



HOUSE OF LORDS

Select Committee on the Constitution

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18th Report of Session 2008–09

**Parliamentary  
Standards Bill:  
implications for  
Parliament and the  
courts**

Report

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# Parliamentary Standards Bill: implications for Parliament and the courts

## Introduction

1. The Parliamentary Standards Bill will create a new system for the administration of salaries, allowances and the registration of financial interests of members of the House of Commons. The bill proposes to establish the Independent Parliamentary Standards Authority (IPSA) and a Commissioner for Parliamentary Investigations. These arrangements will replace the existing, non-statutory office of Parliamentary Commissioner for Standards set up in 1995 following recommendations from the Committee on Standards in Public Life.
2. Our first report on the Parliamentary Standards Bill set out concerns about the rapid policy-making process that preceded the bill, the lack of public consultation and the fast-tracking of the bill through Parliament.<sup>1</sup> In this second report on the bill we examine the proposals contained in the bill.
3. In our first report on the bill we welcomed changes made to the bill in the House of Commons to remove two constitutionally controversial clauses (to create a statutory code of conduct for Members of Parliament, and to create an exemption from Article IX of the Bill of Rights) from the bill.<sup>2</sup> We reaffirm those views.
4. We also noted the Government's intention to bring forward a further bill to extend the principles of independent regulation to the House of Lords. **The Government have rightly recognised that the principles of self-regulation operate differently in the House of Lords compared to the House of Commons. We call upon the Government to publish in draft any bill that will seek to extend the principles of the Parliamentary Standards Bill to the House of Lords and to permit sufficient time for effective pre-legislative scrutiny of any such bill.**
5. We do not seek in this report to express views on the policy merits or otherwise of introducing a new system of regulation for Parliament. However, in our first report we noted that the proposals amount to a "profound change", the implications of which require very careful examination.
6. Our function in carrying out legislative scrutiny is to consider whether, from the perspective of constitutional principle and practice, the policy contained in the bill is acceptable. We also seek to identify and analyse the constitutional implications, intended and inadvertent, of the bill. We take as our starting point the fact that any bill seeking to alter the relationship between Parliament and the courts is likely to engage matters of

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<sup>1</sup> 17th Report of 2008–09, HL 130.

<sup>2</sup> For a comparison of the bill as introduced to the House of Lords and the House of Commons, see Appendix 1.

constitutional importance, potentially to a significant extent. In this report we have sought to address three broad questions relating to independence, accountability and the role of the courts.

- (a) Does the bill create a set of arrangements that meet the Government's intention of establishing independent regulation?
- (b) Do the arrangements proposed in the bill provide adequate opportunities for decision-makers to be held accountable?
- (c) To what extent will or should the work of the new regulatory system be subject to the supervisory jurisdiction of the courts, by way of judicial review or appeals?

### Assessment of independence

7. Appendix 2 sets out a comparison between the arrangements for the current Commissioner for Parliamentary Standards and proposals in the bill for the IPSA and new Commissioner. **Our overall assessment is that the proposed institutional and procedural arrangements for the IPSA and new Commissioner meet a range of indicators of formal independence.**
8. We are, however, concerned that the bill makes no provision either for party political neutrality or, alternatively, party political balance in the backgrounds of those appointed to the IPSA and as the new Commissioner. Appointment to the IPSA must be "on merit" (Schedule 1, paragraph 2(4)), and the same criterion applies to the appointment of the new Commissioner (Schedule 2, paragraph 1(3)). The bill includes no qualifying criterion related to restriction on party political affiliation of candidates for the IPSA (though it does state that "a person who has been a member of the House of Commons at any time within the last five years may not be a member of the IPSA" (Schedule 1, paragraph 1(5)) or the post of the new Commissioner. Obviously, a party political restriction would not be appropriate in respect of the member of the IPSA who must be a former MP. In relation to the other members of the IPSA and the new Commissioner, there is however a question as to whether perceptions of independence would be enhanced by imposing a party political restriction.
9. Alternatively, consideration might be given to a provision to the effect that while appointments are to be made on the basis of merit, in making selections for appointment the Speaker must ensure that between them the members of the IPSA and the new Commissioner have knowledge or experience of the organisation of the main political parties.
10. The aim of establishing an independent system of regulation for the House of Commons will be put at risk if selection of members of the IPSA and the new Commissioner, which must be on merit, leads to a composition which is perceived to be weighted in favour of one or more of the political parties. **The Government should explain why it is not considered necessary or desirable for the bill to make provision as to party political affiliation of members of the IPSA and the new Commissioner.**

### Accountability

11. Where a bill proposes to create a new public body, an important feature of the institutional design is how that body will to be called to account for its

individual decisions and its work more broadly. Appendix 3 sets out a comparison between the arrangements for the current Commissioner for Parliamentary Standards and proposals in the bill for the IPSA and new Commissioner.

12. **We are broadly satisfied that the proposed institutional and procedural arrangements for the IPSA and new Commissioner meet a range of indicators of accountability, including parliamentary oversight, duties to consult, annual reporting duties, financial audit and application of the Freedom of Information Act 2000.**

### Supervision by the courts

13. When a new public body or regulatory scheme is to be established, constitutional scrutiny requires there to be careful examination of the proposals to ensure that adequate arrangements have been made for a regulated person to be able to make legal challenges to a decision. This is a practical application of the constitutional principle of the rule of law. In most situations, such opportunities of challenge should be by way of an appeal to a tribunal or court whose independence and impartiality is beyond doubt. If no appeal is specified in a bill, then the fall-back position is that the person should be able to make a judicial review challenge to the lawfulness of the decision.
14. In the context of the present bill, consideration of the principle that a regulated person should have access to a tribunal or court is complicated by the fact that there is a rival constitutional principle of great importance—parliamentary privilege. As many others have noted, the term “parliamentary privilege” risks being misunderstood in modern times insofar as it may suggest that Parliament and its members seek advantages that other institutions and people do not enjoy. The reality is that parliamentary privilege is a set of principles that underpin democracy. It is “the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions effectively”.<sup>3</sup> Article IX of the Bill of Rights states “That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament”. This embodies a fundamental feature of the British Constitution (common to many other legislatures around the world) that there needs to be a clear borderline between the functions and powers of Parliament and those of the courts.
15. For sound constitutional reasons, the courts have historically respected the right of Parliament to govern itself and have refused to be drawn into any disputes that may arise about things said or done in Parliament. This ensures the freedom of members and witnesses giving evidence to parliamentary committees to speak openly without concern that what they say or do during “proceedings in Parliament” may subsequently be used in court proceedings.
16. We asked the Clerk of the Parliaments for his views on the possible implications of the bill for the House of Lords. We thank him for providing us with a memorandum, reproduced at Appendix 4, at short notice. He told us that “The constitutional principle most directly engaged by the bill is that

