



**Submission to the**

**Joint Select Committee on Parliamentary Standards**

*2 September 2022*

[www.adrac.org.au](http://www.adrac.org.au)

## Introduction

The Australian Dispute Resolution Advisory Council ('ADRAC') is a voluntary, unaligned, independent council of 12 individuals, chaired by the Honourable Ruth McColl AO SC. According to its Charter, ADRAC is to provide thought leadership in exploring, researching and promoting better dispute resolution (DR) in all areas of Australian life. This includes identifying and commenting upon trends, challenges and developments in DR procedures and processes. More information on ADRAC's contributions to this important area can be found at [www.adrac.org.au](http://www.adrac.org.au)

ADRAC commends the Joint Select Committee on Parliamentary Standards ('JSC') on its important work in seeking to improve standards of behaviour in Parliamentary workplaces by giving practical consideration to the Jenkins Report,<sup>1</sup> including consultations on that Report's recommendations. ADRAC welcomes the opportunity to provide this submission to the JSC.

Of immediate relevance to this submission, ADRAC's objects include providing information for managing and resolving disputes; promoting the use of DR mechanisms, principles, and values; and ensuring contemporary trends in DR are considered and promoted.<sup>2</sup>

ADRAC has read the Jenkins Report in full, and the JSC's Terms of Reference for submissions, and agrees that the development of a Code of Conduct applicable to Commonwealth Parliamentarians, parliamentary staff, and parliamentary workplaces ('the Code') is an important first step in promoting and ensuring positive, safe and respectful workplace behaviour throughout the Australian Parliament House ('APH'). As quoted in the Jenkins Report, Commonwealth Parliamentary Workplaces (CPW) should set 'the highest standards in relation to safe and respectful workplace behaviour.'<sup>3</sup> It is ADRAC's view that, in order to protect those who work in APH, and to ensure that the institution of the Parliament retains the confidence of the broader Australian community, it is crucial that the Code be developed and implemented to the highest standard.

In preparing its submission, ADRAC has considered, in particular, the JSC terms of reference ('c. recommend options for the enforcement of any proposed code, and mechanisms for reviewing the operation of any proposed code') and the following two recommendations in the Jenkins Report:

- Recommendation 22 'Independent Parliamentary Standards Commission', whose role would include overseeing the operation and enforcement of the Codes of Conduct, including to 'operate a fair, independent, confidential and transparent system to receive disclosures, as well as handle informal and formal complaints and appeals about misconduct.'<sup>4</sup>
- Recommendation 14 'Best practice training' which is recommended to include 'respectful workplace behaviour', and 'relevant codes of conduct'.<sup>5</sup>

ADRAC offers the following comments for the Committee's consideration regarding the development, implementation, and enforcement of the Code, and the importance of integrating DR principles and processes throughout the proposed CPW system. In particular, the CPW enforcement system must consider the interests of all parties to any complaint.

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<sup>1</sup> Australian Human Rights Commission ('HRC'), *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (HRC, Report to the Federal Attorney-General, November 2021).

<sup>2</sup> Available at <https://www.adrac.org.au/charter>.

<sup>3</sup> Jenkins Report, 41.

<sup>4</sup> Jenkins Report, 26.

<sup>5</sup> Jenkins Report, 22.

## **The JSC Terms of Reference and the CPW context**

The JSC's Terms of Reference for submissions focus primarily on the content of the Code, its applicability and its enforcement. A Code itself sets the required behavioural standards in a workplace; however, in ADRAC's view, the Code's practical application, represented by the systems and mechanisms implemented to enforce it will determine whether it achieves its potential to influence workplace behaviour and culture. ADRAC prefers this more holistic approach to workplace behaviour standards and their implementation.

If the best outcomes are to be achieved for individuals, for workplaces, and for the organisation as a whole, the enforcement system must include a range of DR processes that are available at all levels and stages of the system, and the system itself must operate in ways that are both flexible and responsive to all those who access it. This includes from the early identification or reporting stage before a matter is "formally" referred for DR, through to any resolution processes, be they informal party-to-party negotiations, facilitative or determinative resolution processes, or full-scale formal investigations. The system should also be able to accommodate access by discrete workplaces where unacceptable behaviours have created a negative or even toxic culture requiring broader intervention than that typified by a complaint about individual behaviour.

