



Parliamentary Standards Bill

Bill No 121 of 2008-09

RESEARCH PAPER 09/61 25 June 2009

This Bill is due for its second reading on Monday 29 June 2009, and is due to have its Committee stage on the floor of the House on Tuesday 30 June, and conclude its Commons stages on Wednesday 1 July.

The Bill introduces a statutory Independent Parliamentary Standards Authority (IPSA) and Commissioner for Parliamentary Investigations. The IPSA will be responsible for devising a scheme for Members' allowances and for determining claims. Research Paper 09/60 *Members' Allowances* covers the background to the Government's decision to implement major changes, pending the report from the Committee on Standards in Public Life expected in autumn 2009.

IPSA is also required to devise rules on Members financial interests, superseding the current Register which is established by Resolution of the House. The Commissioner will investigate allegations of misuse of allowances and breaches of the financial interest rules. The Bill also provides for a Code of Conduct for Members, incorporating the Seven Principles of Public Life. The provisions have considerable implications for the current system of self regulation under which the Commons is governed, and for the operation of parliamentary privilege.

Oonagh Gay

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Research Paper 09/61

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Summary

The system of Members' expenses has come under considerable criticism recently. Research Paper 09/60 *Members' Allowances* discusses background to the interim measures announced by Speaker Martin on 19 May 2009, pending the report from the Committee on Standards in Public Life (CSPL), chaired by Sir Christopher Kelly, on allowances expected in autumn 2009. In response to media and public concern, the Government announced on 20 May 2009 that it would bring forward legislation to create an independent body to oversee both Members' and Member's financial interests. There followed discussions between the party leaders as to the format of the Bill, which were not made public.

This Bill establishes the Independent Parliamentary Standards Authority, as appointed by Her Majesty, following an address by the House, and approval from a new Speaker's Committee for the Independent Parliamentary Standards Authority (IPSA), to undertake the following functions:

- to devise a scheme for Members allowances, following the Kelly review;
- to pay salaries and allowances to Members, and authorise allowances claims;
- to make rules on registration and declaration of Members Interests, as well as a prohibition on paid advocacy;
- to maintain the register of Members financial interests;
- to supervise a new Commissioner for Parliamentary Investigation, who would undertake investigations into allegations about misuse of allowances and/or failure to comply with registration of financial interests; and
- to provide information to Members about the allowances scheme and the financial interest rules.

The House currently regulates itself in respect of the payments of Members' allowances and the registration and declaration of Members' financial interests. The functions carried out by the IPSA and the Commissioner are not to be considered proceedings in Parliament and so would not attract parliamentary privilege.

The Bill also provides for a Code of Conduct for Members, incorporating the Seven Principles of Public Life.

In addition the Bill creates new criminal offences for:

- knowingly providing false or misleading information in a claim for an allowance,;
- failing without reasonable excuse to comply with the rules on registration,
- breaching the rules which prohibit paid advocacy,.

The Bill's provisions do not extend to the Lords, although initial statements from the Leader of the House and the Prime Minister indicated that they expected IPSA to take over responsibility at a later stage. There is no specific provision for this in the Bill.

1 The Government's proposals for a Standards Authority

Background on the pressure to reform the system of Members' allowances is covered in a number of Library Standard Notes and in Research Paper 09/60 *Members Allowances*.¹ The Committee on Standards in Public Life (CSPL) chaired by Sir Christopher Kelly, is due to report by October 2009 on a new system for MPs' allowances. The Government have indicated that it will accept these proposals, provided they are cost effective. The CSPL is currently holding oral hearings and evidence submitted to the inquiry is available from its website.² The Leader of the House, Harriet Harman, gave evidence on 16 June and a transcript is available from the Committee website..³

This Bill is designed to introduce a new body to regulate and provide for the payment of Members' pay and allowances, to be known as the independent Parliamentary Standards Authority (IPSA) This body would oversee the registration rules for Members financial interests. The Bill would also create a statutory Commissioner for Parliamentary Investigations, to investigate allegations of misuse of allowances and failure to observe the rules on financial interests. The House of Commons would continue to maintain a Code of Conduct, incorporating the Seven Principles of Public Life (the Nolan principles). The proposals would introduce radical changes to both the governance of the Commons and the system of self regulation. The initial announcements are first set out and then the implications discussed under three main headings: Members allowances, Parliamentary self regulation and investigation procedures, and the independence and accountability arrangements for the IPSA.

1.1 Immediate background to the introduction of the Bill

An extensive series of articles in the *Daily Telegraph* in May and June 2009 led to great public concern about the current operation of the system of Members' expenses. Library Standard Note 4732 *MPs' allowances and Fol requests* gives background to the release of redacted receipts by the Commons on 16 June 2009 in response to earlier Fol requests since 2005.

Speaker Martin's statement on 19 May 2009 indicated that he had convened all party talks to discuss reforms of the parliamentary allowances system:

Mr. Speaker: I should like to make a statement, for the second time today.

This afternoon I convened a meeting of party leaders—both major and minor parties—and members of the House of Commons Commission to make decisions on the operation of parliamentary allowances pending the recommendations of Sir Christopher Kelly's Committee on Standards in Public Life. The Chairman of the Committee on Members' Allowances was also present to advise us...

After setting out immediate changes in the system of Members' allowances, he went on to say:

The meeting also received a paper from the Prime Minister, which was endorsed by the other party leaders, calling for a fundamental reform of allowances—moving from self-regulation to regulation by an independent body. The Government will consult widely on this proposal. Further to this, the Leader of the House will be making a statement tomorrow, which will allow the House a full opportunity to ask questions, and

¹ These are available at http://www.parliament.uk/works/notes_on_parliament_and_constitution.cfm#parliament

² http://www.public-standards.gov.uk/OurWork/MPs__Expenses__Evidence.html

³ http://www.public-standards.org.uk/Library/Uncorrected_transcript__First_Hearing__MPs__Expenses3_16_06_09.doc

Members to air their views on the decisions we have made and the proposals for the future.⁴

Harriet Harman made a statement to Members on a proposed Independent Parliamentary Standards Authority on 20 May 2009. She said:

At the MEC meeting last night all parties agreed to the Prime Minister's proposal that the keystone of any reform must be to switch from self-regulation to independent external regulation, and that we should end the gentleman's club approach, where we set and enforce our own rules, and instead bring forward proposals for a new Independent Parliamentary Standards Authority. The proposal on which we seek to consult would see Parliament legislate to delegate specific responsibilities to a new, independent Independent Parliamentary Standards Authority.

The new Independent Parliamentary Standards Authority would revise and update the code of practice for Members of this House, investigate complaints where a Member of this House is alleged to have breached the code of conduct, take forward the implementation of the recommendations of the Committee on Standards in Public Life as to allowances, take responsibility for authorising claims for payment under the new allowance system, as well as disallow claims, be able to require payback of claims wrongly paid out, and be able to impose financial penalties.⁵

Subsequently, a statement was deposited in the Library that day which gave further details of plans for an Independent Parliamentary Standards Authority:

The time has come to consult on moving from self-regulation to independent regulation – with Parliament agreeing to cede specific delegated authorities to a new, independent Parliamentary Standards Regulator. The Government is therefore proposing to consult widely on such a proposal,

Such a body would act independently of MPs or political parties to entrench high standards of propriety, rigour and financial conduct; oversee and administer the new allowance system put in place following the Committee on Standards in Public Life; investigate abuses and impose financial sanctions as necessary. Its overarching purpose would be to assure the public that Members of Parliament were operating in line with the highest standards of behaviour in the wider public and private sectors and avoiding the potential conflicts of interest that could arise through a traditional approach of self-regulation.

...

The new body will have the authority to apply sanctions, to disallow claims and take money back from a Member who is found to have broken the rules. Sanctions which involve preventing a Member from performing their work would remain as present, so a suspension from the House will remain a matter for the House. The remainder of disciplinary procedures, such as discipline in the Chamber will remain as now. If the body suspects any breach in the criminal law they will refer this to the police.

The new body and its actions should be subject to independent, external audit, potentially by the NAO.

Transparency – the body will want to be transparent in all of its procedures, codes and rules – consulting on them and continuing transparency on all payments.

⁴ HC Deb 19 May c1423

⁵ HC Deb 20 May c1505

Pay – MPs pay is set independently by the SSRB. This should continue. The SSRB could consult the regulator in considering its proposals.

Pensions - the SSRB are reviewing MPs pensions and will report. The new body will have a role in determining the arrangements for MPs' pensions.

Separating functions - In constituting this new body care will need to be taken to split the functions of authorising payment from the functions of scrutinising that payment. The two roles are different and the reforms will need to reflect the separation of those powers.

The deposited paper also suggested that the appointments to the new body would be made by Parliament following fair and open competition. The impact on existing bodies was also sketched out: the CSPL would remain unchanged; the Parliamentary Standards Commissioner would operate under the auspices of the new body, reinforcing its independence and the Standards and Privileges Committee would be subject to an open discussion about the extent to which disciplinary functions should transfer to the new body. The paper maintained that "it is clearly appropriate that this new body also takes responsibility for these issues in the Lords". But it noted,

We recognise that the principle of self-regulation operates differently in the House of Lords. It is clear that extensive work and consultation will be necessary in order to ensure the agreement of the House to the effective transfer of responsibilities to the new body.⁶

The Prime Minister, Gordon Brown, separately stated in media interviews on 31 May 2009 that there would also be a statutory Code of Conduct for Members, to be legally enforced.⁷ Further details were made available in his statement on Constitutional Renewal on 10 June 2009:

At its first meeting yesterday, the Government's democratic council decided to bring forward new legislative proposals before the summer Adjournment on two issues that have been the subject of constructive cross-party discussion. First, we propose that the House of Commons—and subsequently the House of Lords—move from the old system of self-regulation to independent, statutory regulation. That will mean the immediate creation of a new Independent Parliamentary Standards Authority, which will have delegated power to regulate the system of allowances. No more can Westminster operate in ways reminiscent of the last century, whereby Members make up the rules and operate them among themselves.

The proposed new authority would take over the role of the Fees Office in authorising Members' claims, oversee the new allowance system, following proposals from the Committee on Standards in Public Life, maintain the Register of Members' Interests, and disallow claims, require repayment and apply firm and appropriate sanctions in cases of financial irregularity. I welcome the cross-party support for these proposals, which will be contained in the Bill that we will introduce very soon. I believe that the whole House will also wish to agree that, as part of this process, the new regulator should scrutinise efficiency and value for money in Parliament's expenditure, and ensure, as suggested to Sir Christopher Kelly, that Parliament costs less.

⁶ Dep Paper 2009/1474

<http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-1474.doc>

⁷ "Brown pledges to 'clean up system' with far-reaching series of reforms" 1 June 2009 *Times*
<http://www.timesonline.co.uk/tol/news/politics/article6401975.ece>

Secondly, the House will be asked to agree a statutory code of conduct for all MPs, clarifying their role in relation to their constituents and Parliament, detailing what the electorate can expect and the consequences that will follow for those who fail to deliver. It will codify much more clearly the different potential offences that must be addressed, and the options available to sanction. These measures will be included in a short, self-standing Bill on the conduct of Members in the Commons, which will be introduced and debated before the summer Adjournment. This will address the most immediate issues about which we know the public are most upset, but it will be only the first stage of our legislation on the constitution.

The current system of sanctions for misconduct by Members is not fit for purpose. It does not give the public the confidence they need that wrongdoing will be dealt with in an appropriate way. The last time a person was expelled from the House was 55 years ago, in 1954. It remains the case that Members can be sentenced to up to one year in prison without being required to give up their parliamentary seat. The sanctions available against financial misconduct or corruption have not been updated to meet the needs of the times. This is not a modern and accountable system that puts the interests of constituents first. It needs to change.