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<sup>3</sup> Joint Committee on Parliamentary Privilege, Session 1998-99, Volume I, HL 43-II/HC 214-II, paragraph 3.

of parliamentary privilege”. He said “the most serious concerns” about the bill in the form it was introduced to the House of Commons “have now been met” and that “the remaining issues are different in scale”. But he warned that “there remain, however, provisions within the Bill which, by leaving open the possibility of judicial examination of the House’s internal rules, could threaten the principle of Parliamentary privilege” in the House of Lords.

17. We therefore turn now to consider the question of whether the bill will enable judicial review challenges to be made to new system of financial conduct regulation proposed by the bill, and whether such challenges might have adverse constitutional consequences.

*Legal challenges to the IPSA and the new Commissioner*

18. It is possible to speculate that the exercise of various functions of the IPSA and the new Commissioner may give rise to disagreements, for example:
- (a) A dispute may arise as to whether, in exercising powers under clause 3, the IPSA has consulted adequately in preparing or revising the MPs’ allowances scheme. Similar disputes might arise in relation to consultation over the MPs’ code relating to financial interests (clause 5);
  - (b) Disagreements may emerge as to whether the code on financial interests prepared by the IPSA complies with the requirement in clause 5(8), that it must prohibit a member from engaging in paid advocacy.
  - (c) In relation to allowances claims under clause 4, a member or another person may call into question whether the IPSA was correct to allow (or refuse, as the case may be) a payment under the MPs’ allowances scheme. The bill makes express provision for the IPSA to carry out a review as to whether the determination was properly made, but the outcome of that internal review may not satisfy a person minded to challenge the determination;
  - (d) Under clause 6, the new Commissioner may decide not to conduct an investigation into an alleged breach of the allowances scheme or the code of conduct relating to financial affairs; this may leave a person aggrieved. The new Commissioner may for the purposes of an investigation require a member to provide “any information the Commissioner reasonably requires”; there may be disagreement as to whether information is reasonably required. Or the dispute may be about a decision of the Commissioner, having conducted an investigation, not to make a report to the IPSA. A member may say that the Commissioner did not adopt a fair procedure in carrying out an investigation;
  - (e) The IPSA has enforcement powers under clause 7 to “direct” a member to repay a sum paid under the allowances scheme or to take “any steps necessary” to correct an omission or inaccuracy on the financial interests register;
  - (f) The IPSA may make a recommendation to the House of Commons Standards and Privileges Committee under clause 7(2) as to the sanction that should be applied to a member. The member, or another person, may seek to argue that the recommendation is, in a

legal sense, “irrational” (for example, because it is said to be wholly disproportionate to the infraction at issue).

19. It seems clear that some of these disputes might be capable of developing into judicial review challenges. If the courts have jurisdiction to review a failure by a minister to consult before making a statutory instrument, it is difficult to see why the IPSA should not be subject to judicial review if it is alleged to have failed to consult properly about revisions to the allowances scheme or code on financial interests (scenario (a), above). Similarly, in scenario (c), there would seem to be no reason in principle why a dispute about a payment under the allowances scheme should be immune from judicial determination. Nothing in these scenarios would change the current demarcation line between what properly falls into the exclusive competence of Parliament and the remit of the courts.
20. In his evidence, the Clerk of the Parliaments drew our attention to difficulties that may arise in a scenario such as (b). He explained that the code prepared by IPSA under clause 5 would be limited to financial interests and the prohibition of paid advocacy. In itself, the register of financial interests is not a privileged document and therefore raises no issues of parliamentary privilege. The difficulty that may, however, arise is that rules relating to non-financial interests and the *declaration* of financial and non-financial interests (for example, when speaking in a debate or participating in a select committee inquiry) “will be a matter for the two Houses (if the provisions [of the bill] are applied to the Lords) to regulate by means of their own codes of conduct and their own enforcement procedures”. The Clerk of the Parliaments goes on to say:

“the definition of ‘paid advocacy’ is less clear in practice than in theory. There is a grey area between, on the one hand, paid advocacy, and, on the other, legitimate participation in proceedings following the declaration of a relevant financial interest. Deciding where the conduct of a particular member falls within this grey area will require careful exercise of judgement”.
21. He concluded on this point that:

“What clause 5 of the Bill does, in effect, is to create a new boundary, between ‘paid advocacy’ and legitimate declaration of financial interests in debate, a boundary which falls in the heart of an area that hitherto has been regarded without question as subject to parliamentary self-regulation and exclusive cognisance. A legal challenge alleging that a code prepared by IPSA did not comply with clause 5(8) by failing to prohibit a category of conduct which the House itself regards as acceptable could potentially lead the court into an examination of the House’s own rules regarding such conduct. It follows that the juxtaposition of the statutory provisions on paid advocacy contained in the Bill (which will of course be subject to judicial oversight) with the codes covering declaration adopted by the two Houses, which are omitted from the Bill (and which are privileged), could erode the protection offered by Article IX”.
22. **The bill will in clause 5 create a statute-based prohibition of paid advocacy (as part of the code regulating financial interests), as well as creating a criminal offence of engaging in paid advocacy (clause 8(3)). Even though the initially proposed express exemption from Article IX**

