

Appendix VIII

The MPs' expenses scandal of 2009: a case study

1 Introduction

During May and June 2009 the *Daily Telegraph*, a national newspaper, published details of the expenses claims made by a large number of sitting Members of Parliament. These disclosed what that newspaper, many other commentators and large sections of the public considered were in many cases abuses of the expenses reimbursement rules managed by the House of Commons. Among other consequences, these disclosures resulted in the (forced) declaration by a number of MPs that they would not stand for re-election, the resignation of the Speaker of the House of Commons, inquiries by the Parliamentary Standards Commissioner into excessive claims, the revision of the House of Commons' internal guide to Members' allowances, an externally conducted review of all of the contested claims, an independent committee inquiry to devise new claims rules and an Act of Parliament establishing an independent body to oversee claims and repayments.

These events, and the official and unofficial responses to them, raised a number of issues that are relevant to themes discussed in this book. In this Appendix we first summarise the events (subsections 2.1–2.9). Section 3 identifies those themes and refers to those chapters where they are of particular relevance. Finally, section 4 contains some questions and exercises. The facts recounted below are drawn from a range of sources, including parliamentary debates, official reports and accounts drawn from *The Times* newspaper. The official responses noted in section 2 summarise the position that had developed by 1 January 2010. As the story did not end there, we have updated the principal developments to March 2012.

2 The events

2.1 The rules

'Allowances for MPs have been set by a series of resolutions approved by the House of Commons over many years.'¹ The rules were set out in *The Green*

¹ Explanatory Notes to the Parliamentary Standards Act 2009, para. 3. The Notes summarise and contain extracts from the *Green Book*. See, in full, Members Estimate Committee, *Revised Green Book and Audit of Members' Allowances* (First Report of Session 2008–9, HC 142).

Book: A Guide to Members' Allowances, which the Members Estimate Committee reviewed and updated in January 2009,² and, following the disclosures, again in July 2009.³ Because the claims that were the subject of those disclosures were made under the pre-July 2009 edition, we refer in this section to those earlier rules; we have footnoted the later changes. The rules in the *Green Book* were administered by the Operations Directorate of the House of Commons Department of Resources, informally known as 'the Fees Office'. Its task was to ensure that Members complied with these rules and to deal with the particular claims as they were made. The rules covered a range of expenditure by MPs on various activities, all of which expenditure had to be necessarily incurred 'to enable [Members] to work effectively in Parliament and in their constituencies'.⁴ They included employing staff, purchasing stationery and postage, and making overnight stays while performing these duties. The allowance governing accommodation away from an MP's main home was known as the Additional Costs Allowance (ACA).⁵ It was claims made under ACA that were the principal subject matter of the *Daily Telegraph's* disclosures.⁶

It is generally accepted that MPs whose constituencies are distant from the Palace of Westminster need accommodation in London to perform their parliamentary duties. The ACA rules permitted Members who designated an 'only or main residence' (their 'main' home) outside London to claim for the cost of overnight stays in London, either at an address designated as a 'second' home for ACA purposes, or at a hotel. Where an MP's main home was in fact in London, a claim could be made for overnight stays at a designated second home in the constituency. If the main home was neither in London nor in the constituency, the MP could designate a second home in either. For these purposes 'constituency' was regarded as any point within 20 miles of the constituency boundary. The rules permitted MPs to claim a range of expenses in respect of ACA for overnight stays in hotel accommodation or the designated second home: a major expense for those not claiming for hotels was incurred in rental payments or interest on a mortgage in respect of that second home. The *Green Book* listed some non-exhaustive examples of other expenditure appropriate for ACA claims. These included utility bills, furnishings and

² Members Estimate Committee, *Consolidated list of provisions of the Resolutions of the House relating to expenditure charged to the Estimate for the House of Commons* (Second Report of Session 2008–9, HC 281). This Committee has the power to modify the provisions in the *Green Book* 'in the interests of clarity, consistency, accountability and effective administration and conformity with current circumstances'. Parliamentary oversight is provided by this committee and the Committee on Members' Allowances, renamed the Members' Expenses Committee in July 2011; see House of Commons Standing Orders 152D and 152G.