There will be consultation with all sides of the House to come forward with new proposals for dealing effectively with inappropriate behaviour, including the potential options of effective exclusion and recall for gross financial misconduct, identified by the new independent regulator and by the House itself.

The House of Lords needs to be reformed, too. Following a meeting of the House Committee of the House of Lords, and at their request, I have today written to the Senior Salaries Review Body to ask it to review the system of financial support in the House of Lords, to increase its accountability, to enhance its transparency and to reduce its cost. For the first time, there will also be new legislation for new disciplinary sanctions for the misconduct of peers in the House of Lords.⁸

In response, David Cameron, the Leader of the Opposition, said that the Conservatives would support the establishment of a Independent Parliamentary Standards Authority, but there “were still serious questions to be answered, not least about how it will relate to the House and to whom it will be ultimately accountable”.⁹ Nick Clegg, for the Liberal Democrats, also offered support and called for immediate implementation of the IPSA proposals. Sir George Young, chairman of the Standards and Privileges Committee, warned against rushing through a statutory code of conduct, enforceable in the courts, without proper consultation.¹⁰ In the Lords, Lord Strathclyde sounded warning notes:

My right honourable friend Mr Cameron has accepted the need in the House of Commons for the new supervisory body that the Prime Minister proposes, but are there not still serious questions to answer? How will this body relate to the two Houses if that is what happens? How will it recognise the differences between a House that is paid and representative and one that is not? To whom will this body ultimately be accountable? The Statement says that the regulator will,

“apply firm and appropriate sanctions”.

⁸ HC Deb 10 Jun 2009 c796-797

⁹ Ibid c799

¹⁰ Ibid c805

What if a Peer or an MP objects? Will he be able to challenge the regulator in the courts? Surely, there is one thing on which we can all agree: we do not want the judiciary determining questions that are matters for Parliament.¹¹

There were a number of comments in the Lords as to the different nature of the second chamber and the robust action already taken in suspending two peers following the report from the Committee for Privileges in 2009.¹²

On 23 June 2009 the *Parliamentary Standards Bill* had its first reading. Harriet Harman made a statement in which she emphasised the need for swift legislative action:

I shall set out in my Business Statement the date for second Reading of the Bill but the House should know that we intend that its committee stage as well as Report and Third Reading will be taken on the floor of the House and we hope that there is sufficient consensus – following the consultation which has been led by my Rt hon friend the Justice Secretary – for it to reach Royal Assent by the time the House rises for the summer recess so that it can be ready to start work with the Kelly Committee’s recommendations by the end of the year.¹³

In questions following the statement there was some concern that the Bill would not be subject to detailed scrutiny. The Conservative Christopher Chope complained that the terms of the legislation had been available to party leaders in advance of backbenchers:

Mr. Chope: On a point of order, Madam Deputy Speaker. The new Speaker has made it very much his remit to ensure that Back Benchers get more rights and privileges in this Chamber. You will have noticed from recent exchanges on the Parliamentary Standards Bill that there were two schools: those who have already seen the Bill in draft, or almost final, form, and those of us who have not, even though we know it is about to be published. Would it not have been much better for the Bill to have been published before the statement, so that we could all have been acting on the same basis?¹⁴

The Bill was officially published after the statement ended as Bill 121 of 2008-09. Some immediate press reaction expressed concern about the speed at which legislation was being introduced.¹⁵

2 The *Parliamentary Standards Bill* 2008-09

The Bill has 14 clauses and three schedules. It was published on 23 June and is due for a second reading on 29 June, with all stages in the Commons to be completed on the floor of the House by 1 July, according to the Business statement on 24 June. The Bill establishes the Independent Parliamentary Standards Authority, as appointed by Her Majesty following an address by the House, and approval from a new Speaker’s Committee for the Independent Parliamentary Standards Authority, to undertake the following functions:

- to devise a scheme for Members allowances
- to pay salaries and allowances to Members, and authorise allowances claims

¹¹ HL Deb 10 June 2009 c643

¹² Committee for Privileges Second Report HL 88 2008-09

¹³ HC Deb 23 June 2009 c678-680

¹⁴ HC Deb 23 June 2009 c691

¹⁵ “MPs will regret rushing into tough looking legislation on expenses” *Times* 24 June 2009

- to make rules on registration and declaration of Members Interests, as well as a prohibition on paid advocacy
- to maintain the register of Members financial interests
- to supervise a new Commissioner for Parliamentary Investigation, who would undertake investigations into allegations about misuse of allowances and/or failure to comply with registration of financial interests.
- to provide information to Members about the allowances scheme and the financial interest rules.

In addition the Bill creates new criminal offences for:

- knowingly providing false or misleading information in a claim for an allowance,
- failing without reasonable excuse to comply with the rules on registration,
- breaching the rules which prohibit paid advocacy.

The Bill's provisions do not extend to the Lords. Clauses 12 and 13 (transitional provisions) come into effect on royal assent; other clauses are due to be commenced by statutory instrument.

This Paper discusses the Bill's provisions in relation to each of the above functions.

3 Members' pay, allowances and pensions

This section sets out the existing governance arrangements for the House of Commons, including those for the payment of pay and allowances to Members. Background on the system and development of Members' allowances is given in Library Research Paper 09/60 *Members' Allowances*. The Paper tracks the development of the current Green Book, *The Green Book: a guide to Members' Allowances* which took effect from 1 April 2009. The Green Book sets out a series of principles, derived from the Members' Code of Conduct to which Members should adhere when making claims. On 19 May, as noted above, the Speaker announced a series of interim measures on allowances, pending the publication of the report from Sir Christopher Kelly, set out in Research Paper **xx**.

3.1 The existing governance of the House of Commons

The *House of Commons (Administration) Act 1978* established the House of Commons Commission as it exists at present, as an independent statutory body to manage the House. Background on the governance of the House of Commons is given in Library Standard Note 4391 *The Tebbit Review of Management and Services of the House of Commons*. There are currently four departments and a joint department of both Houses, the Parliamentary Information and Communications Technology (PICT). The Commission's principal statutory role is as the employer of the permanent staff of the various departments of the House, determining numbers and grading of staff.¹⁶ The Act gave backbenchers representation on the Commission. Its membership is set out in the Act and consists of the Speaker, Leader of House, a nominee of the Leader of the Opposition (usually the shadow Leader of House), all ex officio, and three Members who are not Ministers. These are normally drawn from the each of the three largest parties. So the Commission's design is intended to prevent domination by the governing party and/or frontbenchers. There is no provision for non-Members to sit on the Commission.

¹⁶ The staff in the Speaker's office continue to be appointed personally and are not employed by the Commission. Robert Blackburn and Andrew Kennon, *Parliament: Functions, Practices and Procedures*, p230

In 2004 the Members' Estimate Select Committee (MEC) was established to review the resolutions on pay and allowances for Members and to provide the Speaker with advice. As a select committee its proceedings attract parliamentary privilege. Its membership is identical to that of the Commission.¹⁷ There is also an Administration Estimate Audit Committee of the Commission with three external members and a similar Estimate Audit Committee. Two select committees advise the Commission. These are the Finance and Services Committee¹⁸ and, on more general services, the Administration Committee.¹⁹ An organogram of House administration is available on the intranet.²⁰

The House is externally audited by the National Audit Office. The responsibility for running House services and employing staff is delegated to the Board of Management, chaired by the Clerk of the House in his role as Chief Executive. The Committee on Members' Allowances was established in 2008 to advise the MEC on the development of arrangements on Members' allowances, among other functions.

There are two separate Estimates, or allocations of funds. The first covers the administration costs of House, staff, buildings maintenance and security. This amount is agreed by the House of Commons Commission and does not have to be formally approved by the Government, although senior officials ensure that the total cost is reasonable. Outturn expenditure is set out in the HoC:Administration Resource Accounts.²¹ The second Estimate covers costs of Members' salaries, allowances and pensions as well as financial assistance to political parties (Short Money) This comes under the Supply Estimates laid by the Chancellor of the Exchequer and so the Commission does not have statutory responsibility for such expenditure. However the Clerk of the House is Accounting Officer for both Votes.²² Outturn expenditure is set out in the HoC:Members' Resource Accounts.

3.2 Members' pay and allowances

The department which currently administers pay and allowances to Members is called the Department of Resources, often referred to as the Fees Office. This Department also has a number of other responsibilities, such as staff appointments, pensions and pay, and various HR functions. Payroll services for paying MPs staff and House staff are currently provided by the Department of Resources. Further details are available in the Commission Corporate Plan and annual reports.²³ The Department was recently reviewed by Sir Kevin Tebbit who did not make recommendations for major change, observing:

241. The House administers the pay and allowances of over 5,000 people, including Members, their staff and House officials. In many organisations, these functions are now outsourced. In the Commons this happens only in respect of pensions, the reasoning being that the task of administering Members' expenses and allowances is of a complexity and sensitivity which require the function to be performed in-House and that, this being so, it makes economic sense for the pay of Members and staff also to be handled by the same office. We do not challenge this proposition.

¹⁷ For further details, see http://www.parliament.uk/parliamentary_committees/mec.cfm and SO No 152D.

¹⁸ The Finance and Services Committee is established under SO No 144 .For more detail, see http://www.parliament.uk/parliamentary_committees/finance_and_services_committee.cfm

¹⁹ The Administration Committee is established under SO No 139. For background, see http://www.parliament.uk/parliamentary_committees/admin.cfm

²⁰ <http://www.parliament.uk/documents/upload/HCCorganogram.pdf>

²¹ <http://www.publications.parliament.uk/pa/cm/cmresacc.htm>

²² See House of Commons Library Standard Note no 1663 Short Money for details at <http://www.parliament.uk/commons/lib/research/briefings/snpc-01663.pdf>

²³ Thirtieth Report of the House of Commons Commission Financial Year 2007/08 HC 710 2007-08 <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcomm/710/710.pdf>

242. We have, however, looked at the quality of the service performed and the responsiveness of the 'Fees Office' as it is sometimes known, to Members' needs. In the course of our review, we heard some concerns expressed that allowances and expenses are now subjected to such detailed scrutiny and regulation via the Green Book that it amounts to a 'policing' of Members' activities, rather than a facilitation of their work. On the other hand, many Members have welcomed the need for allowances to be accounted for in detail, as a protection against any allegations of abuse. On the basis of the recent survey of Members' views, this was not an area of widespread criticism: 75% of Members responding were either very or extremely satisfied and the majority considered that the rules were interpreted in a fair, helpful and appropriate manner. A similar proportion of Members responding rated the quality of advice on the DFA enquiry and advice telephone helpline equally highly.²⁴

However, the review of allowances begun by the MEC in January 2008 led to some major changes. On 30 April 2009, the House passed a resolution on Members staff:

(1) That, in the opinion of this House, staff who work for an hon. Member should be employed by the House, as a personal appointment and managed by the hon. Member; and

(2) That the House of Commons Commission shall consider this decision and make recommendations for its implementation, including any transitional provisions which may be necessary, by 29 October 2009.²⁵

The House of Commons Commission is currently considering the implications of this resolution and no detailed plans are yet available. There are major concerns to be considered in respect of the precise terms and conditions for Members' staff under which they would be transferred to House employment. MPs' staff are not bound to observe political impartiality and do not have access to the pensions available to House staff. Concern has been expressed by representatives of Members staff as to the conditions under which a transfer would be made.²⁶

Currently the basis for the Commons authorities to pay allowances for Members is the Resolution of the House on 22 January 2009, which has been subsequently modified by the decisions of the Members Estimate Commission as set out in the statement by Speaker Martin on 19 May 2009. The Bill provides for transitional arrangements, allowing Commons resolutions to have effect pending new rules developed by the IPSA.