It is acknowledged in the Jenkins Report that it is critical for the success of the CPW system to incorporate promotion of early intervention approaches, and make it easy for complaints to be made, while providing appropriate support and protection for complainants and respondents (including confidentiality and protection from retribution). ADRAC suggests that this support and protection be maintained through the full lifecycle of any complaint, as should all parties' access to appropriate DR processes – whether or not a complaint is ultimately referred for a Code investigation. Such inbuilt mechanisms will foster trust in the system and employees' willingness to access it, eventually influencing workplace behaviour and workplace culture more generally. It is important that designing the complaints management system takes these factors into account and does not allow the process to become a means of addressing only the most serious grievances.

The Jenkin's Report sets out three pathways for reporting and responding to complaints about a potential breach of the Code. If these pathways are to form part of CPW's complaints management system, and to ensure the system's credibility among all stakeholders, ADRAC recommends that the system itself be designed according to DR principles and accepted dispute systems design practice, both of which are discussed below.

### **Dispute resolution principles**

ADRAC recommends that DR principles be included as the underpinning framework of the whole CPW complaints management system.

Key DR principles were developed by ADRAC's predecessor body, the National Alternative Dispute Resolution Advisory Council (NADRAC). The principles are outlined on ADRAC's website,<sup>6</sup> where a copy of NADRAC's original document is also available.<sup>7</sup> The seven DR principles are:

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<sup>6</sup> Available at <<https://www.adrac.org.au/principles-of-adr>>.

<sup>7</sup> National Alternative Dispute Resolution Advisory Council, National Principles for Resolving Disputes (2011), available at <[https://www.adrac.org.au/files/ugd/34f2d0\\_06c160e0ada6465da12b3569db51bb6d.pdf](https://www.adrac.org.au/files/ugd/34f2d0_06c160e0ada6465da12b3569db51bb6d.pdf)>.

1. *Personal responsibility*: People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.
2. *Proportionality*: Disputes should be resolved in the simplest and most cost-effective way. Steps to resolve disputes including using alternative dispute resolution (ADR) processes,<sup>8</sup> wherever appropriate, should be made as early as possible; and both before and throughout any court or tribunal proceedings.
3. *Participation and effort*: People who attend a DR process should show their commitment to that process by listening to other views and by putting forward their own and considering other's options for resolution.
4. *Informed choice*: People who are in dispute should have access to, and seek out, information that enables them to choose suitable DR resolution processes and informs them about what to expect from different processes and service providers.
5. *Fairness*: People in dispute should aim to reach an agreement through DR processes that are conducted in ways that are fair and reasonable. People should not be required or pressured to reach an agreement if they consider it to be unfair or unjust. If unable to resolve the dispute, people should have access to alternative processes, including courts and tribunals.
6. *Quality and accessibility*: Effective, affordable and professional DR services which meet acceptable standards should be readily available to people as a means of resolving their disputes.
7. *Stakeholder confidence*: Terms describing various DR processes should be used consistently to enhance community understanding of, and confidence in, them.

NADRAC's stated intent is that principles 1 – 3 are designed to encourage people in dispute to consider using DR before commencing litigation, and to provide some guidance on people's conduct obligations in DR processes.<sup>9</sup> Although NADRAC does not provide detailed examples for the application of these principles, in the context of the CPW Code, they could relate to the "visibility" of the complaints handling system, the inclusion of early intervention processes, and the importance of internal training and education aimed at facilitating participation at all stages. According to NADRAC, principles 4 – 7 are designed to enhance community understanding of DR, and to promote community confidence in its processes.<sup>10</sup> In the context of the CPW Code, these could relate to there being readily accessible information about the system, including key terms and the various alternative processes and pathways that are available for potential complainants and respondents. The descriptive resource could include information about the experience, training and education of relevant officers in the Office of Parliamentary Staffing and Culture, and the Independent Parliamentary Standards Commission (see below).