**of the Bill of Rights 1689 has been removed from the bill, we are concerned (for the reasons given by the Clerk of the Parliaments) that this may open up a possible area of conflict between the role of the courts in adjudicating on the scope of the code regulating financial interests on the one hand, and Parliament’s own rules regulating declarations of interests in debates and other proceedings in Parliament on the other.**

23. Other difficult terrain emerges in relation to the investigatory work of the new Commissioner and the decision-making powers of the IPSA—scenarios (d), (e) and (f) above. If the courts were to accept jurisdiction over these matters, this would bring about a change in the borderline between Parliament and the courts.
24. Hitherto, the courts have declined jurisdiction over an allegation that a parliamentary standards inquiry had not been carried out in accordance with legal principles. In *R. (on the application of Mohammed Al Fayed) v Parliamentary Commissioner for Standards*,<sup>4</sup> the Court of Appeal had to consider whether a report made by the current non-statutory office of Parliamentary Commissioner for Standards to the House of Commons Standards and Privileges Committee was amenable to judicial review. The Court recognised at the outset that “The issue raises the question of the relationship between the Courts and Parliament. That is a relationship which is central to the constitutional arrangements in this country. It is clearly a matter of sensitivity and importance”. The Court went on to hold that:
- “... the focus of the Parliamentary Commissioner for Standards, is on the propriety of the workings and the activities of those engaged within Parliament. He is one of the means by which the Select Committee set up by the House [i.e. the Standards and Privileges Committee of the House of Commons] carries out its functions, which are accepted to be part of the proceedings of the House. This being the role of the Parliamentary Commissioner for Standards, it would be inappropriate for this Court to use its supervisory powers to control what the Parliamentary Commissioner for Standards does in relation to an investigation of this sort. The responsibility for supervising the Parliamentary Commissioner for Standards is placed by Parliament, through its Standing Orders, on the Committee of Standards and Privileges of the House, and it is for that body to perform that role and not the Courts.”
25. Insofar as decisions or actions of the IPSA and the new Commissioner constitute “proceedings in Parliament” the courts will decline jurisdiction, respecting Article IX of the Bill of Rights. Erskine May warns that “comprehensive lines of decision have not emerged” as to the definition of proceedings in Parliament “and indeed it has been concluded that an exhaustive definition could not be achieved”.<sup>5</sup> It might be thought that recommendations by the IPSA to the Standards and Privileges Committee—scenario (e) above—fall within the ambit of parliamentary privilege (and we note that whether or not this falls within parliamentary privilege, a court may

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<sup>4</sup> [1998] 1 *Weekly Law Reports* 669. Two members of this Committee were involved in this case: Lord Woolf, as Master of the Rolls, presided in the Court of Appeal; and Lord Pannick was counsel for Mr Al Fayed.

<sup>5</sup> Erskine May, *Parliamentary Practice*, 23rd edn (2004).

take the view that a mere “recommendation”, which itself does not have decisive force, is not reviewable).

26. It should not be assumed that those decisions or actions of the IPSA and new Commissioner which are not “proceedings in Parliament”—such as those in scenarios (c), (d) and (e), above—will automatically fall within the court’s jurisdiction. The Court of Appeal’s judgment in *Al Fayed* was based on broad constitutional understandings about the appropriate division of responsibility between the courts and Parliament, a borderline that is based on sound constitutional principles. **The fact that investigations and other regulatory decisions are now to be placed on a statutory footing (rather than based on a Resolution of the House of Commons) does not, in and of itself, have the consequence that they will in future be judicially reviewable. The courts will determine the extent of their jurisdiction having regard to the constitutional principles governing a parliamentary democracy.**

*Review of decisions by others*

27. In addition to making provision for decision-making by the IPSA and the new Commissioner, the bill will create or recognise powers to be exercised by others. As in relation to IPSA and the new Commissioner, it is not possible to foresee all situations in which disputes may arise but several scenarios may be anticipated:
- (g) The Speaker of the House of Commons is given responsibility to select “on merit on the basis of fair and open competition” nominees for membership of the IPSA and to be the new Commissioner (Schedule 1, paragraph 2(4) and Schedule 2, paragraph 1(3)). There may be dissatisfaction about the way in which an appointment competition is run;
  - (h) A new parliamentary committee, the Speaker’s Committee for the IPSA, is created (Schedule 3) and must agree to any candidate for membership of IPSA or for the post of the new Commissioner (Schedule 1, paragraph 2(5) and Schedule 2, paragraph 1(4)). Controversy may arise as to the agreement, or refusal of agreement, of this committee;
  - (i) The Speaker of the House of Commons is placed under a statutory duty to lay before the House of Commons the MPs’ allowances scheme and the code of conduct relating to financial interests prepared by the IPSA (clauses 3(5) and 5(5));
  - (j) In relation to enforcement, the bill recognises the power of the Committee on Standards and Privileges to “accept, modify, or reject as it sees fit” a recommendation from the IPSA on a sanction to be placed on a member (clause 7(3)). The bill states that a breach by a member “may be punished by the House of Commons in exercise of any of its disciplinary powers” (clause 7(6)), and these powers are further instanced in clause 7(11).
28. As in relation to the functions of the IPSA and the new Commissioner, a court considering whether it has jurisdiction over disputes such as the ones set out in scenarios (g) to (j) above will need to consider first whether parliamentary privilege attaches.