In his statement on Members allowances on 19 May 2009, Speaker Martin noted:

All past claims under the former additional costs allowance over the past four years will be examined. This will be carried out by a team with external management; the external manager will be appointed after consultation with the Comptroller and Auditor General. All necessary resources will be made available. The team will look at claims in relation to the rules which existed at that time, and will take account of any issues which arise from that examination which cause them to question the original judgment.²⁷

²⁴ <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcomm/685/68502.htm> paras 243-245

²⁵ For further information see Library Standard Note 5046 *Members allowances: the Government's proposals for reform*

²⁶ *Submission to the Committee on Standards in Public Life by the Members and Peers' Staff Association* June 2009

²⁷ HC Deb 19 May c1423

A parliamentary answer on 19 June referred to a team headed by Sir Thomas Legg which will undertake this Additional Costs Allowance review, following a decision of the MEC on 20 May 2009.²⁸ In her statement on 23 June Harriet Harman gave further details:

On payback, work has begun by Sir Thomas Legg, who has been contracted by the House authorities to lead a reassessment of all claims over the past four years and, having reconsidered each claim and the evidence submitted to support it, to report whether it was within the rules as they obtained at the time, with a view to ensuring that where there has been overpayment, it is paid back. The public expect that over-claims will be paid back, and that will happen, together with any necessary disciplinary action.²⁹

The Bill does not give the IPSA power to review allowances claims prior to its enactment, and so this work is not likely to pass to the IPSA. However there are transitional provisions allowing IPSA investigations of claims made prior to royal assent in clause 13.

The status of the Legg team may be subject to some debate. The review will be made up primarily of existing House staff, who will review earlier claims. The authority for its establishment is a decision of a select committee, the MEC and presumably it will report to the MEC. The extent to which its work is to be considered a parliamentary proceeding may present some questions; since the payment of allowances is not directly related to the work of the House (see below, Part 3). Ms Harman stated on 23 June that Sir Thomas would notify Members in advance of publication where there appeared to be an overpayment.³⁰ Further are not yet available as to whether Members will be able to make representations following decisions by the review.

As a separate issue, there has been concern expressed about the disciplinary bodies established by political parties which have already removed the whip from individual MPs, before any review from House authorities.³¹ A number of Members have announced that they will not stand again, following allegations in the *Daily Telegraph*.³²

The Members' Estimate

This currently includes:

- Members' salaries and allowances;
- Members' staff costs;
- Members' pensions;
- Central provision of IT equipment for Members;
- Short Money.

This Estimate is laid by the Treasury rather than the House administration and in 2007-08 stood at £171m. A similar figure is expected for 2008-09. The Administration Estimate is larger, at £224m in 2008-09, but covers security and maintenance of buildings. The plans for the IPSA are likely to involve the transfer of elements of the Members' Estimate to the new body. The Clerk is currently the Accounting Officer for both Estimates.

²⁸ HC Deb 19 June 2009 c539W

²⁹ HC Deb 23 June 2009 c678

³⁰ HC Deb 223 June 2009 c683

³¹ "The great purge has started in the Conservative party" 25 June 2009 *Daily Telegraph*

³² See for example "Expenses row MP dropped by Labour" 16 June 2009 *BBC News*

Members pensions are payable under the *Parliamentary and Other Pensions Act 1987*. The administration is undertaken by officials in the Department of Resources reporting to Trustees of the Parliamentary Contribution Pension Fund. Ministerial responsibility is with the Leader of the House, in consultation with the Treasury and the Senior Salaries Review Body is currently consulting on MPs pensions. Further information is available in Library Standard Note 1844 *Parliamentary Contribution Pension Fund*. The Bill does not authorise the IPSA to take on the administration of MPs' pensions nor to devise the rules of the pension scheme.

Short Money is also payable from the Members' Estimate. Background to the administration of the scheme is given in Library Standard Note 1663 *Short Money*. These payments to political parties to assist with the carrying out of parliamentary business were first authorised in 1975 and are currently regulated by a parliamentary resolution of 26 May 1999. There has been some controversy about the auditing of Short Money. Parties claiming Short Money must provide the Accounting Officer of the House of Commons (the Clerk of the House) with an auditor's certificate confirming that all expenses claimed were incurred exclusively in relation to the party's parliamentary business. However, very little information is published about the qualifying parties' use of their Short Money allocation in carrying out their parliamentary business.

The Bill does not alter the arrangements for Short Money. However, the creation of the IPSA is likely to have an impact on the existing Members Estimates since Members pay and allowances form the major component. Therefore some further transfers might ensue. The Electoral Commission is already responsible for the Policy Development Grants payable to parties under the *Political Parties Elections and Referendums Act 2000* and therefore a transfer to the Commission of responsibility for Short Money might seem logical.

Other aspects of the Members Estimate include Members' IT equipment; an alternative home might be the PICT budget. PICT is a joint department of both Houses, established under the *Parliament (Joint Departments) Act 2007*.³³ Certain other reimbursement to Members are currently handled by the Department of Resources, such as select committee travel at home and abroad and subsistence costs for international parliamentary assemblies under rules approved by the House of Commons Commission.

3.3 The Bill's provisions

Clause 2 requires the IPSA to pay the salaries of Members, in accordance with the relevant resolutions of the House. Further background on MPs' pay is given in Library Research Paper 09/29 *Members' pay and the independent review process*. MPs' pay therefore will continue to be governed by parliamentary resolution, rather than statute. The IPSA does not take on the role of the SSRB in setting the appropriate level of remuneration. However, IPSA is given the power to withhold pay following a determination from the House.

Clause 3 authorises the IPSA to pay allowances to Members. It also authorises the IPSA to prepare a MPs' allowances scheme, in consultation with:

- The Leader of the House of Commons;
- The Speaker of the House of Commons;
- A Committee of the House nominated by the Speaker (currently the House of Commons Committee on Members Allowances);

³³ For detail about the 2007 Act, see Library Research Paper 07/44 *The Parliament (Joint Departments) Bill 2006-07*

- The Review Body on Senior Salaries;
- HM Treasury;
- Any other person or body considered appropriate by the IPSA.

The IPSA has power to revise the scheme; both the original scheme and revisions must be laid before the House. Clause 3(8) ensures that the parliamentary pension scheme is not included within the remit of the IPSA. **Clause 13** provides for transitional orders, allowing the Commons resolutions on allowances to remain in effect until replacement by IPSA rules.

Clause 4 makes clear that any claims for allowances must be made by the Member. It also requires the IPSA not to pay an allowance without authorisation. The IPSA role is also to determine individual claims and review initial determinations on request. Further details are available in the *Explanatory Notes*. In particular:

82. *Clause 4(6)* provides that the scheme may make further provision as to how claims are to be dealt with. This could include such matters as the sort of evidence required, or the format in which a claim must be made. This subsection also provides that the scheme may contain a mechanism through which overpayments may be recovered by permitting the setting off of payments to which an MP is not entitled against payments to which the MP is entitled.³⁴

There is likely to be considerable concern about the need to separate out these functions within one authority. This point is discussed in detail below in Part 5. The Bill does not provide details about the process of appeal. Since the IPSA is a body separate from Parliament, its decisions may potentially be subject to review by the courts. At the moment appeals on determinations from the Resources Department are handled by the Committee on Members Allowances.³⁵ The Bill does not allow any Member involvement in reviews or appeals.

The Bill does not require the IPSA become the employer for Members' staff, but its Estimate will bear the cost of the staff. There may be scope to transfer staff under transitional provisions. The costs of House staff remain on the Administration Estimate.

Clause 13 allows for a transitional order to transfer House staff to the employment of IPSA. Any such order would presumably to comply with TUPE procedures on the transfer of staff.³⁶ House staff who transferred to the new joint department PICT following its establishment in the *Parliament (Joint Departments) Act 2007*, were covered by TUPE agreements.

In her statement on 23 June, the Leader of the House said:

This afternoon, the Parliamentary Standards Bill will be published. It will establish a new, wholly independent authority to take over the role of the Fees Office in authorising Members' claims, overseeing a new allowance system, following proposals from the Committee on Standards in Public Life and maintaining the Register of Members' Interests. I assure the House that as the new independent authority for allowances is established, we will work closely and sympathetically with the House

³⁴ *Explanatory Notes Bill 121 2008-09*
<http://www.publications.parliament.uk/pa/cm200809/cmbills/121/en/2009121en.pdf>

³⁵ The Committee has issued a Practice Note on the procedure for appeals. See <http://www.parliament.uk/mpslordsandoffices/finances/appeals.cfm>

³⁶ For details on TUPE, see Library Standard Note 1064 *Transfer of Undertakings*

authorities on the future of the staff currently working in the Department of Resources.³⁷

Staff in the Resources Department are already involved in establishing the Legg review and preparing allowances information after 2008 for release under FoI. They will presumably be required to begin implementation of changes to the allowances scheme recommended by the CSPL in autumn 2009, while preparing for the establishment of the new IPSA as soon as possible before an expected general election in 2010.

4 Investigation and regulation powers of IPSA and Commissioner

This part examines the current regulatory structure of the House of Commons, with respect to the conduct of Members, before setting out the proposals in the Bill to introduce a statutory system to replace self regulation of Members' conduct.

4.1 Parliamentary privilege

The Houses of Parliament have for some hundreds of years claimed and held a set of rights and immunities essential in order for their members and staff to carry out their functions without interference. These are known as parliamentary privilege. There are two main components:

- Freedom of speech, which is guaranteed by Article 9 of the Bill of Rights 1688
- The exercise by Parliament of control over its own affairs, known technically as 'exclusive cognisance'.

The privilege of freedom of speech protects what is said in debate in either House. As Article 9 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.

Exclusive cognisance enables Parliament to have control over all aspects of its own affairs, to determine its procedures and to discipline its own members for misconduct. It forms the legal and constitutional foundation for parliamentary self-regulation. The Joint Committee on Parliamentary Privilege report of 1999 set out the justification as follows:

13. The other main component of parliamentary privilege is still called by the antiquated name of '**exclusive cognisance**' (or 'exclusive jurisdiction'). Parliament must have sole control over all aspects of its own affairs: to determine for itself what the procedures shall be, whether there has been a breach of its procedures and what then should happen. This privilege is also of fundamental importance. Indeed, acceptance by the executive and the courts of law that Parliament has the right to make its own rules, and has unquestioned authority over the procedures it employs as legislator, is of scarcely less importance than the right to freedom of speech. Both rights are essential elements in parliamentary independence.

14 Parliament's right to regulate its own affairs includes the **power to discipline its own members** for misconduct and, further, **power to punish anyone**, whether a member or not, for behaviour interfering substantially with the proper conduct of parliamentary business. Such interference is known as contempt of Parliament. This falls within the penal jurisdiction exercised by each House to ensure it can carry out its constitutional functions properly and that its members and officers are not obstructed or impeded, for example by threats or bribes. The sanctions available are reprimand,

³⁷ HC Deb 23 June 2009 c679

imprisonment for the remainder of the session and, possibly in the House of Lords but probably not in the House of Commons, a fine of unlimited amount. Even in the House of Lords the power to impose a fine has not been used in modern times. Members of the House of Commons are also liable to suspension for any period up to the remainder of the Parliament (though there is no modern case of suspension for anything like this length). Members so suspended usually forfeit their salaries for the period of their suspension. Members of the House of Commons can be expelled, although it is over 50 years since the power of expulsion was last used.

