



## PARLIAMENT'S WATCHDOGS: INDEPENDENCE AND ACCOUNTABILITY OF FIVE CONSTITUTIONAL REGULATORS

ROBERT HAZELL, MARCIAL BOO, and ZACHARIAH PULLAR



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The Constitution Unit  
University College London

July 2022



ISBN: 978-1-903903-96-4

Published by:  
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First published July 2022

Front cover image: Magnifying glass in the hand against Big Ben in London by HappyAlex

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# Foreword

The constitutional reforms of the last 25 years have seen a big increase in the number of constitutional watchdogs. The Constitution Unit has anticipated and studied these developments from the start, with an early report on constitutional watchdogs in 1997. This interest was maintained by Oonagh Gay and Barry Winetrobe, senior members of the House of Commons Library, who wrote two major reports for the Unit on the subject: *Officers of Parliament: Transforming the Role* (2003) and *Parliament's Watchdogs: At the Crossroads* (2008).

As those titles imply, constitutional watchdogs were changing fast, along with wider changes in the constitutional landscape. They have changed even further since then, with the creation of IPSA in 2009, the introduction of lay members onto parliamentary committees, strengthening of the Parliamentary Commissioner for Standards, followed by introduction of the Independent Complaints and Grievance Scheme, and creation of the Independent Expert Panel.

It was therefore very timely when Marcial Boo, a former Chief Executive of IPSA, joined the Constitution Unit in December 2020 as an honorary research fellow and we asked if he could do a study of those watchdogs which are directly sponsored by parliament. There is an obvious tension with watchdogs whose role is to scrutinise the executive (like the Independent Adviser on Ministers' Interests), being themselves appointed and sponsored by the executive. Less obvious, but just as fundamental, is the tension for watchdogs whose role is to regulate the behaviour of parliamentarians, being themselves appointed and sponsored by parliament. That is the conundrum which Marcial set out to explore, with the able assistance of one of the Unit's Research Volunteers, Zachariah Pullar, who has since become a Judicial Assistant in the Court of Appeal.

Zach completed a survey of all the literature, reflected in the impressive footnotes; and Marcial and Zach interviewed 17 watchdogs and parliamentary officials in the spring of 2021. We then wrote the report, which was circulated in draft to all our interviewees, and held a private seminar to get further feedback in October 2021. In late September 2021, Marcial took up a new post as Chief Executive of the Equality and Human Rights Commission and his substantive involvement in this project ceased at that point. In March 2022 I conducted a further round of eight interviews about the role of lay members before completing the report.

We are enormously grateful to all those who agreed to be interviewed, and who have commented on drafts of the report. Others who have helped in ways great and small are my colleagues in the Constitution Unit, Meg Russell, Alan Renwick, Tom Fleming, Lisa James and Rachel Cronkshaw, and Research Volunteer Anth ea Lacoste-Henriques. Any remaining errors or omissions are of course our own.

Robert Hazell

July 2022

# List of Acronyms

ACoBA	Advisory Committee on Business Appointments
BCE	Boundary Commission for England
C&AG	Comptroller and Auditor General
CRAG	Constitutional Reform and Governance Act 2010
CSPL	Committee on Standards in Public Life
EC	Electoral Commission
EHRC	Equality and Human Rights Commission
FOIA	Freedom of Information Act 2000
FTT	First Tier Tribunal
HoLAC	House of Lords Appointment Commission
ICGS	Independent Complaints and Grievance Scheme
IPSA	Independent Parliamentary Standards Authority
JACO	Judicial Appointments and Conduct Ombudsman
NAO	National Audit Office
NDPB	Non-departmental Public Body
OCPA	Office of the Commissioner for Public Appointments
PACAC	Public Administration and Constitutional Affairs Committee
PASC	Public Administration Select Committee
PCA	Parliamentary Constituencies Act 1986
PCS	Parliamentary Commissioner for Standards
PPEA	Political Parties and Elections Act 2009
PPERA	Political Parties, Elections and Referendums Act 2000
PSA	Parliamentary Standards Act 2009
SCEC	Speaker's Committee on the EC
SCIPSA	Speaker's Committee on the IPSA



# Executive Summary

Over the last 30 years, new independent bodies and officers, often known as ‘constitutional watchdogs’, have been created in the UK. Their role is to ensure fairness and safeguard integrity in the mechanisms of democracy. Their establishment has been *ad hoc*, and little noticed by the academic literature. This report makes a small start to fill that gap.

Our focus is on four watchdogs concerned with safeguarding the election, payment and conduct of MPs: the Electoral Commission, Boundary Commission for England, Parliamentary Commissioner for Standards, and Independent Parliamentary Standards Authority; plus the Committee on Standards in Public Life. The report examines how the independence of these watchdogs to regulate politicians (individually) intersects with their accountability to politicians (collectively) in parliament.

The report situates these watchdogs within the familiar, tripartite separation of powers, dismissing the argument that they constitute a fourth branch of government. Instead, they should be considered as regulators of ethics and democratic processes. In common with other regulators, they referee and apply rules fairly and consistently, with the rules themselves set through democratic processes.

Two core institutional design features are watchdogs’ independence from, and accountability to, political actors. Watchdogs must be independent of the politicians they regulate; yet they also need to be accountable, as public bodies performing public functions, and paid out of public funds. For this they need accountability lines into the political system, or their decisions will not seem legitimate to those being regulated. The purpose of this report is to examine how the delicate balance of independence and accountability can best be maintained.

The report identifies the main factors which support watchdogs’ independence as being a secure legal status, with protection from arbitrary abolition; merit-based appointment; security of tenure, with dismissal only for incapacity or misconduct; adequate funding; authority to initiate their own inquiries; authority to publish their own reports, and to decide the timing of publication.

The accountability of watchdogs is essentially explanatory: they can be called upon to explain and justify their decisions. They cannot and should not be punished merely because their decisions are unwelcome or unpopular. Design features to ensure watchdogs’ accountability are transparency, including freedom of information; giving reasons for decisions; mechanisms to challenge watchdogs’ decisions by appeal or judicial review; scrutiny of the budget, and audit of expenditure; and accountability to parliament through its committees.

Our analysis was aided by interviews with 25 senior post-holders from the watchdogs and the House of Commons, and feedback from a private seminar. Interviewees agreed that these watchdogs should be formally independent, to do what they think is right, without fear or favour. The strength of watchdogs’ independence depends as much on their culture and the character of their senior leaders as on their formal legal status.

There is an inevitable tension between watchdogs’ democratic accountability and their independence in performing their regulatory functions: by exercising independence, watchdogs



can irritate those to whom they are accountable. As one interviewee remarked: the stronger the independence, the stronger the accountability needed to be.

To strengthen the watchdogs' independence, the report recommends that sponsoring committees should not have a single-party majority, and should contain lay members; they should be required to follow the Governance Code on Public Appointments; all board members should be appointed for a single, non-renewable term; and no board member should be removed unless clearly unfit to hold office. Remuneration should be more consistent, as some board members receive a *per diem* and others an annual salary, with periodic review.

A secure legal foundation is important to underpin watchdogs' independence, but the Parliamentary Commissioner for Standards (PCS) should remain a creature of Standing Orders to retain parliamentary privilege. As the Committee on Standards in Public Life (CSPL) could be swept away by prime ministerial fiat, it should be placed in statute, or at least an Order in Council.

In addition to power to initiate their own investigations and publish their own reports, watchdogs need protection from external direction. The provision in the Elections Act 2022 to give power to the government to prepare a strategy and policy statement for the Electoral Commission threatens seriously to undermine the Commission's independence.

The introduction of lay members onto parliamentary committees has been a success, guarding against MPs becoming too inward looking or self-interested. They need to be more than a token number: the Standards Committee now has seven lay members with full voting rights. With the chair having only a casting vote, this gives the lay members an effective 7:6 majority.

The Speaker's Committees on IPSA and the Electoral Commission should continue to be chaired by the Speaker, as this confers authority and status and encourages attendance. But the Speaker is very busy; more could be delegated to sub-committees, with lay members playing a stronger role, especially in scrutiny of the Estimates. There should be more lay members, and no party should have a majority on these committees.

The Electoral Commission, IPSA and the PCS have transformed the transparency of elections policy and administration, of MPs' expenses and allowances, and of MPs' discipline. To further strengthen the watchdogs' accountability, there should be greater awareness of the right to complain to the Parliamentary Ombudsman (with IPSA and the PCS coming within the Ombudsman's jurisdiction); more effective and expert scrutiny of their budgets; and regular appearances before parliamentary select committees, or possibly a single select committee dedicated to the scrutiny of constitutional watchdogs.

Finally, the CSPL could play an additional role as the *primus inter pares* of these watchdogs, monitoring and safeguarding their independence and accountability, and periodically reviewing their governance arrangements.

# Chapter 1: Introduction

## Constitutional watchdogs take centre stage

1.1 This report is about five generally rather little known constitutional watchdogs. Yet while we have been writing this report, all five of them have been thrust centre stage. First was the Parliamentary Commissioner for Standards (PCS), Kathryn Stone, dragged into the limelight when in November 2021 the House of Commons sought to reject her findings that Owen Paterson MP had breached the lobbying rules.<sup>1</sup> So great was the public outrage, not least from Lord (Jonathan) Evans, chair of the Committee on Standards in Public Life, that within 24 hours the government did a complete U-turn and Paterson resigned.<sup>2</sup>

1.2 In March 2022 the Parliamentary Commissioner for Standards was thrust centre stage again, for her investigation into complaints of bullying by the former Commons Speaker John Bercow, which he described as a travesty of justice.<sup>3</sup> Bercow appealed against her findings to an independent expert panel, chaired by former Court of Appeal judge Sir Stephen Irwin. The panel upheld 21 allegations of bullying, and said that if he was still an MP they would have recommended expelling him from the House.<sup>4</sup>

1.3 The second watchdog in the firing line has been the Electoral Commission (EC), whose Chair Sir John Holmes was not re-appointed in 2021, after a long-running briefing campaign against the Commission by some Brexiteers and parts of the Conservative Party. The government's Elections Bill was then introduced with proposals to reduce the Electoral Commission's powers and functions in two important respects: by removing the Commission's power of prosecution; and by requiring the Commission to comply with a strategy and policy statement prepared by the government.

1.4 The third watchdog in the firing line is the Independent Parliamentary Standards Authority (IPSA), which in March 2022 triggered headlines such as 'MPs set for £2,200 pay rise just when costs soar for millions around UK'.<sup>5</sup> In 2021, IPSA had stopped what would have been a £3,300 increase after coming under pressure from MPs because of the economic impact of the Covid pandemic. In 2022 Richard Lloyd, IPSA's chair, defended the increase saying, 'This is the first increase in pay for MPs in two years and follows the average of increases across the public sector last year. MPs play a vital role in our democracy and this is reflected in their pay'.<sup>6</sup>

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<sup>1</sup> House of Commons Standards Committee, *Mr Owen Paterson*, HC 797, 26 October 2021; HC deb vol 702 cols 938–973, 3 November 2021.

<sup>2</sup> Heather Stewart and Aubrey Allegretti, 'MP Owen Paterson resigns from "cruel world of politics"', *The Guardian* 4, November 2021.

<sup>3</sup> 'Ex-Commons Speaker was a serial bully, says report', *BBC News*, 8 March 2022.

<sup>4</sup> 'Independent Expert Panel reprimands former Speaker John Bercow for being serial bully', UK Parliament, 8 March 2022.

<sup>5</sup> ITV News, 1 March 2022.

<sup>6</sup> *ibid.*

1.5 The fourth watchdog in the news has been the Boundary Commission for England (BCE), which in 2021 commenced the Seventh Periodical Review of parliamentary constituency boundaries, which have been unchanged since 2007. In the summer of that year it embarked on its first consultation about the proposed new boundaries, and in spring 2022 on a second round with public hearings. These will inform its final report, in 2023, which will provide the constituencies for the next general election; in a legislative change made in 2020, MPs no longer have power to overturn the Commission’s findings. There are separate Boundary Commissions for Scotland, Wales and Northern Ireland, which (like the Boundary Commission for England) are chaired by the Speaker, with the Deputy Chair being a High Court judge. Similar considerations apply to them, but for the sake of brevity they are not considered further in this report.

1.6 The fifth watchdog making headlines has been the Committee on Standards in Public Life (CSPL), which in November 2021 published the final report of its Standards Matter 2 review. CSPL recommended that more of the ethical watchdogs regulating government should be placed on a statutory footing, ‘giving them clearer accountability and greater independence from the executive they regulate’.<sup>7</sup> The need for clearer accountability and greater independence for watchdogs is a theme running all the way through this report.

## The five constitutional watchdogs in this report

1.7 Over the last 30–40 years, these five independent bodies and officers, often known as ‘watchdogs’, have been created in the UK to oversee different aspects of the work of parliament and parliamentarians. The Boundary Commissions, in their current form, were created in 1986 to revise periodically the boundaries of parliamentary constituencies. The Parliamentary Commissioner for Standards was created in 1995 to investigate the cash-for-questions scandal. The Electoral Commission was formed in 2000 to supervise the conduct and financing of elections and referendums. The Independent Parliamentary Standards Authority was established in 2009 to determine the level of pay, and to administer the expenses regime of members of parliament. The Committee on Standards in Public Life (CSPL) was set up in 1995 as the Prime Minister’s ethics adviser: its first report led to the creation of the Parliamentary Commissioner for Standards.

1.8 These are not the only watchdogs created in recent years. Alongside long-established bodies like the Civil Service Commission, Comptroller and Auditor General, and Parliamentary Ombudsman the more recent creations include the Information Commissioner, House of Lords Appointments Commission, Commissioner for Public Appointments, Advisory Committee on Business Appointments, Judicial Appointments Commission, Independent Adviser on Ministers’ Interests, and the Equality and Human Rights Commission.

1.9 Collectively, these watchdogs try to ensure that rules directed at fairness and integrity are applied consistently and impartially, whether in relation to appointments, behaviour, or public spending. They also try to ensure fairness in the mechanisms of democracy, on behalf of the electorate, free from any political pressure emanating from the legislature and executive. The

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<sup>7</sup> ‘High standards begin at home’, Lord (Jonathan) Evans, CSPL blog launching final report of Standards Matter 2 review, 1 November 2021.

bodies might, accordingly, be regarded as comprising a family of ‘ethical regulators’, whose aim is to safeguard the integrity of political governance.<sup>8</sup> In particular, these watchdog bodies variously give institutional expression and weight to the Seven Principles of Public Life, first promulgated by CSPL in its inaugural report, *Standards in Public Life*.<sup>9</sup> Indeed, several of the bodies in existence today are ‘Nolan watchdogs’, conceived by CSPL to uphold standards, and maintain public confidence in all the different areas of public life.

1.10 The establishment of these bodies has largely been *ad hoc*, often in response to high-profile events or perceived gaps or deficiencies in public standards: CSPL itself, IPSA and the Parliamentary Commissioner for Standards were all created as a direct consequence of short-term political scandals. There were no works of political theory that guided their creation. As the numbers of these watchdogs have proliferated, the paucity of the literature on these bodies has become increasingly obvious. Indeed, commentary on the role of these watchdogs has, in the main, been led by politicians and the media: MPs have criticised IPSA, the Electoral Commission and the EHRC,<sup>10</sup> while the media lament the weaknesses of the Advisory Committee on Business Appointments (ACoBA), the House of Lords Appointments Commission (HoLAC), and the regulation of public appointments.<sup>11</sup>

1.11 A full analysis of these UK ‘integrity regulators’ is overdue. This report aims to contribute to the debate by examining how the independence of these watchdogs to regulate politicians (individually) intersects with their accountability to politicians (collectively) in parliament. In light of that analysis, it aims to examine how these twin demands of independence and accountability might most effectively be met in respect of the constitutional watchdogs selected for study.

1.12 The report focuses just on five watchdogs, those charged with safeguarding the election, payment and conduct of MPs, listed in para 1.7. We have included the CSPL, because of its broad advisory remit touching on the same areas, though it does not itself regulate specific individuals or organisations. This subset of watchdogs has been selected because of their close relationship with parliament, which (unusually) is the sponsoring body for three of them, appointing their boards and providing their funding. Parliament has developed novel mechanisms for managing the sponsoring relationship, with committees chaired by the Speaker, and lay members on some of the committees.

1.13 The five watchdogs display differences in their governance arrangements that enable comparison and analysis. Three – the EC, BCE and IPSA – are statutory bodies. The PCS, like them, reports directly to parliament, although she is a non-statutory officer of the House. Four of

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<sup>8</sup> Public Administration Select Committee, *Ethics and Standards: The Regulation of Conduct in Public Life (Fourth Report of Session 2006–07)*, HC 101 2006–07 (London: House of Commons, 2007).

<sup>9</sup> First Report of the Committee on Standards in Public Life, *Standards in Public Life*, Cm 2850–I (London: HMSO, 1995).

<sup>10</sup> See, e.g., Independent Parliamentary Standards Authority, *Findings from the Annual Survey of MPs and their Staff* (London: IPSA, 2019); Peter Walker, ‘Tory plan to scrap election watchdog “undermines democracy”’, *The Guardian*, 31 August 2020; Joint Committee on Human Rights, *Black People, Racism and Human Rights (Eleventh Report of Session 2019–21)* HL 165, HC 559 2019–21 (London: House of Commons, 2020), paras 91–102; HC deb vol 673 col 435, 12 March 2020 and HC deb vol 691 cols 742–744, 22 March 2021.

<sup>11</sup> See, e.g., David Aaronovitch, ‘Government revolving door is out of control’, *The Times*, 14 April 2021; Henry Mance, ‘British politics is morphing from delusion into sleaze’, *Financial Times*, 31 March 2021; John Bowers, ‘The public appointments system in crisis’, *Prospect Magazine*, 2 March 2021.

the watchdogs are directly accountable to parliament; the Electoral Commission is also accountable to the Scottish Parliament and to the Welsh Senedd. Accountability at Westminster lies through the Speaker for the BCE, the Speaker's Committee for the EC (SCEC) and for IPSA (SCIPSA), and the House of Commons Committee on Standards for the PCS. This allows us to explore the extent of parliamentarians' actual or potential influence over the bodies that regulate their election, remuneration and behaviour, given that parliament has power to appoint and re-appoint the leaders of the watchdogs, to approve their budgets and work programmes; and to influence their strategies.

1.14 The CSPL, by contrast, reports directly to the Prime Minister and the Cabinet Office; which, *qua* sponsor, has responsibility for exercising the powers of appointment, dismissal and funding. In each case, politicians' powers of oversight create obvious tensions with the independent operation of these bodies.<sup>12</sup>

## Research questions and methodology

1.15 The report situates these watchdogs within the well-understood framework of the separation of powers between the executive, legislative and judicial branches of government, discussed further in Chapter 2. The main research questions addressed in the report are as follows:

### Independence

- What is the rationale for the independence of these watchdogs? From whom do they need to be independent; why; and how?
- How independent are they in practice?
- Could their independence be better secured?

### Accountability

- What are the main lines of accountability of these watchdogs, legally and politically?
- Could their accountability be better secured?

### Balance between independence and accountability

- What is the right balance between institutional independence on the one hand, and public and parliamentary accountability on the other?

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<sup>12</sup> Though, as we submit, an analysis of integrity regulators in this report is overdue, this central issue has been considered in a number of earlier reports and commentaries, on which we build: see, e.g., Oonagh Gay and Barry Winetrobe, *Officers of Parliament – Transforming the Role* (London: Constitution Unit, 2003), 51; and Oonagh Gay, 'Introduction – Watchdogs in Need of Support' in Oonagh Gay and Barry Winetrobe, eds, *Parliament's Watchdogs: At the Crossroads* (London: Constitution Unit, 2008), 15. See also Dobson Phillips, *British Standards Landscape: A Mapping Exercise* (2020) for a recent survey of the watchdogs operating in the public standards landscape, at central and local government levels.

## Lay members

Since this is the first study of lay members on parliamentary committees, our final research question is more specific:

- What is the contribution of lay members to parliamentary supervisory committees; what difficulties have they encountered; what difference do they make?

1.16 To answer these questions we adopted three main research methods. First, to understand the governance structures of constitutional watchdogs, and their underlying rationale, we undertook a literature survey: our references are listed at the end of the report. The bibliography contains many more references to official reports than to the academic literature, which is limited, and on the role of lay members is non-existent: we would welcome corrections if there is anything we have missed. Second, to understand the watchdogs' legal lines of accountability, we read all the relevant case law, which is listed in the second part of the bibliography, along with all the relevant statute law: the results are analysed in Chapter 5.

1.17 To understand how independent watchdogs are in practice, and to explore the tensions between their independence and accountability, our third research method was to conduct interviews with senior figures in all the watchdogs concerned, and from the House of Commons. Interviewees included a former Speaker; a former Clerk of the House; three former PCs; two former chairs of CSPL; two former chairs of the Electoral Commission; a former chair of IPSA; a former deputy chair of the BCE, now a Justice of the UK Supreme Court; parliamentary officials; and lay members of parliamentary committees. Each interviewee had high-level oversight of the watchdogs concerned, and each was personally accountable for aspects of their work. This ensured that each interviewee could provide personal insight into the pressures on watchdogs' independence and how their governance might be improved.

1.18 In most cases, interviewees were former, rather than current post-holders. We feared that current post-holders would be more constrained in expressing their views. Those no longer in post are also able to reflect more holistically, and with the benefit of hindsight, on their overall experience in office, including on their watchdogs' independence and accountability in practice.

1.19 Table 1.1 lists those interviewed. Most interviews were conducted virtually between December 2020 and April 2021. In March 2022 we conducted a further eight interviews about the role of lay members, with parliamentary officials, lay members and head hunters. Two interviewees who wished to remain anonymous are not recorded in the table on the following page.

**Table 1.1: Interviewees for this study**

Organisation	Role	Interviewee	Tenure
House of Commons	Speaker	John Bercow	2009 – 2019
	Clerk of the House	Sir David Natzler	2014 – 2019
	Clerk of Committees	Andrew Kennon	2012 – 2017
	Selection Panel Chair	Philippa Helme	2019 – present
IPSA	Chair	Sir Ian Kennedy	2009 – 2016
	Chief Executive	Andrew McDonald	2010 – 2014
Electoral Commission	Chair	Sir John Holmes	2017 – 2021
	Chair	Jenny Watson	2008 – 2016
	Chief Executive	Claire Bassett	2015 – 2018
	Chief Executive	Bob Posner	2019 – 2022
CSPL	Chair	Sir Christopher Kelly	2008 – 2013
	Chair	Lord (Paul) Bew	2013 – 2018
	Member	Richard Thomas	2012 – 2017
PCS	Commissioner	Elizabeth Filkin	1999 – 2002
	Commissioner	Sir Philip Mawer	2002 – 2008
	Commissioner	John Lyon	2008 – 2012
Boundary Commission for England	Deputy Chair	Lord (Philip) Sales	2009 – 2014
	Secretary to the Commission	Tim Bowden	2020 – present
SCIPSA	Lay Member	Cindy Butts	2019 – present
Standards Committee	Clerk	Robin James	2018 – present
House of Commons Commission	External Member	Dame Janet Gaymer	2015 – 2018
Saxton Bampfylde	Headhunter	Deborah Loudon	2006 – 2016

1.20 All interviewees were assured that their responses would be kept confidential and anonymised, unless they also gave their consent to be quoted. In the first round interviewees were asked the same questions relating to the governance and accountability arrangements of the five watchdogs under scrutiny:

1. What is the rationale for the independence of the watchdog body?
2. How secure is the independence of these bodies to external pressure, and how does that pressure manifest?
3. What are the main lines of accountability of these watchdogs, to parliament and to the public?
4. Is there any tension between the watchdogs' independence and their accountabilities?



5. How might the watchdogs' governance change to strengthen their independence and accountability, if at all?

1.21 In the second round of interviews, about the role of lay members on parliamentary committees, interviewees were asked:

1. What is the role of lay members?
2. How are they recruited?
3. What difference do they make?
4. What difficulties have been encountered? How could they be overcome?

1.22 In October 2021 we held a private seminar to discuss our draft report, to which all the interviewees were invited, as well as current post-holders from the watchdogs concerned, and academic experts. We are grateful for their comments and suggestions, which have greatly strengthened this final report.

## The structure of this report

1.23 Chapter 2 introduces the terms of the discussion developed in the subsequent chapters, which centres on the watchdogs' independence and accountability; and defines what is at stake. It engages with the academic debate on the roles of the three branches of government in relation to independent supervisory bodies; and in particular the argument that these constitutional watchdogs might constitute, or represent, a fourth branch of government. This argument is ultimately dismissed: the chapter concludes, instead, that these watchdogs should be considered to be, or akin to, independent regulators. This then helps to frame the inevitable tension between independence and accountability that comes with the territory of regulation. Chapter 2 concludes with an analysis of the principles underlying the concepts of independence and accountability, and the trade-offs between them.

1.24 Chapter 3 examines the governance arrangements of the five watchdogs under review, by drawing on their constituent and other official documentation, such as annual reports, reports of select committees, and parliamentary debates. The chapter proceeds to analyse those governance arrangements in closer detail, drawing out and expanding on a series of factors contributing to watchdogs' independence and accountability, including their legal (or other) status; capacity to set their own agenda; their board membership; the appointments process to senior positions, and mechanisms for removal; the frequency and transparency of their meetings; the procedures and membership of the parliamentary committees overseeing their work; the process for approving their budget, strategic plan and annual work programmes; and the role of the Speaker of the House of Commons and of the ministers on parliamentary oversight committees.

1.25 This analysis supplies a framework for assessing in Chapters 4 and 5 the design and operation of the watchdogs themselves, with separate lists of factors maximising their independence, and their accountability. This, along with the interview findings set out in Chapter 6, provides the groundwork for developing the report's substantive proposals in Chapter 7. Chapter 6 reports interviewees' views on the watchdogs' independence and accountability, and the role of lay

members. Chapter 7 draws on their wider reflections on how to strengthen watchdogs' institutional design, and the analysis developed in earlier chapters to set out our overall conclusions, with a series of specific recommendations for strengthening the watchdogs' governance arrangements.

## The House of Lords

1.26 This report focuses on watchdogs answerable to the House of Commons. The House of Lords has its own Commissioners for Standards (currently Martin Jelley QPM, and Karimullah Hyat Akbar Khan, both appointed in 2021). We did ask consultees on our draft report whether the Lords could play a role in upholding the independence, or strengthening the accountability, of bodies which are primarily accountable to the House of Commons. Unsurprisingly, given the traditional separation between the two Houses, the answer was no. The House of Lords will not interfere in the governance of the House of Commons. The Lords Constitution Committee has shown little interest in these watchdogs (unlike the Public Administration and Constitutional Affairs Committee (PACAC) in the House of Commons, and its predecessor the Public Administration Select Committee); it was felt that sponsorship and scrutiny was best left to the lower, democratically elected House.

## Other omissions

1.25 In addition to not including the Lords Commissioners for Standards, this report also omits consideration of the parliamentary boundary commissions other than that for England: namely, the Boundary Commissions for Scotland, Wales and Northern Ireland. As explained in para 1.5, they are omitted for the sake of simplicity and brevity.

# Chapter 2: Watchdogs, the Separation of Powers, and the Concepts of Regulation, Independence and Accountability

2.1 This chapter sets out the theoretical background for the empirical chapters which follow. It is in two parts. The first part summarises the academic literature on constitutional watchdogs, and in particular the theory that constitutional watchdogs might form a distinct, fourth branch of government. Although we dismiss the idea, it is so dominant in the literature that we cannot ignore it. Readers more interested in the practicalities may skip to the second part of the chapter (beginning at para 2.11), where we set out a list of the conditions necessary to uphold the independence of constitutional watchdogs, derived from the literature on judicial independence. This is followed by a list of conditions to ensure the accountability of watchdogs (para 2.19), drawn from the literature on accountability, and specifically the literature on judicial accountability. The chapter concludes that constitutional watchdogs are regulators, regulating democratic processes. They referee and apply the rules of democracy, rules which have been set by politicians in the executive and legislature. In the application of the rules, watchdogs need to be independent of the politicians they regulate; but they also have to be accountable, to maintain the trust of those they regulate, as well as of the wider public.

## Watchdogs and the separation of powers

2.2 At the outset, it is necessary to address an important analytical question: where, in any given set of constitutional arrangements characterised by a separation of powers (such as those of the United Kingdom),<sup>13</sup> are constitutional watchdogs situated? More specifically, what is – or ought to be – their relationship with branches of government, such as parliament or the judiciary? As will be seen, this is not merely an academic issue; on the contrary, it goes to the heart of questions concerning watchdogs’ independence and accountability *vis-à-vis* other institutions of the state.<sup>14</sup>

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<sup>13</sup> Lord Mustill characterised the British separation of powers as follows: ‘that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed’ (*R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 A.C. 513 (HL) 567).

<sup>14</sup> As Oonagh Gay and Barry Winetrobe have observed (‘Watchdogs of the Constitution – the Biters Bit?’, in Robert Hazell, ed, *Constitution Futures Revisited: Britain’s Constitution to 2020* (London: Palgrave, 2008), 200), watchdogs’ ‘constitutional location has potentially sensitive implications for their governance and operation’ – whether they follow the executive sponsorship model, or instead have a closer parliamentary connection; or, indeed, more notionally,

2.3 Thus, it has been noted that, ‘Like inquiries or royal commissions, watchdogs do not fit neatly within a traditional executive–legislative–judicial “separation-of-powers” model, though they have complex operational and institutional relationships with, and across, these three branches’;<sup>15</sup> other commentators have made similar observations.<sup>16</sup> It is with the working out and refinement of these ‘complex operational and institutional relationships’, in respect of a particular subset of watchdogs, that this report is concerned; and reflecting on this separation-of-powers issue provides a useful starting point.

2.4 Constitutional watchdogs could, perhaps, be conceived as falling squarely within or under one of the existing branches of government; for instance, the boundary commission within the parliament (operating, for example, as a select committee of the Commons). But, as principle suggests – and history confirms<sup>17</sup> – treating watchdogs as mere ‘adjuncts of electoral politics’<sup>18</sup> would be wholly self-defeating: as Professor Mark Tushnet describes, precisely

The reason for creating these [watchdog] institutions rather than relegating their work to the [traditional branches of government] is that those branches are placed in a situation of conflict of interest when particular cases challenging democratic functioning arise. Legislators, for example, cannot be trusted to set district boundaries without attention to the effects that doing so will have on their or their parties’ electoral prospects.<sup>19</sup>

2.5 He concludes that the ‘recurring rationale’ behind the creation of structurally independent watchdog bodies, each charged with supervising a specific aspect of the democratic process, has, broadly, two connected aspects: negatively, the inadequacy of the traditional branches’ incentives

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comprise ‘part of the quasi-judicial branch of government, perhaps affiliated in some way, especially with a written constitution, to a “constitutional court”’ (*ibid*, 209–10).

<sup>15</sup> Gay and Winetrobe, *ibid*, 199; see also Gay, ‘Introduction – Watchdogs in Need of Support’ in Oonagh Gay and Barry Winetrobe, eds, *Parliament’s Watchdogs: At the Crossroads* (London: Constitution Unit, 2008).

<sup>16</sup> E.g., Ann Chaplin, ‘The Constitutional Legitimacy of Officers of Parliament’, *National Journal of Constitutional Law* 29, 2011, 72–3) remarks that ‘most [watchdogs] ... do not serve inside the legislative branch of government. They are widely accepted to be independent, as well, from the executive. They are not judges, and do not form part of the judicature’ (72–3). Frank Vibert (*Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge: Cambridge University Press, 2007), 11) similarly notes that watchdog bodies ‘occupy a new space between law and politics. Their procedures are different from both and present a challenge to what the rules should be and how relationships between the different branches should be formulated.’

<sup>17</sup> Cf. the politically controlled redistributions occasioned by the 19th century Reform Acts: politicians decided on the allocation of seats, and the *ad hoc* boundary commissions, tasked with defining the new boundaries in detail, were filled with political appointees: see DJ. Rossiter *et al.*, *The Boundary Commissions: Redrawing the UK’s Map of Parliamentary Constituencies* (Manchester: Manchester University Press, 1999), 18, 26–31, 39 and 42.

<sup>18</sup> Frank Vibert, *Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge: Cambridge University Press, 2007), 176.

<sup>19</sup> Mark Tushnet, ‘Institutions Protecting Democracy: A Preliminary Inquiry’, *Law & Ethics of Human Rights* 12(2), 2018, 183. As Sir Sylvanus Vivian’s Committee on Electoral Machinery reported in 1942, rejecting the thought that the boundary commissions might comprise political nominees, ‘such political members would find it impossible to divest themselves of their Party allegiance in regard to any features of redistribution proposals which affected Party interests. The result would inevitably be, as we see the matter, the occurrence of frequent deadlocks, or of majority decisions which would go far to deprive the Commission’s recommendations of any inherent validity or authority.’ *Report of the Committee on Electoral Machinery*, Cmd. 6408 (London: HMSO, 1942), para 102. See, too, Bruce Ackerman, ‘The New Separation of Powers’, *Harvard Law Review* 113(3), 2000, 716.

to address problems of protecting democracy; and positively, ‘the varying combinations of expertise and independence required to address specific problems of that sort.’<sup>20</sup> Political partisanship, and the typically generalist nature of a politician’s skill set tend to militate against this: conversely, watchdogs may be deeply implicated in politics and make decisions or recommendations with major political import; but they are not and should not *be* political. Further, they may be staffed to reflect the expertise and specialised knowledge necessary and/or appropriate to their tasks.