29. The Clerk of the Parliaments expressed concern about clause 7, which in several respects appears to confer a statutory permission on the House to exercise those enforcement powers.<sup>6</sup> **We concur with the view that clause 7 should be amended to avoid defining in statute the circumstances in which the House of Commons may exercise the disciplinary powers that it possesses as part of its ‘exclusive cognisance’ to run its own internal affairs. Placing references to these powers on the statute book risks opening the door to the possibility of arguments in court in favour of judicial examination of the House of Commons’ own rules.**

*Should there be a right of appeal for members?*

30. We turn now to the question of whether the enforcement system envisaged by the bill should include the possibility of an appeal from decisions of the IPSA, the Standards and Privileges Committee and the House of Commons as a whole. This is a different question from whether there is, or should be, judicial review in the ordinary courts. Clearly, the exercise of decision-making powers by the IPSA, the Standards and Privileges Committee and the House of Commons may have very significant impacts on the reputation of a member of the House of Commons and, in cases of suspension or expulsion, the ability of a member to represent his or her constituents.
31. The idea of creating a right of appeal against disciplinary sanctions is not a new one. In 1998, the House of Commons Standards and Privileges Committee conducted an inquiry into the desirability or otherwise of creating an appeal against findings of fact by the current non-statutory Parliamentary Commissioner for Standards.<sup>7</sup> A wide range of suggestions were received as to the appropriate person or body to consider such appeals: the Committee on Standards and Privileges itself; a sub-committee of the Committee; the Committee or its sub-committee sitting with expert legal advisers; an ad hoc committee drawn from a panel of senior members; an ad hoc tribunal of experienced members or of members and lay persons (including lawyers); a committee of senior Privy Counsellors chaired by a Law Lord; a panel of judges; a High Court judge sitting alone; and a tribunal of three eminent and independent persons chaired by an experienced lawyer.<sup>8</sup> The Committee recommended that “Standing Orders be amended so as to make possible the appointment of a legally qualified assessor to assist the Commissioner and the appointment of an independent tribunal to assist the Committee”.<sup>9</sup> This recommendation was not implemented.
32. There have also been long-standing suggestions that a right of appeal should be created in respect of decisions taken by the House of Commons Standards and Privileges Committee itself. This remains a live issue, as the Committee on Standards and Privileges will, in those cases which do not result in a criminal prosecution, continue to make a decision as to what sanctions should be recommended to the House of Commons as a whole in respect of a Member of Parliament found to have contravened the code. It is also extremely relevant to this House, in view of its recent decision in respect of

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<sup>6</sup> Appendix 4, paragraphs 16–18.

<sup>7</sup> Appeal Procedures, 21st Report of 1997–98, HC 1191; Appeal Procedures: a Consultative Document, 13th Report of 1997–98, HC 633.

<sup>8</sup> paragraphs 25–26.

<sup>9</sup> paragraph 34.

the report of the Committee for Privileges.<sup>10</sup> In his evidence to the Joint Committee on Parliamentary Privilege in 1998, Lord Bingham of Cornhill (then the Lord Chief Justice of England and Wales), suggested that a member subject to a sanction imposed by parliamentary committee should have a right of appeal to the Judicial Committee of the Privy Council.<sup>11</sup> Lord Bingham suggested the Judicial Committee as the appropriate court because, at that time, it heard appeals against professional bodies such as the General Medical Council. That jurisdiction has now been transferred to the Administrative Court and it might now be thought that the United Kingdom Supreme Court is an equally appropriate high-level court to determine appeals in relation to parliamentary matters. Lord Bingham explained:

“... in the situation that I envisage the Judicial Committee would give the greatest possible weight to the decision of the House and it would recognise that the House was in a better position than it was to assess the gravity of particular kinds of offence, just as the General Medical Council are in a better position to assess the gravity of different kinds of breaches of doctors’ ethical responsibility. But it would mean that there was a power of review, it would mean that there was another body that could look at the decision, and that I think is a healthy safeguard in almost any situation of this kind”.<sup>12</sup>

33. The Joint Committee on Human Rights has renewed the idea of appeal to the Judicial Committee of the Privy Council in their report on the bill.<sup>13</sup> Such an appeal would lie “against decisions of both the IPSA and the House of Commons which amount either to determination of a criminal charge or which determine a member’s rights”.<sup>14</sup>
34. **We believe that, as a matter of constitutional principle, decision-making powers of a public authority should be subject to the possibility of an appeal to a different body. We see no justification for denying members such a right of appeal against determinations of the IPSA. It is clear from the 1998 report of the House of Commons Standards and Privileges Committee, the 1998 report of the Joint Committee on Privileges, and the Joint Committee on Human Rights’ report on the bill that complex legal and constitutional questions need to be considered in reaching a final view as to the right design for such an appeal. These questions include the question of whether a member of either House of Parliament holds an office of a public or private nature, the composition or qualifications of the appellate body or person deciding the appeal, the nature of appeal (whether a review or full rehearing, whether confined to facts or including judgements), and whether that appellate body is situated within or external to Parliament.**
35. **In relation to decisions of the House of Commons as a whole, or recommendations of the Standards and Privileges Committee, there**

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<sup>10</sup> Committee for Privileges, *The Conduct of Lord Moonie, Lord Snape, Lord Truscott and Lord Taylor of Blackburn*, 2nd Report, 2008–09, HL 88-I.

<sup>11</sup> Joint Committee on Parliamentary Privilege, *Session 1998-99, Volume II: Minutes of Evidence*, HL 43-II/HC 214-II, QQ 398–405.

<sup>12</sup> Q 401.

<sup>13</sup> *Legislative Scrutiny: Parliamentary Standards Bill*, 19th Report of 2008–09, HL Paper 124/HC 844.

<sup>14</sup> paragraph 1.29.

seem to us to be even more complex considerations. The Joint Committee on Human Rights have suggested that “it is only a matter of time before Strasbourg makes a finding of violation of a member’s right to a fair hearing in Article 6(1) ECHR”.<sup>15</sup> If this analysis is correct, we can see some advantage in creating a domestic appellate body that is sufficiently impartial and independent from Parliament to satisfy the requirements of Article 6 to ensure that members have access to justice within the United Kingdom. We recognise that such an appeal would have profound implications for parliamentary privilege if the appellate body were to be a judicial tribunal outwith Parliament.

36. We do not have concluded answers to the questions we have raised on appeal mechanisms. The fast-tracking of the bill has prevented us from seeking expert opinion, corresponding with ministers and deliberating on the issues. It is deeply troubling that the bill is proceeding without the necessary policy-work and consultation on appeals having been done.