Parliamentary privilege attaches to the Houses, not individual Members. MPs do not have immunity from criminal or civil prosecution.³⁸ However, it is not possible for parliamentary proceedings to be used in evidence against Members when prosecutions are undertaken, because of Article 9. The only exception to this is section 13 of the *Defamation Act 1996*. This allows anyone, whether Member or not, to waive parliamentary privilege, for the purposes of defamation proceedings only.³⁹

As outlined above, certain aspects of the Members' allowances system could be considered parliamentary proceedings and therefore as attracting parliamentary privilege. The Members Estimate Committee and the Committee on Members' Allowances are both select committees. The allowances are established by Resolution of the House. On the other hand, the process of payment of these expenses is not likely to be considered by the courts to be proceedings, as it is not sufficiently connected with the immediate formal work of Parliament. The establishment of an Independent Parliamentary Standards Authority may require a more precise definition of a proceeding. There is also some linkage with Freedom of Information, since section 34 of the *Freedom of Information Act 2000* provides an exemption to the release of information, in order to avoid infringing the privileges of either Houses of Parliament. The Speaker is given power to issue a certificate which would provide conclusive evidence of an infringement.

4.2 The Joint Committee on Parliamentary Privilege report in 1999

For some years, it has been suggested that parliamentary privilege should be codified in statute. This was the approach taken in Australian Parliament, which enacted the *Parliamentary Privileges Act 1987*. A joint committee of both Houses was established at Westminster in 1997 as part of the new Labour Government's initiative to modernise Parliament, with a brief to review parliamentary privilege and make recommendations. The immediate policy background had been the allegations against Neil Hamilton by Mohammad Al-Fayed, which dominated the end of the 1992 Parliament. The Joint Committee reported in March 1999 and recommended a new Parliamentary Privileges Act.⁴⁰ This recommendation was not implemented.

Clause 15 of the draft *Bribery Bill* currently being scrutinised by a Joint Committee would make the words or conduct of an MP or peer admissible in proceedings for a bribery offence under the Bill where the MP or peer is a defendant or co-defendant, notwithstanding Article 9. Further information is available in Library Standard Note 5045 *The Draft Bribery Bill*. The Clerks of both Houses gave evidence on 10 June 2009 to the Joint Committee recommending a statutory definition of parliamentary privilege as part of the package to implement the draft bill.

³⁸ Some examples are cited in *Parliamentary Practice* 23rd edition 2004 p119-120

³⁹ Joint Committee on Parliamentary Privilege HL Paper 43-I/HC 214 –I 1998-99, para 67 gives background

⁴⁰ HL Paper 43/HC 214 1998-99 at <http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4305.htm>

4.3 The Parliamentary Commissioner for Standards

The post of Parliamentary Commissioner for Standards was created in 1995, following the first report from the Committee on Standards in Public Life. The post was created through Resolution of the House and is non statutory. The Commissioner is an Officer of Parliament.⁴¹ Research Paper 01/102 *Parliamentary Standards* sets out the history of the establishment of the post in 1995 and the Code of Conduct in 1996. The current postholder is Sir John Lyon, who was appointed for a five year fixed term and took up his post in January 2008, on a four day a week basis.⁴²

The Commissioner is appointed by the House, and works to the Standards and Privileges Committee, which publish his investigations and findings as an appendix to Committee reports. This preserves self regulation by the House of its own Members, while introducing an independent element. The Standards and Privileges Committee may also undertake its own investigations when a possible breach of privilege or contempt of the House is at issue.

The system was last reviewed by the Committee on Standards in Public Life in 2002, which considered that if the current system did not operate satisfactorily, legislation might be necessary to introduce a fully independent system.⁴³ The CSPL was reluctant to recommend this course, as it would interfere with the operation of parliamentary privilege. The report said:

Such fundamental change could include putting the system for regulating standards of conduct in the House on a statutory basis and introducing external members into the decision-making process. However we are of the view that alternative methods of strengthening the current system are preferable at this stage.⁴⁴

The then Clerk of the House, Sir William McKay, gave evidence to the Committee on the basis that judicial intervention in the affairs of Parliament should be avoided wherever possible. To allow anyone or anybody outside Parliament to be involved in making decisions on standards of conduct would expose aspects of self-regulation to judicial review. This he feared would be the beginning of “judicial creep” and provide the potential for “multiplying the number of judicial tanks on the parliamentary lawn”. However, other witnesses pointed out that other elements of self-regulation, such as control over the determination of parliamentary elections, had been ceded to the courts in the nineteenth century. Further detail is given in Library Standard Note 3720 *The new code of conduct for Members*.

Following concern expressed in 1999 by the former Commissioner, Elizabeth Filkin, in obtaining sufficient resources to undertake investigations, the House of Commons Commission made a commitment to make sufficient resources available in the context of the subsequent inquiry into parliamentary standards by the Committee on Standards in Public Life. This commitment has been recognised in successive annual reports from the Parliamentary Standards Commissioner.⁴⁵

⁴¹ For background on this term, see Library Research Paper 03/77 *Officers of Parliament: A Comparative Perspective*

⁴² The House of Commons Commission: Parliamentary Commissioner for Standards: Nomination of Candidate 24 October 2007 HC 1096 2006-07
<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcomm/1096/1096.pdf>

⁴³ CSPL Eighth Report *Standards of Conduct in the House of Commons* 2002 http://www.public-standards.org.uk/OurWork/Eighth_report.html

⁴⁴ Committee on Standards in Public Life *Standards of Conduct in the House of Commons* http://www.public-standards.org.uk/Library/OurWork/8thInquiry_Fullreport.pdf Chapter 9 2002

⁴⁵ http://www.parliament.uk/about_commons/pcfs/annualreports.cfm

Trends in complaints to the Commissioner were discussed by Sir Philip Mawer, in his valedictory annual report in 2007. He commented on the increased emphasis on complaints on the misuse of allowances and facilities of the House, calling for greater clarity:

3.34 Finally, reflecting on the lessons to be drawn from the complaints I have considered over the years, two stand out. The first concerns the importance of achieving as much clarity as possible in the rules which regulate the use of allowances and other resources or facilities provided by the House. This is a constant challenge (not unique to the House), which perhaps reflects the difficulty of striking the right balance between clarity and overprescription whilst securing agreement on how to move forward. My belief is that the best approach can be summed up as "keep it as simple as you can, and be as clear as you can about what the relevant rules aim to achieve and about the boundary between what is and what is not acceptable behaviour".⁴⁶

Dr Patricia Leopold, an expert in parliamentary ethics, has argued in a lecture on 1 June 2009 that the Code had not been integrated, or internalised, by Members, as relevant to the expenses affair, despite the specific admonition to ensure that the use of allowances was strictly within the rules.⁴⁷ The Parliamentary Commissioner for Standards has conducted a number of investigations into allegations against the misuse of allowances. Such investigations have become more common in the Parliaments of 2001 and 2005, and included the high-profile investigations of the employment of family members by Derek Conway⁴⁸ and the staffing arrangements of Caroline Spelman.⁴⁹

4.4 The Register of Members Interests and the Code of Conduct

The Register of Members Interests was first established by the House in February 1974. Further details are available in Library Research Paper 01/102 *Parliamentary Standards*. The Register is currently enforced by resolution of the House. In 1995, following the Nolan recommendations, the detailed registration and declaration requirements were incorporated into the Code of Conduct. There have been three recent changes to the system of registration:

- Following provisions in the *Electoral Administration Act 2006*, the House is due to end on 1 July the system of dual reporting of donations to Members to both the House and to the Electoral Commission. In future, the lead responsibility for reporting donations will be to the Commons Registrar, a House official. This will implement section 59 of the *Electoral Administration Act 2006*. For further information see Library Standard Note 5046.⁵⁰
- On 27 March 2008 the House agreed by resolution to require Members to register family members who worked as their staff. This now forms Part 2 of the Register, which was first published on 30 April 2008.
- On 30 April 2009 the House agreed by resolution to require Members to register full details of earned outside income. This new requirement will take effect on 1 July 2009.

⁴⁶ 2006-7 PCS annual report
<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcomstan/1012/1012.pdf>

⁴⁷ Constitutional Law Group Lecture, Standards in Public Life, University College London 1 June 2009
<http://www.ucl.ac.uk/laws/events/index.shtml?past>

⁴⁸ HC 207 2008-09

⁴⁹ HC 316 2008-09

⁵⁰ <http://www.parliament.uk/commons/lib/research/briefings/snpc-05046.pdf>

There are actually four registers:

- Members' Financial Interests;
- Members' secretaries and research assistants;
- Register of Journalists Interests; and
- Register of All Party Groups and the approved list of all party groups and associate parliamentary groups.

All are made available on the internet and are maintained by small team of House staff under the supervision of the Parliamentary Commissioner for Standards. The Registrar of Members Interests is a senior clerk, who provides confidential advice to Members.

4.5 Implications of statutory regulation of Members' conduct

The Bill provides for a statutory Commissioner for Parliamentary Investigations and requires the IPSA to prepare rules on the registration of Members Interests. At present, the registration of Members financial interests and the work of the Standards Commissioner has been considered a parliamentary proceeding.⁵¹ In parliaments where there is a statutory requirement for the registration of interests, such as Scotland or Canada, the actual text of the Code of Conduct is appended to Standing Orders or the subject of a parliamentary resolution.

Statutory regulation and investigation of Members Interests raises quite important questions of review by the courts. Under Article 9 of the Bill of Rights 1688, parliamentary proceedings cannot be cited in court, to protect freedom of speech. The definition of these proceedings is not fixed in statute but is generally considered to be matters closely connected with the formal work of the Houses, such as draft committee reports, Hansard etc. The Joint Committee noted in 1999 that a definition was necessary without delay and recommended that used in the Australian Act. No action resulted. Investigations by the Commissioner are likely to draw on parliamentary proceedings, such as parliamentary questions and contributions to debates although other evidence may be available. The Bill provides that Article 9 does not impede either an IPSA or a criminal investigation

The Scottish Parliament, as a creature of statute does not have the same powers of self regulation under parliamentary privilege as Westminster. Section 39 of the *Scotland Act 1998* made failure to register and declare financial interests by MSPs a criminal offence. The Parliament has enacted its own legislation to establish a Commissioner in the *Scottish Parliamentary Standards Commissioner Act 2002*⁵² In *Whaley v Lord Watson of Invergowrie* the distinction was made between the power of the courts to review the statutory powers of the Parliament and the right of the Parliament to have jurisdiction of its own Standing Orders and Code of Conduct.⁵³ This position has not yet faced further challenge.

The Scope of the Code of Conduct

At present the Code consists of three main elements:

⁵¹ The finding of the PCS are not open to judicial review. *R v Parliamentary Commissioner for Standards ex parte Al-Fayed* [2001] 1AC 295 HL and *Hamilton v Al Fayed* [2001] 1AC 395 [1999] 3 All ER 31, For a history of the Hamilton and Al-Fayed litigation, see Geoffrey Lock "The Hamilton Affair" in O Gay and P Leopold eds *Conduct Unbecoming: The Regulation of Parliamentary Behaviour* 2004

⁵² http://www.opsi.gov.uk/legislation/scotland/acts2002/asp_20020016_en_1

⁵³ 2000 SLT 475

- *Context*- the scope and purpose of the Code, including that includes the conduct of Members in their public role only, and not their private lives.
- *Declaratory*—including the Seven Principles of Public Life, as promulgated by the Committee on Standards in Public Life in 1995. As well as the Seven Principles, there are Public Duties of Members, including a duty to their constituents and Rules of Conduct, including a duty to maintain and strengthen public trust and to ensure that their use of allowances is strictly in accordance with the rules laid down. These are set out in an appendix to this Paper.
- *Detailed rules on the registration and declaration of interests*. These are based on those in force since 1974, and include a prohibition on paid advocacy.
- List of the relevant House resolutions on registration and declaration of interests.