³ House of Commons, *The Green Book: A Guide To Members' Allowances* (Revised Edition, July 2009).

⁴ *Ibid.*, para. 1.1.

⁵ The July 2009 revision of the *Green Book* divided these allowances into nine separate headings.

⁶ An earlier controversy arose over an MP's employment of his sons on parliamentary business. Rules on Members' employment of 'bought in' staff are set out in *ibid.*, para. 2.3.

maintenance; 'furnishings' included 'general household items', in which 'cutlery or crockery' were exemplified.⁷

The designation of a home as 'main' or 'second' is of some significance in the context of capital gains tax (CGT). When a person sells her 'principal private residence' she does not become liable for CGT; but the sale of a second home does give rise to CGT liability. An MP's designation of a home as his main or second home for the purpose of the reimbursement of parliamentary expenses would not determine his liability to CGT should he sell it. Nor is the MP under any duty to inform HM Revenue and Customs (HMRC) of the designation for the purpose of claiming parliamentary allowances. But the designation will be relevant to HMRC's decision as to liability to CGT should the second home later be sold.⁸ More generally, MPs were not liable to income tax on payments made under ACA. Nor are they liable under any of the arrangements that have replaced that allowance; in this respect they are in law treated differently from other taxpayers.⁹ For instance, an employee whose employer provides him with rent-free accommodation receives a 'benefit in kind' and must pay tax on its cash equivalent.¹⁰ 'The House rules and the income tax legislation do not always coincide.'¹¹

In the context of the claims that the *Daily Telegraph* disclosed it is worth noting two general points of advice that the *Green Book* continues to give to Members. First, it sets out nine 'Fundamental Principles' to which Members must adhere when making claims. The second provides: 'Claims must only be made for expenditure that it was necessary for a Member to incur to ensure that he or she could properly perform his or her parliamentary duties.' The requirement that an expense be 'necessary' is long established as an element of the income tax rules on taxpayers' expense claims; what constitutes a 'necessary' expense will be case dependent and often likely to be contested. A similar analysis arises in the present context.

Second, should they be in doubt whether to make a claim, the *Green Book* invites MPs to ask themselves a series of questions about the claim.¹² These include 'Could the claim in any way damage the reputation of

⁷ The July 2009 revision of the *Green Book* dealt with these matters under the heading, Personal Additional Accommodation Expenditure (PAAE). It included new rules regarding MPs representing London constituencies and, from 1 April 2010, MPs representing constituencies within 20 miles of Westminster. These Members were not eligible for PAAE but received instead a fixed London Costs Allowance (LCA) (*ibid.*, para. 2.1.2).

⁸ See *ibid.*, para. 2.1.5.

⁹ Income Tax (Earnings and Pensions) Act 2003, s. 292 (see *ibid.*, para. 3.3).

¹⁰ See the example of the teacher whose son was given a 'free' place at the school at which the teacher was employed: *Pepper v. Hart*. Chapter 8, section 4.3 (b).

¹¹ See HMRC, *Tax and National Insurance Contributions: Guide for MPs and Ministers* (MP/M1 HMRC 06/11) and also ss. 41 and 42 of the Constitutional Reform and Governance Act 2010. Section 42 illustrates a point made at n. 127 of Chapter 7: the use of symbols to describe those who are subject to the Act; in this case 'M', being 'a member of the House of Lords'.

¹² *Green Book* (July 2009), paras. 1.3 and 1.4. MPs are also advised to consult the Department of Resources; in the event of disagreement, the Members Estimate Committee may make a final ruling.

Parliament or its Members?' and 'How comfortable do I feel with the knowledge that my claim will be available to the public under Freedom of Information?'

