of the House of Representatives, Parliamentary Budget Office);
- Senators and Members of Parliament;
- The Department of Finance;
- Companies or individuals engaged under contract to provide services such as catering, event management, security; or otherwise present in the workplace – provided a sufficient connection to the undertaking of the Commonwealth can be established; and
- Individuals who hold “worker”, “officer” or “other person” duties in connection with the entities listed above.

Key PCBUs for the Commonwealth are the Department of Finance and the Department of Parliamentary Services who have roles in supporting the functioning of the Parliament.

## Comcare’s responses to psychological injury complaints

Comcare receives complaints and allegations from workers regarding workplace bullying, harassment and conflict. This can include sexual harassment. Workers may use their own workplace procedures to attempt to resolve the matter, and there are circumstances where Comcare encourages this as a first step if appropriate. More information is available in Comcare’s [Workplace Bullying Worker Information Sheet](#) and [Workplace Sexual Harassment Regulatory Guidance for Employers](#).

Comcare conducts inspections and investigations into WHS issues including those with psychosocial elements. In examining psychosocial elements Comcare’s work can include assessing whether the PCBU has a safe system of work in place to support workers and prevent psychological harm, which is often found in a WHS management system. As part of this work Comcare assesses whether the system of work is appropriate and followed, assists the PCBU in supporting their workers, and reduces psychosocial risk factors in the workplace by making recommendations for improvement. Enforcement action is also available to Comcare if it is warranted in accordance with Comcare’s Compliance and Enforcement Policy.

Comcare notes that the 76 complaints dealt with by the Department of Finance’s Ministerial and Parliamentary Services Division between July 2017 and March 2021, as detailed in the *Review of the Parliamentary Workplace: Responding to Serious Incidents*, are substantially more than the number of complaints received by Comcare from MOP(S) Act workers. The Review articulated reasons why workers may be reluctant to report incidents.

There are legislative issues that impact on the notification of psychological injury incidents to Comcare. The prescriptive nature of sections 36 and 37 of the WHS Act, regarding incidents that must be notified to Comcare, are such that workplace bullying, harassment or aggression and psychological injuries are generally not required to be notified.

In 2021 WHS ministers, in responding to the *Review of the Model WHS Laws* (Boland Review), agreed to review the incident notification provisions to ensure the provisions capture relevant incidents, injuries and illnesses and that WHS regulators

have appropriate visibility of work-related psychological injuries and illnesses. Safe Work Australia members have also agreed to develop a model Code of Practice on psychosocial hazards. Comcare supports these changes, as notifications can point to where regulatory action by Comcare may be necessary and where WHS management systems may be deficient.

Since 2012 Comcare has received a small number of bullying, harassment and psychological injury complaints from MOP(S) Act workers, and workers from some of the various departments in parliamentary workplaces. Some of these complaints were made directly to Comcare by the affected individual, while others were brought to Comcare's attention as concerns raised by others or through media reports. Complaints brought to Comcare's attention were made by and about both male and female workers and were about general bullying behaviours in parliamentary workplaces.

While it is not advisable to rely on findings from a limited number of complaints, some affected individuals raised concerns about a lack of accountability in their workplace complaint processes and reported to Comcare only after they had resigned, been dismissed, or had taken leave from the workplace. Comcare is aware of concerns held by some affected individuals about putting their complaint in writing.

As the regulator, Comcare has engaged with the Department of Finance in relation to its bullying and harassment and workplace violence policies. As a consequence of these engagements, improvements have been made to these systems over time.

As noted in the *Review of the Parliamentary Workplace: Responding to Serious Incidents*, the Department of Finance works closely with employing parliamentarians and their staff to meet WHS obligations.

Comcare's observations, based on completed regulatory activities, are similar to those in the *Review of the Parliamentary Workplace: Responding to Serious Incidents*. Comcare notes a lack of clarity regarding how the various departments and persons in parliamentary workplaces interact to deliver a healthy and safe workplace (i.e., no overarching system or explanatory statement). For example, a lack of clarity regarding:

- the degree of influence, control, authority and accountability the Department of Finance has regarding the parliamentary workplaces; and
- who is responsible for directing MOP(S) Act workers and parliamentarians regarding WHS matters and holding them to account for their behaviours.

Comcare also notes issues with consultation and coordination between departments and persons who have shared duties under the WHS Act across parliamentary workplaces when managing WHS risks and/or responding to incidents.

## **Safety systems in parliamentary workplaces**

Comcare notes that there are other arrangements that form part of the broader safety system(s) operating in and around parliamentary workplaces. Comcare has considered a number of these below and some related comments from the *Review of the Parliamentary Workplace: Responding to Serious Incidents*. Comcare recommends that these arrangements are reviewed holistically to ensure that they are integrated, align with, and do not create doubt or ambiguity relative to, WHS Act duties and obligations and expected standards of behaviour.