### **The creation of new criminal offences applying only to MPs**

37. In the final part of our report, we turn to consider clause 8 of this bill. This creates three new criminal offences (a) in relation to making claims under the MPs’ allowances scheme, (b) of failing to register a financial interest and (c) of engaging in paid advocacy in contravention of the code of conduct on financial interests (to be prepared by the IPSA under clause 5). We have a number of concerns about these provisions.
38. It is far from clear to us that it is constitutionally appropriate to create criminal offences that apply only to a very small class of people (in this case, MPs) whose potential misconduct is already governed by offences under the general criminal law. In his lecture on the rule of law, Lord Bingham of Cornhill said that “the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation”.<sup>16</sup> It is not clear to us that the dishonesty offences created in the bill specifically to cover the conduct of members in relation to the allowances scheme and failure to register financial interests are necessary. Offences under the ordinary criminal law already appear to cover the type of misbehaviour in question, for example under section 2 of the Fraud Act 2006 (fraud by false representation). In correspondence with Baroness Royall of Blaisdon (Leader of the House of Lords) we asked “Has an assessment been made as to whether existing legislation is sufficient to deal with any of the issues in question?” (referring to the whole bill). Baroness Royall told us “There is no existing legislation dealing with the issues in question, except where an MPs’ [sic] behaviour might break the existing criminal law, for example in relation to obtaining money by deception”.<sup>17</sup>
39. It is difficult to see what objective difference justifies creating offences for members only which are broadly similar to those that already exist in the general law. It is also noteworthy that while the maximum sentence for the

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<sup>15</sup> paragraph 1.27.

<sup>16</sup> “The Rule of Law” (2007) 66 Cambridge Law Journal 67, the text of a lecture delivered at the University of Cambridge Centre for Public Law on 16 November 2006.

<sup>17</sup> See 17th Report of 2008–09, HL 130, Appendix 2.

Fraud Act offences is 10 years imprisonment only 12 months is proposed for the new offences created by the bill. **We do not support the retention in the bill of provisions creating criminal offences applicable to members only when offences in the general criminal law already adequately covers the misconduct in question.**

40. The third proposed offence, paid advocacy, raises constitutional questions of a different type. In a prosecution for this offence, what evidence would be put before the court? There would appear to be serious evidential obstacles following the removal, by the House of Commons, of the clause creating an exception to Article IX of the Bill of Rights, as no evidence of proceedings in Parliament will be admissible as evidence in such a prosecution.
41. **We welcome the amendment of the bill by the House of Commons to remove the clause on parliamentary proceedings, which would have undermined the principles of parliamentary privilege which are essential for the proper functioning of Parliament. Without this clause is it highly questionable whether the proposed offence of paid advocacy in clause 8(3) is workable and, accordingly, we do not support its retention in the bill.**
42. **If clause 8(1) and (2) are to remain part of the bill, the Government should explain why current legislative provision needs to be supplemented or supplanted, and the relationship between the new and current offences.**
43. The Government also needs to explain whether trials for the offences may take place in Scotland. The bill extends to the whole of the United Kingdom. Clause 8(6) expressly recognises that offences may be prosecuted in the separate criminal legal jurisdictions of England and Wales and of Northern Ireland. It is not clear to us whether the clause, as currently drafted, would enable a trial and sentencing to take place in Scotland. **Offences relating to the United Kingdom Parliament should be amenable to prosecution in all three of the United Kingdom's criminal law jurisdictions.**

**APPENDIX 1: COMPARISON OF THE BILL INTRODUCED TO THE HOUSE OF COMMONS WITH THAT INTRODUCED TO THE HOUSE OF LORDS**

Bill as introduced to House of Commons		Changes made (clause and subsection references to bill as introduced to the House of Lords unless otherwise stated).	Bill as introduced to House of Lords
Clause/ Schedule	Subsections subject to change		
1: Independent Parliamentary Standards Authority etc		No change.	1: Independent Parliamentary Standards Authority etc
2: MPs' salaries		No change except minor consequential amendment.	2: MPs' salaries
3: MPs' allowances scheme			3: MPs' allowances scheme
	3(4)	Addition of (a) the Committee on Standards in Public Life, (e) members of the House of Commons, and (g) Her Majesty's Revenue and Customs to the list of those the IPSA must consult in preparing or revising the scheme. No other change except minor consequential amendments.	3(4)
4: Dealing with claims under the scheme			4: Dealing with claims under the scheme
	N/A	Addition of 4(7), to provide for an allowance to be paid to another person at the member's discretion. No other change.	4(7)

5: MPs' financial interests rules		Clause title changed.	5: MPs' code of conduct relating to financial interests
	5(1) and 5(2): requirement on the IPSA to prepare "the MPs' financial interest rules".	Replaced with requirement to prepare "the MPs' code of conduct relating to financial interests". Consequential amendments at 5(3), 5(4), 5(5), 5(6), 5(7), 5(8), 6(1)(b), 7(5)(a), 8(2), 8(3), 11(2)(b), 11(2)(c), and Schedule 1, para 18(2)(b).	5(1) and 5(2)
	5(4): List of those whom the IPSA must consult in preparing the code.	Addition of (a) the Speaker of the House of Commons and (b) members of the House of Commons. Minor consequential amendments.	5(4)
	5(5): Requirement on the IPSA to lay the rules before the House of Commons.	Replaced by requirement on the Speaker to lay the code before the House of Commons.	5(5)
	5(8): Statement that rules must require a member to declare specified financial interest before taking part in specified related proceedings, and that rules may require a member to declare specified financial interest in other specified circumstances.	Subsection removed. Consequential amendment to 11(2). Reference to declaration of members' interests at 13(2)(c) (in the bill as introduced to the House of Commons) removed.	N/A
	5(9): explanation of reference to a member with a specific financial interest in 5(8).	Subsection Removed.	N/A
	5(10)	Subsection re-numbered. Consequential amendment at 11(2)(c).	5(8)
	5(11)–(13)	Subsections re-numbered.	5(9)–(11)