2.6 At the other extreme, it has been argued – by Professor Bruce Ackerman, and the various Commonwealth authors who have followed and developed the ideas in his seminal 2000 article<sup>21</sup> – that, as one is dealing with institutions with distinctive functions and powers, constitutional watchdogs ‘deserve special recognition as a distinct part of the system of checks and balances’.<sup>22</sup> Ackerman suggests that this might extend to recognition as a distinct, fourth branch of government, sitting alongside, and ‘on the same plane as the [traditional] branches.’<sup>23</sup>

2.7 The argument has been developed by Michael Pal as follows:

in the fourth branch model the [watchdog] is conceived of as *institutionally* distinct. The *subject-matter* of its authority is also separate. The model carves out the ... functions previously carried out by other actors within the state and assigns them to an autonomous body not directly accountable to any of the other branches (emphasis in original).<sup>24</sup>

Connected to this argument is the notion of intra-governmental or ‘horizontal accountability’, in which constitutional watchdog bodies are portrayed as key actors on a level with traditional institutions:

For [horizontal] accountability to be effective, there must exist state agencies that are authorized and willing to oversee, control, redress, and if need be sanction unlawful

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<sup>20</sup> Tushnet, ‘Institutions Protecting Democracy’, *ibid*, 201; Mark Tushnet, ‘Institutions Supporting Constitutional Democracy: Some Thoughts about Anti-Corruption (and Other) Agencies’, *Singapore Journal of Legal Studies*, 2019, 440.

<sup>21</sup> Bruce Ackerman, ‘The New Separation of Powers’, *Harvard Law Review* 113(3), 2000. See, e.g., James Spigelman, ‘The Integrity Branch of Government’, *Australian Law Journal* 78(11), 2004, 724–37; Jeffrey Bell, ‘Agents of Parliament: A New Branch of Government?’, *Canadian Parliamentary Review* 29, 2006, 13–21; John McMillan, ‘Re-Thinking the Separation of Powers’, *Federal Law Review* 38(3), 2010, 423–43; David Solomon, ‘What is the Integrity Branch?’, *AIAL Forum* No. 70, 2012, 26–32; AJ Brown, ‘The Integrity Branch: a “System”, an “Industry”, or a Sensible Emerging Fourth Arm of Government?’, in Matthew Groves, ed, *Modern Administrative Law in Australia: Concepts and Context* (Cambridge: Cambridge University Press, 2014), 301–25; Paul Kildea, ‘The Constitutional Role of Electoral Management Bodies: The Case of the Australian Electoral Commission’, *Federal Law Review* 48(4), 2020, 469–82. But cf. Wayne Martin, ‘Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government’, Whitmore Lecture 2013, 1–43.

<sup>22</sup> Bruce Ackerman, ‘The New Separation of Powers’, *Harvard Law Review* 113(3), 2000, 718.

<sup>23</sup> Mark Tushnet, ‘Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries’, *University of Toronto Law Journal* 70, 2020, 105. See, too, for a British perspective, Frank Vibert, *Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge: Cambridge University Press, 2007), arguing that ‘we should take [unelected bodies wielding official powers, including watchdogs] as a whole and view them as composing a new branch of government and forming the basis of a new separation of powers’: 2.

<sup>24</sup> Michael Pal, ‘Electoral Management Bodies as a Fourth Branch of Government’, *Review of Constitutional Studies* 21(1), 2016, 94.

actions by other state agencies. The former agencies must have not only legal authority but also sufficient *de facto* autonomy *vis-à-vis* the latter. What I am talking about, of course, is nothing new and goes under the familiar headings of separation of powers and checks and balances. It includes the executive, legislative, and judicial branches, but ... also extends to various oversight agencies, ombudsmen, accounting offices, *fiscalías*, and the like.<sup>25</sup>

2.8 There are two strong arguments against the ‘fourth branch’ thesis, as applied to the UK. The first is that although they do not fit neatly alongside the other branches of government, they are clearly subordinate to them. The power and legitimacy of constitutional watchdogs is derived from the executive or parliament: their existence is ‘contingent in a way that the legislative, executive and judicial branches are not’.<sup>26</sup> The second is that

in Britain, with no written, supreme constitution, we do not have the option of establishing bodies which are legally above and beyond the ordinary law of the land as enacted by parliaments and governments of the day. We could not therefore establish, as a constitutionally untouchable body, what could amount to a fourth arm of government, alongside the legislative, executive and judicial arms.<sup>27</sup>

2.9 Our conclusion is that the ‘fourth branch’ thesis overstates the degree to which watchdogs might unequivocally be characterised as (institutionally or formally) *separate*, or indeed separable, from the political institutions of the existing branches, by which they are sponsored. Watchdogs still need to be appointed; to be funded; to be held to account by someone. A sensible analysis of constitutional watchdogs must be able to make sense of the ‘institutional tensions and ambiguities that come with the territory’ of watchdoggery;<sup>28</sup> and, as far as possible, should avoid unnecessary constitutional contortions.<sup>29</sup>

2.10 Hence, in this report, we prefer to identify the watchdogs (with the exception of CSPL) as regulators, regulating democratic processes and ethics in the public domain.<sup>30</sup> These watchdogs, in common with other regulatory actors, referee and apply rules fairly and consistently, where the

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<sup>25</sup> Guillermo O’Donnell, ‘Horizontal Accountability in New Democracies’, *Journal of Democracy* 9(3), 1998, 119. Cf. Bruce Ackerman, ‘The New Separation of Powers’, *Harvard Law Review* 113(3), 2000, who, in this vein, advocated a separate ‘integrity branch’ of government, “armed with powers and incentives to engage in ongoing oversight ... [and scrutiny of] the government for corruption and similar abuses”: 694, 727.

<sup>26</sup> Chris Gill, ‘The Evolving Role of the Ombudsman: A Conceptual and Constitutional Analysis of the “Scottish Solution” to Administrative Justice’, *Public Law*, 2014, 676.

<sup>27</sup> Barry Winetrobe, ‘Conclusion – Parliamentary Watchdogs: Time for a Decision’, Oonagh Gay and Barry Winetrobe, eds, *Parliament’s Watchdogs: At the Crossroads* (London: Constitution Unit, 2008), 119.

<sup>28</sup> Robert Hazell, ‘Constitutional Watchdogs’ in *Delivering Constitutional Reform: The Collected Briefings of the Constitution Unit* (London: Public Finance Foundation and Constitution Unit, 1997), 87.

<sup>29</sup> Cf. Chris Field, ‘The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability’, AIAL Forum No. 72, 2013, 28.

<sup>30</sup> See, for a similar perspective, Christopher Hood et al., *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-busters* (Oxford: Oxford University Press, 2003), and Robert Kaye, *Regulating Parliament: The Regulatory State Within Westminster*, CARR Discussion Paper No. 13, 2003, 1–18. Some constitutional watchdogs explicitly regard themselves as regulators: IPSA, for instance, defines itself on its website as ‘the independent body that regulates and administers the business costs and decides the pay and pensions of ... MPs’, and the Electoral Commission describes itself as ‘the independent body which oversees elections and regulates political finance’.

rules are set through existing democratic processes in the executive and the legislature.<sup>31</sup> In the case of these watchdogs, however, rather than regulate utility markets or standards of education, their function is to regulate ethical behaviour and the rules of democracy. As Mark Bovens and Anchrit Wille explain in a recent study, constitutional watchdogs are ‘engaged in second-order governance tasks, in delivering accountability by monitoring executive actors in the implementation of their first-order governance tasks ... the work of auditors, ombudsmen, and integrity offices [thus] increasingly complements the oversight functions of the established branches of government’;<sup>32</sup> but is not on a level with them.

## Independence and accountability

2.11 Considering constitutional watchdogs in this manner gives focus to their two correlative institutional design features: their independence of, and accountability to political and other public actors. For, in their application of legal and ethical norms to politicians, or determination of matters which directly affect their interests, they should plainly be independent of the political power that is regulated or interested; direct political control would make it impossible for watchdogs to protect democracy and public ethics against threats from the traditional branches. In this sense, their existence is *justified* by their independence.

2.12 Yet, to borrow from Tushnet, watchdog independence is not an ‘unalloyed good’;<sup>33</sup> nor is it an end in itself, to be given priority over other (competing or counterpoising) values.<sup>34</sup> The interminable issue of who guards the guardians requires to be addressed.<sup>35</sup> Accountability is one of the Nolan principles, and applies no less to watchdogs than to those they regulate; these are public bodies performing public functions, and paid for out of public funds. Without lines of accountability into the political system, their recommendations or decisions might not seem legitimate including to those being regulated. When watchdogs operate in areas in which there is clear party-political interest, politicians may be quick to criticise such bodies as out of touch – a claim substantiated in Chapter 6. *In extremis*, ‘too much independence would deprive the

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<sup>31</sup> See, generally, Malcolm Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Washington: Brookings Institution Press, 2000).

<sup>32</sup> Mark Bovens and Anchrit Wille, ‘Indexing Watchdog Accountability Powers, a Framework for Assessing the Accountability Capacity of Independent Oversight Institutions’, *Regulation and Governance*, 2020, 3. See also the discussion of ‘second-order governance’ in Jan Kooiman, *Governing as Governance* (California: SAGE Publications, 2003), 153–69. This role is made explicit, for instance, in the statutory requirement that, ‘[i]n carrying out its functions the IPSA must have regard to the principle that members of the House of Commons *should be supported in efficiently, cost-effectively and transparently carrying out their Parliamentary functions*’: s 3A(2) Parliamentary Standards Act 2009 (emphasis added).

<sup>33</sup> Mark Tushnet, ‘Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries’, *University of Toronto Law Journal* 70, 2020, 104.

<sup>34</sup> Cf. Philip Giddings, ‘The Parliamentary Ombudsman: A Classical Watchdog’ in Oonagh Gay and Barry Winetrobe, eds, *Parliament’s Watchdogs: At the Crossroads* (London: Constitution Unit, 2008), 94.

<sup>35</sup> Gay, ‘Introduction – Watchdogs in Need of Support’, in Oonagh Gay and Barry Winetrobe, eds, *Parliament’s Watchdogs: At the Crossroads* (London: Constitution Unit, 2008), 15. For analogous comments about the need to ‘balance’ the institutional independence and accountability of judges, see Graham Gee *et al.*, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge: Cambridge University Press, 2015), 7–8.



commissions of the political support they require if they are to survive' as permanent constitutional bodies.<sup>36</sup>

2.13 Thus clearly emerges a central conundrum: watchdogs regulating the ethical conduct of parliamentarians, the boundaries of their constituencies and the conduct of their elections are themselves accountable to, and dependent on, these very parliamentarians.<sup>37</sup> It is this central conundrum, and the resulting challenge of finding 'the right combination of structural and practical safeguards to secure an appropriate balance between institutional and "goal" independence on the one hand, and public and Parliamentary accountability on the other',<sup>38</sup> that this report addresses in respect of the subset of watchdogs concerned with politicians' remuneration, election, and regulation of their conduct.

2.14 The following paragraphs develop the concepts of independence and accountability, and the principles underlying them. Four out of the five watchdogs under review perform adjudicatory functions, and the arguments for their independence are similar to the arguments for judicial independence; likewise, the arguments for their accountability.<sup>39</sup> We have therefore drawn on the literature on judicial independence to identify the underlying principles. The fundamental argument for watchdogs' independence – as for judicial independence – is that they must be allowed to issue rulings and resolve disputes impartially, according to the rules and the law, and free from improper pressure, whether from MPs, the government, outside interests or the media. If watchdogs are induced to make decisions or resolve complaints other than through a good-faith adjudication of the facts and determination of the relevant rules and law, then the party being regulated no longer has a reason to accept the fairness or legitimacy of the regulator's decision. And the wider public no longer has reason to trust the impartiality of watchdogs or the fairness of their decisions.

2.15 From this starting point we can identify a number of conditions to underpin the independence of constitutional watchdogs. Again this is based on the generally accepted conditions for judicial independence: there is a wide literature on judicial independence, helpfully distilled into numerous international documents articulating the basic principles.<sup>40</sup> These agreed sets of principles are seen as necessary to uphold the independence of the judiciary as an institution, and the independence of individual judges. Similarly in the list below, drawn from the international

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<sup>36</sup>Mark Tushnet, 'Institutions Protecting Democracy: A Preliminary Inquiry', *Law & Ethics of Human Rights* 12(2), 2018, 192.

<sup>37</sup> Cf. Winetrobe, 'Conclusion – Parliamentary Watchdogs: Time for Decision', in Oonagh Gay and Barry Winetrobe, eds, *Parliament's Watchdogs: At the Crossroads* (London: Constitution Unit, 2008), 116.

<sup>38</sup> Robert Hazell, 'Constitutional Watchdogs' in *Delivering Constitutional Reform: The Collected Briefings of the Constitution Unit* (London: Public Finance Foundation and Constitution Unit, 1997), 96.

<sup>39</sup> This final section draws heavily on Graham Gee *et al.*, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015), 9–24.

<sup>40</sup> For two of the most important international declarations, see UN General Assembly, UN Basic Principles on the Independence of the Judiciary (1985); Commonwealth (Latimer House) Principles on the Three Branches of Government (2008). See also J van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles*, BIICL 2015; S Comtois and K d Graaf, eds, *On Judicial and Quasi-Judicial Independence*, Boom Juridische uitgevers 2013; S Burbank and B Friedman, eds, *Judicial Independence at the Crossroads*, Sage 2013; S Shetreet and S Turenne, *Judges on Trial: Independence and Accountability of the English Judiciary*, Cambridge University Press 2014.

declarations on judicial independence, watchdogs refer both to the institutions and to the people who lead them:

- Watchdogs should have a secure legal status, protected from arbitrary abolition.
- Their powers and functions should not be arbitrarily changed. Changes should only follow widespread consultation, and/or an inquiry by an independent, impartial body.
- Watchdogs should have authority to initiate their own inquiries; to publish their own reports; and to decide the timing of publication.
- Watchdogs should enjoy guaranteed tenure until the expiry of their terms of office. They should only be removed for reasons of incapacity or misconduct that renders them unfit for their office. They should not be eligible for re-appointment.
- There should be a merit-based appointment process that ensures that persons appointed as watchdogs have appropriate experience, with a willingness to make decisions with an open and fair mind according to the rules; and that they are robust and independent-minded, capable of withstanding external pressure.
- If watchdogs are appointed or funded by a committee, that committee should include non-party members, to guard against political self-interest; and if it includes politicians, the committee should be cross-party, with no party having a majority.
- There should be arrangements in place to ensure that constitutional watchdogs receive adequate funds to fulfil their functions, and that their leaders receive fair and secure remuneration.
- There must be a general attitude of respect for watchdogs and their functions within parliament, government and the political system.
- The arrangements for the supervision and accountability of watchdogs (see below) should not be used to undermine their independence.

2.16 These are the core conditions required to buttress the independence of constitutional watchdogs. A similar check list of eight institutional features which buttress independence has been compiled by CSPL.<sup>41</sup> More problematic is their implementation, which is what the rest of this report is about: how the practical requirements of independence have been negotiated and defined in relation to each watchdog, how far they fall short of the ideal conditions set out above, and what is required to remedy the deficiency. As we shall see, the shortfall is greater in terms of the independence of watchdogs than their accountability; but before we describe the arrangements for each of the watchdogs in Chapter 3, we must first explore the accountability side of the equation.

2.17 Accountability is a concept which has become increasingly prominent in public life as politics and government have moved away from systems based on trust to systems based on openness and public explanation. Accountability of the executive to parliament has of course long

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<sup>41</sup> CSPL, *Upholding Standards in Public Life*, final report of Standards Matter 2 review, November 2021, para 2.20.

existed. Outside parliament, accountability is no longer limited to narrow ideas of legality and probity, but now extends to value for money, efficiency, fairness and equality; with a new emphasis on mechanisms such as complaints procedures, ombudsmen, audits and reporting obligations. Despite this extension, at its core accountability remains a simple idea: it involves the giving of reasons or explanations for decisions or conduct. It therefore requires transparency, and the possibility of challenge to those decisions and their reasons.

2.18 Professor Mark Bovens defines accountability as ‘a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences’.<sup>42</sup> Implicit in the capacity to call to account, there is an element of control; control and accountability are linked concepts, operating on a continuum.<sup>43</sup> This takes on a particular salience where the relevant account-holder is drawn from the account-giver’s regulated sector.

2.19 We can identify a number of conditions to ensure the accountability of constitutional watchdogs. Again, this is drawn from the wide literature on accountability, but with specific reference to the more recent literature on judicial accountability.<sup>44</sup>

- Transparency requires publication of board minutes and other papers, and the giving of reasons for decisions.
- Transparency also requires being subject to freedom of information, so that outsiders can request information not readily available.
- The decisions of constitutional watchdogs, especially those imposing a penalty, must be capable of challenge by appeal or judicial review. There must also be mechanisms for hearing complaints.
- The finances of watchdogs must be independently audited.
- Watchdogs can be required to attend parliamentary committees to explain their governance, and stewardship of their resources.
- They can also be required to explain their strategy, policies and performance.
- But when exercising adjudicatory functions, watchdogs are not required to defend individual decisions (which are instead subject to appeal: see above).

2.20 As we shall see, the supervisory role (responsibility for appointing watchdogs, and providing their funding) and the scrutiny role (questioning their strategy, policies and performance) can be performed by different parliamentary committees. But in all cases the emphasis is on explanatory

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<sup>42</sup> Mark Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, *European Law Journal* 13(3), 2007, 447; others similarly consider a *duty* to account as central to the concept: see, e.g., Colin Scott, ‘Accountability in the Regulatory State’, *Journal of Law and Society* 27(1), 2000, 40.

<sup>43</sup> *Ibid.*, 39; as Bovens (‘Analysing and Assessing Accountability: A Conceptual Framework’, *European Law Journal* 13(3), 2007, 454) similarly reflects, ‘[a]ccountability is a form of control, but not all forms of control are accountability mechanisms.’

<sup>44</sup> Graham Gee et al., *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge: Cambridge University Press, 2015), 16-21.

rather than sacrificial accountability. The latter has a strong hold on the constitutional imagination in the UK because of the tradition of ministerial accountability to parliament, and the expectation that ministers will resign in the event of serious failure. But even with ministers, almost all of their accountability is explanatory, through answering parliamentary questions, giving evidence to select committees, responding to debates etc. Constitutional watchdogs are not normally subject to the same intense scrutiny as ministers, but the rationale of their accountability is essentially the same: they are politically accountable to parliament, and legally accountable to the courts, and in both cases the accountability is essentially explanatory – they can be called upon to explain and justify their decisions. But they cannot and should not be punished merely because their decisions are unwelcome or unpopular. This does not mean they are wholly immune: as with judges, they can be dismissed for misconduct. Occasionally sacrificial accountability is required: as happened with the resignation of the Comptroller and Auditor-General Sir John Bourn in 2007 after criticism of his travel expenses. But dismissal should not be possible merely because the government disagrees with a watchdog’s operational decisions: see para 4.10.

2.21 Judicial independence and judicial accountability are sometimes described as two sides of the same coin. This can be a helpful metaphor if applied to watchdogs, insofar as it helps us to grasp that independence and accountability are not in inevitable and irreconcilable tension. If implemented sensitively, accountability can help to bolster trust in watchdogs, which in turn fosters conditions in which their independence is likely to thrive. Accountability can enhance independence more directly: a robust system for declaring conflicts of interest will protect watchdogs’ independence as well as ensuring their accountability.

2.22 If we adopt an explanatory definition of accountability, then several of the conditions for watchdogs’ independence listed above – for example, those relating to removal for misconduct, merit-based appointment and recusal – are also relevant for their accountability. Independence and accountability are realised together in the constitutional design of watchdogs, their governance, and their daily operations. In discussions about how much autonomy watchdogs should have in supervising elections, or sanctioning MPs’ misconduct, or defining parliamentary boundaries – or on the other side how much discretion politicians should have in the appointment, funding or staffing of watchdogs – concerns about independence and accountability are woven together. As one of our interviewees said (see Chapter 6), ‘the stronger a watchdog’s independence, the stronger its accountability needs to be’.

## Conclusion

2.23 This chapter has considered where watchdogs are situated within the traditional separation of powers between executive, legislature and judiciary, and their relationship with the other branches of government. The rationale for the creation of independent watchdogs is that the traditional branches are conflicted when addressing problems of protecting democracy: it requires independence and expertise, qualities not found in the generalist skillset of partisan politicians. But it is a stretch too far to suggest that watchdogs can be a distinct, fourth branch of government; they are not separable from the political institutions by which they are sponsored.

2.24 We prefer to categorise constitutional watchdogs as regulators, regulating democratic processes and ethics in the public domain. They referee and apply rules fairly and consistently,

where the rules are set through existing democratic processes in the executive and legislature. In the application of the rules, the watchdogs should plainly be independent of the politicians they regulate; but they also have to be accountable, as public bodies performing public functions paid for out of public funds. The central conundrum is that in regulating the ethical conduct of parliamentarians, the watchdogs are themselves accountable to, and dependent on, these very parliamentarians.

2.25 The arguments for the independence of watchdogs are similar to the arguments for judicial independence; likewise, the arguments for their accountability. The fundamental argument for watchdogs' independence is that they must be allowed to issue rulings impartially, according to the rules and the law, and free from improper pressure, whether from MPs, the government or outside interests. The second part of this chapter set out a list of conditions necessary to underpin the independence of watchdogs, based on the generally accepted conditions for judicial independence; and a list of conditions necessary to ensure their accountability, based upon the literature on judicial accountability. Constitutional watchdogs are politically accountable to parliament, and legally accountable to the courts: in both cases the accountability is explanatory – they can be called upon to explain and justify their decisions.

2.26 If we adopt an explanatory definition of accountability, then several of the conditions for watchdogs' independence listed in para 2.15 are also relevant for their accountability listed in para 2.19. Independence and accountability are realised together in the constitutional design of watchdogs, their governance, and their daily operations.

# Chapter 3: Governance Arrangements of Five Watchdogs

3.1 This chapter describes in some detail the governance arrangements of the watchdogs under scrutiny.<sup>45</sup> For each watchdog it explains its legal status; role and functions; composition, method and terms of appointment; funding arrangements; and main lines of accountability. Chapter 4 then develops a series of indicators to help determine how much independence and accountability watchdogs have vis-à-vis parliament, the executive and judiciary. These factors, along with our interview findings in Chapter 6, will assist in developing our recommendations as to how watchdogs' independence and accountability might, in practice, be maximised, considered in Chapter 7.

## Boundary Commission for England

3.2 The Boundary Commissions for England, Wales, Scotland and Northern Ireland were first established as permanent statutory bodies in 1944<sup>46</sup> on the principle that the periodic redrawing of constituency boundaries – necessitated by the changing distribution of the electorate over time – ‘should not be undertaken (or even driven) by politicians, who would be likely to promote their sectional interests, but instead allocated to an independent body ... with strong links to Parliament.’<sup>47</sup> They are currently established under the Parliamentary Constituencies Act 1986 (PCA).<sup>48</sup>

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<sup>45</sup> A more comprehensive account of most of these watchdogs' (then) governance arrangements, and their development, may be found in works by Oonagh Gay and Barry Winetrobe: see, e.g., Oonagh Gay and Barry Winetrobe, *Officers of Parliament – Transforming the Role* (London: Constitution Unit, 2003), 51; Oonagh Gay and Barry Winetrobe, eds, *Parliament's Watchdogs: At the Crossroads* (London: Constitution Unit, 2008); Oonagh Gay, *Officers of Parliament: A Comparative Perspective* (Research Paper 03/77) (London: House of Commons Library, 2003); Oonagh Gay, *Officers of Parliament: Recent Developments* (04720) (London: House of Commons Library, 2013).

<sup>46</sup> By the House of Commons (Redistribution of Seats) Act 1944. For a detailed account of the evolution of the Boundary Commissions' legislative framework over time, see DJ. Rossiter *et al.*, *The Boundary Commissions: Redrawing the UK's Map of Parliamentary Constituencies* (Manchester: Manchester University Press, 1999), 76–132.

<sup>47</sup> DJ. Rossiter *et al.*, *The Boundary Commissions: Redrawing the UK's Map of Parliamentary Constituencies* (Manchester: Manchester University Press, 1999), 74; see also *R v Boundary Commission for England, ex parte Foot* [1983] Q.B. 600 (CA) 614–15 for judicial recognition of the importance of the BCE's independence. But note, nonetheless, that the ‘extent to which that [non-partisan] agency will be free of direct political influence may be a matter of dispute. The redistribution rules, for example, may have to be the subject of negotiation between the political parties, although they will in all probability exclude any overtly political considerations. Alternatively, leading parties may be permitted to nominate representatives to membership of the agency, although overt party participation may serve to undermine the perceived neutrality of the agency which can give its recommendations considerable weight.’ Hugh Rawlings, *Law and the Electoral Process* (London: Sweet & Maxwell, 1988), 17. In any event, a measure of party-political bias in the distribution of parliamentary seats may, statistically, be inevitable: *ibid.*, 46–7.

<sup>48</sup> s 2(1) PCA 1986. For further detail on the boundary commissions and a brief history of the redistribution of parliamentary constituencies, see Elise Uberoi and Neil Johnston, *Constituency Boundary Reviews and the Number of MPs*

3.3 The boundary commissions are advisory non-departmental public bodies, independent of parliament, political parties and government; though they are sponsored by the latter, via the Cabinet Office.<sup>49</sup> The BCE's remit is to review and report on the distribution of parliamentary constituencies in England every eight years, with a view to recommending to the UK government a new pattern of constituency boundaries (which must give effect to the Rules of Redistribution prescribed by the PCA<sup>50</sup>); though it may conclude that no change is required.<sup>51</sup>

3.4 The BCE comprises four members.<sup>52</sup> Its chair is the Speaker of the House of Commons, *ex officio*, but by convention the Speaker does not participate in meetings; these are instead led by the deputy chair, a serving High Court judge appointed by the Lord Chancellor.<sup>53</sup> The remaining two members are appointed by the Minister for the Cabinet Office following an open competition. The PCA does not prescribe a term of office for members,<sup>54</sup> though most deputy chairs have served three-year terms, which in some cases have been renewed.<sup>55</sup> The fieldwork and public consultation is led by Assistant Commissioners, also appointed by open public competition.

3.5 The Cabinet Office pays the Commissioners, and Assistant Commissioners, a fee based on days worked, determined by the Minister for the Cabinet Office and approved by the Treasury.<sup>56</sup> The BCE's staff complement, also supplied by its sponsoring department, is fluid: during periods of active constituency review, it averages around 18; during fallow years, it has a 'skeleton staff' as small as 1.4 FTE.<sup>57</sup>

3.6 The BCE is accountable to the Cabinet Office, including for use of public funds through that department's Accounting Officer (a civil servant). The BCE is also accountable to parliament

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(05929) (London: House of Commons Library, 2021). The PCA 1986 was amended by the Parliamentary Voting System and Constituencies Act 2011, which (*inter alia*) modified the Rules of Redistribution so as to reduce the number of UK parliamentary constituencies, from 650 to 600; and the Parliamentary Constituencies Act 2020, which revised the number of UK constituencies back up to 650, and increased the length of time between reviews from five to eight years.

<sup>49</sup> It is notable that the Local Government Boundary Commission for England differs in this respect from the BCE, in that it reports to the Speaker's Committee on the EC; this may be explained by the fact that the local government commission has the added responsibility for reviewing the 'electoral arrangements' operating within local authorities: see ss 56–59 Local Democracy, Economic Development and Construction Act 2009.

<sup>50</sup> See Sch 2 PCA 1986.

<sup>51</sup> s 3(1) PCA 1986. The current constituency boundaries are based on the BCE's Fifth Periodical Review, which was completed in 2005. After two abortive attempts to update the boundaries in 2013 and 2018, the BCE's latest review commenced on 5 January 2021, and must conclude by 1 July 2023: s 3(2)(a).

<sup>52</sup> See Sch 1 PCA 1986.

<sup>53</sup> Sch 1, para 3(a) PCA 1986. As noted by the Home Affairs Committee, *Redistribution of Seats (Second Report of Session 1986–87)*, HC 97-I 1986–87 (London: House of Commons, 1986), '[t]he purpose of these arrangements is to ensure that the Boundary Commissions are independent of political allegiances. We regard this independence as essential to their functioning:' para 4.

<sup>54</sup> Sch 1, para 4 PCA 1986.

<sup>55</sup> E.g., Sir Philip Sales, who was appointed to a three-year term in June 2009; and then re-appointed, before stepping down on becoming a judge of the Court of Appeal in November 2014.

<sup>56</sup> Sch 1, paras 4A and 8 PCA 1986.

<sup>57</sup> Based on data contained in the BCE's Annual Reports from the past ten years (2010-11 to 2020-21).



through the Speaker who chairs it; to whom the BCE submits its periodical reports; and who lays the BCE's reports before parliament.<sup>58</sup>

3.7 The independence of the BCE has recently been augmented by the Parliamentary Constituencies Act 2020: its recommendations may not now be revised by ministers or by parliament once its periodical reports have been issued – they are automatically implemented.<sup>59</sup> Previously, both Houses of Parliament were required to vote on any draft Order in Council giving effect to the BCE's recommendations, and if the draft Order was debated but not approved, the government could lay an amended draft for approval. This inevitably dragged the work of redrawing constituency boundaries into the political arena. This was graphically illustrated when in 1969 the Labour government delayed implementation of the BCE's Second Periodical Review – which, it was thought, would be prejudicial to its election chances – by instructing its MPs to vote against the draft Orders in Council implementing the commission's recommendations.<sup>60</sup> A similar episode occurred under the coalition government in 2012, when the Deputy Prime Minister Nick Clegg announced that the Liberal Democrats would not vote for the Order implementing the report of the boundary commissions, because Conservative backbenchers had failed to support his proposals for Lords reform. The government is now required to draw up a draft Order containing the BCE's final recommendations without amendment, and parliament has no role in approving the Order before it is submitted to Her Majesty in Council for approval.<sup>61</sup>

3.8 The BCE's website indicates that its members meet 'as and when required to deal with the necessary business'. Its workload has big peaks and troughs, determined by the cycle of electoral reviews, as reflected in its staffing arrangements. It met five times in 2018, four times in 2020, and five times in 2021, with no meetings in 2019.<sup>62</sup> Minutes are published online, alongside consultations, reports, registers of interests and its annual reports.<sup>63</sup>

## Electoral Commission

3.9 The EC was established by the Political Parties, Elections and Referendums Act (PPERA) 2000.<sup>64</sup> That Act gives the EC a wide range of roles and functions straddling the executive,

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<sup>58</sup> SS 3(1), (2ZB) PCA 1986. Prior to the passage of the Parliamentary Constituencies Act 2020, it was the Secretary of State who received and laid the reports.

<sup>59</sup> s 2 Parliamentary Constituencies Act 2020.

<sup>60</sup> DJ. Rossiter *et al.*, *The Boundary Commissions: Redrawing the UK's Map of Parliamentary Constituencies* (Manchester: Manchester University Press, 1999), 1–4, 102–4; and Robert Blackburn, *The Electoral System in Britain* (London: Palgrave, 1995), 134–37.

<sup>61</sup> s 4(1) PCA 1986. Ministerial modification of the BCE's recommendations may now be made only on the BCE's own instigation, by submitting a 'statement of modifications' to the Speaker under s 4A – e.g., if there was an error in the original recommendations.

<sup>62</sup> See <<https://boundarycommissionforengland.independent.gov.uk/about-us/the-commissioners/commission-meetings-2020/>>.

<sup>63</sup> Unlike other statutory watchdog bodies, the BCE does not, under the PCA 1986, have legal duty to present an annual report.