2.2 The claims

The claims that the *Daily Telegraph* disclosed over a period of weeks in the spring of 2009 covered a range of expenditures.¹³ A large number of these concerned payments to cleaners and to gardeners made under ACA in respect of second homes. As noted above, the rules permitted MPs to claim for maintenance, which included cleaning. Depending on the size of the house this was likely to be once or twice a week, but some Members were in effect paying for a full-time housekeeper. Maintenance was taken to include routine gardening such as lawn mowing and hedge-trimming. But MPs were making claims (which were not paid) for expenses incurred in refilling a moat, building a rockery or purchasing a floating 'duck island' to be installed in a garden pond.

Those that attracted most public opprobrium comprised claims for the payment of the full cost of mortgages taken out on the purchase of second homes. As noted, reimbursement of mortgage interest payments is allowed, but not of the capital on which the interest is charged. If it were, then the taxpayer would in effect be contributing to the capital cost of the house for the MP; who in turn would benefit from any sale, subject, as noted above, to CGT if it were the sale of a second home. These disclosures provoked widespread public anger. This was especially so in respect of those MPs who, colloquially speaking, 'flipped' the designation of a home between 'main' and 'second', or flipped between two or more second homes; that is, changed the designation so as to maximise the additional allowances that could be paid.¹⁴

2.3 The response

These disclosures were unquestionably deeply damaging both to the individual MPs concerned and collectively to the House of Commons. Those named by the *Daily Telegraph* included the Prime Minister, the Leader of the Opposition and a number of other senior MPs, including ministers and shadow ministers. In the case of the Chancellor of the Exchequer the disclosures showed that he had switched his designated second home on more than one occasion.¹⁵ In other cases the damage was exacerbated by suggestions that some MPs had

¹³ *Daily Telegraph* and *The Times*, 11 May 2009.

¹⁴ *The Times*, 1 June 2009. To address the matter of 'flipping', para. 2.1.5 of the *Green Book* (July 2009) provided that, subject to an appeal to the Committee on Members' Allowances (now the Members' Expenses Committee), 'Members may not swap the respective designations as between their main home and additional home.'

¹⁵ *The Times*, 2 June 2009.

harassed officials in the Fees Office into accepting their claims. Further aggravating factors were that the House of Commons authorities had since 2005 resisted requests made by the *Daily Telegraph* and others under the Freedom of Information Act 2000 for the disclosure of information on ACA claims, and that in 2007 MPs had voted in favour of a Bill which would have exempted them from the provisions of that Act. When required by the High Court to disclose copies of each claim, the Commons authorities indicated that they would post redacted copies of them on the parliamentary website in July 2009.¹⁶ The details of the claims that the *Daily Telegraph* began to publish in May were drawn from unredacted copies of claim forms which had been leaked to the newspaper, though it published very few actual claim forms.

Once made, the disclosures were widely repeated in other national and, in the case of named MPs, local print media, and received extensive airtime on TV and radio. There were calls for the named government ministers to resign, and MPs were pilloried in the media for claims for the cost of bath plugs, treating dry rot, replacing light bulbs, repairing a pipe under a tennis court, and for the aforementioned 'duck island'.

The politicians' responses were mixed. Some MPs quickly accepted that they had improperly claimed ACA allowances and sought to correct matters. By mid-June some £500,000 had been voluntarily repaid. But while they made such repayments, some MPs denied that they had acted improperly, insisting that they had made their claims in good faith and that the Fees Office had approved them. Other MPs refused to repay, holding to the line that their claims had been approved. Critics countered that while the MPs might have acted in compliance with the rules, they were in breach of their spirit. A leading political commentator wrote, "The most pathetic sight on television over the weekend was of an MP protesting that "everything I have claimed has been within the rules".¹⁷ It may be noted that the first of the *Green Book's* 'Fundamental Principles' is that 'Claims should be "above reproach"'. These principles also refer to the Commons Code of Conduct for Members of Parliament agreed in 1995, which states what later became the seven principles of public life (the 'Nolan principles') the first of which is 'selflessness'. (See Committee on Standards in Public Life, section 2.8 below.)

For the government, performing badly in the opinion polls and facing a general election not more than a year away, the disclosures were particularly unwelcome. Nor was the Official Opposition unmarked: members of the

¹⁶ *The Times*, 19 June 2009, pp. 6–11.