Comcare notes the MOP(S) [Workplace Bullying and Harassment Policy](#) Issues Resolution Procedure states that the Department of Finance has no capacity to take disciplinary action against either a parliamentarian or MOP(S) Act employee where a complaint is substantiated. Where a complaint against an employee is substantiated the parliamentarian decides the appropriate management action.

Comcare notes the *Review of the Parliamentary Workplace: Responding to Serious Incidents* makes an observation that for the parliamentarian there are no effective consequences. The Review observes that expectations about how parliamentarians conduct themselves are governed by the Parliament and that the Parliament is the appropriate body to impose any consequences on parliamentarians in these circumstances. The Review proposes that any escalation should be through the Parliamentary Service Commissioner and the Presiding Officers of the House of Representatives and the Senate.

Comcare has identified barriers to the Department of Finance being able to monitor or seek compliance with its policies and procedures for parliamentary workplaces. Comcare has responded to incidents reported to it by the Department of Finance where the Department expressed concerns about its ability to ensure the health and safety of MOP(S) Act workers in parliamentary workplaces.

Comcare observes that the current [Determination](#) issued by the Special Minister of State under the MOP(S) Act states that '*Electorate Officers work under the sole direction of the employing Senator or Member*'. This may limit the capacity of the Department of Finance to instruct workers and implement safety arrangements in these workplaces.

Comcare also observes that the current [Administrative Arrangements Order](#) (AAO) specifies that the Department of Finance deals with certain matters relating to parliamentarians and their workplaces, but is silent in regard to the Department having any specific authority to deal with employment matters relating to MOP(S) Act workers.

The observations in the *Review of the Parliamentary Workplace: Responding to Serious Incidents* are consistent with Comcare's observations that the Department of Finance has difficulty in ensuring compliance with instructions that meet the PCBU's training and supervision obligations under the WHS Act.

Comcare notes recommendation 1 of the *Review of the Parliamentary Workplace: Responding to Serious Incidents* which recommends that certain Ministerial Standards be amended to align with a parliamentary leadership commitment that assault, sexual assault, sexual harassment, and serious or systemic bullying and harassment are unacceptable. Comcare supports this recommendation and suggests that it is applied holistically to all relevant behavioural standards in parliamentary workplaces.

When allegations of bullying and harassment arise concerning workers employed under the *Public Service Act 1999* or the *Parliamentary Service Act 1999*, the PCBU may rely on procedures for determining suspected breaches of the applicable Code of Conduct and employees may refer matters to a Merit Protection Commissioner. Consideration could be given to enhancing the MOP(S) Act to provide a MOP(S) Code of Conduct and a MOP(S) Merit Protection Commissioner.



The *Review of the Parliamentary Workplace: Responding to Serious Incidents* notes that the factors which can inhibit MOP(S) Act workers from reporting incidents are compounded by a parliamentarian's ability, subject to the *Fair Work Act 2009*, to terminate their employment at any time. Relevantly, the WHS Act prohibits discriminatory conduct for a prohibited reason.<sup>5 6</sup> This might apply, for example, if a MOP(S) Act worker was dismissed simply because they complained about a WHS issue in their workplace.

The WHS Act also permits a worker to cease work or refuse to carry out work if they have a reasonable concern that to carry out the work would expose them to a serious risk to their health or safety, emanating from immediate or imminent exposure to a hazard.<sup>7</sup> This may apply, for example, if a worker has a reasonable concern that immediate or imminent exposure to workplace bullying, harassment or aggression exposes them to a 'serious' risk to their health and safety. The seriousness of the risk is a significant element in this provision.

The *Review of the Parliamentary Workplace: Responding to Serious Incidents* addresses outcomes that can be achieved at a workplace level including stopping (inappropriate) behaviours, an apology, undertakings regarding improved behaviour and future conduct, training, counselling, changes to workplace arrangements and management action such as warnings. In Comcare's experience, other outcomes which might be sought or needed include changes and improvements to policies, procedures, processes and controls, and regulatory action against individuals and/or the PCBU. In some cases, the outcomes sought or needed may be outside what the PCBU can provide or may not have been provided by the PCBU to the satisfaction of the affected individuals.

Comcare's guidance material for responding to workplace bullying and harassment and sexual harassment allegations and complaints acknowledges a landscape of other regulatory and law enforcement organisations, laws and guidance which may be relevant to the circumstance of each matter and the outcomes sought or needed. These include the laws administered by the Australian Human Rights Commission, Fair Work Commission, state and territory anti-discrimination and equal opportunity regulators, state and territory WHS regulators, and state and federal police services.