<sup>64</sup> s 1(1) PPERA 2000.

legislative and judicial categories.<sup>65</sup> Thus, its core statutory remit includes overseeing (and keeping under review a broad range of matters relating to) UK elections and referendums;<sup>66</sup> registering UK political parties and their recordable donations;<sup>67</sup> and running national referendums held under PPERA.<sup>68</sup> The EC regulates party and election finance – in particular, it may make regulations prescribing the form and content of political parties’ annual accounts and returns as to their campaign expenditure;<sup>69</sup> the EC may set standards of performance for election officials,<sup>70</sup> and must also be consulted on certain changes to electoral law effected by delegated legislation.<sup>71</sup> PPERA was amended by the Political Parties and Elections Act 2009, *inter alia*, to give the EC enhanced investigatory powers, and wider powers to impose civil sanctions on political parties and other regulated actors to support its regulatory functions.<sup>72</sup>

3.10 PPERA created a committee chaired by the Speaker to sponsor the Electoral Commission: to appoint its members, and provide its funding. PPERA (as amended) provides that there will be ‘nine or ten’ Electoral Commissioners, each appointed by the Queen on an Address from the House of Commons on the recommendation of the Speaker’s Committee (SCEC).<sup>73</sup> The Commissioners include a chair and three members responsible for Scotland, Wales and Northern Ireland. Originally all the Commissioners were apolitical: a requirement guaranteed by statute, in line with the CSPL’s original recommendations (under Lord Neill).<sup>74</sup> On revisiting the issue, the CSPL (under Sir Alastair Graham) revised its opinion and, following PPEA’s enactment, four Commissioners are nominated by party leaders – with three representing the three largest political parties, and one representing the smaller parties at Westminster.<sup>75</sup> The political Commissioners are intended to maintain links with the political parties, to provide political context and understanding, and guard against the Commission’s policies or requirements being regarded as naïve or unrealistic. The Electoral Commission has also established a Parliamentary Parties Panel whose function is to keep the Commission informed about matters affecting the political parties.

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<sup>65</sup> See, too, Keith Ewing, ‘Transparency, Accountability and Equality: The Political Parties, Elections and Referendums Act 2000’, *Public Law*, 2001, 565–68.

<sup>66</sup> Variousy encompassed by ss 5–6B, 9B–9C PPERA 2000.

<sup>67</sup> ss 23, 28 and 69 PPERA 2000.

<sup>68</sup> Part VII of PPERA 2000. The EC’s chairman (or his delegate) is the Chief Counting Officer: s 128(2). Other ‘executive’ functions include the giving of advice and guidance on electoral matters to various bodies including political parties, devolved legislatures and election officials; and the promotion of public awareness about electoral systems and elections themselves: ss 10, 13.

<sup>69</sup> ss 42(2)(a) and 80(6); Sch 1, para 22 PPERA 2000.

<sup>70</sup> s 9A PPERA 2000.

<sup>71</sup> s 7 PPERA 2000.

<sup>72</sup> ss 145–47; Sch 19B and Sch 19C PPERA 2000. The EC’s regulatory and enforcement role has been emphasised under s 38 Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014, which amends s 145 to give the EC a *duty* to ‘monitor, and take all reasonable steps to secure, compliance with’ the PPERA regulatory regime; and not merely the ‘general function’ of so doing.

<sup>73</sup> ss 1(3)–(5), 3 PPERA 2000.

<sup>74</sup> s 3(4). See Fifth Report of the Committee on Standards in Public Life, *Standards in Public Life: The Funding of Political Parties in the United Kingdom*, Cm 4057–I (London: HMSO, 1998), para 11.8.

<sup>75</sup> s 3A PPERA 2000 Act; s 5 PPEA 2009. See Eleventh Report of the Committee on Standards in Public Life, *Review of the Electoral Commission*, Cm 7006 (London: HMSO, 2007), paras 3.20–34.

3.11 Commissioners may be appointed for a maximum term of 10 years,<sup>76</sup> and may be re-appointed if the Speaker's Committee so recommends.<sup>77</sup> The party leaders need to consent to the appointment of Commissioners (including the chair). Commissioners may be removed from office by the Queen, on an Address from the Commons; but this must follow a report from the Speaker's Committee, stating its case that a statutory reason for removal is made out in respect of the Commissioner.<sup>78</sup>

3.12 The EC's chair is paid an annual salary (£70,000 in 2019–20 for two days a week<sup>79</sup>), and the other Commissioners receive a fee based on the number of days worked: by a resolution of the House of Commons, Commissioners' fees increase on 1 April each year, by the percentage increase awarded to High Court judges; a similar arrangement applies to the chair's salary.<sup>80</sup> Both are paid out of the Consolidated Fund. During 2019–20, the EC had an average staff of 153 FTE, and 134 in 2018–19.<sup>81</sup>

3.13 SCEC has nine members, and is chaired by the Speaker; for details of the committee's functions, size and composition, see Table 3.1 below. By statute, the committee includes the Secretary of State responsible for elections, the Minister for local government, the chair of the select committee responsible for scrutinising elections (in 2022, Clive Betts MP, chair of the DLUHC Committee), and five other backbench MPs appointed by the Speaker.<sup>82</sup> The power to appoint five members effectively gives the Speaker control of the party balance on the committee. Previous Speakers have agreed that no single party should have a majority.<sup>83</sup> But in the current parliament, the Speaker's initial appointments gave the committee a Conservative majority – five members – against two Labour and one SNP; by comparison, in the previous parliament, the committee had four Conservative members, three Labour and one SNP.<sup>84</sup>

3.14 The EC's chief executive is an Accounting Officer answerable to the Speaker's Committee for the proper expenditure of public money.<sup>85</sup> The EC is also subject to audit by the National

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<sup>76</sup> s 3(3) PPERA 2000.

<sup>77</sup> s 3(5), (5A) PPERA 2000.

<sup>78</sup> Sch 1, para 3(4)–(5) PPERA 2000. This is similar to the statutory protection against dismissal afforded to senior judges: see s 11(3) Senior Courts Act 1981.

<sup>79</sup> Electoral Commission, *Annual Report and Accounts 2019–20*, HC 597 (London: Electoral Commission, 2020) records a salary of £80,523: p 60, but Sir John Holmes says it was approx £70,000. The previous chair Jenny Watson was paid £100,000 for three days a week. The discrepancy in the figures for Sir John Holmes may be employer's pension contribution.

<sup>80</sup> HC deb vol 365 cols 784–785, 26 March 2001 and HC deb vol 423 cols 1379–1380, 13 July 2004.

<sup>81</sup> See, respectively, Electoral Commission, *Annual Report and Accounts 2019–20*, HC 597 (London: Electoral Commission, 2020), 70; *Annual Report and Accounts 2018–19*, HC 2482 (London: Electoral Commission, 2019), 75.

<sup>82</sup> s 2(2)–(4) PPERA 2000. These members may be re-appointed: Sch 2, para 2(5).

<sup>83</sup> CSPL *Review of the Electoral Commission*, Cm 7006 para 4.12, January 2007. For a different formulation, that there should be balance between government and opposition, see Mike O'Brien reporting the views of then Speaker Betty Boothroyd: HC deb vol 346 cols 92–93, 13 March 2000.

<sup>84</sup> Speaker's Committee on the Electoral Commission, *Work of the Committee 2017–18* (Fourth Report of Session 2017–19), HC 1786 2017–19 (London: House of Commons, 2018) paras 3–7; *Work of the Committee in 2018–19* (First Report of Session 2019–21), HC 277 2019–21 (London: House of Commons, 2020), paras 3–4; *Work of the Committee in 2019–20* (Fifth Report of Session 2019–21), HC 794 2019–21 (London: House of Commons, 2020), paras 3–5.

<sup>85</sup> Sch 1, para 19 PPERA 2000.

Audit Office (NAO); in 2019–20, its annual budget was £22.2 million.<sup>86</sup> The Commissioners meet monthly with the EC’s senior officials, with board minutes published on the website alongside annual reports, corporate plans and registers of interest. Both the EC and the SCEC must report to the House of Commons annually on the exercise of their functions.<sup>87</sup> The EC has made frequent appearances before parliamentary committees (both select committees and bill committees), and is also accountable to the Scottish Parliament and the Senedd. It publishes statutory reports on elections and referendums, and produces reports on wider issues such as electoral registration and digital campaigning, making recommendations as necessary. The EC has a social media presence.

**Table 3.1: The Speaker’s Committees, and the Standards Committee**

	Speaker’s Committee on Electoral Commission (SCEC)	Speaker’s Committee on IPSA (SCIPSA)	Select Committee on Standards
Legal basis	PPERA 2000 s2 and Sch 2	PSA 2009 s3(5) and Sch 3	SO no. 149
Function	Appoint Electoral Commissioners and approve EC’s budget	Appoint board of IPSA and approve its budget	Draft MPs’ Code of Conduct; oversee work of the PCS; consider PCS’s reports on breaches of the Code
Size	9 members	11 members	14 members
Composition	Speaker; 2 Ministers; 1 select committee chair; 5 backbenchers appointed by the Speaker	Speaker; Leader of the House; chair of Standards Cttee; 5 backbenchers appointed by the House; 3 lay members appointed by the House	7 MPs and 7 lay members appointed by the House
Party balance of MPs on committee in 2022 (excluding Speaker)	4 Con, 3 Lab, 1 SNP	4 Con, 2 Lab, 1 SNP	4 Con, 2 Lab, 1 SNP (Labour chair)
Lay members	None	3 lay members	7 lay members

## Independent Parliamentary Standards Authority

<sup>86</sup> Electoral Commission, *Annual Report and Accounts 2019–20*, HC 597 (London: Electoral Commission, 2020), 34–5.

<sup>87</sup> Sch 1, para 20 (see also s 145(6B)), Sch 19B, para 15 and Sch 19C, para 27); Sch 2, para 1(1) PPERA 2000.

3.15 IPSA was set up by the Parliamentary Standards Act 2009 as a statutory body, independent of parliament, government and political parties.<sup>88</sup> This was done in direct response to the MPs' expenses scandal,<sup>89</sup> and, as with the Parliamentary Commissioner for Standards, its creation is 'evidence of the withdrawal from the paradigm of self-regulation [in Westminster]. This is in line with the approach taken by most professions which recognise that a degree of independent regulation is necessary, not least for ensuring public confidence.'<sup>90</sup> IPSA's remit is to provide independent regulation and administration of MPs' pay, pensions, business costs and expenses. IPSA sets the rules by which MPs are paid their business costs and expenses, and then regulates and administers those rules.<sup>91</sup>

3.16 It may, in conjunction with its Compliance Officer (see below), enforce its allowances regime by means of repayment directions, backed up by powers to impose civil monetary penalties on non-compliant MPs.<sup>92</sup> IPSA's remit was extended by the Constitutional Reform and Governance Act (CRAG) 2010 to give it the added responsibility of setting MPs' pay and pensions.<sup>93</sup>

3.17 IPSA's board is required to have five members. Apart from the chair, one must be a former judge, one a former MP and one a qualified accountant.<sup>94</sup> Each is selected for appointment by the Speaker of the House of Commons, following an open recruitment process, and appointed by the Queen on an Address from the House of Commons.<sup>95</sup> Their terms of appointment are for five years; members may be re-appointed for a further term of up to three years.<sup>96</sup> They may only be removed from office by the Queen, on an Address from both Houses of Parliament.<sup>97</sup>

3.18 IPSA's chair and board members receive a *per diem* fee; this is determined by the Speaker – currently, £700 for the chair and £400 for the members – and has not been varied since 2009. During 2019–20, IPSA had an average staff of 83 FTE, and 71 in 2018–19.<sup>98</sup>

3.19 Like the EC, IPSA is accountable to a Speaker's Committee (SCIPSA), a statutory creature chaired by the Speaker of the House of Commons.<sup>99</sup> Similarly to the SCEC, this committee is

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<sup>88</sup> s 3(1) PSA 2009.

<sup>89</sup> Emma Crewe and Andrew Walker, *An Extraordinary Scandal: the Westminster Expenses Crisis and Why it still matters*, Haus Publishing 2019.

<sup>90</sup> Navraj Ghaleigh, 'Politics as a Profession: Electoral Law, Parliamentary Standards and Regulating Politicians', *Public Law*, 2012, 671.

<sup>91</sup> See ss 4–7, and Sch 1, para 18 PSA 2009; Sch 6, paras 12 and 15 Constitutional Reform and Governance Act 2010. The PSA 2009 requires that, '[s]o far as possible the IPSA's administration functions and its regulation functions must be carried out separately, so that one set of functions does not adversely affect the carrying out of the other': Sch 1, para 17(2).

<sup>92</sup> Sch 4, paras 1, 5, 6 and 12 PSA 2009.

<sup>93</sup> s 29 and Sch 6 CRAG 2010. This followed the CSPL's recommendations in the Twelfth Report of the Committee on Standards in Public Life, *MPs' Expenses and Allowances: Supporting Parliament, Safeguarding the Taxpayer*, Cm 7724 (London: HMSO, 2009), paras 13.27–35.

<sup>94</sup> Sch 1, para 1 PSA 2009.

<sup>95</sup> Sch 1, para 2 PSA 2009.

<sup>96</sup> Sch 1, para 4 PSA 2009.

<sup>97</sup> Sch 1, para 5(3)–(4) PSA 2009.

<sup>98</sup> See, respectively, Independent Parliamentary Standards Authority, *Annual Report and Accounts for 2019–20*, HC 1109 (London: HMSO, 2021), 17; *Annual Report and Accounts for 2018–19*, HC 11 (London: HMSO, 2019) 17.

<sup>99</sup> s 3(5)–(6) PSA 2009.

responsible for appointing the board members of IPSA, and for overseeing and approving its annual budgets.<sup>100</sup> The Speaker must also lay IPSA's annual report before parliament.<sup>101</sup> The power to approve the budget can (and has) been used to influence policy, through threatening to block the relevant Supply Estimate.

3.20 Details of the Speaker's Committee are in Table 3.1 above. By statute, the Speaker's Committee comprises the Leader of the House, the chair of the Standards Committee, and five other MPs appointed by the House of Commons. The Leader of the House consults the Speaker and receives nominations from the whips before laying the appointments motion before the House. There are also three lay members on the Committee, each appointed by open recruitment for a fixed, non-renewable period of five years.<sup>102</sup> Apart from the Speaker, in June 2022, the committee had four Conservative members, two Labour and one SNP, giving it a Conservative majority amongst the political members. In the previous parliament, the committee had three Conservative members, three Labour and one SNP, giving it an opposition majority. The committee thus reflected the composition of the House as a whole; but there is no requirement that it should do so. Indeed, in the case of SCEC, the government stated during the passage of PPERA, 'there will be no requirement on the Speaker to ensure that the membership of the Committee as a whole reflects the balance of the parties in the House'.<sup>103</sup>

3.21 The chief executive of IPSA is an Accounting Officer,<sup>104</sup> answerable to the Speaker's Committee for the proper expenditure of public money. In 2019–20, its annual budget was £230 million, most of which paid the running costs for MPs' offices.<sup>105</sup> IPSA is subject to NAO audit, and its chief executive can be called before the Public Accounts Committee. The chief executive and chair of IPSA can also be (and have been) regularly called to appear before other Commons select committees including the Administration Committee, the Standards Committee, and groupings of party MPs such as the 1922 Committee of the Conservative party, the Parliamentary Labour party, and the SNP Group of MPs in Westminster.

3.22 IPSA's board generally meets at least once a month, with *ad hoc* sub-committees established as necessary.<sup>106</sup> There were 10 board meetings held in 2019, 13 in 2020, and eight in 2021. Minutes are published on the website, alongside annual reports and consultations on changes to the rules relating to MPs' pay and expenses. All spending made by MPs is published every two months, with a cumulative publication of data relating to the previous financial year each autumn.

3.23 IPSA, uniquely, has a further accountability forum in its Compliance Officer, a post created by CRAG.<sup>107</sup> This independent post-holder,<sup>108</sup> often a former police officer, has the power, on his

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<sup>100</sup> Sch 1, paras 2(5), 22(2)–(6) PSA 2009.

<sup>101</sup> Sch 1, para 25 PSA 2009.

<sup>102</sup> Sch 3, paras 1, 2A PSA 2009.

<sup>103</sup> Mike O'Brien MP, HC deb 13 March 2000, vol 346 at col 92.

<sup>104</sup> Sch 1, para 23(4) PSA 2009.

<sup>105</sup> Independent Parliamentary Standards Authority, *Annual Report and Accounts for 2019–20*, HC 1109 (London: HMSO, 2021), 43.

<sup>106</sup> Sch 1, para 12 PSA 2009.

<sup>107</sup> See Sch 2 to PSA 2009.

<sup>108</sup> As case-law has elaborated, '[t]he Compliance Officer is not an officer of IPSA. His status is separate and independent ...' (*McGovern v Compliance Officer for the Independent Parliamentary Standards Authority* [2013] UKFTT 206 (TC))

or her own initiative, at the request of MPs or of the public, to investigate expenses payments paid by IPSA to MPs;<sup>109</sup> and, at the instigation of the MP concerned, to review IPSA's decision that his or her claim should be refused or only partly allowed.<sup>110</sup> She may, moreover, refer matters to the police where fraud is suspected.<sup>111</sup> In 2018–19 and 2019–20, respectively, the Compliance Officer reported that two and three such referrals had been made to the police.<sup>112</sup>

## Parliamentary Commissioner for Standards

3.24 The PCS was created in 1995 in response to the cash-for-questions scandal and the first report of CSPL.<sup>113</sup> It is not a statutory office. Under Standing Order 150 the PCS is an officer of the House of Commons, appointed by the House and from outside the House, independent of government and political parties. His or her principal duties include maintaining the Register of Members' Financial Interests, giving confidential advice on registration to MPs, investigating alleged breaches of the MPs' Code of Conduct, and reporting on those investigations to the House of Commons' Select Committee on Standards.<sup>114</sup> Since July 2018, the PCS has also investigated complaints about bullying, harassment or sexual misconduct under the Independent Complaints and Grievance Scheme (ICGS).<sup>115</sup> The PCS has independent powers of investigation;<sup>116</sup> and, following investigation, may decide to resolve relatively minor breaches without reference to the Committee or the House.<sup>117</sup>

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[16]); '[t]he Compliance Officer and IPSA are separate persons ... IPSA is a body corporate, but the Compliance Officer is an individual office-holder' (*Byrne v Independent Parliamentary Standards Authority* [2017] UKFTT 88 (TC) [16]).<sup>109</sup> s 9 PSA 2009; the Compliance Officer may make a specific finding that an MP's being paid an amount under the scheme, which should not have been allowed, was wholly or partly the IPSA's fault: s 9(6).

<sup>110</sup> s 6A(1)–(4) PSA 2009; see Chapter 5.

<sup>111</sup> See the Joint Statement by the IPSA and the Compliance Officer for the IPSA with regard to the Metropolitan Police and Director of Public Prosecutions.

<sup>112</sup> See, respectively, Independent Parliamentary Standards Authority, *Annual Report and Accounts for 2018–19*, HC 11 (London: HMSO, 2019), 79; Independent Parliamentary Standards Authority, *Annual Report and Accounts for 2019–20*, HC 1109 (London: HMSO, 2021), 77.

<sup>113</sup> CSPL, *Standards in Public Life*, Cm 2850, ch 2.

<sup>114</sup> SO 150(2).

<sup>115</sup> SO 150(2)(f).

<sup>116</sup> Under SO 150(2)(e), the PCS may 'investigate, if he thinks fit, specific matters which have come to his attention relating to the conduct of Members ...'. Prior to SO 150's amendment in December 2010, the PCS could only 'receive and, if he thinks fit, investigate specific complaints from Members and from members of the public ...' (emphasis added). Further, as of 7 January 2019, the PCS is no longer 'expect[ed] ... to consult [the Committee on Standards] before exceptionally initiating an inquiry into a former Member or in respect of a matter which goes back more than seven years': compare the 2019 edition of *The Guide to the Rules relating to the Conduct of Members*, HC 1882 (London: House of Commons, 2019) with the 2015 edition, HC 1076, Chapter 4, para 11.

<sup>117</sup> SO 150(4); the PCS might determine that certain minor breaches of the rules of the House can be 'rectified' by apology, repayment, etc., without a more formal sanction. At the other extreme, the PCS may refer the matter to the police if an investigation uncovers evidence of possible criminality. He or she is no longer obliged to consult with the Committee before so doing: see Committee on Standards, *The House of Commons and the Criminal Law: Protocols between the Police and the Parliamentary Commissioner for Standards and the Committee on Standards (Tenth Report of Session 2019–21)*, HC 883 2019–21 (London: House of Commons 2020).

3.25 The PCS is appointed by resolution of the House of Commons on the recommendation of the House of Commons Commission, following an open competition.<sup>118</sup> The term of appointment is for five years, which may not be renewed.<sup>119</sup> The post-holder may, likewise, be dismissed following a resolution of the House; though this may only be moved by a Member of the House of Commons Commission, after the Committee on Standards has reported to the House that it is satisfied that the PCS is unfit to hold office or unable to carry out his or her functions.<sup>120</sup>

3.26 The PCS's salary and formal work commitment have varied with each appointment: for instance, John Lyon was appointed (January 2008) on the basis of a four-day week at an annual salary of £108,000. The current PCS, Kathryn Stone, was initially appointed (January 2018) on the basis of a three-day week 'at a salary commensurate with the seniority of the post'.<sup>121</sup> Since she assumed the additional responsibility for investigating complaints under the ICGS, the position has become full time, at a salary of £115-120,000. The PCS's staff has similarly varied – the office had just over six staff FTE during 2014–15, and has grown incrementally over the years in line with increasing demands on the office.<sup>122</sup>

3.27 The PCS publishes annual reports on his or her work, and the outcome of investigations into MPs' conduct or failure to register a relevant interest, on the PCS website. High profile cases have included the investigations into the conduct of Keith Vaz (suspended for six months in October 2019), Owen Paterson (who resigned in November 2021), and Boris Johnson for repeated failure to maintain his entry in the Register of Interests. A Register of Financial Interests is published every fortnight when the House is sitting. Outcomes of investigations under the new Independent Complaints and Grievance Scheme for MPs' staff (ICGS) are not published, nor are any details about ongoing investigations.

3.28 The Committee on Standards is responsible for overseeing the work of the PCS, and considers any alleged breaches of the Code of Conduct referred to it by the PCS.<sup>123</sup> Details of the Standards Committee are in Table 3.1 above. The committee now comprises seven MPs, and seven non-political lay members;<sup>124</sup> the lay members are selected on the basis of fair and open

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<sup>118</sup> SO 150(1). The position was advertised in March 2022: see GatenbySanderson, GSe85601.

<sup>119</sup> See HC deb vol 407 cols 1239–1258, 26 July 2003. The then Leader of the House of Commons, Peter Hain MP, noted that '[t]he proposals to improve the Commissioner's security of tenure and to make the appointment for a fixed term and non-renewable, comprise a package that is designed to reinforce both the reality and the public perception of the Commissioner's independence': col 1243.

<sup>120</sup> SO 150(13): any such report must include a statement of the Committee's reasons for its conclusion. Prior to SO 150's amendment in June 2003, the PCS was summarily dismissible by resolution.

<sup>121</sup> See House of Commons Commission, Parliamentary Commissioner for Standards: Nomination of Candidate, HC 1096 2006–07 (London: House of Commons 2007), para 12; Parliamentary Commissioner for Standards: Nomination of Candidate, HC 294 2017–19 (London: House of Commons, 2017), para 12.

<sup>122</sup> See Parliamentary Commissioner for Standards, *Annual Report 2014–15*, HC 329 (London: House of Commons 2015), para 173; and, e.g., *Annual Report 2017–18*, HC 1256 (London: House of Commons 2018), para 54; *Annual Report 2018–19*, HC 2559 (London: House of Commons, 2019), para 72; *Annual Report 2019–20*, HC 616 (London: House of Commons, 2020), Appendix 1; *Annual Report 2020–21*, HC 309 (London: House of Commons, 2021), 5.

<sup>123</sup> SO 149(1).

<sup>124</sup> SOs 149(2), 149A(4). The first lay members were appointed under SO 149A in January 2013, following an amendment to the SOs in March 2012.



competition, and each serves a non-renewable term of up to six years.<sup>125</sup> The chair of the Standards Committee is an opposition member; but, as for all select committees, the party balance on the committee reflects the overall party balance in the House. In the current parliament, this means there is a Conservative majority amongst the political members – four members – against two Labour members and one SNP; whereas, in the previous parliament, there were three Conservative MPs, three Labour and one SNP. The PCS may also be called to appear before other groups of MPs and select committees, as is the case with all other officers of the House.

3.29 The new Independent Complaints and Grievance Scheme (ICGS) has dramatically changed the whole disciplinary system, with a new code, the Behaviour Code, and an entirely independent process, which bypasses the Standards Committee. Complaints of bullying and harassment or sexual misconduct can be brought against parliamentary staff as well as MPs; they are investigated by an independent external investigator, who reports to the Parliamentary Commissioner for Standards. The PCS decides whether to uphold the complaint, and in serious cases refers the case to an Independent Expert Panel (IEP) to determine the penalty. The IEP (created in 2020, and currently chaired by Sir Stephen Irwin, former Court of Appeal judge) also hears appeals against decisions of the PCS. The most high-profile case to date is that of the former Speaker John Bercow, who appealed against the PCS’s decision that he had been guilty of bullying and harassment on 21 separate occasions: in March 2022 the IEP upheld the PCS’s decision.<sup>126</sup>

3.30 In complaints under the Code of Conduct the Standards Committee remains in charge; but with independent elements in the form of the PCS, and the lay members on the Standards Committee. As part of its review of the Code of Conduct the Standards Committee asked Sir Ernest Ryder (another former Court of Appeal judge) to consider whether the procedures were compatible with fairness and natural justice. Ryder advised that excluding MPs from the process would damage the constitutional basis for the standards jurisdiction, and felt it was unnecessary to codify the procedures in legislation. The inquisitorial procedure was fair and compliant with Article 6 ECHR (the right to a fair hearing), but the PCS should not be the first decision maker. Instead this should pass to the Standards Committee, adjudicating on the basis of reports from the PCS, but there should be a right of appeal from the Committee to the Independent Expert Panel with its judicial expertise. The IEP would thus hear appeals against decisions by the Standards Committee that an MP had breached the Code of Conduct, as well as appeals in ICGS cases under the Behaviour Code. To avoid the debacle when the House supported an amendment to overturn the proposed suspension of Owen Paterson MP,<sup>127</sup> Ryder recommended that reports on serious disciplinary cases should be voted on by the whole House without amendment or debate.<sup>128</sup>

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<sup>125</sup> SO 149A(2), (3) and (5). This followed a recommendation of the Committee on Standards, which had argued for fixed terms capable of withstanding a dissolution of the parliament: ‘Lay Members need to understand the House without being in place long enough to be “captured” by it’: Committee on Standards, *The Standards System in the House of Commons (Sixth Report of Session 2014–15)*, HC 383 2014–15 (London: House of Commons, 2015), para 89. Prior to the relevant (March 2015) amendment to SO 149A, lay members’ tenure lasted only for the duration of the parliament; but could be reappointed for a further two years during the subsequent parliament: see SO 149A(6)–(8) of 24 May 2012.

<sup>126</sup> Independent Expert Panel, *The Conduct of Mr John Bercow*, HC 1189, March 2022.

<sup>127</sup> Richard Kelly, *Standards in the House of Commons (9359)* (London: House of Commons Library, 2021).

<sup>128</sup> Committee on Standards, *Review of Fairness and Natural Justice in the House’s Standards System (Sixth Report of Session 2021–22)*, HC 1183 2021–22 (London: House of Commons, 2022).

3.31 The whole disciplinary system has changed dramatically in the last 10 years, and is still changing. What was essentially a system of self-regulation, with the potential for self-interest and abuse, has evolved into a system with strong independent elements. Important amongst those is the introduction of lay members, first recommended in 2009 by CSPL. In 2013 just three lay members were introduced alongside 10 MPs; in 2016 the numbers became seven lay members with seven MPs; and in 2019 the lay members gained full voting rights. Our interviewees suggested ‘lay members are in the driving seat most of the time’: they have more time than MPs, they read the papers more carefully and can attend more frequently, and effectively they are in the majority because the chair has only a casting vote. This does not mean they speak or vote as a block; on policy issues such as outside earnings there is the same range of views amongst lay members as MPs; and in disciplinary matters likewise. But the presence of lay members has transformed the committee with their professional and disciplinary expertise, ensuring that it conducts itself in an independent and impartial way.

3.32 Lay members are recruited in an open process which attracts a lot of competition: the last recruitment in 2021 saw 265 applicants. These were reduced to a shortlist of four, interviewed by a selection panel chaired by an external member of the House of Commons Commission, alongside the chair of the Standards Committee and one of its lay members, and a senior Commons official.<sup>129</sup> The panel reports to the Commission, and the Speaker submits the Commission’s report to a vote in the House. Politics can still intrude at that final hurdle, as happened in November 2020 when the Leader of the House of Commons, Jacob Rees-Mogg, declined to support the nomination of one of the candidates, Melanie Carter. She appeared well qualified, as an experienced solicitor and tribunal judge; but Rees-Mogg objected on the ground that she had been politically active, even though her political activity had been declared and was known to the Commission which approved her nomination. The chair of the Standards Committee, Chris Bryant MP, and Sir Bernard Jenkin MP (a senior member of the committee) both protested, but after a fractious debate followed by a whipped vote her nomination was voted down.<sup>130</sup>

## Committee on Standards in Public Life

3.33 The CSPL is different from the previous bodies in having no connection with parliament, and no executive or disciplinary functions. We have included it in our study because of its broad advisory remit covering the same areas. It is an advisory non-departmental public body, sponsored by the Cabinet Office. It was established by Prime Minister John Major in 1994 as ‘standing machinery to examine the conduct of public life and to make recommendations on how best to ensure that standards of propriety are upheld’,<sup>131</sup> and its terms of reference have, at various points, been amended.

3.34 The CSPL advises the Prime Minister on ethical standards in public life, including by conducting broad inquiries into standards of conduct of public office holders, assessing

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<sup>129</sup> House of Commons Commission, *Lay Members of the Committee on Standards: Nomination of Candidate*, HC 474, (London: House of Commons, 2021).

<sup>130</sup> HC deb vol 683 cols 843–864, 10 November 2020.

<sup>131</sup> HC deb vol 248 col 758, 25 October 1994.

institutions and policies, and reporting on its findings. As examples of its scope, recent reports have concerned such issues as public standards and artificial intelligence; local government ethical standards; MPs' outside interests; a wider review of standards in public life; and the role of leadership in embedding those standards. The CSPL, as an advisory body, has no statutory powers – it cannot investigate individual cases of misconduct in public office, nor compel witnesses to provide evidence.

3.35 The committee comprises a chair appointed by the Prime Minister, alongside four independent members, appointed by open competition, and three political members appointed by the Prime Minister following nominations by leaders of the Conservative, Labour and Liberal Democrat parties. The term of office for the chair and independent members is five years, non-renewable; the political members serve three-year, renewable terms. They give the committee greater political credibility, but occasionally make it harder to reach consensus; in CSPL's 2011 inquiry into party funding one political member refused to sign the report, leading another to follow suit.<sup>132</sup>

3.36 CSPL's chair currently receives an annual salary of £36,000 on the basis of five to six days' work per month,<sup>133</sup> though these arrangements have varied over the years: for instance, Sir Christopher Kelly was paid an annual salary of £50,000, whereas the chairs preceding and succeeding him each received a *per diem* fee, for a commitment of two to three days a month.<sup>134</sup> The other members, other than the political appointees, also receive a daily fee. The CSPL's secretariat comprises five full-time civil servants.

3.37 CSPL is directly accountable to the Prime Minister and Cabinet Office. Its chair is also periodically called before parliamentary select committees, particularly PACAC.

3.39 The committee meets approximately 10-11 times a year, according to its minutes, which (since 2017) are published online alongside CSPL reports and consultations, an annual report of the committee's work and a register of interests. The committee also has a social media presence.

## Conclusions

3.40 The five bodies described in this chapter have important similarities, but also many differences: their key features are summarised in the following table.

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<sup>132</sup> Thirteenth Report of the Committee on Standards in Public Life, *Political party finance: Ending the big donor culture*, Cm 8208 (London: HMSO, 2011). The dissenters were Margaret Beckett and Oliver Heald.

<sup>133</sup> As of Lord Evans' appointment in November 2018: see Committee on Standards in Public Life, *Annual Report 2018–19*, Annex G; but cf. Committee on Standards in Public Life, *Annual Report 2020–21*, Annex I; Cabinet Office Centre for Public Appointments, *Chair – Committee on Standards in Public Life*, May 2018 and accompanying text.

<sup>134</sup> See Committee on Standards in Public Life, *Annual Report 2006–07*, Appendix 2; *Annual Report 2012–13*, Appendix 2; *Annual Report 2013–14*, Appendix 2.