In addition to these principles, there are a number of critical features which should be considered when developing a dispute, or complaints, management system, and many of these are acknowledged in the Jenkins Report. They include confidentiality, impartiality/neutrality (in the handling of complaints as well as in all facilitative and decision-making processes), respect for all participants, responsiveness/flexibility, and an emphasis on early intervention and less formal

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<sup>8</sup> In its original document, NADRAC uses the term "alternative dispute resolution" and the acronym "ADR"; in contemporary usage the word "alternative" has been dropped, and ADRAC follows this custom.

<sup>9</sup> NADRAC, *National Principles for Resolution of Disputes* (Interim Report to the Attorney-General, 2010), 11.

<sup>10</sup> NADRAC, *National Principles for Resolution of Disputes* (Interim Report to the Attorney-General, 2010).

approaches intended to reduce escalation of a dispute. It is also important that the system incorporate ongoing operational consultative approaches designed to continuously improve the system and to build and maintain trust in its operation.

It would be valuable for the system to allow the parties to have at least some input into how the complaint is to be addressed (for example, if it is to be referred to, say, mediation or to a restorative process, that the parties consent to that referral), and the Jenkins Report does recommend that the complainant be afforded such input. It would also be appropriate if the views of the person being complained about were also to be taken into account (though not with a power of veto).

In relation to DR principle 5 (Fairness), the Jenkins Report highlights the importance of its recommended complaints-handling system being ‘fair, confidential and independent’.<sup>11</sup> It is important to note that “fairness” can be a fraught concept in the context of ADR processes (as the Australian Law Reform Commission has acknowledged<sup>12</sup>). ADRAC suggests that the system include specific clarification of how it interprets “fair/fairness” for the purposes of CPW workplace complaints handling.

### Dispute systems design

ADRAC recommends that a dispute systems design approach be taken by the CPW in developing the implementation and enforcement protocols for the Code. The term “dispute systems design” (‘DSD’) refers to the recognised process of designing an appropriate system which enables the organisation to take a systematic and predictable (rather than *ad hoc*) approach to dealing with its complaints and disputes. This includes employee grievances and complaints about bullying and harassment, as well as other forms of unacceptable workplace behaviour – including allegations about conduct perceived to fall short of an applicable Code of Conduct. The best complaints management systems involve a responsive systematic DR approach that includes responding to complaints and/or grievances under an existing code of conduct, enforcing any proposed code, and/or associated approaches, as well as reviewing such a system after it has operated for a certain time (the review process could be designed to incorporate ongoing evaluation of the Code itself). Any DSD would be expected to consider best practice in dispute management, as well as in complaints management.<sup>13</sup>

In short, the steps for designing such an organisational system are accepted as including the following:<sup>14</sup>

1. Research the existing system (the Jenkins Report has largely already achieved this in the case of CPW).
2. Consult with all stakeholders about why changes might be needed, including everyone who might be impacted by a new system, potential neutral interveners (such as

<sup>11</sup> Jenkins Report, 232; see also pp 229 – 232.

<sup>12</sup> Australian Law Reform Commission (ALRC), *Review of the Federal Civil Justice System* (ALRC, Discussion Paper 62, 1999).

<sup>13</sup> For example, see Standards Australia, *AS4608-2004 Dispute Management Systems*; Standards Australia, *AS ISO 10002-2006, Customer Satisfaction – Guidelines for Complaints Handling in Organisations*.

<sup>14</sup> Key Australian references for this systematic approach include David, J., ‘Designing a Dispute Resolution System’ (1994) 1(1) *Commercial Dispute Resolution Journal* 26; Sourdin, T., *Alternative Dispute Resolution* (Thomson Reuters, Australia, 2020).

mediators/conciliators/investigators), and potential disputants (again, this has, at least in part, been completed by the Jenkins Report).