6: MPs' code of conduct. Stating that the House of Commons will continue to have a code of conduct incorporating the Nolan principles and other matters as may be determined by the House.		Clause removed.	N/A
7: Investigations		Clause re-numbered. Consequential amendments to 7(5)(b), 7(9) and 7(10).	6: Investigations
	7(2): Circumstances in which an investigation may be conducted.	Addition of 6(2)(b) "at the request of the member"..	6(2)
	N/A	Addition of 6(5): No report shall be made (a) where the member has agreed that he has failed to register or declare an interest, if in the Commissioner's opinion the interest involved is minor, the failure was inadvertent, the member has concerned has taken rectifying action as required by the Commissioner, or (b) in any case involving the MPs' allowances scheme, or where the use of facilities or services of the Commissioner has with the agreement of the member referred the matter to the IPSA to secure financial reimbursement, and where the member has made such reimbursement within a period of time considered reasonable by the Commissioner.	6(5)
	7(5)	Subsection re-numbered. Consequential amendment to Schedule 1, para 18(2)(c).	6(6)

	N/A	Addition of 6(7): Requirement on the IPSA, in determining the procedures in relation to investigations, complaints and publication of reports, to consult the Leader of the House of Commons, the House of Commons Committee on Standards and Privileges and any other person the IPSA considers appropriate.	6(7)
	7(6)	Subsection re-numbered.	6(8)
8: Enforcement		Clause re-numbered. Consequential amendments to 2(2), 11(3), and Schedule 1, para 18(2)(d).	7: Enforcement
	N/A	Addition of 7(3): The Committee on Standards and Privileges may accept, modify or reject a recommendation under 7(2) as it sees fit.	7(3)
	8(3)–(11)	Subsections (and cross-references) re-numbered.	7(4)–7(12)
	8(6): requirement on the IPSA to secure agreement of the Speaker's Committee on the Independent Parliamentary Standards Authority for a protocol on how various listed bodies are going to work together.	Replaced with requirement to secure agreement of the Committee on Standards and Privileges. Consequential removal of the House of Commons Committee on Standards and Privileges from the list of bodies which the protocol will cover. Consequential amendments.	7(7)
9: Offences		Clause re-numbered.	8: Offences
10: Proceedings in Parliament. Clause stating that no enactment or rule of law preventing proceedings in Parliament being impeached or		Clause removed.	N/A

questioned in court or any place out of Parliament is to prevent the IPSA or the Commissioner from carrying out their functions, or any evidence from being admissible in proceedings against a member of the House of Commons for an offence under clause 9 (in the bill as introduced to the House of Commons).			
11: Further functions of the IPSA and Commissioner		Clause re-numbered.	9: Further functions of the IPSA and Commissioner
12: Interpretation		Clause re-numbered. Consequential amendment at 12(2)(a).	10: Interpretation
	12(1): interpretation of references to “the Leader of the House of Lords” in the Act.	Reference to Leader of the House of Lords removed.	10(1)
13: Power to make transitional etc provision		Clause re-numbered. Consequential amendment at 12(2)(b).	11: Power to make transitional etc provision

	13(2)(d)	Subsection re-numbered.	11(2)(c)
	13(5): Provision that an order under this clause may provide for the Commissioner and the IPSA to carry out their functions under the Act in relation to matters arising under the rules before the order comes into force (including matters arising before the date on which the Act is passed).	Subsection removed.	N/A
	13(6): Consequential provision to 13(5) requiring the Commissioner and the IPSA to deal with any question about the conduct of a member of the House of Commons on the basis of the rules having effect at the time.	Clause removed.	N/A
	13(7)–(12)	Subsections (and cross-references) re-numbered.	11(5)–(10)
	13(11): A statutory instrument containing an order under this clause is to be subject to the negative procedure.	Replaced with a provision that a statutory instrument under this clause is to be subject to the draft affirmative procedure.	11(9)
14: Short title and commencement		Clause re-numbered.	12: Short title and commencement
Schedule 1: Independent Parliamentary Standards Authority			Schedule 1: Independent Parliamentary Standards Authority

	1(2): At least one of the members of IPSA must be a person who holds or has held high judicial office	Changed to refer to a person who has held (but no longer holds) high judicial office.	1(2)
	5(5): A motion for an address in relation to the removal of the chair or an ordinary member of the IPSA may be made in the House of Commons by the Leader of the House of Commons only, and in the House of Lords by the Leader of the House of Lords only.	Subsection removed.	N/A
	5(6)	Subsection re-numbered.	5(5)
	18(2)(a): The IPSA's regulation functions are its functions under clause 3(3) to (5) (preparing and revising MPs' allowances scheme).	Amended to refer to functions under subsections 3(3) and (4) (preparing and revising MPs' allowances scheme).	18(2)(a)
	22(6): After reviewing the IPSA's resources estimate and making any modifications, the Speaker's Committee for the Independent Parliamentary Standards Authority must lay the estimate before the House of Commons.	Replaced by a requirement on the Speaker to lay the estimate before the House of Commons after the Committee has reviewed the estimate and made any modifications.	22(6)
	22(7): If the Speaker's Committee for the Independent Parliamentary Standards Authority does not follow any advice given by the Treasury, or makes any modifications to the estimate, it must prepare a statement of its reasons and lay it before the House of Commons.	Replaced by a requirement on the Speaker to lay the statement before the House of Commons, once the Committee has prepared it.	22(7)

	25(1) and 25(2): References to the requirement on the IPSA to prepare its annual report and lay it before each House of Parliament	Replaced by a requirement on the Speaker to lay the annual report before each House of Parliament, once the IPSA has prepared it.	25(1) and 25(2)
Schedule 2: Commissioner for Parliamentary Investigations			Schedule 2: Commissioner for Parliamentary Investigations
	4(3): A motion for an address relating to the removal from office of the Commissioner may be made in the House of Commons by the Leader of the House of Commons only, and in the House of Lords by the Leader of the House of Lords only.	Subsection removed.	N/A
	8(1) and 8(2): Requirement on the Commissioner to prepare an annual report, and to lay it report before each House of Parliament.	Replaced by a requirement on the Speaker to lay the report before each House of Parliament, once the Commissioner has prepared it.	8(1) and 8(2)
Schedule 3: Speaker's Committee for the Independent Parliamentary Standards Authority		No change	Schedule 3: Speaker's Committee for the Independent Parliamentary Standards Authority