**Table 3.2: Legal Status, Remit, Composition and Accountability of the five Watchdogs**

Watchdog	Status	Remit	Composition	Accountable to
BCE	Statutory Body PCA 1986 s.2(1)	Reviews the distribution of parliamentary constituencies in England	4 members, incl. Speaker of the House of Commons and a serving High Court Judge	Cabinet Office & parliament
EC	Statutory Body PPERA 2000 s.1(1)	Oversees UK elections & referendums.  Registers political parties.  Regulates parties and election finance.  Has investigatory powers	9/10 Commissioners appointed on recommendation from the Speaker's Committee.  Mix of political and apolitical members.  Renewable term, maximum 10 years	Speaker's Committee on the EC.  Other Select Committees, e.g. PACAC
IPSA	Statutory Body PSA 2009	Develops and regulates rules regarding MPs' pay, pensions, business costs, and expenses	5 board members serving 5 year terms, renewable for up to 3 years.	Compliance Officer.  Speaker's Committee on IPSA
PCS	Non-Statutory Standing Order 150	Maintains the Register of Members' Financial Interests.  Investigates & reports on alleged breaches of the MPs' Code of Conduct	Single office holder.  Non-renewable 5 year term	Committee on Standards
CSPL	Non-Statutory Advisory Body	Advises the PM on ethical standards in public life	The Chair & 4 independent members serve 5 year non-renewable terms.  3 political members serve 3 year terms, renewable	Prime Minister & Cabinet Office

# Chapter 4: Analysis of Governance Arrangements: Indicators of Independence and Accountability

4.1 Extrapolating from the governance profiles in the previous chapter, and drawing on the literature on watchdogs' institutional design, this chapter identifies the main factors contributing to watchdog independence and accountability. The factors are inevitably inter-related, and cannot be treated as wholly discrete items. As has been noted in the context of judicial independence, 'debates about the practical implications of independence and accountability go hand-in-hand, culminating in difficult and disputed decisions about how to ensure that judges have sufficient independence to fulfil their ... role and manage their collective affairs, whilst at the same time ensuring adequate accountability.'<sup>135</sup>

4.2 Three preliminary issues should be noted. First, independence features more strongly than accountability: the chapter lists 15 factors affecting watchdogs' independence, and only nine factors affecting their accountability. Second, in discussing independence, a basic but critical question is independence from whom – in the context of constitutional watchdogs, this chiefly refers to parliament or the executive. As Chapter 3 indicates, institutional design choices inevitably involve a trade-off: '[i]ndependence from government can be ensured and fortified by a formal parliamentary connection, but this brings with it a degree of dependence on parliament.'<sup>136</sup> However, as the following analysis suggests, effective design should be capable of mitigating any 'substituted' dependence. As an added complicating factor, this issue is not binary, given that:

Above all, parliaments are forums for the operation of party politics by party politicians seeking re-election and advancement, and so all parliamentary activities, including any [watchdog] oversight and governance, are political and politicised to some degree or other. It is hardly surprising that, while watchdogs often look to parliaments for protection against executive interference, they are wary of moving too close to them for similar reasons.<sup>137</sup>

4.3 Third, as to accountability, this is a term susceptible of various interpretations and definitions. Nonetheless, as we saw in para 2.18, it refers to a relational mechanism that can be analysed within the framework of the questions: who is accountable, to whom, for what and

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<sup>135</sup> Graham Gee et al., *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015), 8–9.

<sup>136</sup> Oonagh Gay and Barry Winetrobe, *Officers of Parliament – Transforming the Role* (London: Constitution Unit, 2003), 11.

<sup>137</sup> Winetrobe, 'Conclusion – Parliamentary Watchdogs: Time for a Decision', in Oonagh Gay and Barry Winetrobe, eds, *Parliament's Watchdogs: At the Crossroads* (London: Constitution Unit, 2008), 118.

how?<sup>138</sup> Constitutional watchdogs may be subject to several different accountability regimes, each focussed on a different aspect of their performance, with different aims, and employing different processes.

4.4 The following list is based upon the conditions to underpin the independence of constitutional watchdogs set out in para 2.15, which in turn was based upon the generally accepted conditions for judicial independence. But we have disaggregated several of those items, so the list of nine conditions has been expanded to 15 factors affecting watchdogs' independence.

## Factors affecting watchdogs' independence

4.7 *The formal legal status of the watchdog*: whether it is established in primary legislation – i.e. statute, or Order in Council<sup>139</sup> – and thus benefits from (actual or potential) legal safeguards encoded into the text;<sup>140</sup> or enjoys no legal basis. All else being equal, statutory backing should provide a more robust form of independence in terms of entrenching a body against dissolution, at least so far as possible within the limits of a constitution that recognises no official hierarchy of legal sources. Certainly, given the greater difficulty of amending or repealing a statute, the BCE, EC and IPSA lack the intrinsic vulnerabilities of the PCS and CSPL – which are respectively, a product of parliamentary Standing Orders, and bare prime ministerial initiative.<sup>141</sup> Non-statutory bodies can more easily be abolished, or see their powers, functions or governance arrangements being undermined. In 2021 CSPL recommended legislation to place the Independent Adviser on Ministers' Interests, Commissioner for Public Appointments, and the Advisory Committee on Business Appointments on a statutory basis, arguing that 'Regulators with a firmer basis in statute will be more empowered to speak out against the undermining of norms and conventions that break the spirit of their codes, if not the letter'.<sup>142</sup> Similar arguments can be mounted in relation to parliament's watchdogs.

4.8 *The mode of appointment of the chair and board members*: to borrow from Ackerman, a watchdog's strength and independence are intimately tied to the manner in which its members are appointed, and the terms for which they serve (see para 4.9).<sup>143</sup> There are obvious problems, both apparent and real, with an independent body being appointed by those whom it is regulating, and, in a

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<sup>138</sup> See, e.g., Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge: Cambridge University Press, 2020), 13–24. See also Jerry Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance', in Michael Dowdle, ed, *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge University Press, 2006) 117–118.

<sup>139</sup> As is currently the case, e.g., for the Commissioner for Public Appointments, presently under the Public Appointments (No. 2) Order in Council 2019.

<sup>140</sup> Some watchdogs have explicit statutory guarantees of independence from parliament and from the executive: s 17(1) Budget Responsibility and National Audit Act 2011, for instance, ensures that the Comptroller and Auditor General is not subject to the control or direction of the executive or Parliament (replicating the now repealed s 1(3) National Audit Act 1983).

<sup>141</sup> But the PCS is intrinsically less vulnerable than CSPL, because Standing Orders require parliamentary approval before they can be changed.

<sup>142</sup> Committee on Standards in Public Life, *Upholding Standards in Public Life: Final Report of Standards Matter 2 Review*, November 2021, para 2.27.

<sup>143</sup> Bruce Ackerman, 'The New Separation of Powers', *Harvard Law Review* 113(3), 2000, 669–70.

constitution where parliamentary sovereignty remains the ‘bedrock’,<sup>144</sup> no practicable governance solution is capable of resolving them entirely. Nevertheless, there is a spectrum. For instance, purely executive appointments, such as those to the CSPL or BCE, place their (perceived) independence and credibility at greater risk than those made by a constitutionally independent actor, subject to a public debate and approval by one or both Houses; and where the choice of nomination has engaged key stakeholders, such as the major political parties and the Speaker (as, e.g., with the Electoral Commissioners). Candidates’ independence might, further, be demonstrated through greater use of pre-appointment scrutiny by a Commons select committee, as happens with the chair of CSPL; and by bringing parliamentary appointments within the scope of the Governance Code on Public Appointments. Currently the Code applies only to appointments made by ministers, with the Commons complying on a voluntary basis in relation to selected appointments.<sup>145</sup> This means there is no scope for investigation of complaints, nor for an annual audit of performance.

4.9 *The tenure of the chair and board members*: the Public Administration Select Committee, in its 2007 report on ethics and standards in public life, characterised the prospect of reappointment as ‘the greatest threat to independence ... which can risk becoming, or be perceived as being, a factor influencing a watchdog’s decisions and actions’.<sup>146</sup> Judges serve for fixed terms with no re-appointment, so that they can deliver their judgments without fear or favour. For the same reasons it should not be open to politicians to terminate an appointment because they dislike the way a watchdog has carried out his or her functions. It was damaging to the reputation of the House of Commons when Elizabeth Filkin was not re-appointed as PCS in 2002; and damaging to the reputation of the House and the EC when Sir John Holmes was not re-appointed as chair in 2021.<sup>147</sup> The only way to avert this possibility is to appoint watchdogs for a single, non-renewable term for a fixed number of years. This now applies, for instance, to the PCS and to the chair and members of the CSPL, but not to the Boundary or Electoral Commissioners, nor to the members of IPSA.

4.10 *Removal of chair and board members from office*: the norm should be that chairs and board members of constitutional watchdogs are only dismissed following a resolution of both Houses. This is the protection offered to High Court judges, and the requirement of both Houses guards against a judge being dismissed just by the government mobilising its Commons majority. It is the

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<sup>144</sup> The language of Lord Bingham in *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 A.C. 262 (HL) [9].

<sup>145</sup> Compliance with the Code is monitored by the Commissioner for Public Appointments. *Inter alia*, it stipulates that competitions be publicly advertised, and candidates interviewed by an Advisory Assessment Panel which must include at least one independent panel member. ‘Significant appointments’, such as the CSPL’s chair, call for a ‘Senior Independent Panel Member’, who is ‘familiar with senior recruitment ... [and] should be independent of the department and of the body concerned and should not be currently politically active’ (para 6.1).

<sup>146</sup> Public Administration Select Committee, *Ethics and Standards: The Regulation of Conduct in Public Life (Fourth Report of Session 2006–07)*, HC 101 2006–07 (London: House of Commons, 2007) para 81.

<sup>147</sup> The minutes of the 16 July 2020 meeting of the Speaker’s Committee on the Electoral Commission record (para 7): ‘The Committee considered whether to recommend Sir John Holmes for re-appointment as Chair of the Electoral Commission. It noted feedback gathered by Mr Speaker from serving Commissioners, former Commissioners, the Chief Executive and a key stakeholder. Mr Speaker asked each member in turn whether they were content to recommend Sir John for reappointment’. The four Conservative members of the Committee voted No; the two Labour and one SNP MP abstained.

protection offered to board members of IPSA, but not to members of the Electoral Commission: they can be dismissed following a resolution of the House of Commons – but only after a report from the Speaker’s Committee specifying the grounds of dismissal.<sup>148</sup> Protection is thus enhanced further if the watchdog’s constituent document specifies, exhaustively, the relevant grounds for removal, as with the EC. Conversely, the Cabinet Office watchdogs enjoy no protection, and may be dismissed by the Prime Minister for minimal or no reason.<sup>149</sup>

4.11 *The composition of the watchdog/its board:* a core concern for watchdog institutional design should be to maximise what may be referred to as ‘relational distance’<sup>150</sup> between regulator and regulated, i.e. the degree of social distance between them. This may be influenced by such factors as shared experience or culture, overlap in membership, mutual familiarity, etc. – that, all else being equal, may impinge on the watchdog’s (perceived) independence and neutrality. This would favour maximising the number of independent members, and, perhaps, a broader inclusion of judicial members (as on the board of IPSA, the BCE and, historically, CSPL),<sup>151</sup> and restricting or excluding those with party-political backgrounds.

4.12 However, as we noted in para 2.12, depoliticising a watchdog is a two-edged sword: ‘regulators need to understand the underlying problems and potential tensions within the organisations or service domains they oversee, and without having extensive experience within such domains (as well as a reputation for competence that will lead them to be respected by the regulatees), they can easily become detached from intelligence about what is really going on until it is too late.’<sup>152</sup> Some political representation on a watchdog’s board may be appropriate; indeed necessary – but to mitigate the obvious risk with political appointments that political loyalties may colour their judgement, they should not form a majority of the members.

4.13 *The size of the watchdog/its board:* multi-member bodies carry the risk that they might lack the decisive authority and unambiguous responsibility of a single commissioner. On the other hand, a corporate body commends itself if a watchdog’s remit requires that it represent a diverse range of

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<sup>148</sup> PSA 2009 Sch 1 para 5; PPERA 2000 Sch 1 para 3(4) and (5).

<sup>149</sup> The Cabinet Office’s ‘Principles of Good Corporate Governance’ state that, in respect of advisory NDPBs, the relevant minister ‘will normally appoint the chair and all non-executive board members of the body and be able to remove individuals whose performance or conduct is unsatisfactory’: see Cabinet Office, *Tailored Reviews: Guidance on Reviews of Public Bodies* (London: HM Government, 2019), Annex C.

<sup>150</sup> See Donald Black, *The Behaviour of Law* (Bingley: Emerald Group Publishing, 1976), 40–48; drawing, by way of analogy, on the point made there that, ‘all else constant, a policeman is more lenient toward someone close to him – a relative, friend, neighbor, or fellow policeman’: 44.

<sup>151</sup> As to CSPL, its first chair, Lord Nolan, was a Lord of Appeal in Ordinary; its second chair, Lord Neill of Bladen, QC, had experience as a judge of the Jersey and Guernsey Courts of Appeal. See too, as well, the newly established Independent Expert Panel for the Independent Complaints and Grievance Scheme, whose first chair is a retired Lord Justice of Appeal (Sir Stephen Irwin). There were some views expressed during the passage of PPERA 2000 that (retired) judges should have a place on the EC’s board, in order to emphasise its impartiality: see, e.g., HC deb vol 344 cols 676–684, 14 February 2000; HL deb vol 611 col 1164, 3 April 2000; HL deb vol 612 cols 1743–1756, 11 May 2000.

<sup>152</sup> Martin Lodge and Christopher Hood, ‘Regulation Inside Government: Retro-Theory Vindicated or Outdated?’, in Robert Baldwin, *et al.*, eds, *The Oxford Handbook of Regulation* (Oxford: Oxford University Press, 2010), 602–03; see also, for a strong parliamentary statement to this effect, HL deb vol 611 col 1106, 3 April 2000.



interests or backgrounds (e.g. CSPL), or secure cross-party ‘buy-in’ (e.g. the EC).<sup>153</sup> Tushnet proposes a further risk, that regulators, ‘with the independence they have, can do “too much”’ in pursuit of their mandate, but postulates that ‘multimember [watchdogs] are less subject to mission-commitment than single member ones’, given the constraints associated with a board structure.<sup>154</sup>

4.14 *Oversight and approval of budget, expenditure and strategic plan*: from an accountability standpoint, watchdogs should be scrutinised by the bodies responsible for providing their resources, in particular as regards their budgets, corporate plans, and deployment of those resources. One advantage to parliamentary sponsorship consists, in principle, in enabling key aspects of independence, such as appointment, financing and reporting, to be more open and transparent than if these were matters for government.<sup>155</sup> Yet, the degree of control implicit in this political oversight role (approving or modifying budgets; scrutinising work priorities and strategy;<sup>156</sup> etc.)<sup>157</sup> clearly poses a particular challenge, from an independence standpoint, in respect of watchdogs whose functions cover matters of direct concern to elected representatives (e.g. party finance, or parliamentary standards). Here, in particular, ‘[t]ensions between elected representatives and an independent individual or body may be too strong to contain without intelligent but nonpartisan parliamentary scrutiny’,<sup>158</sup> which leads on to the next point.

4.15 *The composition of any oversight/sponsoring committee*: as regards those watchdogs sponsored by parliament, oversight committees formed mainly, or solely, by backbenchers are crucial to preserving parliament’s institutional independence. This calls into question the *ex officio* role of government ministers, such as the Minister for the Cabinet Office or the Leader of the House of Commons on such committees (as in the case of the SCEC and SCIPSA): even if they take no substantive part in scrutiny or performance evaluation, there is an inevitable tension and potential conflict of interest.<sup>159</sup> The rationale for having ministers on the sponsoring committees is that they contribute their departments’ expertise; but for this expertise to be realised, the minister must be an active participant. The Minister for the Cabinet Office has rarely attended SCEC: he attended

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<sup>153</sup> Cf. Robert Hazell, ‘Constitutional Watchdogs’ in *Delivering Constitutional Reform: The Collected Briefings of the Constitution Unit* (London: Public Finance Foundation and Constitution Unit, 1997), 95–6.

<sup>154</sup> Mark Tushnet, ‘Institutions Protecting Democracy: A Preliminary Inquiry’, *Law & Ethics of Human Rights* 12(2), 2018, 197–98.

<sup>155</sup> Oonagh Gay and Barry Winetrobe, *Officers of Parliament – Transforming the Role* (London: Constitution Unit, 2003), 11.

<sup>156</sup> Cf. HL deb vol 612 col 1782, 11 May 2000: ‘... "Strategic oversight" could be construed as doing a bit of checking to see how [the watchdog] is working. If seven politicians are to sit down to decide whether or not it is working, one begins to introduce politics into it, which is what one seeks to avoid’ (Lord Mackay of Ardbrecknish).

<sup>157</sup> As the CSPL has also pointed out, ‘there will be some overlap between the scrutiny of resources and that of performance in an effective accountability mechanism ... the body responsible for the budget and effective use of that budget is bound to take account of comments and views on performance as part its scrutiny’ (Eleventh Report of the Committee on Standards in Public Life, Cm 7006 (London: HMSO, 2007), paras 4.17, 4.28); see also Barry Winetrobe, ‘Scotland’s Parliamentary Commissioners: An Unplanned Experiment’, Oonagh Gay, ‘Introduction – Watchdogs in Need of Support’ in Oonagh Gay and Barry Winetrobe, eds, *Parliament’s Watchdogs: At the Crossroads* (London: Constitution Unit, 2008), 40.

<sup>158</sup> Gay, ‘Introduction – Watchdogs in Need of Support’, in Gay and Winetrobe, Oonagh Gay, ‘Introduction – Watchdogs in Need of Support’ in Oonagh Gay and Barry Winetrobe, eds, *Parliament’s Watchdogs: At the Crossroads* (London: Constitution Unit, 2008), 13–14.

<sup>159</sup> See, e.g., HC deb vol 495 col 216, 30 June 2009.

one out of four committee meetings in 2020. And in terms of party balance, no party should have a majority on the committee; as we noted in para 3.13, reliance on convention might no longer be sufficient to ensure a partisan balance.

4.16 A further, important factor in ‘intelligent but nonpartisan parliamentary scrutiny’, and which helps to address the higher-order problem of who guards the guardians’ guardians, is the inclusion of a sizeable and rotating independent, or lay, membership on oversight committees, recruited through fair and open competition. This is currently the case for SCIPSA, and exemplified even more strongly in the Committee on Standards, whose balanced composition of political and non-political members sends a clear signal of ‘independen[ce] of what might be called the “parliamentary establishment”’ (see para 3.32).<sup>160</sup>

4.17 *Operational autonomy within remit/terms of reference*: ‘[t]he concept of independence implies that an institution has both freedom *from* interference and freedom *to* act within its sphere of authority,’<sup>161</sup> which are two sides of the same coin. The obverse side implies ‘own initiative’, or agenda-setting powers. The majority of the bodies under scrutiny in this report enjoy such powers,<sup>162</sup> although by convention, CSPL does not embark on an inquiry or review without first informing the Cabinet Office; there is some precedent to suggest that CSPL, in the past at least,<sup>163</sup> may have felt constrained by government asking it not to review a standards issue falling under its terms of reference.<sup>164</sup>

4.18 The other side of the coin implies the absence of directive management. None of the watchdogs is currently subject to overt powers of direction;<sup>165</sup> but that is about to change now the Elections Act has become law. The Act contains a controversial new provision that would require the Electoral Commission to have regard to a strategy and policy priorities statement prepared by the government, including guidance relating to the Commission’s functions. There is of course regular communication between government and the Commission, and the boundary separating legitimate communication and consultation which stops short of direction is not always clear. More subtle directive influence can be exerted by sponsoring bodies, for instance, through ‘structuring

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<sup>160</sup> Committee on Standards, *Implications of the Dame Laura Cox Report for the House’s Standards System: Initial Proposals (Fifth Report of Session 2017–19)*, HC 1726 2017–19 (London: House of Commons, 2018), para 45, quoting its Second Report of that session, HC 1396 2017–19 (at para 36); this is *a fortiori* the case now that the seven lay members enjoy full voting rights on the committee: SO 149(5).

<sup>161</sup> Michael Pal, ‘Electoral Management Bodies as a Fourth Branch of Government’, *Review of Constitutional Studies* 21(1), 2016, 100 (emphasis added).

<sup>162</sup> See, e.g., Public Administration Select Committee, *Ethics and Standards: The Regulation of Conduct in Public Life (Fourth Report of Session 2006–07)*, HC 101 2006–07 (London: House of Commons, 2007), Appendix 2 for a brief survey of various watchdogs’ ‘autonomy in policy and operation’.

<sup>163</sup> Cf. the remarks of former CSPL chair, Sir Alastair Graham, in oral evidence to PASC, who denied that the CSPL could only do things by agreement; ‘the committee can decide to investigate even if after consultation they do not get widespread agreement for that next area of inquiry’: Public Administration Select Committee, Oral Evidence given by Sir Alastair Graham, 15 May 2007, HC 121-I 2006–07, Q 49.

<sup>164</sup> See, e.g., Public Administration Select Committee, *Ethics and Standards: The Regulation of Conduct in Public Life (Fourth Report of Session 2006–07)*, HC 101 2006–07 (London: House of Commons, 2007), paras 93–95.

<sup>165</sup> Though there can be found some marginal directive powers, which are generally unobjectionable – e.g., at the Secretary of State’s request, the EC must review and report to him or her, ‘within such time as the Secretary of State may specify ... on such matter or matters ... as the Secretary of State may specify’: s 6(2) PPERA 2000.

the [watchdog's] action by prescribing the rules' under which it works;<sup>166</sup> or influencing the scope of its activities through formal or informal request or suggestion.<sup>167</sup> From an independence standpoint, the watchdog's power to say 'no' is crucial.

4.19 *Power to publish reports*: further to publishing their annual reports, certain watchdogs have specific powers, in their own right, to publish additional reports relating to their remit, separately from their sponsor.<sup>168</sup> Thus the EC issues reports on the administration of past elections and referendums, and about electoral matters more generally;<sup>169</sup> and the BCE publishes its own periodical reports containing its recommendations for redistributing constituencies.<sup>170</sup> The EC and IPSA, moreover, possess the general power to 'do anything (except borrow money) which is calculated to facilitate, or is incidental or conducive to, the carrying out of any of their functions.'<sup>171</sup> The EC has used this power to publish reports setting out an account of its investigations under PPERA and its findings;<sup>172</sup> and IPSA issues a number of additional reports and reviews connected to its statutory functions, such as annual assurance and periodic policy reviews. In contrast, the CSPL's substantive reports, and the PCS's formal memoranda in cases referred to the Committee on Standards are made public by their sponsoring bodies, on governmental (Cabinet Office) and parliamentary (Committee on Standards) webpages respectively.<sup>173</sup>

4.20 *Power to impose sanctions*: formal powers to sanction regulated actors, where necessary to support the aims of a regulatory regime, are central to regulatory independence. At one end of the spectrum, both the EC and IPSA enjoy broad enforcement powers to support their regulatory responsibilities. The PCS, further along the continuum, is very restricted in his or her capacity independently to sanction breaches of the rules of the House,<sup>174</sup> and does not recommend sanctions in cases where formal memoranda are submitted to the Standards Committee<sup>175</sup> – though this reflects constitutional limits on the disciplinary authority which can be delegated by the House

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<sup>166</sup> Robert Hazell, 'Constitutional Watchdogs' in *Delivering Constitutional Reform: The Collected Briefings of the Constitution Unit* (London: Public Finance Foundation and Constitution Unit, 1997), 91.

<sup>167</sup> The CSPL has, in the past, broadened its inquiries in response to a prime ministerial request, which leaves open the possibility that they could be narrowed by the same token.

<sup>168</sup> Though, in some cases, there is a corresponding *duty* to publish the relevant report, such as the BCE and its periodical reports 'as soon as reasonably practical' after the Speaker has laid them before parliament: s 3(2ZC) PCA 1986.

<sup>169</sup> In each case 'in such manner as the Commission may determine': ss 5(1), 6(1), (5) PPERA 2000.

<sup>170</sup> '[I]n such manner as they think fit': s 3(2ZC) PCA 1986.

<sup>171</sup> Sch 1, para 2 PPERA 2000; Sch 1, para 11 PSA 2009.

<sup>172</sup> See *R (Vote Leave Ltd) v Electoral Commission* [2019] EWCA Civ 1938, [2019] 4 W.L.R. 157 (CA).

<sup>173</sup> PCS memoranda are published as appendices to the relevant Committee on Standards report.

<sup>174</sup> The PCS has the power only to 'rectify' minor breaches, with the offending MP's agreement (see Committee on Standards, *The House of Commons and the Criminal Law: Protocols between the Police and the Parliamentary Commissioner for Standards and the Committee on Standards* (Tenth Report of Session 2019–21), HC 883 2019–21 (London: House of Commons 2020), as well, now, as to hold informal discussions or a formal meeting with respondents in order to 'indicate concern about or give words of advice on the Member's reported attitude, behaviour or conduct': SO 150(5) (21 April 2021 amendment). The PCS has somewhat greater powers of sanction in respect of ICGS cases: aside from proffering formal or informal words of advice to the respondent MP, the PCS may require an apology in writing, or on the floor of the House by means of a point of order or a personal statement: see HC deb vol 692 col 1076, 21 April 2021.

<sup>175</sup> See Committee on Standards, *Sanctions in Respect of the Conduct of Members* (Seventh Report of Session 2019–21), HC 241 2019–21 (London: House of Commons 2020), para 16.

to an independent officer, as well as a deliberate policy of separating ‘investigatory’ and ‘adjudicatory’ functions.<sup>176</sup> At the far end of the spectrum, since the CSPL is technically ‘not a regulator, but offers a perspective on the ethical landscape,’<sup>177</sup> it does not have formal powers of sanction; though it does carry informal (and potent) powers of censure in its reports by highlighting systemic failings or deficiencies.

4.21 *Budgets and resources:* an adequate budget is crucial to a body’s operational independence. The BCE or CSPL’s funding is, *prima facie*, potentially insecure, resting directly on Cabinet Office departmental vote. Finances should not be based on assessments by the executive about the effectiveness or previous activity of the body, a risk inherent in this model. The budgets of the EC and IPSA (and older bodies such as the NAO), by contrast, are voted directly by parliament on estimates prepared by their respective statutory oversight committees. They are thus not subject to direct government or departmental interference; nonetheless, this model still entails reliance on the very organisation whose affairs constitutional watchdogs are charged with regulating – this, whilst unavoidable,<sup>178</sup> attests to the importance of appropriate design of watchdog oversight committees (see para 4.14).

4.22 *Salary arrangements:* robust salary arrangements are, too, an important aspect of a body’s independence. Salaries that are met directly from the Consolidated Fund, as ‘standing services’, are protected from across-the-board budget cuts and thus signal constitutional independence from the executive; this is the case for the Electoral Commissioners (and older institutions such as the Comptroller and Auditor General; as well as judges). Salaries should also be index-linked, or regularly revised, to maintain their real value and ensure that recruitment to watchdog bodies remains competitive.

4.23 *Staffing arrangements:* from the standpoint of maximising independence, watchdogs should have broad discretion in deploying their budgets, including decisions as to recruitment and remuneration. The EC and IPSA directly appoint and pay their staff who, accordingly, are not civil servants, avoiding any issues of perception about the resultant Whitehall link. The PCS also chooses his or her own staff, and their number; though these are technically employees of the House of Commons Commission, which has the final say. In practice, however, the issue is complicated by such factors as the size of the organisation; whether it can offer satisfactory career progression and attract good candidates; the degree of expert knowledge or professional training required; and the extent to which its activity comes in peaks and troughs. In respect of a small body such as the CSPL or BCE, for example, it might be unrealistic for it directly to recruit a

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<sup>176</sup> *ibid*, paras 83–87; and Committee on Standards, *The Standards System in the House of Commons (Sixth Report of Session 2014-15)*, HC 383 2014-15 para 61. See also the discussion in the Eighth Report of the Committee on Standards in Public Life, *Standards of Conduct in the House of Commons*, Cm 5663 (London: HMSO, 2002), paras 5.16–23.

<sup>177</sup> Public Administration Select Committee, *Ethics and Standards: The Regulation of Conduct in Public Life (Fourth Report of Session 2006–07)*, HC 101 2006–07 (London: House of Commons, 2007), para 100.

<sup>178</sup> As the CSPL has recognised, ‘since Parliament is, by one route or another, the ultimate source of authority for all public expenditure, no viable arrangement is available which entirely avoids this conflict of interest;’ in any event, this is preferable to the immediate alternative of ceding ‘control over the independent regulator’s budget to the Executive’: Twelfth Report of the Committee on Standards in Public Life, *MPs’ Expenses and Allowances: Supporting Parliament, Safeguarding the Taxpayer*, Cm 7724 (London: HMSO, 2009), para 13.58.

permanent staff or secretariat; these are instead composed of civil servants on secondment from the Cabinet Office.

4.25 *Physical premises*: the physical separation of a watchdog from the body subject to its regulation or oversight is a clear and tangible signal of its day-to-day independence. The EC and IPSA both have their own, independent premises;<sup>179</sup> whereas the PCS is based in the Palace of Westminster, and the CSPL and BCE share government offices.<sup>180</sup> An analogous point may be made about these bodies' webpages.<sup>181</sup>

4.26 Having enumerated the main factors affecting watchdogs' independence, the second part of this chapter lists the main factors affecting their accountability. As before, this is based upon the list of conditions to ensure the accountability of constitutional watchdogs itemised in Chapter 2 (at para 2.19); but again, slightly expanded, so that there follows a list of nine factors.

## Factors affecting watchdogs' accountability

4.27 *Formal reporting requirements*: all the watchdogs under scrutiny prepare an annual report, though only three – the EC, IPSA and PCS – are required formally to report to parliament; CSPL makes its annual reports to the Cabinet Office. Gay and Winetrobe, in their 2003 Constitution Unit report on officers of parliament, had advocated greater consistency of approach, with all constitutional watchdogs submitting annual reports to parliament as a matter of good practice.<sup>182</sup> But it does not follow that such reports or other outputs will be scrutinised or engaged with by parliament – without which accountability is more illusory than real – leading to the next point.

4.28 *Regular oversight by a (dedicated) parliamentary committee*: the Speaker's Committees on the EC and IPSA are responsible for appointing the board members of these bodies (see paras 3.10 and 3.17), and for scrutinising and approving the Estimate providing them with funds. But we can draw a broad distinction between this *sponsoring* role and the (in principle) quite distinct '*scrutiny*' role, traditional for select committees, in which committees engage with the reports from regulators, examine their policies, and have power to make observations about the level and use of funds.<sup>183</sup> Parliamentary officials were clear that the Speaker's Committees do not perform this scrutiny function; that falls to select committees. Of the bodies we are considering, only the PCS has a relationship with a dedicated select committee, the Standards Committee. The EC has been invited fairly frequently to give evidence to select committees, as has CSPL; IPSA less so; and the BCE

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<sup>179</sup> Respectively, 3 Bunhill Row, Islington and 85 Strand, Westminster.

<sup>180</sup> Respectively, 1 Horse Guards Road, Westminster and 35 Great Smith Street, Westminster (where CSPL also used to be based).

<sup>181</sup> The EC, IPSA and BCE each have separate, bespoke websites (the BCE has an 'independent.gov.uk' domain); but the PCS and CSPL's webpages have a parliamentary and governmental (Cabinet Office) domain, respectively.

<sup>182</sup> Oonagh Gay and Barry Winetrobe, *Officers of Parliament – Transforming the Role* (London: Constitution Unit, 2003), 44.

<sup>183</sup> Public Administration Select Committee, *Ethics and Standards: The Regulation of Conduct in Public Life (Fourth Report of Session 2006–07)*, HC 101 2006–07 (London: House of Commons, 2007), para 60 (emphasis in original). See also *ibid*, para 64, where it is suggested that separate bodies should provide 'funding and operational challenge' and substantive engagement with watchdog reports; and Eleventh Report of the Committee on Standards in Public Life, *Review of the Electoral Commission*, Cm 7006 (London: HMSO, 2007), para 4.17.

not at all.<sup>184</sup> Regular appearances matter, because without frequent contact and appearances before select committees watchdogs can quickly be considered as faceless bureaucrats. Effective watchdog oversight by committees requires adequate time commitment, resourcing, and preparation, so that political participants in watchdog scrutiny are sensitive to, and can fully realise their dual role in ‘championing’ as well as ‘challenging’ constitutional watchdogs, where appropriate, on their policies, decisions and activities.<sup>185</sup>

4.29 *Parliamentary questions*: a backbench member of the SCEC and SCIPSA (currently Christian Matheson MP and Sir Charles Walker MP, respectively) answers parliamentary questions from MPs about their watchdog. Conversely, the NDPB model requires ministers – the Minister for the Cabinet Office in the BCE’s and CSPL’s cases – to answer relevant questions in parliament. Typically such questions tend to be about the government’s responsibilities rather than those of the watchdog, and so they are at best an indirect means of holding the watchdog to account.<sup>186</sup>

4.30 *Codes of Conduct*: each of the collegiate watchdogs publishes a code of conduct providing guidance on the standard of behaviour expected of its members; making provision for the disclosure of interests; and generally incorporating the Nolan principles.<sup>187</sup> The PCS and her staff have internal handbooks to guide both Code of Conduct and ICGS investigations. Non-executive members of NDPBs, such as the CSPL and BCE, are likewise obliged to abide by a Code of Conduct for Board Members of Public Bodies, promulgated by the Cabinet Office.<sup>188</sup>

4.31 *Financial accountability*: the C&AG, supported by the NAO, audits the annual accounts produced by the EC and IPSA;<sup>189</sup> the PCS’s budget is also susceptible to audit by the NAO as part of the wider House of Commons Administration budget. The CSPL and BCE, as advisory NDPBs, do not prepare separate accounts; their expenses are audited by the C&AG as they are borne on the Cabinet Office’s Estimates and included as part of the department’s resource accounts.<sup>190</sup>

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<sup>184</sup> NDPBs are directly accountable for their performance and use of resources to the sponsoring department/its responsible minister; they are also subject to periodic ‘tailored reviews’ (formerly triennial reviews) by the sponsor, intended to provide ‘regular assurance and challenge about the continuing need, efficiency and good governance’ thereof (see Cabinet Office, *Tailored Reviews: Guidance on Reviews of Public Bodies* (London: HM Government, 2019)).