The Code was last subject to a major review in 2004 by the Standards and Privileges Committee, following a recommendation from the eighth report of the CSPL in 2002. For further details see Library Standard Note 3720 *The new code of conduct for Members*. The most recent version of the Code dates from 9 February 2009,⁵⁴ but major changes were made in July 2005. It was at this point that the conduct rule on allowances was added, following a series of Standards and Privileges reports on alleged misuse of allowances. This states:

14. Members shall at all times ensure that their use of expenses, allowances, facilities and services provided from the public purse is strictly in accordance with the rules laid down on these matters, and that they observe any limits placed by the House on the use of such expenses, allowances, facilities and services.⁵⁵

Despite a suggestion from the CSPL and the Standards Board for England that that the Code should include a duty of accessibility to constituents (as appeared at that time in the Code for MSPs), the Committee decided against such inclusion.

The Commissioner argued to the Committee that an unelected official should be wary of intruding into the relationship between individual Members and their constituents. The Commissioner also concluded that his jurisdiction should not be extended to include investigations of allegations that a Member had lied to or seriously misled the House. Such an extension would lead to problems of overlapping jurisdiction between the Speaker and the Commissioner. He recommended that Members' conduct in the Chamber and in committees should continue to be regulated by the Chair and that the Code should not be amended to bring within its scope alleged serious failures by Members to observe security requirements of the House.

The Prime Minister's statement of 10 June 2009 referred to a "statutory code of conduct for all MPs clarifying their role in relation to their constituents and Parliament".⁵⁶ Harriet Harman also referred to a statutory code in her evidence to the CSPL on 16 June 2009. Clause 6 of the Bill requires the Commons to continue with a Code containing the Nolan principles; it defines those principles as the Seven Principles or "such other similar principles as may be adopted by the House from time to time".

The extent to which the Code can remain a parliamentary proceeding may well warrant examination. It is also worth noting that section 34 of the *Freedom of Information Act 2000*

⁵⁴ HC 735 2008-09

⁵⁵ HC 735 2008-09

⁵⁶ HC Deb 10 June 2009 c796-797

provides an exemption to avoid infringing the privileges of either Houses of Parliament. The Speaker may issue a certificate which would provide conclusive evidence of an infringement. If the Code were no longer considered to be a parliamentary proceeding, this exemption would no longer apply.

Members' work outside Parliament, such as letters to constituents, is not generally considered by the courts to fall within the scope of parliamentary privilege. A statutory Code of Conduct which regulated relationships with constituents would seem to involve potentially complex litigation against Members. A constituent recently attempted to bring a case against Ann Keen MP, on the basis that her constituency service was ineffective.⁵⁷ The case was dismissed. The Scottish Code had until recently a requirement that Members be accessible to constituents. The new version of the Code approved on 14 March 2007 omitted this requirement, following a series of complaints on this area to the Scottish Parliamentary Standards Commissioner.⁵⁸ Some further changes in the Code were approved on 25 March 2009.⁵⁹

Sanctions

When a Member is found to have breached the Code of Conduct, the Standards and Privileges Committee makes a recommendation to the House for a suitable sanction. These are effectively limited to a personal apology or a period of suspension, with loss of pay. The power to expel has not been used since the case Gary Allighan in 1947, where the House voted 187-75 to expel him for a breach of privilege.⁶⁰ The Joint Committee did recommend in 1999 a power for both Houses to institute fines for Members, but again this was not implemented.

There has been some discussion as to whether the current procedures of the House are compatible with Article 6 (right to fair trial) of the European Convention on Human Rights. The CSPL considered this issue as part of its eighth report recommending an Investigatory Panel to handle serious, contested cases of alleged misconduct; The House is not a public authority under the *Human Rights Act 1998*, but the European Court of Human Rights has jurisdiction and has heard cases relating to the procedures of the House, although not as yet in respect of disciplinary procedures.⁶¹ In *Demicoli v Malta*, the Court held that disciplinary sanctions against a media editor by the Maltese Parliament had violated Article 6 (right to a fair trial).⁶²

At present, where criminal charges are expected due to serious allegations, or a civil suit is likely, the Commissioner awaits court hearings before continuing with an independent

⁵⁷ "Labour MP first to be sued for laziness" 4 February 2009 *Daily Telegraph*. A civil claim for negligence was due to be heard at Brentford and Isleworth County Court on 29 April, but the court did not proceed with the action. An earlier default judgment was quashed See <http://www.annkeenmp.co.uk/brentford-county-court-verdict> and http://www.richmondandtewkesburymtimes.co.uk/news/4329546.War_veteran_s_case_against_Ann_Keen_MP_overtuned/

⁵⁸ Standards and Public Appointments Committee 2nd Report 2007 (Session 2) Annex D contains the 2007 Code

⁵⁹ Standards, Procedures and Public Appointments Committee 2nd report (Session 3), Annex. Many of the changes were to do with changes in terminology from Members Allowance Scheme to Reimbursement of Members Expenses Scheme

⁶⁰ The expulsion of Peter Baker in 1954 followed from his sentence in a criminal court, not from any disciplinary procedure of the House. Gary Allighan was investigated by the Privileges Committee for suggesting that Members gave information to newspapers about private parliamentary meetings, often for money. See Committee of Privileges HC 138 1946-47

⁶¹ *McGuinness v United Kingdom* (1999) ECHR No 39511/98; *A v United Kingdom* 2002 (Application No 35373/97)

⁶² *Demicoli v Malta* (1992) 14 EHRR 47

investigation, to ensure that court proceedings are not compromised.⁶³ Similar procedures are followed in the Scottish Parliament and the National Assembly for Wales.

4.6 The Bill and the regulation of Members

The Bill creates a statutory IPSA and Commissioner, which will not be subject to parliamentary privilege. Their work therefore is potentially reviewable by the courts. The IPSA is not specifically made a body subject to the *Human Rights Act 1998*, but the courts may well determine that its functions fall within that Act. This point is covered in more detail below.

Clause 5 requires the IPSA to prepare rules on:

- Registering financial interests
- Declaring financial interests
- Prohibiting paid advocacy

The *Explanatory Notes* provide further detail:

84. *Subsections (7) to (9)*[of clause 7] set out provisions which must be included in the financial interests rules. It sets out a formal framework requiring MPs to register financial interests with the IPSA, and to declare such interests before taking part in any Parliamentary proceedings relating to that matter. An MP must declare specified information if he or she presently has a financial interest, has had such an interest in specified circumstances (this could be, for example, within a specified number of years) or when he or she knows that he or she will have such an interest. This last point could cover, for example, a circumstance where someone knows that he or she has been offered a directorship which will be taken up in the next couple of weeks.

85. *Subsection (10)* sets out that the rules must prohibit paid advocacy. It covers both the actions of the MP in advocating or initiating any cause or matter for any consideration, whether financial or in kind, and also urging someone else to advocate any cause or matter on his or her behalf.

IPSA is required to consult the Leader of the House, the Standards and Privileges Committee and any other person considered appropriate on the preparation of the rules. The financial rules themselves are not set out in the Bill, but there are expected to be some issues in relation to their potential justiciability. The clause requires the rules to be approved by resolution of the House, which would presumably make such rules a parliamentary proceeding. The Bill does not deal with the position if the IPSA rules are not approved by the Commons.

The *Explanatory Notes* state that the definition of financial interests includes a benefit in kind or indirect financial interest, including the employment of family members currently set out in Part 2 of the register. The CSPL is expected to make recommendations on the employment of family members in the autumn.

The IPSA would take over responsibility for publishing and preparing the register of Members financial interests, as a statutory duty. **Clause 11** enables IPSA to take over registration duties for the three other registers in agreement with the Speaker, in consultation with the Commissioner and the Standards and Privileges Committee.. The clause also enables the Commissioner for Parliamentary Investigations to take over functions of the Parliamentary Commissioner for Standards.

⁶³ Standards and Privileges Committee Sixth Report *Conduct of Mr George Galloway* HC 909 2006-07

The Bill therefore appears to remove the core functions of the non statutory Parliamentary Commissioner for Standards and the Registrar for Members Interests. These postholders are currently due to register much more detailed information about the outside financial interests of Members, following the new form of the register from 1 July 2009. The ending of the system of dual registration of donations to Members from that date is also expected to involve staff resources, since Members will declare donations to the Registrar that they would previously have registered with the Electoral Commissions.

Clause 6 states:

6 MPs' code of conduct

(1) The House of Commons is to continue to have a code of conduct incorporating—

(a) the Nolan principles;

(b) such other matters as may be determined by the House from time to time.

(2) "The Nolan principles" means the seven general principles of public life set out in the First Report of the Committee on Standards in Public Life (Cm 2850) or such other similar principles as may be adopted by the House from time to time.

The *Explanatory Notes* state that "this clause provides a legal framework for the House of Commons code of conduct".

There has been some considerable interest as to whether the Code will become subject to review by the courts. The drafting does not specifically include the other general principles of the Code which exist in the current 2005 version of the Code, such as strengthening the public's trust and confidence in the integrity of Parliament. However, the definition of the Seven Principles does refer to other similar principles being adopted from time to time.

Clause 7 provides for the Commissioner to conduct an investigation if he/she has reason to believe that a Member has:

- been paid, or may have been paid, an allowance to which he is not entitled
- have failed, or may have failed, to comply with the rules on Members financial interests

The Commissioner may conduct an investigation under his/her own initiative, or in response to a complaint, or at the request of the IPSA. Members are required to provide any information reasonably required by the Commissioner. The Commissioner makes a report to the IPSA on the investigation. Currently, the Standards Commissioner reports directly to the Standards and Privileges Committee. The IPSA is given statutory responsibility for determining procedures for the investigation and complaint processes. The *Explanatory Notes* give some further detail:

94. *Clause 7(5)* requires the IPSA to determine procedures for the conduct of investigations by the Commissioner and the handling of complaints from individuals.

This may include procedures for refusing to conduct an investigation in response to a complaint, for example, where the complaint is vexatious or is frivolous. The IPSA must also determine procedures about the circumstances in which a report of findings to the IPSA is to be published.

95. *Clause 7(6)* requires that such procedures afford any member of the House of Commons subject to an investigation the opportunity to make representations to the

Commissioner, and to make representations to the IPSA following the Commissioner's report.

The Commission is established as a public body rather than a tribunal. The question of judicial review of IPSA determinations and recommendations, and sanctions set by the Commons is likely to arise. A person exercising functions in connection with proceedings in Parliament is not a public authority for the purposes of the *Human Rights Act 1998*, but this does not exclude the jurisdiction of the European Court of Human Rights, as was evident in the *Demicoli* case, noted above. Clause 10 ensures that Article 9 of the Bill of Rights 1688 does not inhibit the functions of the IPSA, but the extent of this disapplication is likely to be the subject of debate.