## APPENDIX 2: INDICATORS OF INDEPENDENCE

	Current Commissioner for Parliamentary Standards	IPSA and Commissioner for Parliamentary Investigations
Source of power	Non-statutory; established by Standing Orders (SO 149-150).	Statute
Selection process	Run by House of Commons Commission; chairman of the Committee on Standards in Public Life invited to be a member of the selection panel	Selected by Speaker “on merit on the basis of fair and open competition” with agreement of Speaker’s Committee for IPSA
Appointment	Officer of the House of Commons appointed by Resolution the House of Commons (SO 150(1))	By Her Majesty on an address of the House of Commons
Removal from office	Resolution of the House of Commons	By Her Majesty on an address of both Houses of Parliament
Term of office	At inception, a three year, renewable appointment. Since 2002, fixed, non-renewable term of 5-7 years. <sup>18</sup>	Fixed term not exceeding 5 years, reappointable once only for period not exceeding 3 years
Status	Officer of the House of Commons (SO 150); terms and conditions set by House of Commons Commission.	IPSA, its members and staff “are not to be regarded as servants or agents of the Crown” (Schedule 1, para 9).
Budget	Funding provided by House of Commons Commission, which agreed to “make available whatever resources were judged necessary” <sup>19</sup>	Funding arrangements set out in Schedule 1, para 22: IPSA prepares estimate for Speaker’s Committee; estimate laid before House of Commons

<sup>18</sup> See House of Commons Standards and Privileges Committee, 2nd Report of 2002–03, Eighth Report of the Committee on Standards in Public Life: “Standards of Conduct in the House of Commons”, HC 403.

### APPENDIX 3: INDICATORS OF ACCOUNTABILITY

	Current Commissioner for Parliamentary Standards	IPSA and Commissioner for Parliamentary Investigations
Parliamentary oversight	Committee on Standards and Privileges “to oversee the work of the Parliamentary Commissioner for Standards” (SO 149(1)(a))	<p>Allowances scheme prepared or revised must be laid before Parliament</p> <p>Financial interests code must be laid before Parliament</p> <p>Committee on Standards and Privileges has discretion to accept, modify or reject recommendations from IPSA on imposition of disciplinary sanctions.</p>
Consultation duties		<p>IPSA must consult on preparation and revision of allowances scheme.</p> <p>IPSA must consult on preparation and revision of MPs’ code of conduct relating to financial interests</p> <p>IPSA must consult on investigations procedure</p>
Annual reporting requirements	<p>1. No reports were made prior to 2003.</p> <p>2. Standing Orders now provide: “The Commissioner shall report each year to the House on the exercise by him of his functions” (SO 150(10)).</p>	<p>“(1) As soon as practicable after the end of each financial year, the IPSA must prepare and the Speaker must lay before each House of Parliament a report about the performance of the IPSA’s functions during that financial year.</p> <p>(2) When the Speaker lays such a report, the IPSA must publish it in such manner as it considers appropriate”. (Schedule 1, para 25)</p>
Audit		Annual submission of accounts to Comptroller and Auditor General, who lays before each House of Parliament certified copies
Freedom of information	Parliament subject to Freedom of Information Act 2000	IPSA subject to the Freedom of Information Act 2000

<sup>19</sup> Office of the Parliamentary Commissioner for Standards Annual Report 2002–03, HC 905 paragraph 7.2.

## APPENDIX 4: MEMORANDUM OF THE CLERK OF THE PARLIAMENTS, 6 JULY 2009

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### Introduction

1. I have been asked for my views on the possible implications of the Parliamentary Standards Bill for the House of Lords. The Bill applies only to the House of Commons, and contains no provision that would allow its extension to the House of Lords. However, the Lord Chancellor confirmed during the second reading debate on the Bill on 29 June that:

“it is envisaged that in due course the arrangements relating to the Independent Parliamentary Standards Authority should indeed apply to the other place ... I hope that that matter will be dealt with in subsequent legislation”.

2. My comments are therefore made on the basis that the Bill may be taken as a “template” for possible further legislation which would apply to this House. It would be improper for me to comment directly on the Bill’s impact on the House of Commons.

3. A memorandum by the Clerk of the House of Commons, Dr Malcolm Jack, described in some detail the Bill’s effect on the House of Commons. Like him, I stress that I am commenting not on the merits of the Bill’s policy proposals, but only on the constitutional implications for Parliamentary privilege and the possibility of conflict between the courts and Parliament.

### Constitutional issues

4. The constitutional principle most directly engaged by the Bill is that of Parliamentary privilege. The word “privilege” is perhaps open to misconstruction: the point at issue is freedom of speech within Parliament.

5. Article IX of the Bill of Rights of 1689 states “That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”. The statutory protection conferred by Article IX upon free speech in the legislature has over time evolved into one of the guiding principles of democratic systems of government. In the words of the 19th edition of Erskine May, “Freedom of speech is a privilege essential to every free council or legislature.”

6. The effects of the Bill (as introduced in the House of Commons) on Parliamentary privilege, were described in Dr Jack’s memorandum to, and his evidence before, the House of Commons Justice Committee on 30 June. In particular, Dr Jack made the point that clause 10 of the Bill as introduced, which, by waiving the Article IX protection, would have allowed evidence of Parliamentary proceedings to be admissible in court, could “have a chilling effect on the freedom of speech of Members and of witnesses before committees and would hamper the ability of House officials to give advice to Members.”