<sup>185</sup> Public Administration Select Committee, *Ethics and Standards: The Regulation of Conduct in Public Life (Fourth Report of Session 2006–07)*, HC 101 2006–07 (London: House of Commons, 2007), para 60. As Gay relates, ‘[p]arliamentarians need supportive and non party political structures to operate effective oversight, as well as offering a safe haven for these core watchdogs. But this demands much of MPs whose first loyalty remains to their party, whether in opposition or in government’ (Gay, ‘The UK Perspective: Ad Hocery at the Centre’, in Oonagh Gay, ‘Introduction – Watchdogs in Need of Support’ in Oonagh Gay and Barry Winetrobe, eds, *Parliament’s Watchdogs: At the Crossroads* (London: Constitution Unit, 2008), 29).

<sup>186</sup> For example, on 22 November 2021 Angela Rayner MP asked the Minister for the Cabinet Office whether he intended to implement any of the recommendations in CSPL’s Standards Matter 2 review. Cf. Oonagh Gay, ‘The Fall of Canada’s Privacy Czar: Institutionalising Officers of Parliament’, *Public Law*, 2003, 639.

<sup>187</sup> IPSA is required by statute to do so: Sch 1, para 7 PSA 2009.

<sup>188</sup> See <<https://www.gov.uk/government/publications/code-of-conduct-for-board-members-of-public-bodies>>.

<sup>189</sup> Sch 1, para 18 (see also para 16) PPERA 2000; Sch 1, para 24 PSA 2009.

<sup>190</sup> See Cabinet Office, *Public Bodies: A Guide for Departments* (London: HM Government, 2006), Chapter 6, paras 3.6 and 6.1.

4.32 *Accountability to stakeholders*: alongside institutional mechanisms supporting its independence, a successful regulator should have in place mechanisms that enable it to engage with and consult those it directly regulates. For instance, IPSA conducts annual user surveys of MPs to measure ‘how well [it is] meeting the needs of ... customers and provide an opportunity for MPs and staff to give ... feedback’;<sup>191</sup> and the EC engages with political party representatives via the statutory Parliamentary Parties Panel, a consultative forum enabling parties to ‘submit representations or information to the Commission about such matters affecting political parties as the panel think fit.’<sup>192</sup>

4.33 *Public accountability/transparency*: parliamentary accountability is a mode of public accountability, as is publishing, on the watchdogs’ webpages, annual reports and accounts; minutes of board meetings; and registers of board members’ financial interests. A social media presence assists in rendering a watchdog’s activities more transparent and creates an informal channel of communication with the general public, complementing more formalised public consultation methods. Additionally, the PCS publishes his or her decision to rectify or not to uphold an allegation, along with the relevant evidence – as well, once more, as brief details of ongoing investigations – on the PCS website, along with a regularly updated Register of Members’ Financial Interests. IPSA, similarly, publishes details of claims made against MPs’ staffing and business costs online.

4.34 *Freedom of information*: FOI is another way of ensuring greater transparency, by providing people with the means of requesting documents or information which has not been published. Each of the bodies under scrutiny is specifically identified as a ‘public authority’ for the purposes of freedom of information legislation, and therefore obliged to adopt a ‘publication scheme’ approved by the Information Commissioner<sup>193</sup> – except for the PCS, whose office is subject to the freedom of information regime by virtue of the House of Commons’ classification as a relevant public authority.<sup>194</sup> In 2021 the PCS received 16 FOI requests; in 2020–21, the EC responded to 153 FOI requests, and CSPL 11; in 2019–20, IPSA received 150; and between 2016 and 2022, the BCE has received 47.

4.35 *Legal accountability*: as De Smith points out,

The distinctive roles of judicial review and parliamentary (and other) oversight ... create opportunities for synergy, with aspects of a particular decision being scrutinised in different ways by different bodies ... Judicial review ... goes some way to answering the age old question of “who guards the guards?” by ensuring that public authorities responsible for

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<sup>191</sup> Independent Parliamentary Standards Authority, *Findings from the Annual Survey of MPs and their Staff* (London: IPSA, 2021), para 1.

<sup>192</sup> s 4 PPERA 2000.

<sup>193</sup> See ss 3, 19; Sch 1, Part VI Freedom of Information Act 2000.

<sup>194</sup> Sch 1, para 2 FOIA 2000. It should be noted that the PCS’ Office already places in the public domain, though its annual reports and information published on the PCS’ webpages, data relating to the number and nature of complaints received, accepted and rejected; investigations carried out; their outcome; time taken to resolve cases; etc., which is all therefore ‘exempt information’ (s 21) – as is information whose exemption is necessary to avoid impinging on parliamentary privilege (s 34).

ensuring accountability of government [and parliamentarians] do so within the boundaries of their own lawful powers.<sup>195</sup>

This matter is treated separately, and at some length, in the following chapter: as will be seen, not all watchdogs under scrutiny are amenable to legal challenge and accountability; and, in some cases, the existing legal precedents may not be capable of providing reliable guidance as to a modern court's approach.

## Conclusions

4.36 This chapter has discussed in greater detail the main factors contributing to watchdog independence and accountability. The factors are an expanded version of the conditions to ensure the independence of constitutional watchdogs, and their accountability, first set out in Chapter 2 (at paras 2.13 and 2.17 respectively). Those conditions in turn were based upon the generally accepted conditions for judicial independence and accountability. We have disaggregated several items, so that the list of 11 conditions to underpin watchdogs' independence in para 2.13 has been expanded to 15 factors, and the list of seven conditions to ensure their accountability at para 2.17 has been expanded to nine.

4.37 Our conclusions are summarised in the following tables: the first listing the factors contributing to watchdogs' independence, and the second ensuring their accountability. The information is inevitably condensed, and in many cases understates the full extent of the watchdogs' independence and accountability.

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<sup>195</sup> Harry Woolf *et al.*, eds, *De Smith's Judicial Review* (London: Sweet & Maxwell, 8th edn, 2018), para 1-014.



**Table 4.1: Factors supporting watchdogs' independence**

Factor	Electoral Commission	Boundary Commission	IPSA	PCS	CSPL
Formal legal status	Statutory	Statutory	Statutory	Standing Orders	Discretionary
Mode of appointment	By Speaker's Committee	Deputy chair: by Lord Chancellor Other members by Cabinet Office Minister	By Speaker's Committee	By Commons Standards Committee	By the Prime Minister
Tenure	Renewable, max 10 years	Renewable, no term limit	5 years, renewable for 3 years	Non-renewable 5 year term	Lay members: Non-renewable 5 year term. Political members: 3 year term, renewable
Dismissal	Address from HC on report from SCEC: PPERA 2000 Sch 1 para 5	No provision: Parliamentary Constituencies Act 1986 is silent	On Address from both Houses: PSA 2009 Sch 1 para 5	Resolution of the House of Commons following report from Standards Committee	By the PM, at will
Composition and size of board	10 members, inc 4 political appointees	Deputy chair (High Court judge) plus two members	5 members: 2 lay plus former MP, former judge, accountant	Single office holder	5 independent members, 3 political appointees
Approval of budget	Speaker's Committee	Cabinet Office	Speaker's Committee	Standards Committee	Cabinet Office
Composition of oversight committee	Speaker plus 2 ministers, chair DLUHC Committee, 5 backbenchers	DLUHC select committee	Speaker plus Leader of HC, chair of Standards Committee, 5 backbenchers, 3 lay members	Standards Committee has 7 MPs and 7 lay members	PACAC
Operational autonomy	Now subject to govt statement on priorities	Within statutory guidelines	Compliance Officer can investigate	Power to initiate own investigation	Informs Cabinet Office before new study
Power to publish reports	Yes	Yes	Yes	Yes	Yes

Factor	Electoral Commission	Boundary Commission	IPSA	PCS	CSPL
Power to impose sanctions	Yes; but lost power of prosecution in Elections Act 2022	No	Repayment directions, monetary penalties	Standards Committee can impose minor sanctions; House must approve suspension or expulsion	No
Salaries	Chair's salary is £70k. Commissioners receive £390 a day	High Court judge already salaried. Commissioners receive £505 a day, Assistant Commissioners £350	Chair receives £700, board members £400 a day	Salaried, now full time post	Chair's salary is £36k, members receive £240 a day
Staffing	Employs own staff	Civil servants on secondment	Employs own staff	Recruits own staff, employed by House of Commons	Civil servants on secondment
Premises	Independent	Cabinet Office	Independent	House of Commons	Cabinet Office

**Table 4.2: Factors ensuring watchdogs' accountability**

Factor	Electoral Commission	Boundary Commission	IPSA	PCS	CSPL
Annual report	To parliament	To parliament and Cabinet Office	To parliament	To parliament	To Cabinet Office
Oversight by parliamentary committee	Speaker's Committee (SCEC)	DLUHC Committee	Speaker's Committee (SCIPSA)	Standards Committee	PACAC
Parliamentary Questions	Answered by member of SCEC	Answered by Cabinet Office Minister	Answered by member of SCIPSA	Registrar or Senior Investigations Manager	Answered by Cabinet Office Minister
Code of Conduct	Own Code of Conduct	Cabinet Office Code for Public Bodies	Own Code of Conduct	Internal handbook	Cabinet Office Code for Public Bodies
Financial accountability	NAO audit	Part of Cabinet Office accounts	NAO audit	Part of House of Commons Administration budget	Part of Cabinet Office accounts
Accountability to stakeholders	Regular consultations, stakeholder groups	Statutory consultation, public hearings	Regular consultations, annual user survey of MPs	Through Standards Committee	Publishes detailed list of meetings with stakeholders
Public accountability and transparency	Comprehensive website, inc board minutes	Commission minutes published	Comprehensive website, board minutes	Website gives details of every investigation	Website inc committee minutes
FOI	153 FOI requests	47 requests since 2016	150 FOI requests	16 FOI requests	11 FOI requests
Legal accountability	6 judicial reviews. Appeal to county court against civil penalties	4 judicial reviews	Legal challenges on FOI response and breach of personal data	One judicial review	No legal challenges, purely advisory body

# Chapter 5: Watchdogs' Legal Accountability

5.1 One of our research questions (see para 1.15) is, what are the main lines of accountability of the watchdogs, legally and politically? And one of the principles of accountability set out in Chapter 2 (para 2.19) is that decisions of watchdogs (especially those imposing penalties) should be subject to a right of appeal or judicial review. This chapter considers the legal accountability of the five watchdogs which are the subject of this report, mainly by means of judicial review. As such, it will primarily be of interest to lawyers and the legal advisers to the bodies concerned. Non-lawyers who want to follow the main argument of the report can skip to Chapter 6.

5.2 In summary, the Electoral Commission is the body which has most frequently experienced judicial review, with half a dozen cases (all of which it has won). But it has lost appeals about fines it has imposed, and a case about forfeiture of donations. IPSA has not yet experienced judicial review, but has lost an FOI appeal. IPSA's determinations are also subject to appeal by MPs going to the Compliance Officer, with a further appeal to the First Tier Tribunal. The PCS has been the subject of one, unsuccessful attempt at judicial review; the court held that the Commissioner was subject to supervision by parliament and not the courts. Unsurprisingly, since it is a purely advisory body, CSPL has experienced no judicial review challenges. The Boundary Commission has experienced four, all unsuccessful; but now that parliament has lost its role in approving the Boundary Commission's reports, judicial review must be the only means of ensuring the Commission sticks to its statutory remit.

## Electoral Commission

5.3 The EC has been subject to several judicial review and other legal challenges since its creation in 2001, though the majority have related to issues arising out of the referendum on the United Kingdom's membership of the European Union held on 23 June 2016; in each case, either permission to apply for judicial review was refused, or the EC has succeeded on substantive grounds. The cases are listed below.

### **Box 1: Judicial Review Cases brought against the Electoral Commission**

*R (Elliott) v Electoral Commission* [2003] EWHC 395 (Admin): the High Court refused the claimant permission to apply for judicial review of the EC's decision to accept certain proposals of the now-abolished Boundary Committee for England on grounds of undue delay (under s 31(6) Senior Courts Act 1981).

*R (English Democrats Party) v Electoral Commission* [2018] EWHC 251 (Admin), [2018] 4 W.L.R. 54 (QB): the High Court dismissed the EDP's challenge to the EC's decision to remove one of the

EDP's registered descriptions from the statutory register of political parties ("English Democrats—England Worth Fighting For!") following the murder of MP Jo Cox, whose constituency the EDP sought to contest in the resultant by-election: this was held to be within the EC's statutory powers, for '[t]he maintenance of a register [see s 23(1) PPERA 2000] involves a continual process of securing that both new entries onto it and existing entries satisfy the requirements for being on the Register' ([43]; emphasis added).

*R (Good Law Project) v Electoral Commission* [2019] EWCA Civ 1567, [2020] 1 W.L.R. 1157 (CA): the Court of Appeal upheld the EC's argument that, in deciding not to open an investigation into the campaign spending of, and donations received by Vote Leave and Darren Grimes during the EU referendum campaign period, it had not misinterpreted the definition of 'referendum expenses' in s 111(2) PPERA 2000: in particular, 'the correct interpretation of the legislation read as a whole is that a donation to a permitted participant [Mr Grimes] cannot also be an expense incurred by the donor [Vote Leave]' ([97]).

*R (Vote Leave Ltd) v Electoral Commission* [2019] EWCA Civ 1938, [2019] 4 W.L.R. 157 (CA): the Court of Appeal dismissed Vote Leave's judicial review claim that, in publishing a report setting out an account of its subsequent investigation into Vote Leave's payments to Aggregate IQ and its findings, the EC had acted ultra vires: rather, even though 'there is no provision in PPERA which expressly empowers the Commission to make or publish a report of the kind which was made in the present case ... the publication of the report was within the Commission's powers because it was incidental to the carrying out of its enforcement functions under Part X of PPERA and was accordingly authorised by paragraph 2 of Schedule 1 to the Act' ([22]).

*R (Evans) v Electoral Commission* [2021] EWHC 1818 (Admin): the High Court dismissed the claimant's application for interim relief in a claim for judicial review against the EC's "decision" – actually identifying a justiciable decision on the facts was one 'key difficulty' for the claim ([40]–[41]) – not to determine his application for the addition of a new registered description for the Scottish Labour Party (under s 30 PPERA) in time for the 6 May 2021 Scottish Parliamentary elections: '[i]n establishing a process by which it is able to form the requisite opinion [as to whether the proposed description conforms to the relevant statutory criteria], the [EC] is not imposing a procedural or substantive pre-condition, or seeking to delay the making of a decision; it is seeking to comply with its statutory obligations' ([43]).

5.4 The EC has, furthermore, engaged in judicial review proceedings as claimant, challenging the Westminster Magistrates' Court decision not to order the complete forfeiture of the donations made to the United Kingdom Independence Party by Mr Alan Bown – who, due to falling off the electoral register, was not, in statutory terms, a 'permissible donor'<sup>196</sup> – between December 2004 and February 2006. The EC lost its appeal to the Supreme Court, whose majority judgment clarifies the correct approach to be applied by the magistrates' court when called on to order the forfeiture

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<sup>196</sup> See s 54(2) PPERA 2000.

‘of an amount equal to the value’ of donations accepted by political parties from impermissible sources.<sup>197</sup>

5.5 There is, further, a statutory right of appeal to the county court against a civil penalty imposed by the EC under its enforcement powers, on grounds that it was based on an error of fact; was wrong in law; or was unreasonable.<sup>198</sup> Under this procedure, for instance, Mr Darren Grimes successfully appealed against the £20,000 fine imposed on him by the EC, *inter alia*, for failing to deliver an accurate campaign spending return following the June 2016 referendum.<sup>199</sup>

## Independent Parliamentary Standards Authority

5.6 There have been, as yet, no judicial review challenges to IPSA’s exercise of its statutory powers and functions,<sup>200</sup> though it has been held legally to account on other issues. IPSA was the losing appellant in a dispute, which reached the Court of Appeal, about whether, in response to a Freedom of Information Act request, it was obliged to yield up copies of original receipts which supported MPs’ expenses claims; or whether, as IPSA had argued, providing a transcript of the redacted information contained in the receipts sufficed.<sup>201</sup> It is also likely to be engaged in

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<sup>197</sup> *R (Electoral Commission) v Westminster Magistrates’ Court* [2010] UKSC 40, [2011] 1 A.C. 496 (SC); s 58(2) PPERA 2000. See, e.g., Lord Kerr at [118]: ‘... where it is shown that a donation has come from an impermissible source it should be presumed that this is a foreign donation and that if the presumption is not rebutted, forfeiture should follow. If, however, it can be shown that the donation was not from a foreign donor but came from someone who was entitled to be on an electoral register, the level of forfeiture should reflect the particular circumstances of the case.’

<sup>198</sup> Sch 19C, paras 2(6), 6(6) and 13 PPERA 2000.

<sup>199</sup> See *Grimes v Electoral Commission* (Central London County Court, 19 July 2019). Judge Dight CBE held that it was not ‘open to the Electoral Commission to reach the relevant factual finding, to the criminal standard, on the material available to the Electoral Commission at the time’ ([64]) – viz. that Mr Grimes’ organisation, BeLeave, was not an unincorporated association capable of notifying the EC that it intended to campaign in the EU referendum, under s 106 PPERA 2000. That finding led it to the erroneous conclusion that Mr Grimes *qua* individual, and not BeLeave, was the relevant ‘permitted participant’ for the purposes of making a return as to campaign expenses under s 120.

<sup>200</sup> The PSA 2009 itself provides for an appeal mechanism in respect of the IPSA’s decisions on MPs’ expenses claims (see the text, below), reducing the practical importance of judicial review in this context; see also *R v Birmingham City Council, ex parte Ferrero* [1993] 1 All E.R. 530 (CA) 537. These statutory appeals are ‘not confined to an examination of principles that would be relevant if the ... decision was the subject of judicial review proceedings and [are] not required to pay any particular deference to the ... original decision’: *Byrne v Independent Parliamentary Standards Authority* [2017] UKFTT 88 (TC) [21](2).

<sup>201</sup> *Independent Parliamentary Standards Authority v Information Commissioner* [2015] EWCA Civ 388, [2015] 1 W.L.R. 2879 (CA). The Court held that, on a request under the Freedom of Information Act 2000 for specific information, the entitlement under s 1(1) ‘to have that information communicated’ to the applicant relates to ‘recorded information’ (cf. s 84 FOIA 2000); and that the disputed material – logos and letterheads on the invoices, handwriting and/or manuscript comments, and the invoices’ layout, style and design – ‘can properly be regarded as “information” in a broad sense. It is informative. It does not need to be “linguistic” in character for that purpose: “information” includes visual as well as linguistic information. For example, the design of a logo or letterhead, or the style or layout of an invoice, constitutes information relevant to the identity of the supplier and to the genuineness of the document; and, as the Commissioner said, what a person’s signature looks like is information over and above the person’s name’ ([44]). The Court thus upheld the decision of the Information Commissioner (and decisions of the First-tier and Upper Tribunals), such that the IPSA was required to supply the applicant, the journalist Ben Leapman, with copies of the original invoices/receipts with appropriate redactions.

defending a claim, shortly to be brought by 216 (current and former) MPs' staff, concerning an accidental breach of their personal data in March 2017.<sup>202</sup>

5.7 Additionally, as noted in Chapter 3, the Parliamentary Standards Act 2009 (as amended<sup>203</sup>) provides for a review mechanism if IPSA determines that an MP's claim should be refused, or paid only in part.<sup>204</sup> An MP – after having given IPSA a reasonable opportunity to reconsider its decision – may ask the Compliance Officer to review IPSA's determination. After reviewing the details of the claim against the background of the relevant MPs' allowances scheme, the Compliance Officer must decide whether to confirm or alter IPSA's determination; and an MP may appeal to the First-tier Tribunal against the outcome, by way of rehearing.<sup>205</sup>

5.8 At the time of writing, there have been two appeals against a decision of the Compliance Officer under this procedure. In the first, brought by James McGovern MP following IPSA's refusal to reimburse the cost of his travel from his Scottish constituency to Westminster – complicated by a diversion for party-political purposes – the First-tier Tribunal upheld the Compliance Officer's decision;<sup>206</sup> in the second, brought by Liam Byrne MP in relation to costs associated with the delivery of 'contact cards' to members of his constituency which IPSA had deemed political, the First-tier Tribunal allowed the appeal.<sup>207</sup>

## Parliamentary Commissioner for Standards

5.9 There has been one attempted judicial review of the PCS, in which it was held, both at first instance and on appeal, that the office's functions are not amenable to judicial review. In *R v Parliamentary Commissioner for Standards, ex parte Al Fayed*,<sup>208</sup> Mr Al Fayed sought leave to apply for judicial review of a 1997 report by the PCS, relating to a complaint made by the claimant against

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<sup>202</sup> See <<https://www.bbc.co.uk/news/uk-politics-39459115>>. The prospective claimants applied to the High Court for an order granting them anonymity and permitting them to issue a claim form in their intended proceedings against the IPSA withholding their names and addresses. Nicklin J refused the application, holding that anonymity was 'not necessary either properly to maintain the administration of justice or to protect the legitimate interests of the Claimants,' which might be protected *via* less intrusive methods: *Various Claimants v Independent Parliamentary Standards Authority* [2021] EWHC 2020 (QB) [46]–[52].

<sup>203</sup> See Part 3 CRA 2010.

<sup>204</sup> Under s 6(3) PSA 2009.

<sup>205</sup> See s 6A PSA 2009. The appeal 'is not an appeal on a question of law, nor is it in the nature of a judicial review of the decision of the Compliance Officer' or IPSA's initial determination; rather, 'Parliament has entrusted the making of a fresh decision, untrammelled by what has previously been decided, to the Tribunal ...': *McGovern v Compliance Officer for the Independent Parliamentary Standards Authority* [2013] UKFTT 206 (TC) [17]–[18]. There is, further, a right of appeal on a point of law to the Upper Tribunal against the First-tier Tribunal's decision: s 11 Tribunals, Courts and Enforcement Act 2007; Rule 39 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

<sup>206</sup> *McGovern v Compliance Officer for the Independent Parliamentary Standards Authority* [2013] UKFTT 206 (TC). Technically the appeal was allowed in part, as the Compliance Officer had accepted that Mr McGovern's claim should be paid in respect of part of the overall journey only after the appeal was lodged: see [7] and [52].

<sup>207</sup> *Byrne v Independent Parliamentary Standards Authority* [2017] UKFTT 88 (TC). The judge was satisfied that, under the allowances scheme then in force, Mr Byrne's expenses were incurred 'wholly, exclusively and necessarily' in the performance of his parliamentary function, which included furthering the interests of his constituents.

<sup>208</sup> [1998] 1 W.L.R. 669 (CA).



Michael Howard MP. The High Court refused leave; Mr Al Fayed appealed to the Court of Appeal, which granted leave to seek judicial review,<sup>209</sup> but dismissed his application.

5.10 Counsel for Mr Al Fayed – David Pannick QC – sought to ‘rel[y] strongly on the similarities between the position of the Parliamentary Commissioner for Standards and the Ombudsman’,<sup>210</sup> which had shortly before been held to be susceptible to judicial review.<sup>211</sup> Despite noting some analogies between the two offices (for instance, that both are supervised by a parliamentary committee; and have reporting lines to parliament), the Master of the Rolls, Lord Woolf, considered that these were outweighed by:

... the really significant distinction between the role of the Parliamentary Commissioner for Standards and the Ombudsman ... The Ombudsman is concerned with proper functioning of the public service outside Parliament. On the other hand, the focus of the Parliamentary Commissioner for Standards is on the propriety of the workings and the activities of those engaged within Parliament. He is one of the means by which the select committee set up by the House carries out its functions [now, the Committee on Standards], which are accepted to be part of the proceedings of the House. This being the role of the Parliamentary Commissioner for Standards, it would be inappropriate for this court to use its supervisory powers to control what the Parliamentary Commissioner for Standards does in relation to an investigation of this sort.<sup>212</sup>

5.11 Rather, he continued, ‘[t]he responsibility for supervising the Parliamentary Commissioner for Standards is placed by Parliament, through its standing orders, on the Committee of Standards and Privileges of the House, and it is for that body to perform that role and not the courts.’<sup>213</sup> In recent years the Standards Committee has made significant changes to the supervisory regime for the PCS, with more to come. As we noted in paras 3.29-30, the PCS hitherto has been subject to supervision only by the Standards Committee in terms of her investigations under the Code of Conduct. But that will change if the Ryder report is implemented, with both conduct and ICGS cases in future being subject to appeal to the Independent Expert Panel. That will be a big change in accountability. What began as a system of self-regulation, with purely political mechanisms of accountability, has evolved into a system with stronger and stronger independent elements, and tighter legal accountability. The Ryder review is a significant further twist, with the ultimate decision in disciplinary matters in future lying with the Independent Expert Panel.

5.12 A final point to be explored is the protection afforded to the PCS by parliamentary privilege. Four years before the *Al Fayed* case, in *R v Parliamentary Commissioner for Administration, ex parte Dyer*, the Court of Appeal appeared to adopt a somewhat broader view as regards the Ombudsman, noting that ‘[m]any in government are answerable to Parliament and yet answerable also to the supervisory jurisdiction of this court. I see nothing about the [Ombudsman]’s role or the statutory

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<sup>209</sup> As the Court noted, at 670, it ‘did this so that, if it is thought desirable, an application can be made to the House of Lords for leave to petition their Lordships in relation to the decision to which we have come’; though in the end the House refused leave to appeal.

<sup>210</sup> *R v Parliamentary Commissioner for Standards, ex parte Al Fayed* [1998] 1 W.L.R. 669 (CA) 672.

<sup>211</sup> *R v Parliamentary Commissioner for Administration, ex parte Dyer* [1994] 1 W.L.R. 621 (CA).

<sup>212</sup> *R v Parliamentary Commissioner for Standards, ex parte Al Fayed* [1998] 1 W.L.R. 669 (CA) 672–73.

<sup>213</sup> *ibid.*



framework within which he operates so singular as to take him wholly outside the purview of judicial review.<sup>214</sup> It is therefore significant that the decision in *ex parte Al Fayed* turned on the nature of the PCS' *functions*:<sup>215</sup> As has been held elsewhere, 'the proceedings before the PCS, his report and its acceptance by the [Committee on Standards] [are] all "parliamentary proceedings" and therefore any attempt to investigate or challenge any of the procedures adopted [would constitute] a breach of parliamentary privilege'.<sup>216</sup> Hence, as Bamforth noted, (in the absence of contrary authority) the 'decision makes clear that if a regulator falls within the scope of Parliamentary privilege, constitutional doctrine dictates that a purely functions-based test must be used: even if aspects of the Commissioner's role are analogous to that of the Parliamentary Ombudsman, the court cannot inquire further since the Commissioner's function is "Parliamentary"'.<sup>217</sup>

5.13 As will be seen below, in Chapter 7 (paras 7.11-12), these points are relevant to the case whether the PCS should be made a statutory officer. The Commissioner currently falls within the scope of parliamentary privilege; a statutory PCS would expose her decisions and process to judicial review.

## Committee on Standards in Public Life

5.14 There have been no recorded judicial review challenges to the CSPL. Though PASC's 2007 report on ethics and standards assumed its judicial reviewability,<sup>218</sup> the point is not clear-cut.

5.15 Certainly, following the Court of Appeal's decision in *R v Panel on Take-overs and Mergers, ex parte Datafin*,<sup>219</sup> the fact that the CSPL appears to have no (distinct) legal – i.e. statutory or prerogative – basis, powers or personality<sup>220</sup> will not *per se* defeat the court's judicial review jurisdiction, provided one can point to a sufficient 'public element' to its activities.<sup>221</sup> Examining current concerns about standards of conduct of all holders of public office, and recommending

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<sup>214</sup> *R v Parliamentary Commissioner for Administration, ex parte Dyer* [1994] 1 W.L.R. 621 (CA) 625; see also *R v Parliamentary Commissioner for Administration, ex parte Balchin* [1997] C.O.D. 146 (QB). Mr Pannick QC had tried, unsuccessfully, to argue in *ex parte Al Fayed* that 'it would be inconsistent with the general approach adopted by the Divisional Court in *Dyer's* case for the Parliamentary Commissioner for Standards not to be subject to the supervision of this court on an application for judicial review': 672.

<sup>215</sup> See also *R v Panel on Take-overs and Mergers, ex parte Datafin* [1987] Q.B. 815 (CA).

<sup>216</sup> *Hamilton v Al-Fayed (No 1)* [2001] 1 A.C. 395 (HL) 406.

<sup>217</sup> Nicholas Bamforth, 'Judicial Review, Parliamentary Privilege, and the Parliamentary Commissioner for Standards', *Cambridge Law Journal* 57(1), 1998, 9. As another commentator has similarly noted, the decision in *ex parte Al Fayed* 'maintain[s] the traditional demarcation line between Parliament and the courts.' Geoffrey Lock, 'Statute Law and Case Law Applicable to Parliament', in Dawn Oliver and Gavin Drewry, eds, *The Law and Parliament* (London: Butterworths, 1998), 63.

<sup>218</sup> Public Administration Select Committee, *Ethics and Standards: The Regulation of Conduct in Public Life (Fourth Report of Session 2006–07)*, HC 101 2006–07 (London: House of Commons, 2007), Appendix 2.

<sup>219</sup> *R v Panel on Take-overs and Mergers, ex parte Datafin* [1987] Q.B. 815 (CA).

<sup>220</sup> Cf. *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 [40]–[41].

<sup>221</sup> *R v Panel on Take-overs and Mergers, ex parte Datafin* [1987] Q.B. 815 (CA), 838; see also *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 W.L.R. 909 (CA) 928–29.

changes to ensure the highest standards of propriety in public life might certainly be described as public functions.

5.16 Yet, it must be queried whether the CSPL ‘is exercising public *law* functions, or if the exercise of its functions have public *law* consequences.’<sup>222</sup> Judicial review is classically ‘concerned with actions or other events which have, or will have, substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting existing legal rights or interests.’<sup>223</sup> Since the CSPL is a purely advisory body with no executive or regulatory powers, it is not immediately obvious that its activities are capable of constituting judicially reviewable matters of public law.<sup>224</sup> It has no power, even indirectly, to make decisions affecting individuals or their rights, making it quite difficult to see how any claimant might show a sufficient or ‘particular interest’ in its activities:<sup>225</sup> its power to effect change is based wholly on ‘moral persuasion’.<sup>226</sup> Its terms of reference, alterable by prime ministerial fiat, are certainly not justiciable standards (unlike, for instance, the Rules of Redistribution governing the redistribution of parliamentary seats, to which the BCE is legally bound to ‘give effect’); nor is it clear against which other public law standards the CSPL’s activity (or inactivity) might be challenged as unlawful. Until the point has been tested, however, these can only remain open questions.

## Boundary Commission for England

5.17 Assessing the BCE’s judicial reviewability requires a more extended analysis: ‘[t]his is an area of law in which there is limited jurisprudence’,<sup>227</sup> and the (dated) precedents that do exist may no longer be dispositive in light of significant adjustments to the statutory scheme for redistribution and relationship between the BCE and parliament.

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<sup>222</sup> *ibid*, 847 (emphasis added). It should be noted that the fact that some service or activity is for the public benefit does not mean that engaging in it is a public *function*; nor, relatedly, can it be said that the provision of public policy advice is ‘intrinsically a governmental or quasi-governmental function’, though that advice may, of course, guide and support the proper functioning of government: see, e.g., *R (Liberal Democrats) v ITV Broadcasting Ltd* [2019] EWHC 3282 (Admin), [2020] 4 W.L.R. 4 (QB) [72], [85].

<sup>223</sup> *R (Shrewsbury and Atcham BC) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148, [2008] 3 All E.R. 548 (CA) [32], subsequently described as the ‘true principle’ underlying judicial review (see *R (Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change* [2011] EWHC 3575 (Admin) [26]). See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 (HL) 408–09: ‘[t]o qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either: (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or (b) by depriving him of some benefit or advantage ...’.

<sup>224</sup> Cf. *Khaira v Sbergill* [2014] UKSC 33, [2015] A.C. 359 (SC) [43].

<sup>225</sup> See *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 A.C. 868 (SC) [170]; s 31(3) Senior Courts Act 1981.

<sup>226</sup> *R v Panel on Take-overs and Mergers, ex parte Datafin* [1987] Q.B. 815 (CA), 838. By contrast, the body under scrutiny in that case – the Panel on Takeovers and Mergers – ‘[c]onsistently with its character as the controlling body for the self-regulation of take-overs and mergers ... [combined] the functions of legislator, court interpreting the panel’s legislation, consultant, and court investigating and imposing penalties in respect of alleged breaches of the code ... [i]t has a giant’s strength.’ 841, 845.