Judicial review does not offer an opportunity for the individual to argue the case again on the facts of the matter. Instead, the court will decide whether the initial decision was unreasonable. In *Tsfayo*,⁶⁴ the applicant made a claim for backdated housing benefit. When that claim was refused she appealed first to the relevant local authority itself and then to a review board which comprised five councillors from the same local authority. The adequacy of judicial review for Article 6(1) purposes was a key issue at the European Court of Human Rights (ECHR) therefore, because the review board did not itself adequately satisfy the article 6(1) requirements of independence and impartiality (and this was accepted by all the parties).⁶⁵

The *Explanatory Notes* consider the compatibility with ECHR:

128. The provisions of the Bill which relate to the functions of the IPSA in making directions or recommendations may engage Article 6 ECHR (right to fair trial). That Article provides that where there is a determination of a civil right or obligation, everyone is entitled to certain procedural safeguards. Here, there are arguments that the direction or recommendation functions of the IPSA do not involve the determination of civil rights or obligations. In particular, conduct and discipline concerning a member of the legislature is often regarded for the purposes of the ECHR as a matter of "public law" rather than private law rights. Even were a civil right or obligation found to be determined, there are a range of safeguards in place to ensure the fairness of the procedures of the IPSA. For example, members of the IPSA and the Commissioner are to be appointed by a process involving the Speaker and the House of Commons and removable only on an address of both Houses – processes to ensure the independence of the members and Commissioner. Before a sanction can be applied, an MP will have the opportunity to make representations at all stages of the process – during the investigation, in light of the Commissioner's findings and before the IPSA issues a direction or makes a recommendation.

The *Notes* also refer to the potential engagement of Article 1 of the First Protocol (protection of property) in relation to the sanction functions given to the IPSA, Article 7 (no punishment without law) in respect of criminal offences for Members. The Leader of the House has made a statement that the provisions of the Bill are compatible with Convention rights, as required by the *Human Rights Act 1998*.

Under **clause 8**, the IPSA may direct a Member to make a repayment or correct an omission or inaccuracy in the register of financial interests. However, it is not given a power to exercise disciplinary sanctions, such as a fine, directly. IPSA is to recommend to the Standards and Privileges Committee that the House should exercise its own disciplinary

⁶⁴ *Tsfayo v United Kingdom* [2009] 48 EHRR 18.

⁶⁵ This text is based on Appendix 2 to the Third Report from the Joint Committee on Human Rights HL 39/HC 287 2006-07 <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/39/3909.htm>

powers. It may publish this recommendation. **Clause 8(3)** enables a Member to make representations to IPSA where it proposes to give a direction or make a recommendation. The House would be able to withhold salary for a specified period, to suspend a Member, or to expel a Member under **Clause 8(10)**. The *Explanatory Notes* state that the disciplinary procedures of the House are not confined to these three sanctions. **Clause 8(9)** enable the IPSA to investigate, and the House to exercise its disciplinary powers, even where the MP has been, or is, subject to criminal proceedings.

Clause 8(5) appears to ensure that these sanctions are not have any legal effect, so preserving the Commons right to discipline its own Members. In addition, **clause 8(8)** preserves the existing right of the House to exercise its disciplinary powers for cases where there has not been an IPSA or Commissioner investigation. At present, the House imposes sanctions for breaches of privilege or contempts of the House, such as the leaking of a select committee report. These are investigated by the Standards and Privileges Committee, rather than the Parliamentary Standards Commissioner.

The IPSA is required to prepare a protocol setting out the respective roles of the IPSA, the Commissioner, the Standards and Privileges Committee, the DPP and the Commissioner of Metropolitan Police and any other body which IPSA considers appropriate. The protocol is subject to consultation. The right of the House to exercise its disciplinary powers independently of an investigation by the IPSA is also maintained in clause 7(4). There is explicit recognition that a criminal investigation against a Member in respect of his conduct will not prevent the use of powers under clauses 6 and 7.

Clause 9 makes false or misleading allowances claims or failure to comply with rules on Members financial interests a criminal offence. The *Explanatory Notes* state that the offences in relation to financial interests rules are similar to those applicable to Members of the Scottish Parliament. They are also similar to those applicable to National Assembly for Wales Members and Members of the Northern Ireland Assembly. In all three, Members who are found to have broken the rules on registration and declaration of interests and paid advocacy commit a criminal offence. However these legislatures have no equivalent criminal offence in relation to false or misleading information in respect of an allowance claim.

In her written ministerial statement on 23 June 2009, Harriet Harman set out the sanctions as follows:

- knowingly providing false or misleading information in a claim for an allowance, for which the maximum sanction is up to twelve months custodial sentence or an unlimited fine;
- failing without reasonable excuse to comply with the rules on registration, for which the maximum penalty is a fine of up to £5000;
- and breaching the rules which prohibit paid advocacy, for which the maximum penalty is a fine of up to £5000.⁶⁶

The *Explanatory Notes* contain more detail. It is worth noting that 12 months custodial sentence is a disqualifying offence for membership of the Commons under the *Representation of the People Act 1981*.

It is important to note that Members may already be subject to existing criminal offences in relation to the misuse of allowances, such as the *Theft Acts*, or for fraud.⁶⁷ More broadly, the conduct of individual Members in failing to register financial interests may also result in

⁶⁶ HC Deb 23 June 2009 c54-55WMS

⁶⁷ "Expenses fraud was always a crime" 25 June 2009 *Times* Letter from David Farrar QC; "Police to investigate MP expenses" 19 June 2009 *BBC News*

criminal offences. The *Political Parties Elections and Referendums Act 2000* (PPERA) sets out a series of offences in relation to the failure to declare donations as a holder of an individual elective office.

Clause 10 ensures that the provisions of Article 9 do not hinder any investigation, or prevent evidence being used in proceedings against a MP for the purposes of a criminal investigation under clause 9 or investigations by IPSA under clause 8. It also allows IPSA to carry out their functions without Article 9 being brought into play. The *Explanatory Notes* state:

108. *Clause 10* provides that parliamentary privilege does not prevent evidence being inadmissible in court in proceedings against an MP simply because that evidence relates to “proceedings in Parliament”. The normal rule of parliamentary privilege is that proceedings in Parliament cannot be impeached or questioned in any court or place out of Parliament (Article IX of the Bill of Rights 1689). Where, as may be the case for offences under this section, evidence for the offence will take the form of proceedings in Parliament (for example comments in a debate where it is argued that the MP has breached the “no paid advocacy” rule), it is necessary formally to set privilege aside so that the evidence can be adduced in court.

109. *Clause 10* also makes provision in relation to the activities of the IPSA and the Commissioner. It makes clear that they are able to carry out their functions without themselves breaching privilege.

Transitional provisions

Clause 13 provides for transitional orders to facilitate the transition from the current system of allowances and regulation of Members’ conduct to that set out in the Bill. In particular, the *Explanatory Notes* state that allegations on breaches of the rules of allowances that took place before royal assent can be investigated:

119. *Subsection (5)* provides that an order under this clause may provide that the Commissioner and the IPSA are to carry out their functions as set out in the Bill in relation to matters arising under the rules before the Bill comes into force. This means, for example, that the Commissioner and the IPSA will be able to investigate alleged breaches of the rules on allowances that took place in the past (although see the discussion of subsection (6) below).

120. *Subsection (6)* provides that an order under this clause must require the Commissioner and the IPSA to handle investigations and proceedings in relation to alleged incidents that occurred at a certain time according to the rules in force at that time. This means that the conduct of MPs will be assessed according to the rules they should have followed at the relevant time, not according to potentially stricter rules agreed at a later time.

The proposals for a single body to regulate the payment of allowances and to oversee investigation of Members financial interests has no direct parallel in other parliaments surveyed in the time available. For further details, see the Appendix to this Paper. The most commonly cited comparator, the Scottish Parliament, does not have equivalent arrangements. The Scottish Parliamentary Standards Commissioner is specifically excluded from investigating complaints about the use by MSPs of the Reimbursement of Members’ Expenses. Instead these are referred to the Scottish Parliamentary Corporate Body (SPCB), the Scottish equivalent of the House of Commons Commission. If the SPCB finds there is an

improper claim, it will refer the matter to the Standards, Procedures and Public Appointments Committee and may recommend the removal of entitlement for a specified period.⁶⁸

Change is expected shortly in the arrangements for the Scottish Parliament. A report from the SPCB Supported Bodies Committee recommended that there be a committee bill to rationalise the Commissioners appointed by Parliament, including the Parliamentary Standards Commissioner. If the proposals are implemented, the Commissioner would merge with the Chief Investigating Officer in respect of local government and the Commissioner for Public Appointments in Scotland. The new office would report to the Standards, Procedures and Public Appointments Committee in respect of complaints against individual MSPs.⁶⁹

5 The constitution and structure of the IPSA and the Commissioner

There have been concerns that the IPSA would combine four roles:

- establishing the system of allowances;
- administering the payments to MPs and staff;
- hearing appeals from Members against individual IPSA staff decisions; and
- investigating complaints against Members and/or staff.

Some form of separation of powers is widely considered to be desirable, particularly as the determinations of the IPSA are likely to be justiciable. At present, the Parliamentary Commissioner for Standards is responsible for both advising on the Code, with the assistance of the Registrar and also for investigating alleged breaches. A number of recent complaints relating to allowances have involved the Commissioner in investigating individual payments to Members by the Department of Resources.

In the Scottish Parliament, there is a clearer distinction between functions: the clerks in the Parliament advise Members on interpretation of the Code, and the Commissioner undertakes investigations. However, in the investigation against the former Scottish Labour Party leader, Wendy Alexander, by the Standards Commissioner in 2008, the Standards Commissioner reached a different interpretation of the Code of Conduct than that offered to Ms Alexander by the standards clerks.⁷⁰ Ms Alexander protested to the Committee that this divergence had placed her in a difficult position.

A number of other bodies combine administrative with regulatory functions. These include the Electoral Commission, which administers policy development grants and regulates the registration of expenditure and donations. The *Charities Act 2006* provides for a statutory Charities Tribunal to hear appeals and determinations. Part 4 of the *Legal Services Act 2007* has developed the separation of representation and regulatory functions within legal professional bodies (including the Law Society and the Bar Council), following a report from Sir David Clementi. See in particular sections 29 and 30 of the 2007 Act.

5.1 Issues of accountability and independence

The question of balancing independence against accountability is a concern for a number of constitutional watchdogs and regulators. For background, see the Public Administration

⁶⁸ *Conduct of Conduct for MSPs*, Excluded Complaints para 9.1.5
<http://www.scottish.parliament.uk/MSP/conduct/coc-v2-2.htm#s9>

⁶⁹ Scottish Parliament debates 18 June 2009 col 18540

⁷⁰ See 6th report *Complaint against Wendy Alexander MSP* July 2008
<http://www.scottish.parliament.uk/S3/committees/stanproc/reports-08/stpr08-06.htm>

Select Committee (PASC) report *Ethics and Standards: The Regulation of Conduct in Public Life* published in April 2007.⁷¹ PASC noted that any design had necessarily to envisage appropriate roles for Parliament and government in a satisfactory system of ethical regulation. It went on:

110. Wherever a separate, or free-standing body is created, then, of course, it brings with it issues of its own proper institutional design and governance arrangements, especially for its appointments, resourcing and oversight. This is the classic ultimate regression problem of 'who guards the guardians'.

PASC also addressed the question of overlapping remits for ethical watchdogs. The IPSA may be characterised as another regulator in a rather crowded ethical field. PASC focused on the non statutory Cabinet Office sponsored watchdogs:

- Civil Service Commissioners
- Business Appointments Committee
- House of Lords Appointments Commissioner
- Public Appointments Commissioner
- Committee on Standards in Public Life

The report reviewed whether some consolidation would be desirable, but accepted the special position of the CSPL, as an 'ethical auditor' rather than a specific regulator. PASC favoured a new sponsoring body, the Public Standards Commission, which would oversee these bodies on behalf of Parliament.⁷²

Since the report was issued, the Government have also established the Independent Adviser on Ministerial Interests and indicated intentions to put the Civil Service Commissioners on a statutory footing. The relationship between a statutory Code for Members and a non statutory Ministerial Code may also require some clarification. The Ministerial Code is a non statutory document, issued at the discretion of the Prime Minister at the beginning of his administration. For further information see Library Standard Note 3750 *The Ministerial Code*.