7. Although I shared Dr Jack’s concerns regarding the Bill as introduced, the clauses that most directly engaged parliamentary privilege (clauses 6 and 10 of the Bill as introduced) were removed in the course of the Committee stage in the Commons; clause 6 with the agreement of the Government; clause 10 on division. It follows that the most serious concerns which Dr Jack raised have now been met.

8. The remaining issues are different in scale. Some are practical, and the Government was not able to work through all the consequences of the amendments made to the Bill in the Commons. Thus the Lord Chancellor stated, following the vote on clause 10, that the Government would “take full account of the decision of the House in the consequential amendments in the other place.” Until these Government amendments are tabled, these comments on the Bill must therefore be regarded as provisional.

9. There remain, however, provisions within the Bill which, by leaving open the possibility of judicial examination of the House’s internal rules, could threaten the principle of Parliamentary privilege. I outline these issues below and make the point again that my comments apply only to the possible application of the provisions to the Lords.

### **Paid advocacy (Clause 5)**

10. Clause 5 was substantially amended in the course of proceedings in the Commons. It now requires the Independent Parliamentary Standards Authority (IPSA) to “prepare a code to be observed by members of the House of Commons”. This code will be known as “the MPs’ code of conduct relating to financial interests”.

11. The scope of this code of conduct is described in clauses 5(7) and 5(8). The code “must require members to register specified information about specified financial interests in a register maintained by the IPSA”. The Register of Interests is not a privileged document, and clause 5(7) therefore raises no issues of Parliamentary privilege. However, clause 5(8) states that the code must prohibit a member from:

“(a) by any specified means, advocating or initiating any cause or matter on behalf of any person in consideration of any specified payment or specified benefit in kind, or

(b) in consideration of any specified payment or specified benefit in kind, urging any other member to advocate or initiate, by any specified means, any cause or matter on behalf of any person.”

12. In effect, clause 5(8) gives statutory form to a “*no paid advocacy rule*”. The clause does not, however, make any reference to the duty of Members to declare relevant interests in debate, or otherwise in the course of their Parliamentary work (a provision that would have covered declaration was withdrawn by the Government in the course of Commons scrutiny). The IPSA code will thus be limited to the registration of financial interests and to the prohibition of paid advocacy; rules relating to registration of non-financial interests, and declaration of financial or non-financial interests, will be a matter for the two Houses (if the provisions are applied to the Lords) to regulate by means of their own codes of conduct and their own enforcement procedures.

13. However, the definition of “*paid advocacy*” is less clear in practice than in theory. There is a grey area between, on the one hand, paid advocacy, and, on the other, legitimate participation in proceedings following the declaration of a relevant financial interest. Deciding where the conduct of a particular member falls within this grey area will require careful exercise of judgement. The recent report of the Committee for Privileges on the *Sunday Times* allegations turned in part on this very point. I also understand that the definition of “paid advocacy” is a key issue currently under review by the Leader’s Group on the Code of Conduct.

14. The courts, since at least the early nineteenth century, have played a crucial part in defining the boundaries of parliamentary privilege; they have not, however, questioned its fundamental basis. What clause 5 of the Bill does, in effect, is to create a new boundary, between “paid advocacy” and legitimate declaration of financial interests in debate, a boundary which falls in the heart of an area that hitherto has been regarded without question as subject to parliamentary self-regulation and exclusive cognisance. A legal challenge alleging that a code prepared by IPSA did not comply with clause 5 (8) by failing to prohibit a category of conduct which the House itself regards as acceptable could potentially lead the court into an examination of the House’s own rules regarding such conduct.

15. It follows that the juxtaposition of the statutory provisions on paid advocacy contained in the Bill (which will of course be subject to judicial oversight) with the codes covering declaration adopted by the two Houses, which are omitted from the Bill (and which are privileged), could erode the protection offered by Article IX.

### **Enforcement (Clause 7)**

16. Clause 7 of the Bill (clause 8 of the Bill as introduced) has been significantly amended. Clause 7(3) has been added, to clarify that the Commons’ Committee for Standards and Privileges is not bound to accept a recommendation made by the IPSA. However, the wording of clause 7(3) appears to define in statute powers which the Committee inherently possesses. It may be preferable to avoid this apparent effect.

17. Similar points arise in respect of clause 7(5) and 7(6). Dr Jack noted that these provisions appeared “to make the exercise by the House of its disciplinary powers a matter of statute, since it seems to confer a statutory permission on the House to exercise those powers”. He continued, “if the circumstances in which the House may exercise disciplinary powers became a question of law, it would be open to challenge before the courts”.

18. I believe that these points remain valid. Certain disciplinary powers are inherent in the two Houses, and defining in statute the circumstances in which such powers may be exercised opens up the possibility of judicial intervention. The same issue arises in respect of clause 7(11), which might inhibit the House from adopting other sanctions that might be more appropriate in particular circumstances.

### **Governance of the Independent Parliamentary Standards Authority**

19. The schedules to the present Bill describe the membership and governance of the IPSA, the mode and terms of appointment of the Commissioner for Parliamentary Investigations, and the role of the Speaker’s Committee for the IPSA. These arrangements reflect the fact that under the Bill the IPSA’s remit is limited to the House of Commons.

20. Although it would not be appropriate for me to comment on the governance arrangements for the IPSA, it is clear that those described in the Bill would require careful consideration and significant amendment were the IPSA’s remit to be extended to the House of Lords.

### **Parliamentary Privileges Act**

21. In conclusion, I also share Dr Jack’s view that it is now time to implement the recommendation of the Joint Committee on Parliamentary Privilege in 1999 that

there should be a Parliamentary Privileges Act, rather than tinkering with Parliamentary privilege on a piecemeal basis. Both Dr Jack and I made similar points to the Joint Committee on the draft Bribery Bill in June. As Dr Jack suggested to the Commons Justice Committee such an act would clarify the interpretation of Article IX, identifying those privileges which are necessary for the effective work of a modern Parliament, define the extent of Parliament's control of its internal affairs; and replace existing statute on the reporting of Parliamentary proceedings.