<sup>227</sup> *Lynch v Boundary Commissioner for Northern Ireland* [2020] NICA 32 [12](iii).

5.18 There have been four judicial review challenges to the BCE's discharge of its statutory functions since its inception as a permanent body in 1944.<sup>228</sup> Two of these were brought in the wake of its First Periodical Review (1954), and a second pair of challenges emerged out of its Third Periodical Review (1983); in each case it was claimed the BCE had misunderstood and/or misapplied certain of the Rules of Redistribution obtaining at the time of the challenge in 'deciding' on its proposed redistributions, along with appropriate remedies.<sup>229</sup> Each failed at first instance, and, of the three challenges that were appealed, each was unsuccessful: the following overview of the courts' reasoning in these cases clearly supports Blackburn's conclusion, in 1995, that '[c]hallenging the recommendations of the Boundary Commissions in the courts has a very restricted potential.'<sup>230</sup>

5.19 In *Harper v Secretary of State for the Home Department*, the Master of the Rolls, Sir Raymond Evershed, emphasised the 'measure of latitude or of discretion ... plainly conferred ... on the commission' under the scheme of redistribution then in force,<sup>231</sup> such that there was 'no ground for saying that [the First Periodical Review] ... was such a substantial departure, or was indeed *any* departure, from the rules which the commission had to have in mind.'<sup>232</sup> Further,

My reading of these rules and of the whole Act is that it was quite clearly intended that, in so far as the matter was not within the discretion of the commission, it was certainly to be a matter for Parliament to determine. I find it impossible to suppose that Parliament contemplated that, on any of these occasions when reports were presented, it would be competent for the court to determine and pronounce on whether a particular line which had commended itself to the commission was one which the court thought the best line or the right line – whether one thing rather than another was to be regarded as practicable,

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<sup>228</sup> *Hammersmith BC v Boundary Commission for England*, *The Times*, 15 December 1954 (QB); *Harper v Secretary of State for the Home Department* [1955] Ch. 238 (CA); *R v Boundary Commission for England, ex parte Foot* [1983] Q.B. 600 (CA); *R v Boundary Commission for England, ex parte Gateshead* [1983] Q.B. 638 (CA). The initial non-implementation of the Second Periodic Review was legally challenged – *R v Secretary of State for the Home Department, ex parte McWhirter*, *The Times*, 21 October 1969 (QB) – but this was a judicial review challenge directed at the Home Secretary, not the BCE itself (and was ultimately withdrawn).

<sup>229</sup> *Viz.* an injunction to prevent implementation of the recommendations. This may be directed at the BCE itself or the Home Secretary (who was responsible for laying the BCE's report before parliament and submitting the draft Orders to Her Majesty in Council), depending on the stage in the redistribution process when the litigant chose to bring his action (see, further, n 230). *Dicta* in earlier cases, however, evinces a judicial reluctance to grant injunctive (as opposed, in particular, to declaratory) relief: *R v Boundary Commission for England, ex parte Foot* [1983] Q.B. 600 (CA) 634, 645–46 and *R v HM Treasury, ex parte Smedley* [1985] Q.B. 657 (CA) 672; see also, more recently, *PL v Boundary Commissioner for Northern Ireland* [2019] NIQB 64. The validity of the Order in Council implementing the boundary commissions' recommendations, once made, 'shall not be called in question in any legal proceedings whatsoever': s 4(7) PCA 1986.

<sup>230</sup> Robert Blackburn, *The Electoral System in Britain* (London: Palgrave, 1995), 137; see also Hugh Rawlings, *Law and the Electoral Process* (London: Sweet & Maxwell, 1988), 59–61.

<sup>231</sup> See Sch 2 House of Commons (Redistribution of Seats) Act 1949.

<sup>232</sup> *Harper v Secretary of State for the Home Department* [1955] Ch. 238 (CA), 248–50 (emphasis added). Cf. Stanley de Smith, 'Boundaries between Parliament and the Courts', *Modern Law Review* 18(3), 1955, 281–86 and Hugh Rawlings, *Law and the Electoral Process* (London: Sweet & Maxwell, 1988), 32–33, who both dispute the Court's conclusion that the BCE had not made an error of law – on the facts, using the incorrect metric to calculate the electoral quota, which, it was argued, led it to recommend eight fewer constituencies for England (511 seats) than it ought to have, following the correct metric (519 seats).

and so on. If it were competent for the courts to pass judgments of that kind on the reports, I am at a loss to see where the process would end and what the function of Parliament would then turn out to be.<sup>233</sup>

5.20 It was thus significant that the Rules of Redistribution then in force stipulated, for example, that '[t]he electorate of any constituency shall be as near the electoral quota *as is practicable* having regard to the foregoing rules' (rule 5; first limb), or that '*so far as is practicable*' no county or county borough, or any part thereof, should be included in a constituency which includes the whole or part of any other county or county borough (rule 4) – from whose 'strict application' the BCE may depart '*if it appears to them* that a departure is desirable to avoid an excessive disparity' between neighbouring constituencies or between a constituency and the electoral quota (rule 5; second limb).<sup>234</sup> In any event, it was ultimately (and only) for parliament to decide whether to accept or reject the BCE's recommendations in light of the methodology, 'exposed on the face of [its] report,' that the BCE adopted in drawing them up.<sup>235</sup>

5.21 The Court of Appeal followed an analogous line in its decision in *R v Boundary Commission for England, ex parte Foot*: a challenge brought by the Labour Party (in the name of its then Leader, Michael Foot) on the basis that the BCE had failed, in its Third Periodical Review, to give effect to what it contended was 'the primary purpose of the rules ... [viz.] to achieve electoral equality between constituencies.'<sup>236</sup> The Master of the Rolls, Sir John Donaldson too regarded the discretion built in to the relevant Rules of Redistribution, wherein a finding of "practicability" or "excessiveness" depended on the BCE's 'subjective judgment', as clearly militating against the claimants' judicial review prospects.<sup>237</sup> This argument gained further support from s 2(2) House of Commons (Redistributions of Seats) Act 1958, which the Court held effectively relieved the BCE from the duty, in discharging its functions, 'to aim at giving full effect in all circumstances' to the Rules of Redistribution; and thus whose 'practical effect is that a strict application of the rules ceases to be mandatory so that the rules, while remaining very important indeed, are reduced to the status of guidelines'.<sup>238</sup>

5.22 Moreover, echoing Sir Raymond Evershed in *Harper*,<sup>239</sup> Sir John Donaldson emphasised that 'the commission's task is ancillary to something which is exclusively the responsibility of Parliament itself, namely, the final decision on parliamentary representation and constituency

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<sup>233</sup> *Harper v Secretary of State for the Home Department* [1955] Ch. 238 (CA), 251.

<sup>234</sup> *ibid*, 248–49 (emphases added).

<sup>235</sup> *ibid*, 250.

<sup>236</sup> *R v Boundary Commission for England, ex parte Foot* [1983] Q.B. 600 (CA), 622. It should be noted that, since the action had been brought before the Third Periodical Review had been published (or indeed even handed to the Home Secretary), the claimants faced an added evidential difficulty in substantiating their challenge, which is apparent from the judgment: see, e.g., 633–34.

<sup>237</sup> *ibid*, 622–23: '[p]racticability is not the same as possibility ... Practicability not merely connotes a degree of flexibility: it contemplates that various matters should be taken into account when considering whether any particular purpose is practicable, i.e. capable in practical terms of achievement ...'; and 626. See also Oliver LJ in his (unreported) judgment at first instance.

<sup>238</sup> *ibid*, 623–24. This interpretation of the 'practical effect' of s 2(2) is, however, disputed by Hugh Rawlings, *Law and the Electoral Process* (London: Sweet & Maxwell, 1988), 60.

<sup>239</sup> Though, interestingly, the Court of Appeal in *ex parte Foot* never references *Harper*.

boundaries’:<sup>240</sup> even if the challenge had succeeded, therefore, his Lordship would have refused an injunction to prevent the BCE from submitting its recommendations to the Home Secretary, ‘which the commission, after long and obviously careful consideration, were minded to place before’ parliament (even though, *ex hypothesi*, those recommendations would be unlawful).<sup>241</sup>

5.23 Neither case thus dismissed outright the ‘theoretical possibility’ of a successful challenge to the BCE’s outputs;<sup>242</sup> the Court of Appeal in *ex parte Foot* explicitly considered that a boundary commission’s recommendations could, in principle, be challenged on the familiar administrative law grounds of *ultra vires* or *Wednesbury* unreasonableness (a decision that is so unreasonable that no reasonable person acting reasonably could have made it).<sup>243</sup> Yet, as Blackburn has noted, in both of these hitherto leading cases ‘the courts were clearly of the opinion that Parliament must have intended the Boundary Commissions to have a very wide discretion in preparing their recommendations ... [and that] [i]t is fundamental to the judiciary’s attitude in these cases that constituency review is essentially the business of Parliament, and not that of the courts.’<sup>244</sup> As Sir Raymond Evershed put it in *Harper*, in adjudicating on challenges to the Boundary Commissions’ discharge of its functions, ‘the court is concerned with matters which at any rate come somewhat near to touching on the relative spheres of Parliament and the courts.’<sup>245</sup>

5.24 Following significant amendments to the Rules of Redistribution and the relationship between the BCE and parliament over the past decade, it may now be queried whether a court would maintain such a deferential approach to its judicial review jurisdiction as characterises these earlier cases.

5.25 The Parliamentary Voting System and Constituencies Act 2011 recast the statutory scheme for redistribution, expressing some rules in categorical terms, and making others subservient. Under the current rule 2, for instance, ‘[t]he electorate of any constituency *shall be*’ within 5%, plus or minus, of the electoral quota, which allocates primacy to the achievement of equal constituencies over competing principles;<sup>246</sup> and under rule 4, ‘[a] constituency *shall not have* an area of more than 13,000 square kilometres.’ Under earlier regimes the boundary commissions effectively enjoyed some discretion as to which ‘statutory objective’ – the ‘mathematic’ (i.e. electoral equality) or ‘organic’ (i.e. integrity of communities) – to prioritise.<sup>247</sup> Under the current regime, rule 5 sets out some additional factors which the boundary commissions ‘may take into account, if and to such extent as they think fit’ when recommending constituency boundaries, such

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<sup>240</sup> R v Boundary Commission for England, *ex parte Foot* [1983] Q.B. 600 (CA), 616.

<sup>241</sup> *ibid*, 634.

<sup>242</sup> *Harper v Secretary of State for the Home Department* [1955] Ch. 238 (CA), 251; R v Boundary Commission for England, *ex parte Foot* [1983] Q.B. 600 (CA), 616, 629.

<sup>243</sup> R v Boundary Commission for England, *ex parte Foot* [1983] Q.B. 600 (CA), 626–27.

<sup>244</sup> Robert Blackburn, *The Electoral System in Britain* (London: Palgrave, 1995), 140–41; see also DJ. Rossiter *et al.*, *The Boundary Commissions: Redrawing the UK’s Map of Parliamentary Constituencies* (Manchester: Manchester University Press, 1999), 95.

<sup>245</sup> *Harper v Secretary of State for the Home Department* [1955] Ch. 238 (CA), 247.

<sup>246</sup> Indeed, *re-allocates*: Sch 3, para 4 of the original House of Commons (Redistribution of Seats) Act 1944 provided that ‘[s]o far as is practicable ... the electorate of any constituency returning a single member *shall not be greater or less* than the electoral quota by more than approximately one quarter of the electoral quota’ (emphasis added), which took precedence over the rule on respect for local government boundaries, in para 5.

<sup>247</sup> See, e.g., R v Boundary Commission for England, *ex parte Foot* [1983] Q.B. 600 (CA), 629.

as special geographical considerations or local government boundaries; but these considerations are now explicitly subordinate to rules 2 and 4.<sup>248</sup> In the *ancien régime*, such factors could justify departing from a ‘strict application’ of both of the former rules 4 and 5, cited above.<sup>249</sup> Finally, the provision contained in s 2(2) House of Commons (Redistributions of Seats) Act 1958, initially reproduced as rule 7 in the 1986 Act, has been repealed.<sup>250</sup>

5.26 It follows from all this that, although rule 5 continues to afford a ‘measure of latitude’, the BCE enjoys significantly less operational discretion now – as regards departures from the electoral quota in favour of other values, etc. – thus signalling a reverse trend in the history of the redistribution legislation since 1944 where the legislative purpose has, hitherto, been to confer a progressively *wider* discretion upon the boundary commissions.<sup>251</sup>

5.27 Moreover, under the current scheme parliament’s role is significantly reduced: it no longer approves the draft Order in Council implementing the BCE’s recommendations. Once drawn up, the draft Order must now be submitted by the government straight to Her Majesty in Council. Accordingly, it may no longer be contended that ‘the final decision on parliamentary representation and constituency boundaries ... is exclusively the responsibility of Parliament itself,’ such that, for reasons of constitutional propriety, ‘the court in the exercise of its discretion [ought to be] more slow to intervene in regard to [the BCE’s] activities than it would be in relation to those of many other public authorities.’ Indeed, in the absence of parliamentary accountability for the boundary commissions’ outputs – insofar as parliament, faced either with accepting or rejecting their proposals en bloc, constituted an effective accountability forum – judicial review appears the sole means of holding these bodies substantively to account for the exercise of their statutory functions.

## Complaints mechanism

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<sup>248</sup> Sch 2, para 5(3) PCA 1986. As the Northern Irish Court of Appeal has recently held (see *Lynch v Boundary Commissioner for Northern Ireland* [2020] NICA 32), whilst rule 2 creates a prima facie ‘obligation’ to comply, within very tight margins, with the statutory electoral quota, the rule 5 factors are *not* a ‘goal or statutory objective to be achieved’: *ibid* [34], [37].

<sup>249</sup> *Harper v Secretary of State for the Home Department* [1955] Ch. 238 (CA), 248–49 and accompanying text. The old rule 6 – now repealed – allowed the BCE to ‘depart from the strict application of rules 4 and 5 if special geographical considerations, including in particular the size, shape and accessibility of a constituency, appear to them to render a departure desirable.’

<sup>250</sup> Rule 7 now provides for a limited exception to the ‘parity principle’ in rule 2, applicable only in relation to Northern Ireland; it may be only used where the Boundary Commission for Northern Ireland consider that having to apply rule 2 would ‘unreasonably impair their ability to take into account the factors set out in Rule 5(1) ...’. See *Lynch v Boundary Commissioner for Northern Ireland* [2020] NICA 32.

<sup>251</sup> Cf. Hugh Rawlings, *Law and the Electoral Process* (London: Sweet & Maxwell, 1988), 60. See also the recent, successful judicial review challenge to the work of the Boundary Commission for Northern Ireland – which operates under the same statutory rules – which may suggest a greater willingness to engage in the boundary commissions’ legal accountability: *Lynch v Boundary Commissioner for Northern Ireland* [2020] NICA 32. For example, whilst noting that the boundary commission’s decision to invoke rule 7 (see *ibid*) was ‘a pure exercise of judgment’, the Court was clear this was not (in the words of Sir John Donaldson MR in *ex parte Foot*) a matter falling wholly within the ‘subjective judgment of the commission’; rather, the commission should ‘have set out briefly either in summary or by way of illustration some of the evidence of the “impairment” and why the Commission had concluded that such impairment was “unreasonable”’: [39], [45].

5.28 What appears to be missing for some regulators is any avenue to complain about the regulator's activities which falls short of a legal challenge: a complaint of maladministration or abuse of power. Three of the regulators – the Boundary Commission for England, Electoral Commission and CSPL – are listed as falling within the jurisdiction of the Parliamentary Ombudsman, whose role is to investigate maladministration by government departments and executive bodies.<sup>252</sup> This need not threaten their independence: in the analogous field of the judiciary, who also enjoy a high degree of independence, there is a specific complaints officer created by the Constitutional Reform Act 2005, the Judicial Appointments and Conduct Ombudsman. The main gaps in terms of a complaints mechanism appear to be IPSA and the PCS. IPSA has a first line of appeal in the Compliance Officer, but she cannot hear complaints about delays, unhelpfulness, difficulties with the IT system etc. IPSA could be included within the jurisdiction of the Parliamentary Ombudsman; as could the PCS. The main objection from the PCS might be that a complaints handling body should not itself be subject to a complaints mechanism; but the Information Commissioner can be reviewed by the Ombudsman, so that objection cannot hold. The other gap is in terms of public awareness: regulators could advertise more prominently the possibility of complaining to the Ombudsman, and inform complainants of this right. One example could be the complaints from Peter Bone MP about delays and malicious treatment by the Electoral Commission.<sup>253</sup> It may be that nothing would have assuaged his indignation, short of the Commission's abolition; but in venting his frustration on the floor of the House of Commons, he seemed to be unaware of the possibility of requesting an investigation by the Ombudsman.

## Conclusion

5.29 This chapter has considered the legal accountability of the five watchdogs which are the subject of this report, through a right of appeal or by means of judicial review. All four of the bodies with investigatory and enforcement powers operate within a tight legal framework. The Electoral Commission and the Boundary Commission have both faced challenges by judicial review, in all of which they have been successful. IPSA has not yet experienced judicial review, but there is a right of appeal for MPs to go to the Compliance Officer, with a further appeal to the First Tier Tribunal. The PCS has not been subject to a right of appeal to an independent body in terms of her findings under the Code of Conduct (as opposed to ICGS cases), but that will change if the Ryder report is implemented, with both conduct and ICGS cases in future being subject to appeal to the Independent Expert Panel (see para 3.30).

5.30 As for complaints mechanisms, the BCE, Electoral Commission and CSPL come within the jurisdiction of the Parliamentary Ombudsman, who can investigate complaints about maladministration or abuse of power; but IPSA does not. There may well be complaints about delays, IT systems etc which merit investigation; to fill this gap, IPSA should also come under the Parliamentary Ombudsman.

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<sup>252</sup> Sch 2 Parliamentary Commissioner Act 1967.

<sup>253</sup> HC deb vol 691 cols 742–745, 22 March 2021.

5.31 The biggest changes in accountability have been to the system of standards regulation policed by the PCS, the Standards Committee, and now the ICGS and IEP. What began as a system of self-regulation, with purely political mechanisms of accountability, has gradually evolved into a system with stronger and stronger independent elements, and tighter legal accountability. The Ryder review is a significant further twist, with the ultimate decision in disciplinary matters in future lying with the Independent Expert Panel. But political accountability is equally important for all the watchdogs, as we saw in Chapter 4. The next chapter explores that further, through the practical reflections of former post-holders on their independence and accountability, and the tensions between them. It provides context and grounding for the conclusions and recommendations which follow in Chapter 7.



# Chapter 6: Interview Findings on Independence and Accountability

6.1 The previous chapters have set out the theoretical context and governance arrangements of the five constitutional watchdogs under review; the principles underlying their independence and accountability; and lists of design features to buttress their independence, and to ensure their accountability. As a reality check, and to supplement that analysis, we conducted two rounds of interviews: the first with 17 senior leaders from the watchdogs concerned and from the House of Commons; followed by a second round of eight interviews about lay members, reported at paras 6.40–45 below.

6.2 In the initial round we asked each interviewee about the rationale for their independence; security against external pressures; their main lines of accountability; tensions between their independence and accountability; and their suggestions for improvement. The full list of interview questions is at para 1.21. Interviewees' responses are reported by topic rather than by organisation. Quotations in the text are unattributed except where interviewees have agreed to be named.

## The rationale for independence

6.3 Interviewees were clear that the formal rationale for watchdogs' independence was to enable the bodies to 'do what they think is right, without fear or favour' and to ensure that their 'public functions are efficiently and effectively discharged without day-to-day political interference'. It was noted, for example, that setting constituency boundaries has intensely political implications, and that 'it makes sense to take it out of the political ferment and remove the opportunity for gerrymandering'. Similarly, in relation to the EC, an interviewee commented that 'one can't have politicians running the elections that get them elected': 'it is important for the integrity of the democratic process that elections are seen to be free and fair', with voters wanting to ensure that 'appropriate controls are in place and things are done properly'. For IPSA, an interviewee thought 'it was inconceivable' to return to a system where MPs were responsible for determining and then regulating their own pay and business costs.

6.4 Interviewees were also clear that there was never any doubt that CSPL should be fundamentally independent, able broadly to set its own agenda, and 'not [be] politically partisan, and not connected to party politics or public bodies'. For the PCS, too, this reasoning was expressed most fully by one former post holder:

The starting point is that it is helpful and necessary for parliament, and parliaments in general, to have a Code of Conduct. If so, then this needs to be policed, or at least patrolled – otherwise it is just words. To achieve this, within a political, partisan and tribal parliamentary climate, we need someone who is not a part of tribal politics (although who understands it), and who is clearly seen as independent from the pressures of politics in Parliament. *John Lyon*

6.5 There was also a recognition that independence brought a greater likelihood of fairness in decision-making. For the PCS, for example, it was important for complainants, witnesses, and those subject to investigation to know that the decisions would be based on evidence and the equitable application of the rules: ‘independence is important both for those being investigated and for witnesses putting forward evidence – so that everyone had confidence in the outcome reached’.

6.6 Interviewees differed slightly in their understanding of who these watchdogs were independent from. There was agreement that constitutional watchdogs should be independent of the executive branch, so that ‘they don’t need to worry about the politics of No 10’. The responsibility for overseeing elections was taken away from the Home Office with the creation in 2000 of the EC, and ‘the key issue was to be independent from government rather than independent from parliament or independent *per se*’, so that ‘ministers can’t interfere with their tasks’. But a wider independence was considered to be important when IPSA was formed:

The driver with IPSA was to create an organisation that could make payments independently of parliament. It was politically unacceptable to give the responsibility to government. So, while the independence of the Electoral Commission was explicitly about independence from government, for IPSA it was about being independent of parliament and government. *Andrew Kennon*

6.7 Interviewees agreed that there should be ‘elected politicians involved in the oversight of these bodies’ and that the watchdogs should ‘be accountable to parliament, and across political parties’. They also noted that ‘the House [of Commons] is entitled to scrutinise and question the [budget] Estimate’ for each watchdog, but not to interfere with their operational independence. So, whilst (in the context of the PCS) interviewees acknowledged that there is a ‘need for parliament to demonstrate that its members are subject to appropriate professional and performance standards’, necessitating independent regulation, ‘due to the importance of parliamentary sovereignty, ... accountability to parliament is important too’.

6.8 Interviewees also recognised that there was no ‘grand theory’ in the establishment of the watchdogs, and that some were established in response to crises. Prime Minister John Major set up the CSPL ‘in response to a specific problem – cash for questions – with lots of ad-hocery in its establishment, as with several of the bodies’. And when the government searched for appropriate governance models for the EC, it formed a Speaker’s Committee modelled on parliament’s Public Accounts Commission. The Public Accounts Commission approves the budget of the NAO, and appoints the non-executive members of the NAO board; but the committee is not chaired by the Speaker, but by a senior backbencher (currently Richard Bacon MP).

## Actual and perceived independence

6.9 Interviewees were clear that the *perception* that these watchdogs are independent matters as well as the actuality, so that the EC, for example, is ‘credible and independent with voters, and seen to stand aside from undue influence’ and ‘so that people have confidence in the electoral process’. It was explicit in IPSA’s creation that ‘creating an independent body would seek to recapture trust and integrity in the system and thence in parliament.’ The fact that the deputy chair of the BCE must be a serving High Court judge ‘deliberately trades off the judiciary’s reputation

for integrity and independence'. Independence brings the watchdogs 'legitimacy and confidence.' In the case of the CSPL, it was clear that it

was set up to provide advice to the Prime Minister about issues of ... standards in general ... this advice would be less valuable and have less impact if it were thought to be tainted in any way by political convenience, especially since many issues addressed are sensitive.  
*Sir Christopher Kelly*

6.10 Some mechanisms for demonstrating a watchdog's independence included hosting 'their own website ... and by making themselves distinctive in various ways, such as by paying their own rent'. Neither the CSPL nor the PCS could be seen to be independent in this way, with their websites hosted by government and parliament respectively.

6.11 Another manifestation of independence is that the leaders of IPSA and the EC appear publicly before select committees, bringing clarity about how these bodies are governed and paid for. The transparency of these watchdogs' processes was acknowledged as a means of boosting public confidence in their independence.

6.12 But interviewees were nonetheless clear that 'the actuality of independence is more important than public perception of independence'. There was agreement that most members of the public do not really care about watchdogs' role, or 'talk about the independence of constitutional watchdogs in the pub' – at least until there is a scandal, when the perception of independence, or lack thereof, becomes a salient issue.

6.13 Overall, interviewees considered the actual independence of watchdogs to be strong in principle. Those who led the statutory bodies (IPSA, the EC and BCE) asserted that they were 'independent and can act independently', with IPSA and the EC able to investigate concerns without deferring to parliament. The BCE too was believed to be independent and impartial, demonstrated 'in its willingness and ability to say "this is what we think is right, this is how we are doing it"'. Its former deputy chair, Lord Sales, was clear that the Speaker, although nominally in the chair, did not interfere in operational decisions nor in fact attend the BCE's meetings.

6.14 Other interviewees, however, recognised that independence can be more of 'a mixed picture' in practice. Some watchdogs are not statutorily independent, and it was considered that the CSPL 'wouldn't withstand much attack on its independence', as it could be abolished or its terms of reference changed at a Prime Minister's whim.<sup>254</sup> But even statute may not prove much of a defence against a government determined to cut a watchdog down to size, as witnessed by the provisions in the Elections Act 2022 to restrict the independence of the Electoral Commission.

6.15 Nor is the PCS independent, but an officer of the House, appointed by MPs. One interviewee recalled that a former PCS was appointed by a panel of MPs including Malcolm Rifkind, who was later investigated by the same PCS for alleged breaches of the rules, causing comment in the media about potential conflicts. This led a former Clerk of the House, Sir David Natzler, to conclude that 'the PCS is always ruthlessly independent in approach, but it's hard to prove it externally'.

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<sup>254</sup> CSPL's scope was reduced in 2013 to exclude the devolved nations, following representations from the devolved administrations. Its scope was enlarged under Prime Minister Blair to enable it to look into party funding.

## Pressures on independence

6.16 Interviewees agreed that watchdogs, even if statutory, could have their independence threatened in practice, due to the ‘constant effort by certain MPs to undermine’ their processes: as one of them put it, ‘there are moments when politicians should behave better’. MPs did not like their regulators, but some were more disliked than others. MPs respected the BCE ‘for doing an unpopular, technical job extremely well, even though MPs hate what it does’; while the EC was said to annoy MPs tremendously with its ‘legalistic culture [and] investigative approach’ or ‘political naivety’. There were ‘very raw feelings among MPs when IPSA was set up [and] some quite difficult meetings’. ‘It was not uncommon for MPs to bend [the Speaker’s] ear’ about the watchdogs and their work.

6.17 There were concerns that the future independence of the watchdogs might be at risk. The Owen Paterson affair (which happened after our interviews) provided a vivid illustration of the hostility towards the PCS felt by significant numbers of MPs. Two interviewees regretted the procedural changes which had prohibited the PCS from being transparent about investigations under way; though, since the interviews took place, parliament has voted to restore the right of the PCS to publish brief details of ongoing investigations.<sup>255</sup> One regretted that electoral law had not been updated to strengthen the EC’s powers.

6.18 Yet interviewees recognised that the watchdogs have, in the main, survived with their independence intact. (The Owen Paterson affair, which threatened to undermine the whole standards regime, has seen it emerge stronger than before.) MPs saw benefits to giving independence to bodies, like IPSA, that could make payments to MPs instead of the politically unacceptable alternative of giving the responsibility to government or to MPs themselves. In some cases, a ‘mutual respect’ had grown between politicians and their regulators. In the wake of actual or potential scandals, MPs were keen for there to be a perception of independence, even if they wished to retain oversight overall, and the option of questioning the conclusions of watchdogs when politically sensitive or controversial issues were at stake.

6.19 The strength of the watchdogs’ independence in practice, and their ability to withstand challenge, depended crucially on the culture of the organisations and the character of their senior leaders. There was unanimity that watchdog leaders must be independent-minded, as they will be regularly subject to challenge. The independence of the PCS is ‘as strong as the office-holder’, and when he or she has ‘independence of mind and spirit, wisdom and judgement, and fortitude, [and] an understanding of parliament ... then independence is pretty strong’. CSPL, similarly, was judged

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<sup>255</sup> Between December 2010 and July 2018, the PCS was entitled to publish ‘information about complaints received and matters under investigation’; but following the 19 July 2018 amendment to SO 150, the PCS could only publish ‘statistical information about complaints received’ (SO 150(12)(b); emphasis added). See HC deb vol 645 cols 627–661, 19 July 2018.

For the reversion to the *status quo ante* see HC deb vol 692 cols 1074–1089, 21 April 2021. It followed proposals from the current PCS, Kathryn Stone, endorsed by the Committee on Standards: see Parliamentary Commissioner for Standards, *Annual Report 2019–20*, HC 616 (London: House of Commons, 2020), paras 21–25; Committee on Standards, *Confidentiality in the House’s Standards System (Sixth Report of Session 2019–21)*, HC 474 2019–21 (London: House of Commons, 2020); *Sanctions in Respect of the Conduct of Members (Seventh Report of Session 2019–21)*, HC 241 2019–21 (London: House of Commons, 2020), paras 122–23; *Sanctions and Confidentiality in the House’s Standards System: Revised Proposals (Twelfth Report of Session 2019–21)*, HC 1340 2019–21 (London: House of Commons, 2021), paras 8–22.

to be ‘fairly independent ... because people of integrity have been appointed, who would not have agreed to serve unless they could be independent in what they say’. As the first chair of IPSA summarised:

If you are in charge of a regulatory body, you must be able to withstand any attempt to be held hostage or be undermined. ... I can’t stress enough the importance of leadership. ... The leader of an organisation must have a clear sense of what the organisation is about and communicate this clearly and regularly internally and to those affected. In the case of IPSA the message was that we were a regulatory body, not a “customer service organisation”. This was a major area of dispute where the regulated tried to undermine the regulator by a variety of means. Being clear what we were and being able to identify more or less subtle attacks was a central feature of maintaining IPSA’s independence. *Sir Ian Kennedy*

6.20 Others confirmed the importance of post-holders maintaining their independence, and recalled specifically how four former office-holders, including two former PCSs, had stood up to challenge from the press and politicians. This included a ministerial attempt to remove one former EC chair, and another occasion when a ‘splendidly independent’ post-holder had to be supported against the ‘fury’ of the then Prime Minister:

The government and the main opposition were all in favour of independence, as long as independence didn’t do anything that was publicly unpopular.

6.21 Interviewees took pride in their own independence of character. They did not articulate their own political views and sought to achieve unity within their board or committee so that it would be harder for politicians to undermine the watchdogs’ positions, especially on contentious issues. One noted that he had formally been appointed by the Queen, albeit on the recommendation of politicians. So, although he was ‘deferential to elected democrats [and] sometimes gave them the benefit of the doubt, I took a firm line where the rules were clear’. Another reported that his ultimate independence rested in his ‘sanction of resignation’; although he did not recommend playing this card.

6.22 Three themes emerged about the pressure on watchdogs’ independence. First, some watchdogs came under more pressure than others. Interviewees from the BCE believed that their independence had not come under any pressure at all, partly because it was in the interest of politicians to keep its work at arm’s length, and that, if pressure had come, it ‘would have been met with a cold reception’. Those chairing the CSPL also said that they had come under little pressure, with one chair saying that he had no contact from the Prime Minister while in office, and another responding that any governmental queries were merely a ‘healthy tension and no threat to the Committee’s independence’. On the other hand, there was ‘of course’ pressure on the PCS virtually at all times, due to the nature of her investigative work into the behaviour of individual MPs and her power to sanction them. IPSA is also under fairly constant pressure from those MPs who resent having their expenses queried by an independent regulator.

6.23 Second, interviewees indicated that the intensity of pressure ‘varied enormously over time’. A period of referendums or general elections was likely to lead to more pressure than at other times. And third, some interviewees were willing to admit that they had come under pressure, whilst others were either better able to brush off any pressure or felt that it had not affected them.

Politics is of course a contact sport, and you have to accept that some politicians play the man and not the ball.

Sometimes politicians sail very close to the line.

6.24 A few interviewees feared that pressure on operational independence might come through cuts to funding. The CSPL's budget was reduced at a time of public sector austerity – a reduction that one interviewee suspected the government had welcomed. Other interviewees had been challenged in parliament about whether their watchdogs' expenditure represented value for money, and two interviewees suspected that the budget of the PCS had been kept low in the past to reduce the capacity to conduct sufficient and timely investigations into MPs.

6.25 But most interviewees asserted that there had been little pressure on funding in practice. The EC generally received the money it requested, and the BCE had never experienced pressure to reduce its budget. At IPSA, where there were initial fears that MPs would 'emaciate' the organisation in order to hasten its abolition, it was soon realised that its 'abolition wasn't in [MPs'] interests, and that they depended on IPSA for their money ... [and] had a vested interest in having a decent system in place'.