3. Design the system, including clear objectives for it, with a focus on:
  - A framework of DR principles;
  - Early intervention and interests-based DR processes (though not excluding determinative processes); in general, interests-based DR processes include processes such as assisted negotiation, mediation, and restorative processes;<sup>15</sup>
  - A staged approach to a range of appropriate facilitative and determinative processes, including a clear outline of the role of integrated investigations;
  - Enabling the organisation to identify systemic issues; and
  - Acknowledging legal and corporate requirements, including access to courts and tribunals.
4. Consult again on the proposed design and adjust where necessary.
5. Implement the proposed system. Initially, this should be a pilot project for a set period of time.
6. Evaluate the system to ensure it is meeting its stated objectives. This should occur at the end of the pilot period and be conducted by an independent person. The system should also be evaluated from time to time throughout its operation.

### **Additional comments**

In addition to the above, ADRAC offers the below comments which we suggest be considered when designing the complaints management system for CPW.

- The Jenkins Report includes references to dispute resolution, and dispute resolution processes. For example, having recommended the creation of the Office of Parliamentary Staffing and Culture (OPSC), the Report recommends that body's responsibilities include the provision of 'advice, support, training, coaching and early intervention services (for example, by facilitating mediation or dispute resolution) to parliamentarians when instances of misconduct occur'.<sup>16</sup> Similarly, for the recommended Independent Parliamentary Standards Commission (IPSC) its role would include, for informal complaints, facilitating 'a negotiated outcome ... with flexible problem-solving approaches to suit the circumstances',<sup>17</sup> and, for formal complaints, the body could 'investigate and make findings' as well as 'recommend sanctions' under the Code.<sup>18</sup> The Report's inclusion of flexible approaches is welcomed by ADRAC as a positive approach to designing and enforcing the CPW Code.
- In terms of the existing workplace culture, the best DR systems are designed in ways that acknowledge the positive aspects of existing culture while also promoting potential changes. The Jenkins Report includes reference to the importance of trusted colleagues who take on a 'pastoral care role' in dealing informally with instances of unacceptable behaviour,<sup>19</sup> and

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<sup>15</sup> Interests-based refers to processes that focus on the disputants' interests and motivations rather than on their legal or other rights, although such rights are neither excluded nor ignored.

<sup>16</sup> Jenkins Report, 196.

<sup>17</sup> Jenkins Report, 229.

<sup>18</sup> Jenkins Report, 229.

<sup>19</sup> Jenkins Report, 239.

recommends that this role be formalised through the nomination of ‘peer reference points’ that continue this role.<sup>20</sup> ADRAC commends this approach.

- The Jenkin’s Report acknowledges the role of sanctions in ‘driv[ing] change in culture and practice and ... provid[ing] a degree of deterrence’.<sup>21</sup> ADRAC agrees that sanctions do have an important and visible role in flagging unacceptable workplace behaviours. In addition, a well-publicised DR system in itself can play a key role in informing culture change where the system includes the nomination of respected workplace-based “champions” who support the system and its focus on behaviour and culture changes, and where it also includes an extensive education program that both accompanies the system’s roll-out and is ongoing.
- In its descriptions of appointments to the IPSC, the Jenkins Report recommends that appointees be selected according to a selection process based on ‘a mix of’ four listed criteria.<sup>22</sup> ADRAC suggests that an addition be made to the list: “expertise in dispute resolution processes, including less formal processes such as negotiation and mediation”. ADRAC also suggests that it be made clear that, although some appointees will be required to have legal training, this will not be a requirement for all appointees to the IPSC and that expertise in the other listed areas will also be considered. This would ensure that the full scope of relevant expertise is available for appointment to this important body.

## Conclusion

A Code for CPW can set the tone for respectful and professional behaviour in the CPW, but it is only one part of the broader workplace environment, and may not necessarily address all relevant concerns. The approach recommended by ADRAC in this submission would have a framework of DR principles; would incorporate access to a range of DR methods and processes; would be flexible, supportive, and responsive; would respect and maintain the confidentiality of all who access it; and would incorporate ongoing review and development of the system and its associated Code of Conduct. The inclusion of these key factors would be a major contribution to the integrity and effectiveness of any complaints management system for the CPW, and would enhance its influence more broadly on other Australian workplaces.

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<sup>20</sup> Jenkins Report, 239.

<sup>21</sup> Jenkins Report, 242.

<sup>22</sup> Jenkins Report, 231.