When considering the outcomes sought or needed regarding a matter, it is necessary to consider the wishes of the victim and the way each organisation can respond. Unlike some entities, Comcare has no specific mediation or conciliation functions under the WHS Act. Comcare's regulatory approach is providing information and advice, inspecting and investigating to determine compliance with the WHS Act, and in some cases taking enforcement action.

## **Supporting and enabling safe and respectful parliamentary workplaces**

Comcare promotes and supports education and training on matters relating to WHS, (noting the duty a PCBU has to provide information and training to protect workers). Comcare also provides advice and information on WHS to duty holders under the Act and to the community. This includes guidance for preventing and managing

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<sup>5</sup> See Part 6 Division 1 of the WHS Act – Prohibition of discriminatory, coercive or misleading conduct.

<sup>6</sup> See also [Safe Work Australia Interpretive Guideline – Model WHS Act – discriminatory, coercive and misleading conduct](#).

<sup>7</sup> See Part 5 Divisions 6 of the WHS Act, particularly Section 84 – Right of worker to cease unsafe work.

[psychosocial hazards](#) in the workplace, such as bullying and harassment and [workplace sexual harassment](#). Comcare's sexual harassment guidance is intended to be read in conjunction with Safe Work Australia's guidance on [preventing workplace sexual harassment](#).

Comcare's online [Office Safety tool](#) provides guidance for workers and employers about what they can do to prevent and manage workplace bullying, harassment and conflict. Comcare also offers relevant free self-paced online learning and 'Micro-learns' through an open online [Learning Management System](#).

Comcare has delivered education services for the Ministerial and Parliamentary Services Division, Department of Finance, with content specific to the prevention of workplace bullying. The training has focussed on behaviours influencing safety culture, recognising and managing inappropriate workplace behaviours and understanding bullying in the workplace. This training was made available to parliamentarians and MOP(S) Act workers. Face to face training has been replaced with virtual training since 2020.

During 2020-21 Comcare also delivered training for the Department of Parliamentary Services to 15 SES staff and 186 EL1 and 2 participants that focussed on 'due diligence' and 'promoting a safety culture'.

## **Workers' compensation arrangements**

### **SRC Act scheme**

Under the SRC Act, MOP(S) Act employees and employees of other departments in parliamentary workplaces have workers' compensation entitlements. The scheme is no-fault and compensation is subject to eligibility under the provisions of the Act.

Comcare sets workers' compensation premiums for Commonwealth departments and agencies, with MOP(S) Act employees covered in the premium charged to the Department of Finance.

MOP(S) Act employees can apply directly to Comcare to claim workers' compensation.

Comcare claims managers work closely in collaboration with rehabilitation case managers at the Department of Finance to assist injured employees recover and return to work. The legislative obligations for the provision of appropriate rehabilitation programs and return to work support for MOP(S) Act employees rest with the Department of Finance as the rehabilitation authority.

Claims received by Comcare for MOP(S) employees are low in number and fluctuate from year to year. Comcare has received claims for injury, physical disease and psychological conditions from MOP(s) employees.

### **The Parliamentary Injury Compensation Scheme (PICS)**

The Minister for Finance established the PICS under the *Parliamentary Entitlements Act 1990* by issuing the *Parliamentary Injury Compensation Scheme Instrument 2016* (PICS Instrument).



This scheme provides coverage for an injury or illness, or an aggravation of an injury or illness, suffered by a parliamentarian arising out of, or contributed to, by their activities as a parliamentarian; and an injury or illness, or an aggravation of an injury or illness, suffered by the Prime Minister's spouse, arising out of, or contributed to, by their official activities

Eligibility is limited to parliamentarians or the Prime Minister's spouse and claims must be for an injury or illness suffered while undertaking covered activities on or after 1 January 2016

For parliamentarians, covered activities are any activities engaged in as a parliamentarian, Parliamentary Office holder or Minister, at a time when the parliamentarian was entitled to a parliamentary allowance. For the Prime Minister's spouse, covered activities are official activities as the Prime Minister's spouse.

The PICS excludes an injury, illness or aggravation claim sustained as a result of:

- a loss of, or failure to gain, selection as a candidate for election to the Parliament
- the loss of, or failure to gain, a position as a Minister (including a Parliamentary Secretary) or a Parliamentary office-holder
- the loss of, or failure to gain, a position in a political party
- the result of an election
- a decision relating to a benefit (including a decision made under the PICS Instrument)
- an injury that is intentionally self-inflicted
- an injury that is caused by serious and willful misconduct, which includes a person that is under the influence of alcohol or a drug, other than a prescribed drug correctly taken.

Comcare has received a very small number of claims under the PICS since its commencement.