6.26 Although funding was less of a problem, interviewees agreed that operational independence was of fundamental importance. This chiefly included the ability to make day-to-day personnel and spending decisions, and to receive legal and communications advice separate from government or parliament. This was judged to be 'important at a very basic level of independence: they give the body the ability to think and work independently, so it cannot be restricted in the same way as a body might if these functions were the responsibility of a sponsoring department'.

6.27 Operational independence also included having separate office accommodation. Its all-UK operation means that the Electoral Commission needs to have offices in England, Scotland, Wales and Northern Ireland. That the BCE, EC and IPSA were not in parliament was considered to be a benefit, whereas the fact that CSPL was hosted by the Cabinet Office was judged by some to be a risk. It is part of a cluster of independent offices on the ground floor of 1 Horse Guards Road along with the Civil Service Commission, Commissioner for Public Appointments, Advisory Committee on Business Appointments, and not far away the Honours Secretariat and House of Lords Appointments Commission. Others said this arrangement works well, without any sense of Cabinet Office control. As for the PCS, former Commissioners nonetheless regarded it to be important for the PCS to be seen around the corridors of Westminster, 'so that MPs know you're there,' even though their office on the parliamentary estate created a risk of MPs turning up uninvited to apply pressure on the post-holder.

6.28 Interviewees agreed that any explicit pressure had not changed their operational decisions. It was accepted that MPs and political parties might make representations, and that this could create tensions if their wishes were not satisfied. This was deemed a normal part of consultative practice. But some interviewees pointed to more subtle pressure; for instance, the Cabinet Office was judged to be 'very good at slowing things down and killing things with bureaucracy.' There were also meetings with Chief Whips and other business and party managers who would wish to discuss operational decisions, as a form of 'professional liaison', without it ever quite becoming overt pressure.

6.29 There were concerns about the opportunities for influence over watchdogs' independence through the appointments and re-appointments processes, with politics 'always involved'. In some cases, candidates had been rejected or vetoed (such as Sir Ian Kennedy's candidacy as an Electoral Commissioner),<sup>256</sup> and re-appointments refused (such as Sir John Holmes' chairmanship of the EC).<sup>257</sup> This raised the risk of perceived or actual bias, with politicians picking their own regulators, *a fortiori* where – as happened initially in the current parliament – the appointment committees had government majorities.

6.30 Interviewees accepted the need for some political representation on selection panels; but thought it 'crucial' that appointments be for a non-renewable, fixed term of around five years. Aside from the perception of independence this promotes, it would lead post-holders to understand that there was no prospect of re-appointment – 'a comfort and a strength', as this serves to reduce the scope for any external pressure and threat associated with reappointments.

6.31 Interviewees also reported that pressure was applied to watchdogs through negative anonymous briefings in parliament and to the media, to which the watchdogs could not answer back. A good example (subsequent to our interviews) was when, immediately after the Commons vote rejecting the suspension of Owen Paterson, a government minister told Sky News that it was 'difficult to see what the future of the Commissioner' was, and it was up to her to 'consider [her] position'.<sup>258</sup> Many interviewees, particularly from the EC and IPSA, recalled that they had been subject to such briefings: 'questioning of the integrity and validity of [the watchdog's] findings is a form of pressure' on its independence. Some of this was considered to be normal: 'the pressure is always around electoral events, with each party making noise about the [Electoral] Commission doing or not doing something.' Some MPs have publicly criticised individuals as well as the organisation itself: 'people have sometimes looked for dirt on individuals in order to undermine them'. Some thought this covert pressure influenced parliamentary or governmental decisions, or that it led to inaction. Persistent inaction by ignoring watchdogs' recommendations would slowly reduce their credibility, challenging their effectiveness if not their independence.

6.32 Pressure through the media could be 'enormous and continuing' – in how stories were written, and in the physical presence of journalists on doorsteps. Interviewees accepted that MPs were generally more sophisticated media handlers than they were, and that in the case of the PCS, the Commissioner is now prohibited from talking to the press. In contrast, post-holders at the BCE claimed never to experience hostile media briefings.

6.33 Overall, however, interviewees considered most pressure to be 'proper and decent'. A few MPs under investigation from the PCS might 'get alarmed and go outside normal procedures', with parliamentary authorities 'not always taking the side' of the watchdog for fear of alienating MPs, and the police reluctant 'to get too far involved' in politically sensitive cases. It was rare for watchdogs to experience outright threats and bullying, though some MPs banged tables and used expletives to 'lean on' post-holders, albeit unsuccessfully. This was considered by one to be 'a day-

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<sup>256</sup> HC deb vol 635 cols 232–236, 23 January 2018.

<sup>257</sup> See Speaker's Committee on the Electoral Commission, formal minutes of the meeting on 17 July 2020.

<sup>258</sup> The Business Minister Kwasi Kwarteng MP: 'Government faces backlash over new conduct rules plan', BBC News, 4 November 2021.

to-day thing in the House of Commons'. Most MPs were supportive of the watchdogs and their role, with a former Clerk warning that 'we only hear about or remember those who complain'.

The Parliamentary Commissioner is under pressure at all times from MPs, as well as from those on the other side of a complaint about an MP who want to see a result. But they are under pressure in the same way that judges are under pressure, so it is reasonable. *Sir David Natzler*

6.34 Interviewees asserted that those appointed to be watchdogs in future should not have thin skins or need other employment. One claimed to 'have a skin like a rhino', while another recommended that 'you need not to worry where the next job is coming from if you are making important regulatory decisions'; while a third asserted that 'leaders, especially the chair, must be good, secure and confident in their personality, and mature, able to dig in their heels if necessary'.

6.35 Finally, interviewees recognised that independence was not absolute; nor, in a democracy, should it be. They needed to be accountable as well. The watchdogs must work constructively with the government and parliament of the day. Even for non-statutory bodies like CSPL, there are conventions to consult with interested parties on draft reports to build consensus on contentious issues. So, although independent, these relationships with the executive and the legislature, as well as with political parties, are constraining in important and necessary ways, including to pass legislation if this is necessary.

The arrangements in place [for the PCS] are designed to strike a balance between independence and accountability. It's hard to think how the independence of the role could be further strengthened within the necessary boundary of parliamentary sovereignty. *Sir Philip Mawer*

There [is] no such thing as absolute independence. Nor ought there be: there are always checks and balances and properly so. The ethical regulators should all be as independent and accountable as possible; but these statements beg questions. *Richard Thomas*

Independence is not about creating a "line in the sand". That's an illusion. It's a contract constantly negotiated with those in power, subject to some non-negotiable principles – honesty, transparency, fairness. But within the principles there is scope for flexibility. *Sir Ian Kennedy*

## The Speaker

6.36 Interviewees agreed that the role of the Speaker was particularly important. The Speaker chairs the BCE, and the statutory committees that oversee IPSA and the EC; and can have direct influence over the PCS. It was only with CSPL, which reported to the Prime Minister, where the Speaker has little potential for influence.

6.37 But different Speakers play their roles in different ways. Three interviewees argued that one Speaker, John Bercow, had acted as a champion of parliament as a whole, and so tended to interact with watchdogs less and in ways which respected their independent roles; while others had acted more as MPs' shop stewards, putting points to watchdogs publicly to which they were required to respond.



6.38 If a Speaker chose to apply pressure, it would be felt. ‘Academics underestimate the degree of brute political pressure that the Speaker can exert.’ They could issue veiled threats to the watchdogs unless they gave way, or challenge them repeatedly about particular investigations. It was helpful to remember that the Speaker is not necessarily neutral: ‘they are politicians after all and they think short-term, and not necessarily about parliament’s long-term interests. This is simply in their nature.’

6.39 The Speaker also has a role in appointments to the committees that oversee the Electoral Commission and IPSA. He directly appoints five members of SCEC, and controls the process whereby the House appoints five members of SCIPSA. In practice he invites the party groups to submit nominations; but in so doing he controls the party balance on both committees. Interviewees commented that two MPs who had been publicly critical of the EC and its independence had recently been placed on the Speaker’s Committee overseeing its work. But others maintained that the Speaker had not been involved at all in the detail of the watchdogs’ work or appointments, and one praised the Speaker for publicly defending their watchdog when it had been under public attack.

## Lay members

6.40 We carried out eight additional interviews to learn more about the role of lay members, interviewing three lay members, three parliamentary officials, and two people involved in recruiting lay members. They are a recent innovation, which has developed haphazardly and incrementally, and deserves closer study than we have been able to give in this report. There are now lay members on the House of Commons Commission, its Audit and Risk Committee (chaired by a lay member), the Standards Committee and SCIPSA.

6.41 The first lay members were those appointed to SCIPSA. Under the Parliamentary Standards Act 2009 SCIPSA consisted only of eight MPs, but three lay members were added by CRAG 2010. Next came the Standards Committee: three lay members were first appointed in 2012 alongside the ten MPs on the Standards Committee, following a recommendation by CSPL. The House of Commons was initially reluctant to have lay members, because of concerns that a select committee with lay members would not be protected by parliamentary privilege. But that reluctance quickly dissipated. In 2015 the House agreed to increase their number to seven, alongside seven MPs. Effectively this means the lay members are in a 7:6 majority, because the chair has only a casting vote. And after an interim arrangement of ‘indicative votes’, in 2019 the lay members were given full voting rights.

6.42 Our interviewees identified a range of reasons for introducing lay members: they bring a wider perspective; they provide professional expertise; they guard against self-interest, or undue leniency in disciplinary matters; they encourage attendance, and good behaviour; they ensure due process, sticking to the agenda, with no shortcuts; they validate the process in the eyes of the public; they offer a shield when defending unpopular decisions (e.g. on MPs’ pay).

6.43 The parliamentary officials reported that lay members had certainly helped to encourage attendance, better behaviour by the MPs, and more disciplined conduct of meetings. But lay members have more clearly been a success on the Standards Committee than on SCIPSA. That is reflected in the rapid increase in their numbers, the grant of full voting rights, the observation that

'lay members are now in the driving seat on the Standards Committee'. It is also reflected in the fact that on policy issues and on disciplinary matters lay members express the same broad range of opinions as the MPs: some are strict, some more lenient - they are full and active participants in all the committee's discussions.

6.44 The same cannot be said of SCIPSA. Headhunters confirmed that the lay members are high calibre, with a lot of applications when vacancies are advertised. But it was difficult for them to make a significant contribution. They brought valuable expertise, but the Speaker was said not to be interested: he did not bring them in over scrutiny of the Estimate, and it was difficult for them to make their voices heard in a group of articulate, self-confident MPs.

6.45 Part of the difference may be because the Speaker's Committees and the Standards Committee are doing different jobs. The rationale is clearer for lay members on the Standards Committee, which adjudicates on disciplinary matters: it is generally accepted that all professional disciplinary bodies should now incorporate a lay element, to guard against self-interest. Part may be because of the different attitude of the chair. Part may be because of the difference in numbers – it is harder for lay members to make a contribution when they are in a minority of 3:8 as opposed to 7:7.

## The main lines of accountability

6.46 Interviewees described how their watchdogs were formally held to account. Most had direct accountability lines to the UK parliament, principally via regular interaction with their parliamentary oversight committees. The EC was accountable, too, to the Scottish and Welsh parliaments. The PCS was also considered to have 'a simple line' of accountability to the Committee on Standards, and through it to parliament.

6.47 The watchdogs' relationship with the Speaker's Committees 'depends quite a lot on who the Speaker is' and whether or not he or she 'takes a strong interest' in maintaining a balance in its membership. Most interviewees did not find that their committee members were terribly interested in or conscientious about their scrutiny role. As one observed, 'some [on the committee] were highly invested in [the watchdog's] work; others less so.' Parliamentary officials maintained that the Speaker's Committees for IPSA and the EC each had a narrow statutory remit, overseeing the watchdogs' budget and business plan, and making board appointments, but not engaging in wider scrutiny. Officials working for the EC and IPSA had a different perception: it felt to them that SCEC and SCIPSA were scrutinising them, and holding them to account for their performance. In part this might be because MPs used the sessions to raise complaints, about IT systems, bureaucracy, cost limits, etc. These could be mentioned under any other business, the complainant would be advised to pursue the matter bilaterally with the body concerned, and the issue would not be minuted. The relationship of the Standards Committee with the PCS was different, combining sponsorship with scrutiny; MPs and lay members on the Committee could ask questions about the progress of cases; but not their details or merits.

6.48 Unlike the other watchdogs, CSPL's only formal accountability is to the Prime Minister, and is 'very much separate' from parliament. Indeed, one interviewee was dismissive of its accountability, suggesting that CSPL was 'not accountable to anyone' in practice – despite the convention that the Prime Minister lays its reports before parliament, and frequent appearances

by the chair before parliamentary committees (mainly PACAC, and the Standards Committee). In practice, the BCE was also chiefly accountable to the Cabinet Office, as its sponsoring department, with which it had a ‘good working relationship’.

6.49 It was recognised that the watchdogs are also ‘to some degree accountable’ to parliament for their membership. Appointments could be vetoed by the House of Commons. Sir Ian Kennedy’s nomination to be an Electoral Commissioner was vetoed by the House in 2018;<sup>259</sup> Melanie Carter’s nomination as a lay member of the Standards Committee was vetoed in 2021 (see para 3.32).<sup>260</sup> When this had happened, ‘accountability does not always produce good results, but is better than having no accountability at all’.

6.50 The watchdogs also had other informal accountabilities to parliament via other select committees. *Ad hoc* appearances before parliamentary committees were just as important as more ‘formal’ accountability relationships, and could be more rigorous. One of the EC interviewees recalled making 12 appearances at select committees in under three years, making their work ‘exceptionally exposed and transparent’, and hence more accountable. Others noted that PACAC and the Standards Committee might call watchdog leaders to appear, considering this ‘part of [their] remit’. Such appearances were thought to be ‘part of a two-way relationship ... an independent body can look for parliamentary support (especially from select committees) to bolster its status or influence or that of a particular policy’.

6.51 Various ‘secondary areas of accountability’ were also identified. These included liaison with the Cabinet Office and, through them, the Prime Minister, as well as with the Treasury and NAO on the expenditure of public money. In some cases, there was regular liaison with others, including the whips, the Clerk of the House, and political parties. A former PCS identified a ‘sort of accountability’ to the individuals being investigated, such that complaints should be treated as fairly and quickly as possible. Interviewees also acknowledged the ‘internal accountability’ to their own staff and non-executive boards.

6.52 Interviewees from statutory watchdogs were clear about their legal accountability for actions and decisions, discussed in Chapter 5. One interviewee commented that the advantage of being a statutory body, from an accountability perspective, is precisely ‘that they are governed by statute and can only make decisions within the law and can be subject to the courts’. Most noted how the legal contestability of their regulatory decisions (through substantive appeals, or judicial review on procedural grounds) constituted a healthy part of the democratic process, and helped to ensure that the watchdogs are ‘not “jury, judge and executioner” as is sometimes accused’. Others agreed that the prospect of a judicial review positively influenced and contributed to better decision-making (for details of the judicial reviews, see Chapter 5).

## Public accountability

6.53 All interviewees embraced the importance of accountability to the public:

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<sup>259</sup> HC deb vol 635 cols 232–36, 23 January 2018.

<sup>260</sup> HC deb vol 683 cols 843–64, 10 November 2020.

Accountability is very important. It gives legitimacy. Regulators must be seen to be legitimate. They must be constantly reflecting [the views of] those who they are there to serve – the taxpayers and the public first. *Sir Ian Kennedy*

6.54 Several interviewees asserted that the watchdogs existed to ‘serve the public’. One former PCS was clear that theirs was ‘a public role’, acting on citizens’ behalf to hold MPs to account, and taking complaints from members of the public as well as from parliamentarians. They explained: ‘because of the need to undertake this role properly *for* the public, the PCS has accountabilities *to* the public’. For complaints handling bodies like the PCS it is important to publicise how to make a complaint. The PCS maintains a low profile, but her website does have guidance for complainants explaining her remit. Similarly, ‘much of what CSPL does concerns the relationship between public office holders and the public’, by monitoring the standards by which public office holders ought to behave. CSPL exists to support that relationship and therefore ‘feels accountable to members of the public’ in doing so.

6.55 There was consensus in perceiving – in the absence of formal mechanisms for accounting to the public – a close link between public accountability and transparency, including of their watchdogs’ expenditure, procedures and processes of decision-making. Indeed, one interviewee considered that watchdogs ‘are above all accountable through their transparency’. This was primarily achieved through the publication of information on the watchdogs’ websites, such as annual reports and accounts, minutes of board meetings, and reports on casework. One had wished to publish all documentary material with only a few redactions of addresses and personal details.

6.56 Financial accountability to the public was aided through the laying of the Estimates of statutory bodies: ‘this makes them very visible, so there is no secret how much they cost, how much they are paying their staff, etc.’ All former PCSs regretted the change in procedures from July 2018 to April 2021 which prevented the PCS from reporting details of live investigations on the website; this had created a ‘lacuna in transparency’, weakening public accountability. It was thought to be ‘reasonable that the public should know if there is a complaint against an MP which is being investigated’. The Commissioner’s website does now record allegations currently under investigation, as well as giving details and the outcome of previous investigations.

6.57 Some watchdogs took this ‘accountability through transparency’ further, such as by creating focus groups to assess public reaction to electoral processes or boundaries, or MPs’ pay. Interviewees had also accepted invitations to speak at public events, although few sought to speak to the media, though this was recognised as a further means of public accounting and communicating about their watchdogs’ roles. Appearances before select committees were also welcomed as a form of public accountability.

6.58 Most public accountability, however, took place through formal consultative processes. The BCE, for example, received over 35,000 representations to its consultations during the 2018 boundary review, leading to major changes in its constituency boundary proposals. Its former deputy chair, Lord Sales, commented: ‘ultimately, the Boundary Commission is accountable to the public, for the content of its reviews and substantive proposals. People may like them, or they may not.’ A similar view was expressed by others: CSPL, for example, would ‘stand or fall’ by the content and strength of reasoning in its published reports.

6.59 Nonetheless, there were practical limits to public accountability: ‘like referees, [watchdogs] need not bow to the constant pressure of the crowd’. Watchdogs should take ‘a high view’ of their responsibilities and should not think of themselves as being accountable to the public in ‘any more than a general sense’. For watchdogs to regard direct accountability to the public as their sole concern would be ‘unrealistic and undesirable’.

## Conflict between accountabilities

6.60 Some interviewees noted that there ought not to be any conflict between accountability to parliament and to the public, on the grounds that parliament is a public institution, composed of individuals who are supposed to represent the people. Watchdogs discharge a function for the benefit of parliament as a whole, in a neutral, independent way for the public benefit. Because MPs and members of the public are treated the same, ‘there is never a sense that one accountability cuts across the other. Indeed, they complement each other.’ Many interviewees therefore believed there to be ‘no clear-cut conflict’ between accountabilities to parliament and to others, including the public; and that, in general, watchdogs balance their various accountabilities appropriately.

6.61 It was nonetheless recognised that dual accountabilities to parliament and the public ‘could plausibly be in tension’: if the public wished, for example, to see information about IPSA or the EC’s investigations that had a bearing on an MP’s reputation, and therefore, perhaps, trust in parliament as an institution. Another potential scenario would be if parliament wished to challenge the findings of an investigation into an MP by the PCS (as happened in the case of Owen Paterson).<sup>261</sup> Yet interviewees accepted these potential conflicts simply as part of their role, and asserted that they would always strive to balance their obligations to uphold their duties to the public and adhere to Nolan principles, while also being fair to MPs and others under investigation:

In most senior positions, one is always managing a set of accountabilities. One has to make judgments which prevent conflicts between them the best one can. *Elizabeth Filkin*

## Tension between independence and accountability

6.62 Interviewees acknowledged explicitly that there could be tension between their democratic accountability and the independence that they needed to perform their regulatory responsibilities. By exercising their independence, the watchdogs could irritate those to whom they were accountable. At times, it was alleged that a particular watchdog ‘didn’t have the mettle to show its independence’.

6.63 More often, however, interviewees believed that the watchdogs were generally ‘sufficiently robust to cope with the tensions’ and that their leaders could ‘hold [their] ground and insist on [their] independence’. Any overt challenge to the independence of the watchdogs mostly happened ‘in the heat of the moment’, with MPs generally reluctant to cross the line ‘between appropriate accountability and undue interference with [the watchdogs’] independence’.

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<sup>261</sup> Paul McNamara, ‘MPs vote to overturn Owen Paterson’s immediate suspension after alleged lobbying rules breach’, Channel 4 News, 3 November 2021.

6.64 This tension was inevitable, indeed healthy, given that the watchdogs had to be democratically accountable. One interviewee, former Clerk of the House Sir David Natzler, summarised this with the assertion that ‘if you are accountable, you are therefore not completely independent, and if you are fully independent, you cannot be accountable.’ Another made a similar point:

These roles in their very nature involve holding a number of potentially conflicting objectives in balance, including between independence, parliamentary sovereignty and the accountability of MPs to the public. *Sir Philip Mawer*

6.65 Yet, despite the apparent conflict between independence on the one hand, and accountability on the other, others recognised that these two concepts are closely linked; as former chair of the EC Sir John Holmes noted, ‘the stronger the independence, the stronger the accountability needs to be’.

## Conclusion

6.66 This chapter has reported our interviewees’ answers to our main research questions. These were about the rationale for watchdogs’ independence; how independent they are in practice; the role of lay members; watchdogs’ main lines of accountability; and the tensions between independence and accountability. Their answers are summarised in these final paragraphs.

6.67 The rationale for their independence was to be free from political interference, by the government or parliament. Elections needed to be supervised, and electoral boundaries set, by a neutral body. Self-interested MPs could no longer be left in charge of their pay and allowances, or disciplinary decisions. For public trust to be maintained, these activities needed to be policed by independent bodies.

6.68 All the watchdogs manage to be independent in practice, despite the political pressures. IPSA, the PCS and the Electoral Commission came under a lot more pressure than the BCE or CSPL, which experienced almost none. The pressure on the PCS and IPSA was constant; on the Electoral Commission, greater at election time. Pressure was applied through complaints, veiled threats and negative media briefings, and the occasional veto of appointments and re-appointments. Pressure was resisted through the strength of character and leadership of individual post holders.

6.69 Lay members bring a wider perspective, provide professional expertise, guard against self-interest or undue leniency, ensure due process, and legitimise the process in the eyes of the public. Lay members have clearly been a success on the Standards Committee, with equal numbers to MPs and full voting rights. They make less of a contribution to SCIPSA, being in a minority of 3:8, and their role being less clear.

6.70 Most of the watchdogs had direct accountability lines to parliament, through regular interaction with their oversight committees. Parliamentary officials maintained that SCEC and SCIPSA had a narrow statutory remit, making board appointments and setting the budget; but officials in the EC and IPSA felt that they were being scrutinised and held to account for their performance. Appearances before other parliamentary committees were equally important.

Watchdogs welcomed the legal accountability of their regulatory decisions, through rights of appeal or judicial review, to ensure that they were not jury, judge and executioner.

6.71 Interviewees acknowledged that there could sometimes be tension between their independence and their democratic accountability: by exercising their independence, they could irritate those to whom they were accountable. This tension was inevitable, indeed healthy; the stronger their independence, the stronger the accountability needed to be.

6.72 Our final question to interviewees was to ask how the existing arrangements might be improved. Their answers to this question are collected in Chapter 7, which presents our final conclusions and recommendations.



# Chapter 7: Conclusions and Recommendations

7.1 This final chapter makes a series of specific recommendations as to how the governance arrangements of the watchdogs under scrutiny in this report might be improved. It builds upon the principles developed in Chapter 2, our analysis of the literature, and the interviews summarised in Chapter 6, to answer our central research question: what is the right balance between watchdogs' institutional independence on the one hand, and their public and parliamentary accountability on the other? On the whole, both the independence and the accountability of constitutional watchdogs have improved over the years, and are still improving; so many of the recommendations are relatively minor. Some draw on interviewees' own recommendations elicited by a question asking what modifications they would propose to the governance of their respective watchdogs. And, building on Sir John Holmes' observation that 'the stronger the independence, the stronger the accountability needs to be', we explore how to maximise the independence of the watchdogs under review, while also maximising their accountability. Reflecting the views of our interviewees, there are rather more recommendations about maximising independence, because that was seen to be more problematic than maximising accountability.

## Maximising independence

7.2 In Chapter 2 we drew upon the literature on judicial independence to identify the following conditions to underpin the independence of constitutional watchdogs:

- Watchdogs should enjoy guaranteed tenure until the expiry of their terms of office. They should only be removed for reasons of incapacity or misconduct that renders them unfit for their office. They should not be eligible for re-appointment
- There should be a merit-based appointment process that ensures that persons appointed as watchdogs have appropriate experience, with a willingness to make decisions with an open and fair mind according to the rules; and that they are robust and independent minded, capable of withstanding external pressure
- Watchdogs should have a secure legal status, protected from arbitrary abolition
- Their powers and functions should not be arbitrarily changed. Changes should only follow widespread consultation, and/or an inquiry by an independent, impartial body
- Watchdogs should have authority to initiate their own inquiries; to publish their own reports; and to decide the timing of publication
- If watchdogs are appointed or funded by a committee, that committee should include non-party members, to guard against political self interest; and if it includes politicians, the committee should be cross-party, with no party having a majority



- There should be arrangements in place to ensure that constitutional watchdogs receive adequate funds to fulfil their functions, and that their leaders receive fair and secure remuneration
- There must be a general attitude of respect for watchdogs and their functions within parliament, government and the political system
- The arrangements for the supervision and accountability of watchdogs (see below) should not be used to undermine their independence.

The following paragraphs go through these conditions: not one by one, because in some cases we address two conditions under one heading (as in the first heading below); nor slavishly, because in other cases we have introduced new material (for example, expanding autonomy to include access to independent legal advice).

### Appointment of chair and board members; board membership and tenure

7.3 The appointments of independent members to the CSPL and BCE are made by the executive and subject to the Governance Code on Public Appointments, to ensure those appointments follow a rigorous process of fair and open competition, independently monitored.<sup>262</sup> The parliamentary bodies responsible for appointing the EC, IPSA and PCS have undertaken voluntarily to follow, or ‘have regard’ to the Governance Code.<sup>263</sup> This appears to have worked reasonably well; but it does mean that, unlike regulated executive appointments, there is no scope for investigation of complaints, or an annual audit of performance by the Commissioner for Public Appointments. To guard against the government packing the Electoral Commission, IPSA or CSPL with its supporters, there should be a requirement that the assessment panel has a majority of independent members. CSPL has also recommended that the panel is chaired by the chair of the body concerned.<sup>264</sup> An alternative safeguard could be that the chair must consent to the appointment of new members, similar to the veto given to the First Civil Service Commissioner.<sup>265</sup> A further safeguard to ensure cross-party support could be a requirement to consult with the leaders of the opposition parties (as currently happens with appointments by SCEC).<sup>266</sup>

7.4 The job description and person specification should stress the need for robust independence in all board members, and particularly the chair. Public pre-appointment scrutiny hearings can help to test independent mindedness, as PACAC does for the proposed chair of CSPL, and the

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<sup>262</sup> See Sch 1 Public Appointments (No. 2) Order in Council 2019.

<sup>263</sup> See, e.g., Speaker’s Committee on the Electoral Commission, *Work of the Committee in 2019–20 (Fifth Report of Session 2019–21)*, HC 794 2019–21 (London: House of Commons, 2020), para 9; Speaker’s Committee on the Independent Parliamentary Standards Authority, *Appointment of IPSA Board Members (First Report of Session 2019–21)*, HC 1084 2019–21 (London: House of Commons, 2020), para 5; House of Commons Commission, *Response to the Eighth Report on the Committee on Standards in Public Life: Standards of Conduct in the House of Commons*, HC 422 2002–03 (London: House of Commons, 2003), paras 12–17, and Parliamentary Commissioner for Standards: *Nomination of Candidate*, HC 294 2017–19 (London: House of Commons, 2017), para 6.

<sup>264</sup> Committee on Standards in Public Life, *Upholding Standards in Public Life*, November 2021 paras 5.21–22.

<sup>265</sup> Constitutional Reform and Governance Act 2010, Sch 1 para 3(4).

<sup>266</sup> *ibid*, para 2.

Speaker's Committee did before commending John Pullinger as the new chair of the EC.<sup>267</sup> Such hearings should similarly be used before appointing the chair of IPSA and the PCS; but they seem unnecessary for appointment of the deputy chair of the BCE, who will have been selected by the Lord Chief Justice before appointment by the Lord Chancellor.

7.5 All board members should be appointed for a single, non-renewable term, with no possibility of re-appointment. As we noted in para 4.9, it was damaging to the reputation of the House of Commons when Elizabeth Filkin was not re-appointed as PCS in 2002; and damaging to the reputation of the House and the EC when Sir John Holmes was not re-appointed as chair in 2021. Single, non-renewable terms have been introduced by law for the C&AG, the Information Commissioner, and the chair of the UK Statistics Authority; the same rule should apply to all constitutional watchdogs, to buttress their independence, and protect them when they come under pressure. It is already the practice to appoint the PCS and CSPL's board members and chair for a single, non-renewable term; the same should apply to parliament's other watchdogs.

7.6 The chair of CSPL is appointed for a single term of five years. That seems about the right length, for a demanding role, and we propose similar, non-renewable terms of five years for the chairs of the EC and IPSA. The deputy chair and members of the BCE may need to be appointed for longer terms, now that the period between boundary reviews has been extended to eight years.

7.7 There are 10 Electoral Commissioners, but only five board members of IPSA. Even allowing for its more limited functions, that seems too small: IPSA's board could be increased to eight or nine, allowing for more lay members in addition to the former judge and qualified auditor required by law. Our interviewees suggested that IPSA's board could benefit from people with experience of finance, IT/digital, and customer service.

7.8 The other IPSA board member required by law must be a former MP; but the political members of CSPL and the EC can be serving MPs. We consider (minority) membership of those with political experience on watchdog boards, for the reasons developed elsewhere in this report, to be beneficial: a blanket bar to worthwhile talent and nous is neither necessary nor desirable, and watchdogs must be capable of gaining and preserving the confidence of those they regulate. Our draft report floated the idea that current MPs should be excluded, suggesting that former MPs can be more detached – and give more time – than those still serving in the House of Commons.<sup>268</sup> This was rejected by our consultees: 'current MPs have generally proved to be a success for CSPL and in practice non-partisan'.<sup>269</sup> For those watchdogs with some quasi-judicial functions – involving regulation, enforcement, and the interpretation of rules – we suggest the board should include a lawyer or (retired) member of the senior judiciary; this is already the case with IPSA, and could be extended to the EC.<sup>270</sup>

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<sup>267</sup> See Speaker's Committee on the Electoral Commission, *Appointment of the Chair of the Electoral Commission (First Report 2021)*, HC 1276 2019–21 (London: House of Commons, 2021), Appendix C.

<sup>268</sup> This is in line with the original recommendation in the CSPL's Eleventh Report: see Eleventh Report of the Committee on Standards in Public Life, *Review of the Electoral Commission*, Cm 7006 (London: HMSO, 2007), para 3.33.

<sup>269</sup> CSPL responded to our draft report in similar terms.

<sup>270</sup> See n 144.

## Dismissal

7.9 Chapter 6 mentioned the extreme pressures to which watchdogs can be exposed, including attempts to remove them from office. As recorded in para 4.10, Electoral Commissioners and the PCS can only be removed for cause, if they are clearly unfit to hold office. Electoral Commissioners can be dismissed following a resolution of the House of Commons – but only after a report from the Speaker’s Committee specifying the grounds of dismissal. Board members of IPSA enjoy a slightly higher level of protection, in that they can only be dismissed following a resolution of both Houses. This is the protection offered to High Court judges. Similar protection should be introduced for all the watchdogs, to guard against dismissal just by the government mobilising its Commons majority.

## Legal status

7.10 The EC, IPSA and the BCE are founded in statute, while the CSPL and PCS are non-statutory. The PCS is an officer of the House, constituted under Standing Orders (SO no.150), and since earlier criticisms by the CSPL SO no.150 has been expanded to strengthen the role and powers of the Commissioner.<sup>271</sup> That flexibility – to be able to adjust the role in the light of experience, and with ease – illustrates one of the advantages of being non-statutory; the disadvantage, as noted in Chapter 4, is that powers can be adjusted down as well as up, and the body is more easily swept away.

7.11 Legislating for the PCS would constitute an unambiguous statement of her institutional separation from parliament, and the Commons’ administration. It could additionally empower the PCS to require the production of information and the cooperation of witnesses on her own account, where necessary;<sup>272</sup> at present, she depends on a decision of the Standards Committee to exercise these powers on behalf of the PCS.<sup>273</sup> Putting the PCS on a statutory footing was supported, at least in principle, by some of the former post-holders we interviewed for these reasons.

7.12 The complicating factor, however, is parliamentary privilege.<sup>274</sup> A statutory PCS would create instability: it would, *prima facie*, expose the PCS’s decisions and process to judicial review,<sup>275</sup>

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<sup>271</sup> Eighth Report on the Committee on Standards in Public Life, *Standards of Conduct in the House of Commons*, Cm 5663 (London: HMSO, 2002), chs 3 and 8. SO 150 has since been expanded from five to 14 paragraphs.