In his evidence to the CSPL on 16 June 2009, Professor Anthony King, one of the original appointees to the Nolan Committee in 1994, expressed some doubt about the feasibility of the proposals on a Parliamentary Standards Agency. He was concerned that the body might be executive-led and that the proposals for a statutory code of conduct needed very careful thought.⁷³ Other commentators have argued that the creation of another appointed body to oversee Members' conduct would be unnecessary if there were full disclosure of allowances information on the internet. Simon Carr, writing in the *Independent*, said:

The answer to expenses... is a wiki-site on the internet. Everything an MP claims for goes up on the site. It will be interrogated by the public, of that we can be sure. Every one of those 5 million receipts will be seen by someone or other, and interesting examples will be forwarded to party leaders and newspapers.

⁷¹ HC 121 2006-07 <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmpubadm/121/121i.pdf> .See also *Parliament's Watchdogs: at the crossroads* ed Oonagh Gay and Barry Winetrobe Constitution Unit 2008

⁷² HC 121 2006-07 paras 108-110

⁷³ Committee on Standards in Public Life 16 June 2009 Uncorrected Transcript Questions 44-50 http://www.public-standards.gov.uk/Library/Uncorrected_transcript___First_Hearing___MPs___Expenses3_16_06_09.doc

This removes the need for legislation, for another quango, for a complex bureaucratic structure, for summonses and appeals and interminable consultations. It puts scrutiny in the hands of “the people”. It devolves power in the way they are always saying they want to do. It involves the public. And the primary deterrent to extravagant or doubtful claims will be cultural, not procedural.⁷⁴

Some of the immediate press reaction to the introduction of the Bill made reference to “unaccountable quangos” which would be put in charge of Parliament.⁷⁵

5.2 Proposals in the bill

The governance framework of the IPSA is modelled on that for the Electoral Commission. This involves the appointment of Commissioners by Parliament, and a statutory parliamentary committee akin to the Speaker’s Committee on Electoral Commission established by the *Political Parties, Elections and Referendums Act 2000* (PPERA). The Electoral Commission funding is taken directly from the consolidated fund, rather than from departmental vote and the staff are not civil servants. This is the governance model also followed for the Comptroller and Auditor General and the National Audit Office (NAO). Modifications to the NAO governance arrangements are expected in the forthcoming *Constitutional Renewal Bill*.⁷⁶

Parliamentary questions on behalf of the Speaker’s Committee are answered by a nominated member of that Committee on a regular basis.⁷⁷ The *Political Parties and Elections Bill 2008-09*, which is in its final stages, modifies the governance arrangements of the Committee. Further information is in Library Standard Note 4967 *Progress of the Political Parties and Elections Bill 2008-09*.

5.3 Provisions on IPSA, the Commissioner and the Speaker’s Committee

Schedule 1 establishes a Chair and four other members appointed by Her Majesty on address from the House of Commons, following a fair and open competition approved by a new Speaker’s Committee for the Independent Parliamentary Standards Authority.

At least one of the members of the IPSA must be a senior judge, another must be an auditor qualified to audit the NAO and one more should be a former MP. No other former MP may be appointed within five years of their leaving the Commons. The term of office is five years, with one re-appointment. The provision for re-appointment appears to conflict with the Government response to PASC on ethical watchdogs, which accepted that a single lengthy of term of between five to seven years would safeguard the independence of ethical regulators.⁷⁸

Neither the IPSA nor the Commissioner for Parliamentary Investigations would be covered by parliamentary privilege. This is an important point, which should make the work of both bodies subject to review by the courts. As noted above, the Scottish Parliament operates under a similar position, with a statutory Commissioner who undertakes investigations which are potentially reviewable.

Their terms and conditions are to be set by the Speaker, who has a role in agreeing the appointments address by the Commons. A removal of a Member would be by address of both Houses, the procedure used for Electoral Commissioners and the Comptroller and

⁷⁴ “Can we forget expenses and talk about something else?” 22 June 2009 *Independent*

⁷⁵ “A quango is not the way to build trust” 24 June 2009 *Daily Mail*

⁷⁶ See Library Standard Note 4595 *Comptroller and Auditor General*

⁷⁷ For further background on these types of governance arrangements, see Library Standard Note 4720 *Officers of Parliament: Recent Developments*

⁷⁸ HC 88 2007-08, Response to Recommendation 8

Auditor General. There is provision for payment of members and for a code of conduct. The IPSA becomes a disqualifying authority for the purposes of the *House of Commons Disqualification Act 1975*.

The IPSA is given power to appoint staff and a chief executive on terms broadly in line with those applying to the civil service. This is the position under which House staff are currently employed under the *House of Commons Commission Act 1978*. Staff and members would not be civil servants. They are given powers to do anything to facilitate their functions, including the establishment of committees or subcommittees. The Speaker is to appoint an interim chief executive until the IPSA appoint a permanent executive. The IPSA is given power to contract out payment functions for Members' pay and allowances, so that it need not be responsible for the processing of payments. However, the process of determination of claims may not be contracted out, as made clear in para 20 of Schedule 1.

The IPSA is made subject to the *Freedom of Information Act 2000* and *Public Records Act 1958*. As a result, it will need to establish a Publication Scheme and respond to individual requests for information. It has a duty to lay an annual report before Parliament. The Bill does not include IPSA or the Commissioner within the remit of the Parliamentary Commissioner for Administration (the parliamentary ombudsman).

The Bill does not directly address the question of whether the IPSA will be considered to be undertaking public functions for the purposes of the *Human Rights Act 1998*. The courts are responsible for deciding whether a body is undertaking public functions.⁷⁹ This is in contrast to the *Freedom of Information Act 2000* which lists in Schedule 1 whether a body is subject to FoI.

The IPSA is given a duty to prepare its own Estimate and submit it to the Speaker's Committee for the Independent Parliamentary Standards Authority. It is given a specific duty to be cost effective and efficient in para 10. Its chief executive is to be the Accounting Officer and accounts would be audited by the Comptroller and Auditor General.

The relationship and reporting lines between the Clerk of the House, as the House Chief Executive and the head of the new IPSA is also likely to be the subject of some consideration, once the new body has been established.

Separation of administrative and regulation functions

Part 2 of Schedule 1, in para 17, makes provision for the separation of administrative functions and regulation functions. Administrative functions are defined as payment of pay and allowances to Members and regulation functions as the preparation and revision of the allowances scheme, the rules for financial interests, determining rules for investigations and any directions or recommendations. The IPSA may not delegate regulation functions.

The office of Commissioner

Schedule 2 sets out the legal position of the Commissioner for Parliamentary Investigations. The Commissioner operates on behalf of the IPSA, and there is a specific duty on the IPSA to ensure that the Commissioner has access to sufficient resources to undertake its work. The Commissioner does not have the power to employ staff under his own authority.

The Commissioner is to be appointed on an address from the House of Commons in a similar procedure to that for the IPSA members. The postholder may only serve one fixed term of five years. Removal is by an address from both Houses. The Commissioner is not a civil servant and is also subject to the *Freedom of Information Act 2000* and the *Public*

⁷⁹ "Function of a public nature" 2009 *Judicial Review* pp109-112

Records Act 1958, but not the Parliamentary Commissioner for Administration. Similar principles apply in relation to the Human Rights Act and the ECHR.

Speaker's Committee for the Independent Parliamentary Standards Authority

Schedule 3 sets out the role and constitution of this new statutory Committee. It is to consist of:

- The Speaker of the House of Commons
- The Leader of the House of Commons
- The Chair of the Standards and Privileges Committee
- Five backbench MPs, appointed by the House of Commons

Para 2 allows repeated appointments to the Committee. The Committee would have the power to approve appointments to the IPSA and to review the proposed Estimate, before laying the Estimate before the House. This is in line with the roles of the Speaker's Committee on the Electoral Commission and the Public Accounts Commission. The Committee exercises this role in consultation with the Treasury and must have regard to the Treasury's views. Where the Committee does not follow the advice of the Treasury it must prepare a statement of its reasons, to be laid before the House. This drafting is very similar to that applicable to the Speaker's Committee on the Electoral Commission in Schedule 1 of PPERA. The Committee is not specifically made subject to FoI; para 3 gives it the power to determine its own procedures.

6 Comparative examples of regulation of Members

Standard Note 5050 *Members Pay and Allowances: Arrangements in other states* provides some comparative information on pay. This part sets out some comparative arrangements for the convenience of Members. The decision to combine in one body the functions of payment of allowances with investigation of Members financial interests appears to be unique.

6.1 United States

The United States has a complex system of regulation of allowances and financial interests. The House of Representatives Ethics Manual has detailed rules on the regulation of allowances. The chapter on allowances notes;

The Committee on House Administration governs certifications, documentation, and other standards for reimbursement from the MRA; that Committee's regulations are set forth in the Members' Handbook.⁸⁰

It also notes:

The use of the MRA for other than official purposes, including double billing and claims for nonexistent expenses, could subject a Member, officer, or employee to civil penalties under the False Claims Act. Any citizen may initiate such a suit, in the name of the United States, by alleging that false, fraudulent, or fictitious claims have been made. The Department of Justice may then take over the suit. The government has also initiated civil suits against Members subsequent to their criminal prosecution for the same or related conduct. In one such suit, for example, the government contended

⁸⁰ http://ethics.house.gov/Media/PDF/2008_House_Ethics_Manual.pdf

that a former Member had used, and permitted his family and friends to use, his official telephone credit card to charge personal calls.

Under the *Ethics Reform Act 1989* Members of Congress are required to file Personal Disclosure Reports, listing assets and liabilities, their income (excluding official salaries), asset transactions, gifts, and property where it produces income. The source of their spouse's income, assets and liabilities is also filed. These are available online.⁸¹

Complaints against Congress Members are investigated by the House Committee on Standards of Official Conduct, or as shorthand the Ethics Committee. Following the *Ethics in Government Act 1978*, and the *Ethics Reform Act 1989*, House and Senate Committees administer the gift, outside earned income and financial disclosure requirements set out in the statutes. There are bans on honoraria, limits on outside earned income and restrictions on the acceptance of gifts, which are a feature of the regulation of Congress.

A new independent Office of Congressional Ethics was established in the House of Representatives, following a resolution on 11 March 2008 by 229 votes to-182. The Office has six Board Members, who will not be members of the House, but are appointed by party leaders. Four of these six are however former Members.⁸² Moreover Board recommendations will go to the House Ethics Committee who remains the sole authority for determining the validity of the recommendations and the appropriate penalty. This appears to be a version of the UK Standards Commissioner, but as a committee rather than an individual. Recent media assessments however suggest that the Office has not so far made a public impact, given that its hearings are held in secret and that it reports to the Ethics Committee.⁸³

6.2 Australia

The federal Parliament has no Members' code, but the guides for registration for each House are available online.⁸⁴

Three Australian states have independent Commissions against Corruption: Queensland, New South Wales and Western Australia, which are described in detail in Fleming and Holland 2001. The Commissions cover both ministers and parliament, and are large and well resourced. Fleming and Holland report that there have been particular flashpoints about investigations into parliamentary allowances and battles over resources for the agencies, and that there has not been a restoration of public confidence as a result of the work of the agencies. However, Queensland the Commission has been responsible for removing a number of politicians from frontline posts. Both state legislatures also have separate ethics advisers, with a remit of advice rather than investigation. Queensland has in addition a statutory Integrity Commissioner to regulate members' conduct.