<sup>272</sup> CSPL proposed amending the Standing Orders to give effect to its recommendation that the PCS be given direct powers (*ibid.*, paras 8.39, 8.66); but the majority view is that legislation would be required: see the First Report of the Committee on Standards in Public Life, *Standards in Public Life*, Cm 2850–I (London: HMSO, 1995), para 2.104; Select Committee on Standards in Public Life, *First Report of 1994–95*, HC 637 1994–95 (London: House of Commons, 1995), paras 24–25; Committee on Standards and Privileges, *Eighth Report on the Committee on Standards in Public Life: “Standards of Conduct in the House of Commons” (Second Report of Session 2002–03)*, HC 403 2002–03 (London: House of Commons, 2003), para 80.

<sup>273</sup> Gay and Winetrobe report how Elizabeth Filkin, the PCS from 1999–2002, ‘had difficulty in persuading the Committee to use its powers to enable her to interview witnesses in one or two cases, leading to inevitable friction’: Oonagh Gay and Barry Winetrobe, *Officers of Parliament – Transforming the Role* (London: Constitution Unit, 2003), 19–20. That is less likely to happen now.

<sup>274</sup> Oonagh Gay, ‘The Regulation of Parliamentary Standards after Devolution’, *Public Law*, 2002, 422, 434–35.

<sup>275</sup> See Harry Woolf *et al.*, eds, *De Smith’s Judicial Review* (London: Sweet & Maxwell, 8th edn, 2018), para 3-031.

not least in cases where her findings and conclusions are contested (as with Owen Paterson and John Bercow). But, as noted in Chapter 5, proceedings before the PCS, her reports and their acceptance by the Committee on Standards all constitute ‘parliamentary proceedings’, protected from judicial interference under Article IX of the Bill of Rights 1689. It is, more generally, a long-standing principle of the common law that ‘[t]he jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive’ of any outside interference.<sup>276</sup> Even if it were feasible for the Commons to surrender its privileges in respect of members’ discipline to an entirely independent statutory creature – which is not wholly certain<sup>277</sup> – this would plainly represent a significant constitutional move, and abrogate a key aspect of the House’s autonomy to an extent our consultees considered unacceptable. As Paul Evans notes, ‘Parliament may pass legislation to abridge or define its traditional privileges, but to do so places Parliament at the mercy of the courts’.<sup>278</sup>

7.13 It is noteworthy that some similar difficulties arose as regards the Parliamentary Standards Act 2009, as originally enacted. Thereunder, IPSA would have assumed responsibility for maintaining the register of financial interests and associated code of conduct – a standards matter – supported by a new Commissioner for Parliamentary Investigations responsible for investigating non-compliance.<sup>279</sup> Once CSPL had pointed out the risk of interference with privilege this created, these provisions were repealed.<sup>280</sup>

7.14 Accordingly, subject to the more marginal changes suggested in this chapter, it seems preferable to leave the PCS as a creature of Standing Orders.

7.15 Different considerations apply to CSPL, which too has no legal basis, and could be swept away by prime ministerial fiat. Abolition came close to happening under David Cameron in 2012; mothballing was also considered, reducing CSPL to a ‘care and maintenance’ basis, to be activated

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<sup>276</sup> *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271, 275. See also *Prebble v Television New Zealand Ltd* [1995] 1 A.C. 321 (PC) 332; and *R v Chaytor* [2010] UKSC 52, [2011] 1 A.C. 684 (SC) [63], [76]–[77].

<sup>277</sup> As noted in Chapter 4 in relation to the PCS, there is a limit to the extent to which, procedurally and constitutionally, it is proper and/or desirable for the House to delegate its sanctioning powers in respect of standards issues to external bodies: see Committee on Standards, *Sanctions in Respect of the Conduct of Members (Seventh Report of Session 2019-21)*, HC 241 2019-21 (London House of Commons 2020), paras 84–85. A further, more theoretical difficulty relates to the notions that parliament cannot bind its successors; and that, once abridged by statute – as in the analogous terrain of the royal prerogative – a traditional parliamentary privilege cannot be revived: see Liam Smyth, ‘Privilege, Exclusive Cognisance and the Law’, in Alexander Horne, *et al.*, eds, *Parliament and the Law* (London: Hart Publishing, 2013), 4. Parliament *has*, however, over time waived or relinquished its exclusive cognisance in various areas, and its competence to do so has never been doubted: see, e.g., the Parliamentary Elections Act 1868 and Perjury Act 1911.

<sup>278</sup> Paul Evans, ‘Privilege, Exclusive Cognisance and the Law’, in Alexander Horne and Gavin Drewry, eds, *Parliament and the Law* (London: Hart Publishing, 2nd edn, 2018), 9. The House accordingly rejected a provision in the Parliamentary Standards Bill that, as introduced, would have made the existence of the MPs’ Code of Conduct a matter of statute (and therefore justiciable): HC deb vol 495 cols 44–135, 29 June 2009. Note, however, that the House agreed to a more limited ‘sacrifice’ of privilege by creating the Independent Expert Panel for the ICGS, a creature of the Standing Orders responsible, *inter alia*, for determining the appropriate sanction in ICGS cases referred to it by the PCS: see HC deb vol 677 cols 1244–1272, 23 June 2020.

<sup>279</sup> ss 8–9 PSA 2009 (as originally enacted).

<sup>280</sup> See the Twelfth Report of the Committee on Standards in Public Life, *MPs’ Expenses and Allowances: Supporting Parliament, Safeguarding the Taxpayer*, Cm 7724 (London: HMSO, 2009), paras 13.8, 13.19–21; s 32 CRAG. Similar concerns had been voiced during the passage of the PSA 2009: see, e.g., HC deb vol 495 cols 325, 336, 1 July 2009.

by the PM as and when necessary. But Peter Riddell (then Director of the Institute for Government) concluded in his triennial review that there was a continuing case for CSPL as a permanent body.<sup>281</sup> To give CSPL the surest foundation, as permanent standing machinery, it should be enshrined in statute. But short of that, to define its aims, objectives, composition, method of appointment, reasons for dismissal, etc., it does need some legal foundation: one possibility would be for the CSPL to be based upon an Order in Council, as is the case for the Commissioner for Public Appointments. It is true that an Order in Council can be amended or repealed without any parliamentary procedure, but it provides a degree of formality and protection: changing an Order in Council can be a cumbersome and time-consuming process involving extensive consultation within Whitehall and with the affected public body, which is a deterrent to hasty or frequent amendments.

7.16 Responding to this recommendation in our draft report, CSPL said:

The Committee is in favour of a stronger constitutional basis for standards regulators in order to underpin and give greater certainty to their independence. The Committee is not a regulator itself and members do not feel it currently lacks independence, but we recognise the argument that a legal grounding could enhance the independence and security of the Committee.

This reflects the wider concern expressed by CSPL in the final report of their Standards Matter 2 review:

While abolition of an ethics body would be a controversial move for any administration, the fact that a regulator's powers can be removed by those they are regulating tempers their independence and may diminish the appetite of regulators to speak out.<sup>282</sup>

## Legal powers and autonomy

7.17 One aspect of the strong independence of certain watchdogs is that their recommendations are implemented automatically, denying politicians the capacity to delay or dilute them. This is the case with IPSA's determinations on pay, pensions and allowances, and it is now the case with the boundary commissions' recommendations for new constituency boundaries. Other legal powers which can enhance a watchdog's independence are:

- power to initiate inquiries or investigations on own initiative
- authority to publish own reports, and to decide on the timing of publication
- protection from external powers of direction
- power to refer matters to the police, or initiate prosecutions.

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<sup>281</sup> Peter Riddell, Report of the Triennial Review of the Committee on Standards in Public Life, 19 December 2012.

<sup>282</sup> Committee on Standards in Public Life, *Upholding Standards in Public Life*, final report of Standards Matter 2 review, November 2021, para 2.26.

7.18 These have been live issues for all the watchdogs at different stages in the past. CSPL informs the Cabinet Office and No 10 before embarking on a new inquiry, but does have full authority to publish its own reports; the only exception is if the report is published as a Command paper. The PCS has gradually acquired more and more autonomy: she has power to initiate her own investigations; in 2018 she gained the power to refer matters to the police without first seeking the consent of the Standards Committee.<sup>283</sup> IPSA's Compliance Officer similarly has power to refer matters to the police if she has reason to suspect commission of a criminal offence. The Electoral Commission had power itself to bring prosecutions against those who break electoral law relating to parties or campaigners, but the Elections Act 2022 has removed that power, leaving it to the police and Crown Prosecution Service. That seems a retrograde step, since the police and CPS have less expertise in the complexities of electoral law: the Electoral Commission has said it would 'reduce the scope for political finance offences to be prosecuted, relying solely on the police and prosecutors having the resources and will to take action'.<sup>284</sup>

7.19 More worrying is the requirement in the Elections Act that the Electoral Commission should have regard to a strategy and policy statement prepared by the government, and that the Speaker's Committee should monitor the Electoral Commission's performance in complying with the statement. Those requirements were roundly criticised in evidence to PACAC's inquiry into the bill, and in debates on the bill, particularly at second reading in the House of Lords.<sup>285</sup> They have the potential significantly to undermine the Commission's independence.

7.20 One further aspect of watchdogs' legal powers and autonomy is their capacity to seek independent legal advice, and manage their own communications. All watchdogs need to be able to seek independent legal advice, particularly if they are in dispute with their sponsoring body, or take a different view on a legal matter. The PCS obtains legal advice through the House of Commons legal services, headed by Speaker's Counsel; though she may obtain permission to recruit her own legal advisers, as she did in 2018–19.<sup>286</sup> Watchdogs also need to be in charge of their own press and PR, and get independent PR advice if required: for example, CSPL can call on a part time press officer, engaged on contract and independent of the Cabinet Office.

## Budgets

7.21 For the EC and IPSA, the process for setting a budget seems to work well: they submit their Estimates to the Speaker's Committee, which can then seek comments from the Treasury. The committee then takes evidence from the body concerned, and decides whether to approve the Estimates, or to modify them. If anything the process is too easy: interviewees remarked on the lack of challenge in questioning the Estimate, especially for IPSA whose budget is £230m. The same cannot be said for CSPL or the PCS. CSPL's budget was nearly halved in 2001, following the government's quinquennial review in 2000, and reduced again following the triennial review in

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<sup>283</sup> David Natzler and Mark Hutton, eds, *Erskine May: Parliamentary Practice* (London: House of Commons, 25<sup>th</sup> edn, 2019), section 5.4.

<sup>284</sup> Electoral Commission, written evidence to PACAC, *The Elections Bill*, HC 597 December 2021, para 196.

<sup>285</sup> PACAC received 52 written submissions on the Elections Bill; not one supported the proposed strategy and policy statement, *ibid* para 140.

<sup>286</sup> See Parliamentary Commissioner for Standards, *Annual Report 2019–20*, HC 616 (London: House of Commons, 2020), para 15.

2012.<sup>287</sup> Some interviewees suggested that in the past the PCS was kept deliberately short staffed – although her recent annual reports remark on the House authorities’ commitment to ensuring that the PCS is appropriately resourced, and duly show her staff costs increasing from £524k in 2018–19 to £894k in 2020–21.<sup>288</sup>

7.22 Nonetheless, watchdogs should be protected from across-the-board or arbitrary cuts, or from assessments by the executive or parliament about the desirability or effectiveness of their work. One solution could be a duty for each watchdog to make public its financial requirements, as happens with the EC and IPSA when their estimates are published; and a duty on the sponsoring body to justify any changes when setting the budget. This transparency should help to inhibit routine or arbitrary demands for cuts.

7.23 There is also an inconsistency in the remuneration of the different watchdogs. As we saw in Chapter 3, the chair of the EC receives a salary of £80k for two days per week, and the PCS a salary of £128k for five days a week. But the current chair of CSPL, Lord Evans, is entitled to a daily fee of £500 for an expected five to six days per month (the same as Lord Neill’s fee, the chair from 1997–2001, but £120 more than that of his successor Sir Nigel Wicks; the fifth chair, Sir Christopher Kelly, received a salary of £50,000). The chair of IPSA receives £800 a day (unchanged since 2009) for up to 10 days a month.

7.24 People take on these roles from a sense of public service rather than for reward; but it is puzzling why some watchdog leaders are paid a salary and others a *per diem*, even within the same organisation. There should be arrangements for periodic review of their remuneration; and it would be simpler for all the chairs to be paid a salary rather than keep timesheets. This may be what happens in practice at CSPL: the annual report records that ‘the chair is paid a remuneration of £36k per annum’, while the Cabinet Office notice advertising the position reported the remuneration as a non-pensionable daily fee of £500.<sup>289</sup>

## Staffing, and premises

7.25 Chapter 4 suggests that independence is maximised if a watchdog recruits and employs its own staff. This is feasible for the EC, with 153 staff, and IPSA, with 84 full-time equivalent staff in 2020–21. But it would make less sense for the PCS, whose small staff is supplied by the House of Commons, and CSPL, whose secretariat of five consists of civil servants employed by the Cabinet Office. Such small organisations might struggle to recruit high calibre staff if they were fully independent; and this is even more the case for the BCE, whose periodic reviews require a staff of 15–20 in the peaks, but almost none in the troughs, as noted in Chapter 3.

7.26 Similar considerations apply to premises: the EC and IPSA have their own office space, while the PCS is housed by the House of Commons, and CSPL and the BCE by the Cabinet Office. Again, this makes sense for such small organisations, and even more so for the BCE. It

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<sup>287</sup> See Committee on Standards in Public Life, *Annual Report 2016–17*, Annex C.

<sup>288</sup> See Parliamentary Commissioner for Standards, *Annual Report 2020–21*, HC 309 (London: House of Commons, 2021), 5.

<sup>289</sup> Committee on Standards in Public Life, *Annual Report 2020–21*, Annex I; Cabinet Office Centre for Public Appointments, *Chair – Committee on Standards in Public Life*, May 2018.



would be disproportionately cumbersome and costly for them to find their own premises; and we received no evidence that the existing arrangements have prejudiced their independence.

## The Speaker, and Speaker's Committees

7.27 The supervisory committees for the EC and for IPSA are unusual in being chaired by the Speaker, and in having *ex officio* government members.<sup>290</sup> Having the committee chaired by the Speaker was a departure from the original proposal: PPERA was amended during its passage to provide for the Speaker to be a member of the committee and its *ex officio* chair, in this respect borrowing from the House of Commons Commission.<sup>291</sup>

7.28 The SCEC was heavily criticised in evidence to the CSPL inquiry which reported in 2007 for its secrecy, obscurity and ineffectiveness.<sup>292</sup> It has since grown more secure and transparent in its functions; but the Speaker continues to be an active chair, which can cause problems:

- Part of the Speaker's leadership role is the duty to uphold trust and confidence in parliament as an institution; not all Speakers fully appreciate what this requires. To do this, the Speaker needs to uphold those whose role is to maintain that trust (the PCS, IPSA), particularly when they come under attack, and not to act simply as shop steward for individual MPs.
- The current Speaker initially allowed the government to have a majority on the SCEC through his appointments to it.<sup>293</sup> As indicated in para 3.13, this was a departure from previous practice; some previous Speakers expressly indicated their intention that no single party should have a majority on the Speaker's Committee.<sup>294</sup>

7.29 This raises the following questions:

- Should the Speaker's discretion to appoint members of SCEC be fettered? If so, should the principle that no political party has a majority be written into law; or codified in some other way?
- Should the Speaker continue to chair these committees?
- Should these committees continue to have *ex officio* government representation?
- Should there be lay members on these committees?

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<sup>290</sup> Cf. David Natzler and Mark Hutton, eds, *Erskine May: Parliamentary Practice* (London: House of Commons, 25th edn, 2019), section 38.5.

<sup>291</sup> HC deb vol 344 col 656, 14 February 2000 and HC deb vol 346 cols 92–93, 13 March 2000.

<sup>292</sup> Eleventh Report of the Committee on Standards in Public Life, *Review of the Electoral Commission*, Cm 7006 (London: HMSO, 2007), paras 4.15–21.

<sup>293</sup> In March 2022 the numbers were more balanced: four Conservative, three Labour, one SNP (apart from the Speaker).

<sup>294</sup> n 295 *supra* para 4.12.



Our recommendations are in the following paragraphs.

7.30 The principle that no party should have a majority on these committees does need to be written into law.<sup>295</sup> During the Commons Committee stage of the Elections Bill that was attempted, through an amendment that ‘the Speaker shall ensure that the governing party does not have a majority on the Committee’, but it was opposed by the government.<sup>296</sup> Extending the process that applies to SCIPSA – lay members appointed by the House – is another option; but so long as lay members remain a minority, the risk remains that the Speaker may allow the government to have a majority on SCEC. As we noted in Chapter 3, SCIPSA currently has a government majority amongst its political members.

7.31 Our interviewees were agreed that the Speaker should continue to chair these committees, subject to appropriate safeguards. The Speaker’s chairing of these committees gives them a particular authority and status – ‘unique, special and above reproach’:<sup>297</sup> one result is that attendance is much higher than for most select committees. There is an outside risk with a more political chair (especially one appointed by the House) that nominees, openly hostile to the watchdogs, will be supported by a majority of their colleagues sympathetic to their platform.<sup>298</sup> Such a chair is also naturally vulnerable to party pressures; and may have an eye to his or her next preferment.

7.32 The key difficulty, as reported by some of our interviewees, is that some Speakers have not exercised their authority in a wholly impartial manner. The Speaker is also a very busy person, with many other demands on his time. However, the SCEC can appoint one of its members to act as chair at any meeting in the absence of the Speaker, and its minutes confirm this power is periodically invoked.<sup>299</sup> SCEC can also appoint sub-committees: we were told that one chaired by Gary Streeter MP did a lot of the more detailed work. We asked our interviewees whether this practice, leaving the Speaker as constitutional chair, but delegating day-to-day operational responsibility, could be formalised. A deputy chair could be drawn from the opposition backbenches, as with the chairs of the Standards Committee and Public Accounts Committee;<sup>300</sup> or the Speaker might appoint one of the Deputy Speakers to be the deputy chair. They rejected this suggestion, for a range of reasons: deputy chairs would also be very busy, with too many other demands on their time; MPs would not accept the change; without the Speaker in the chair, attendance would diminish, and the committee would lose its authority.

7.33 The Standards Committee has seven lay members and seven MPs; the SCIPSA has three lay members; the SCEC has none – see Table 3.1 on p31. Lay members have clearly proved a success on the Standards Committee; less so on SCIPSA (see para 6.44). The rationale for having lay

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<sup>295</sup> For instance, an amendment suggested during the Lords Committee stage of PPERA 2000 would have required that, of the five non-ministerial MPs appointed by the Speaker, ‘at least four ... must not be members of the governing party or parties’: HL deb vol 612 col 1779, 11 May 2000.

<sup>296</sup> Amendment 65, tabled for debate on 18 October 2021.

<sup>297</sup> HC deb vol 344 col 660, 14 February 2000.

<sup>298</sup> For an example of open hostility to the EC, see the contribution by Peter Bone MP to the debate on the motion approving the appointment of John Pullinger as the new chair: HC deb vol 691 cols 742–745, 22 March 2021.

<sup>299</sup> Sch 2, Para 3(3) PPERA 2000.

<sup>300</sup> Cf. the Eleventh Report of the Committee on Standards in Public Life, *Review of the Electoral Commission*, Cm 7006 (London: HMSO, 2007), para 4.23.

members on the Standards Committee is clear; less so on the Speaker's Committees (see para 6.45). If it is essentially the same – to guard against MPs being self-serving, or excessively inward-looking – then that needs to be clearly articulated. And there is a case for increasing the number of lay members, as has happened with the Standards Committee, so that the lay members on SCIPSA are a stronger presence, and less likely to be ignored. The same arguments apply to SCEC: if it is desirable to have lay members to guard against MPs undermining the Electoral Commission, through supine appointments or cuts to its budget, they need to be more than a token number. The case for having lay members is even stronger now that the Elections Act has given SCEC the role of monitoring the Electoral Commission's performance against the government's proposed policy and strategy statement. Ideally there should be a minimum of five lay members on SCIPSA, and five on SCEC. With three positions on SCEC filled *ex officio* (two ministers and the chair of PACAC), the size of the committee may need to be increased to achieve that; but we consider next whether ministers should sit on these committees.

7.34 The rationale for having ministers on SCEC, as indicated during the passage of PPERA, is that 'they and their Departments have expertise in [the matters at issue], and each will have something to contribute to the Committee by drawing on the expertise of their Department. Similarly, the Chairman of [PACAC] will have experience of leading such discussions.'<sup>301</sup> Interviewees confirmed the value of a ministerial contribution; but for this expertise to be realised, the minister must be an active participant. As we noted in para 4.15, the Minister for the Cabinet Office has rarely attended (he attended one out of four committee meetings in 2020): it would be better to have just one minister on the committee, the minister responsible for elections.<sup>302</sup> Interviewees also said there is value in having the Leader of the House on SCIPSA, to represent the concerns of MPs; a similar role is performed by the Shadow Leader, one of the five MPs appointed by the House of Commons.

7.35 Special considerations apply to the BCE, which does not have a sponsoring committee, but is formally chaired by the Speaker, although he plays no active part. In practice the BCE is chaired by the deputy chair, a High Court judge. We asked whether it would be better for the formal position to reflect the actuality, and dispense with the Speaker as nominal chair. We also asked whether the judge should be appointed by the Lord Chief Justice rather than the Lord Chancellor, again reflecting the actuality that the judge is selected by the LCJ. In both cases the answer from our consultees was no: there was no need to disturb the existing arrangements.

## Maximising accountability

7.36 In Chapter 2 we identified the following conditions to ensure the accountability of constitutional watchdogs, again derived from the literature on judicial accountability:

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<sup>301</sup> HC deb vol 344 cols 661–662, 14 February 2000; see also HL deb vol 612 col 1780, 11 May 2000.

<sup>302</sup> In September 2021 elections policy transferred from the Cabinet Office to the Department for Levelling Up, Housing and Communities, and the responsible Minister of State became Kemi Badenoch MP. She is also the Minister for local government, removing the need for a separate Minister to represent the Local Government Boundary Commission for England.

- Transparency requires publication of board minutes and other papers, and the giving of reasons for decisions
- Transparency also requires being subject to freedom of information, so that outsiders can request information not readily available
- The decisions of constitutional watchdogs, especially those imposing a penalty, must be capable of challenge by appeal or judicial review. There must also be mechanisms for hearing complaints
- The finances of watchdogs must be independently audited
- Watchdogs can be required to attend parliamentary committees to explain their governance, and stewardship of their resources
- They can also be required to explain their strategy, policies and performance
- But when exercising adjudicatory functions, watchdogs are not required to defend individual decisions (which are instead subject to appeal: see above).

As above, the following paragraphs go through these conditions: not one by one, because in some cases we have consolidated two conditions under one heading, as in the first heading below.

### **Increased transparency: accountability to the public**

7.37 Thanks to the creation of constitutional watchdogs, the transparency of elections policy and administration, of MPs' expenses and allowances, and of MPs' discipline has been transformed. The Electoral Commission is a model of transparency compared with the General Department of the Home Office, which was responsible for elections until PPERA 2000. IPSA is a model of transparency compared with the Fees Office of the House of Commons, responsible for MPs' expenses until the Parliamentary Standards Act 2009. The Commissioner for Parliamentary Standards is a model of transparency compared with the casework of the Standards and Privileges Committee of the House of Commons which existed until 2013. That is all worth stating lest we forget how far we have travelled in the last 10–20 years.

7.38 The watchdogs' websites provide huge amounts of information about their policy work and about their regulatory activities, with lots of granular detail. The Electoral Commission publishes quarterly updates of political parties' donations and loans. IPSA publishes annual data of MPs' staffing and business costs, with more detailed breakdowns. The Commissioner for Parliamentary Standards publishes a list of MPs currently under investigation, and the matter being investigated, together with details of her findings and all the evidence in matters which have been concluded. The watchdogs' websites are generally easily navigable and provide public access to an extraordinary range of regulatory information. We had a minor criticism that the webpage recording the BCE's responses to FOI requests should be updated more regularly, but that has since been remedied.<sup>303</sup>

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<sup>303</sup> See <<https://boundarycommissionforengland.independent.gov.uk/freedom-of-information-2/freedom-of-information-responses/>>.

7.39 The watchdogs also have a social media presence. Each watchdog under review, except for the PCS, has an active presence on Twitter, but only the EC and BCE engage with the public via Facebook and platforms more closely associated with younger audiences, such as Instagram. The PCS's absence from social media cannot be criticised, given the nature of her functions; but the other watchdogs should consider branching out to other platforms, and, perhaps recruiting a dedicated social media team, as the EC already does.

### **Accountability by appeal or judicial review**

7.40 All the watchdogs are accountable to the law: as recorded in Chapter 5, their regulatory decisions are capable of challenge on appeal, or by way of judicial review. The Electoral Commission has experienced half a dozen judicial review challenges, all of which it has won; but it has lost appeals about fines it has imposed, and a case about forfeiture of donations. IPSA's determinations are subject to appeal by MPs going to the Compliance Officer, with a further appeal to the First Tier Tribunal. The findings of the PCS can be challenged before the Standards Committee; under the proposals in the Ryder report, her findings will be opinions, and the Standards Committee will make the determination and decide on any penalty, with a right of appeal to the Independent Expert Tribunal (IEP). In ICGS cases, the Commissioner will make the determination, but again with a right of appeal to the IEP. The Boundary Commission has experienced four judicial review challenges, all unsuccessful; now that parliament has lost its role in approving the Boundary Commission's reports, judicial review is the only means of ensuring the Commission observes its statutory remit.

### **Complaints mechanism**

7.41 As for complaints mechanisms, we noted in para 5.28 that the BCE, Electoral Commission and CSPL come within the jurisdiction of the Parliamentary Ombudsman, who can investigate complaints about maladministration or abuse of power; but IPSA and the PCS do not. There may well be complaints about delays, unhelpfulness etc which merit investigation; to fill this gap, IPSA and the PCS should also come within the remit of the Parliamentary Ombudsman.

### **Accountability for budgets and expenditure**

7.42 The main weakness reported in our interviews is that scrutiny of the Estimates for IPSA and the EC by the Speaker's Committee is formulaic and perfunctory. The MPs do not appear to have the interest or possibly the expertise to see the need to make this better. Many lay members have financial management expertise, but their advice is not called on or heeded. One solution would be for the Speaker to invite the lay members to lead the questioning when the budget is being scrutinised. And if there is not sufficient time, or the MPs become restless, another solution would be to delegate scrutiny of the budget to a sub-committee led by the lay members. There is a precedent for this: the Audit and Risk Committee of the House of Commons Commission is chaired by an external member.

7.43 The annual reports and accounts from the EC and IPSA provide a detailed breakdown of their operational and staffing costs, with statements of resource outturn against parliamentary supply for the financial year. The BCE's reports are similarly detailed, setting out planned vs. actual staffing levels, and itemised expenditure against budget. CSPL also records its final outturn against

budget. The PCS sets out the running and staffing costs of her office; but it would be helpful to have a more consistent record of its size, and how this bears on its resourcing requirements.

## Accountability to parliament

7.44 Accountability to parliament varies for the different watchdogs. The PCS is both sponsored and scrutinised by the Standards Committee. Standing Orders say that the Standards Committee is responsible for oversight of the PCS, but that is not further defined. The Committee adheres to the principle that it does not seek to direct the Commissioner's operational decision-making, and she decides whether to open investigations. The Ryder review suggested an annual debate about standards, which could enhance the accountability of the PCS to the Standards Committee and the House. After publication of her annual report, the PCS could appear for an evidence session before the Standards Committee, the committee could publish its own report on developments in the past year, followed by a debate in the House on both reports which could also agree any revisions of the Code and of Standing Orders.

7.45 For the Electoral Commission and IPSA, sponsorship comes from the Speaker's Committee. This provides a limited form of accountability for the budget and for board appointments, but no more: questioning about policies or performance can only be done in the context of examining the Estimate. That will start to change in the case of SCEC, with its new responsibility under section 17 of the Elections Act 2022 to monitor the Electoral Commission's compliance with the government's strategy and policy statement. Up to now, wider accountability for the EC's and IPSA's strategy and priorities has lain elsewhere. PACAC has been the main select committee interested in elections, with a current inquiry into the work of the Electoral Commission; but with the transfer of elections policy within Whitehall, the lead scrutiny role in future will fall to the Levelling Up, Housing and Communities Committee, which has many other priorities. For IPSA scrutiny for its expenditure should come from the Public Accounts Committee (PAC), and for its policies from the Administration Committee. In practice the PAC has shown no interest after an early value-for-money inquiry by the NAO in 2011; the Administration Committee's interest has largely been limited to pressing for increased spending on MPs' security; the House of Commons Commission has similarly summoned the chief executive to press IPSA to allow increased spending on security.

7.46 For CSPL the main line of accountability to parliament is through PACAC, which holds regular evidence sessions with the chair. For the BCE there is less accountability. Ministers are accountable for appointments to the BCE, and for domestic issues such as its staffing, and cost. But for substantive issues (the conduct of reviews, their timing, public consultation, delays etc) there is no accountability. The Speaker who chairs the BCE is not going to answer questions about it; if a parliamentary spokesperson were required for the BCE, it could be a senior figure like the Chairman of Ways and Means to answer on the Speaker's behalf.

7.47 Given the limited interest by select committees (apart from PACAC) in scrutinising watchdogs, and their increasingly fragmented nature, in the long run the best solution might be to have a single, specialist committee dedicated to scrutinising constitutional watchdogs. Through that specialisation it would be sensitive to the need for watchdogs to have a high degree of independence because of the nature of their constitutional role. It need not be confined to the

watchdogs considered in this report, but its remit could extend to other watchdogs like the Parliamentary Ombudsman.

## The central role of the Committee on Standards in Public Life

7.48 The final body to whom watchdogs are accountable is CSPL. CSPL might not conceive of its role in these terms; but it has conducted occasional reviews of the Electoral Commission, and it has shown a steady interest in improving the standards regime of the Commons, leading to the introduction of lay members onto the Standards Committee, and subsequent strengthening of their role, and that of the PCS. Although CSPL has not shown a direct interest in IPSA since its establishment, it produced a report in 2009 on MPs' Expenses and Allowances as the MPs' expenses scandal was taking place.<sup>304</sup>

7.49 CSPL already plays a central role in its comprehensive reviews of standards in government and parliament, its reviews of individual watchdogs, and its role as convenor of occasional gatherings of the main constitutional watchdogs. It has been suggested at para 7.15 above that CSPL be placed on a statutory footing; or at least in an Order in Council. Building on this, CSPL might be asked to play an additional role – as the *primus inter pares* of the constitutional watchdogs – in monitoring and safeguarding the independence and accountability of other constitutional watchdogs, by periodically reviewing their governance arrangements against the Seven Principles of Public Life.<sup>305</sup> Periodic reviews could be commissioned on a voluntary basis by the individual watchdogs, or they could be regularised by giving the CSPL formal powers to conduct them. External reviews exist for some other watchdogs, such as the Office for Budgetary Responsibility.<sup>306</sup> CSPL could conduct such reviews without compromising the bodies' independence.

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<sup>304</sup> Committee on Standards in Public Life: MPs' Expenses and Allowances: Supporting Parliament, safeguarding the taxpayer, November 2009.

<sup>305</sup> Gay and Winetrobe have pointed out how the CSPL 'has set much of the parameter for the debate on public ethics since its creation in 1994. But the bodies which were created following its recommendations do not have any reporting responsibility to it,' which begs the interesting question, taken up here, of whether this might be a feasible role for it: Oonagh Gay and Barry Winetrobe, *Officers of Parliament – Transforming the Role* (London: Constitution Unit, 2003), 47.

<sup>306</sup> Sch 1, Para 16 Budget Responsibility and National Audit Act 2011.



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This report is about five specialist watchdogs concerned with safeguarding the election, payment and conduct of MPs. Watchdogs must be independent of the politicians they regulate; yet they also need to be accountable, as public bodies performing public functions, and paid out of public funds. For this they need accountability lines into the political system, or their decisions will not seem legitimate to those being regulated, nor to the wider public.

There is a particular tension for watchdogs whose role is to regulate the behaviour of parliamentarians, being themselves appointed and sponsored by parliament. That is the central conundrum explored in this report, which concludes with a series of practical recommendations on how best to maintain the balance between watchdogs' need for a high degree of independence, while also maintaining proper lines of accountability. It is based on a thorough review of all the relevant literature and case law, as well as 25 interviews with senior figures in the House of Commons and the watchdogs being studied.

### **About the Constitution Unit**

The Constitution Unit is a research centre based in the UCL Department of Political Science. We conduct timely, rigorous, independent research into constitutional change and the reform of political institutions. Since our foundation in 1995, the Unit's research has had significant real-world impact, informing policy-makers engaged in such changes – both in the United Kingdom and around the world.

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