Both New South Wales and Queensland have set up parliamentary officers or committees whose role is to investigate the work of the Commissions. These are:

- the Office of the Parliamentary Criminal Justice Commissioner in Queensland

⁸¹ http://www.opensecrets.org/pfds/search_cid.php

⁸² "Goss among former Members appointed to ethics committee" 24 July 2008 *the Hill* <http://thehill.com/leading-the-news/goss-among-former-members-appointed-to-ethics-office-2008-07-24.html>

⁸³ "Slow start for Pelosi's new watchdogs" 25 March 2009 *Politico*
<http://www.politico.com/news/stories/0309/20459.html>

⁸⁴ <http://www.aph.gov.au/house/pubs/standos/resolutions.htm#regmemint>
http://www.aph.gov.au/senate/committee/interests_ctte/info/explanatory_notes.htm

- the Parliamentary Joint Committee in New South Wales

As Standard Note 5050 sets out, the statutory Remuneration Tribunal in Australia sets the limits for pay and allowances for Members. However, the Tribunal has no role in overseeing the payment of such allowances. Instead, the Parliamentary Services Unit of the Department of Finance and Deregulation is responsible for payments.⁸⁵

An e-brief from the Australian Parliamentary Library summarises the division of labour on the payment of allowances as follows:

Parliamentary departments

The [Department of the Senate](#) and the [Department of the House of Representatives](#) (Chamber Departments) pay the annual allowance to parliamentarians and salary to parliamentary office-holders. The Chamber Departments provide advice on, administer, and pay the [electorate allowance](#) and some benefits including postage.

Department of Finance and Administration

[Ministerial and Parliamentary Services](#) (M&PS) in the Department of Finance and Administration (Finance) provides advice on entitlements to the responsible Minister and to Senators, Members, Office-holders and their respective staff. Finance administers the provision of some benefits and pays ministerial salaries.⁸⁶

6.3 New Zealand

The Remuneration Authority determines pay and allowances for Members of Parliament, as well as other public office holders. The responsibilities are held under the *Remuneration Authority Act 1977*. However, there is no role in authorising or making payments to MPs. Instead, this is carried out by the Parliamentary Service, established under statute.⁸⁷

The *Parliamentary Service Act 2000* regulates the Parliamentary Service and contains detailed provision on House management: The House has both a General Manager and a Clerk.⁸⁸ This legislation followed the Rodger review of 1999.⁸⁹

The Speaker issues detailed rules on the regulation and payment of allowances available to Members under the *Parliamentary Service Act 2000*. Directions are also made on the role of the General Manager. The *Directions and Specifications for Services and Funding Entitlements for the House of Representatives, its Members and former Members and certain Electoral Candidates 2008* give further information.⁹⁰ The payment of allowances is subject to a regular external audit on a three yearly basis.

6.4 Canada

This is a bicameral Parliament, with separate Ethics Commissioners for each House. The Commons Commissioner is also the Conflict of Interest Commissioner for Public Office Holders.⁹¹ The *Federal Accountability Act 2006* extended the role of the Ethics

⁸⁵ <http://www.finance.gov.au/parliamentary-services/index.html>

⁸⁶ <http://www.aph.gov.au/library/INTGUIDE/pol/parlrem.htm>

⁸⁷ <http://www.parliament.nz/en-NZ/ParlSupport/Agencies/PS/Who/>

⁸⁸ <http://www.legislation.govt.nz/act/public/2000/0017/latest/DLM55840.html>

⁸⁹

http://cpafrica.org/uploadedFiles/Information_Services/PIRC/ReviewofParliamentaryServiceActReportNewZealand.pdf

⁹⁰ <http://www.parliament.nz/NR/rdonlyres/E7F3E3AF-6CAB-4AD2-ACA9-A13B284BDBD0/103782/2008DirectionsasAmendedby2009Directions1.pdf>

⁹¹ <http://ciec-ccie.gc.ca/Default.aspx?pid=1&lang=en>

Commissioners.⁹² The Ethics Commissioner's annual report lists difficulties in obtaining compliance from Members and agreeing forms to be used for disclosure. The House of Commons Code is an Appendix to the *Standing Orders*, first introduced in 2004, and revised in 2007.⁹³ The Senate Code was introduced in 2005, revised in October 2008.⁹⁴ The House of Commons oversight committee is the Committee on Procedure and House Affairs, which has numerous other responsibilities. The Senate committee, the Committee on Conflict of Interest for Senators, has oversight as its sole responsibility.

The Board of Internal Economy (the equivalent to the House of Commons Commission) provides Members with an annual Member's Office Budget to pay employee salaries, service contracts, some operating and travel costs, and other expenses as determined by the Board. Members are responsible for the management of these resources according to policies and guidelines set by the Board.

After approval by the Board of Internal Economy, the Speaker tables an annual public report of Individual Member's Expenditures in the House of Commons that discloses each Member's expenses related to office operations, employee salaries, contracting, advertising, and travel costs charged to the Member's Office Budget. This public report also indicates the cost of the goods and services provided by the House Administration to each Member. Members receive a copy of their individual expenditures prior to the tabling of the public disclosure report.

It is worth noting that the Code for the Commons specifically excludes anything falling within the jurisdiction of the Board of Internal Economy:

6. Nothing in this Code affects the jurisdiction of the Board of Internal Economy of the House of Commons to determine the propriety of the use of any funds, goods, services or premises made available to Members for carrying out their parliamentary duties and functions.⁹⁵

Therefore, the Commissioner would not be in a position to investigate allegations in respect of allowances.

Newfoundland and Labrador Assembly

Following a major scandal on the misuse of allowances by Members, the Newfoundland and Labrador House of Assembly passed the House of Assembly Accountability Integrity and Administration Act 2007.⁹⁶

Its provisions include:

- An oath sworn by the Clerk to administer with propriety the financial arrangements for Members. The Clerk is given statutory responsibility for the financial oversight of Members allowances and for the Assembly as a whole.
- A Members' Compensation Review Committee consisting of three non members to review remuneration levels, but not to administer allowances.

⁹² For background prior to this, see Library of Parliament briefing *Conflict of Interests Codes for Parliamentarians: A Long Road* 2006 at <http://www.parl.gc.ca/information/library/PRBpubs/prb0576-e.htm#theconflict>

⁹³ <http://www.parl.gc.ca/information/about/process/house/standingorders/appa1-e.htm>

⁹⁴ <http://sen.parl.gc.ca/seo-cse/PDF/Code-e.pdf>

⁹⁵ <http://www.parl.gc.ca/information/about/process/house/standingorders/appa1-e.htm>

⁹⁶ <http://www.gov.nl.ca/publicat/greenreport/mainreport/18-rep-schedule1.pdf>

- A House of Assembly Management Commission, meeting mainly in public, responsible for the financial stewardship of Assembly and Member finance.
- A compulsory induction programme for new Members, explaining the propriety issues in relation to claiming allowances.
- An audit committee, composed of both Members and non Members chosen by the Chief Justice, to oversee audit arrangements, review codes of conduct for staff and regulation whistleblowing by staff
- An independent Commissioner for Legislative Standards to investigate alleged breaches of the Code of Conduct
- An independent auditor, with powers to undertake compliance audits

6.5 Scotland

The *Interests of Members of the Scottish Parliament Act 2006* sets out the statutory requirements that apply to the registration and declaration of members' interests with effect from 4 April 2007.⁹⁷ The Registration and Declaration of Members' Interests guidance is available online.⁹⁸ The text of the Code of Conduct is also available.⁹⁹

The Scottish Parliament is currently considering proposals to amalgamate the Parliamentary Standards Commissioner with the local government standards investigator and the Public Appointments Commissioner.¹⁰⁰

6.6 Wales

Under section 36(1) of the *Government of Wales Act 1998* there is a requirement for there to be a register of interests of Assembly Members and for Assembly Members to register such interests (as defined in the standing orders) in that register. Interests are detailed in standing order 31 and the Annex to the standing order.¹⁰¹

The Code of Conduct for Assembly Members was resolved to be adopted by the Assembly on 18 May 1999; the latest version is dated January 2008.

The Assembly Committee on Standards of Conduct is in the final stages of consultation for a Measure (Act) to establish a statutory Commissioner for Standards.¹⁰²

6.7 Northern Ireland

The Northern Ireland Code was last reviewed in 2001.¹⁰³ The Standards and Privileges Committee is currently consulting on a new Code. Its most recent report on the consultation is available online.¹⁰⁴ The new Code is expected to come into effect in 2009, but a draft is not publicly available.

⁹⁷ http://www.opsi.gov.uk/legislation/scotland/acts2006/asp_20060012_en_1

⁹⁸ <http://www.scottish.parliament.uk/MSP/conduct/coc-v2-1.htm#s1>

⁹⁹ <http://www.scottish.parliament.uk/MSP/conduct/index.htm>

¹⁰⁰ See SPCB Supported Bodies Committee at <http://www.scottish.parliament.uk/s3/committees/rssb/index.htm>

¹⁰¹ <http://www.assemblywales.org/to-register-guidance-may2007-e.pdf>

¹⁰² http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-std-home/bus-committees-third-soc-project/soc_3_-sc2.htm

¹⁰³ <http://www.niassembly.gov.uk/reports/nia24-01.htm>

¹⁰⁴ http://www.niassembly.gov.uk/standards/2007mandate/reports/32_07_08R.htm

Appendix 1 – Seven Principles of Public Life and Rules of Conduct for Members

Extract from *the Code of Conduct for Members together with the rules relating to the conduct of Members*:

III. Public Duties of Members

4. By virtue of the oath, or affirmation, of allegiance taken by all Members when they are elected to the House, Members have a duty to be faithful and bear true allegiance to Her Majesty the Queen, her heirs and successors, according to law.

5. Members have a duty to uphold the law, including the general law against discrimination, and to act on all occasions in accordance with the public trust placed in them.

6. Members have a general duty to act in the interests of the nation as a whole; and a special duty to their constituents.

IV. General Principles of Conduct

7. In carrying out their parliamentary and public duties, Members will be expected to observe the following general principles of conduct identified by the Committee on Standards in Public Life in its First Report as applying to holders of public office.^[1] These principles will be taken into consideration when any complaint is received of breaches of the provisions in other sections of the Code.

"Selflessness

Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.

Objectivity

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership

Holders of public office should promote and support these principles by leadership and example."

V. Rules of Conduct

8. Members are expected in particular to observe the following rules and associated Resolutions of the House.

9. Members shall base their conduct on a consideration of the public interest, avoid conflict between personal interest and the public interest and resolve any conflict between the two, at once, and in favour of the public interest.

10. No Member shall act as a paid advocate in any proceeding of the House.[2]

11. The acceptance by a Member of a bribe to influence his or her conduct as a Member, including any fee, compensation or reward in connection with the promotion of, or opposition to, any Bill, Motion, or other matter submitted, or intended to be submitted to the House, or to any Committee of the House, is contrary to the law of Parliament.[3]

12. In any activities with, or on behalf of, an organisation with which a Member has a financial relationship, including activities which may not be a matter of public record such as informal meetings and functions, he or she must always bear in mind the need to be open and frank with Ministers, Members and officials.

13. Members must bear in mind that information which they receive in confidence in the course of their parliamentary duties should be used only in connection with those duties, and that such information must never be used for the purpose of financial gain.

14. Members shall at all times ensure that their use of expenses, allowances, facilities and services provided from the public purse is strictly in accordance with the rules laid down on these matters, and that they observe any limits placed by the House on the use of such expenses, allowances, facilities and services.

15. Members shall at all times conduct themselves in a manner which will tend to maintain and strengthen the public's trust and confidence in the integrity of Parliament and never undertake any action which would bring the House of Commons, or its Members generally, into disrepute.¹⁰⁵

¹⁰⁵ HC 735 2008-09 <http://www.publications.parliament.uk/pa/cm200809/cmcode/735/73502.htm#a3>