¹⁷ Peter Riddell, *The Times*, 11 May 2009, p. 5. But some MPs' anger at what they perceived to be unfair and retrospective charges continued beyond the enactment of the Parliamentary Standards Act 2009 and the creation of the Independent Parliamentary Standards Authority (see section 2.4 below). Their unrelenting campaign to relax some of IPSA's rules was successful; a third revision of the rules was published in March 2011 (HC 890) and was replaced six weeks later; Independent Parliamentary Standards Authority, *The MPs' Expenses Scheme: Third Edition* (May 2011, HC 954).

Conservative Shadow Cabinet were also named. Set against the recession and growing unemployment caused by the banking crisis of October 2008, the level of public outrage was unprecedented. Under a headline, 'I've Never Seen Voters So Angry Before', one MP wrote:

[A]nother day, another series of corrosive revelations about MPs' expense claims. What has been laid bare is a catalogue of behaviour that is a matter of national shame. The Mother of Parliaments is on the take, from, at one end, those MPs who have determinedly worked the system in ways that are close to corrupt to generate unnecessary claims for hundreds of thousands of pounds from the taxpayer, to those who pathetically fill in forms to claim tiny sums for items such as bath plugs.¹⁸

Under pressure, five ministers resigned their government positions. The Labour Party's National Executive Committee established a small panel to investigate the disclosures in respect of claims made by its MPs. The result was that five MPs were barred from standing as Labour candidates at the next general election: three had already announced that they would stand down, and a fourth MP resigned his seat immediately. These investigations, likened to those of a Star Chamber, were deeply resented. Several of the MPs investigated argued that they had had little chance to defend themselves, and that in any event their claims had been approved. Less publicly, but with similar effect, pressure from the Leader of the Opposition led to the decision of some Conservative MPs not to seek re-election.

Perhaps the most prominent casualty was the Speaker of the House of Commons, Michael Martin MP. Already weakened by what many MPs considered to be his earlier lack of clear direction on important matters affecting the House, following the appearance on the Future Business section of the Order Paper of a motion of no confidence signed by twenty-three backbenchers of the three major political parties, he announced on 19 May his intention to resign. Under huge pressure from the constant negative publicity surrounding these disclosures, graphically reflected by the Speaker's resignation,¹⁹ the government commenced cross-party talks in which it was agreed that self-regulation was not an adequate form of control. The 'gentleman's club' approach would be replaced by a statutory code of conduct enforced by an authority independent of Parliament.²⁰

2.4 Parliamentary Standards Act 2009

Introduced in the Commons on 23 June 2009, the day after the election of a new Speaker, the Bill completed its Commons stages on 1 July and its Lords stages

¹⁸ Norman Baker MP, *Daily Telegraph*, 11 May 2009, p. 25.

¹⁹ The last time that the Speaker had been forced to step down in the face of a motion of censure was in 1695.

²⁰ *The Times*, 1 June 2009.

on 20 July and received the Royal Assent on 21 July. Its provisions upon enactment bore little resemblance to the Bill as published. Such was the political and parliamentary controversy that surrounded the issue that the government, keen to see the Bill become law before the summer adjournment, conceded many controversial points. The only substantive offence to be enacted is contained in s. 10, that it is an offence for an MP to provide information in support of a claim for allowances which he or she knows to be false or misleading in a material respect.

Section 3(1) of the Act creates a new public body, the Independent Parliamentary Standards Authority (IPSA). IPSA is responsible for a number of matters concerning the payment of MPs' salaries and expenses; drawing up, reviewing and administering a Members' expenses scheme.²¹ The content of IPSA's rules was to be a matter for the Commissioner for Parliamentary Investigations (CPI), a new officer created by s. 3(3) of the Act. The Commissioner for Parliamentary Investigations was also to investigate improper allowance claims and report to the House of Commons Committee on Standards and Privileges. But it was not clear what the relationship between this newly created Commissioner and the established Parliamentary Commissioner for Standards would be, and in the event the office was abolished by s. 26 of the Constitutional Reform and Governance Act 2010 and replaced by an officer known as the Compliance Officer for the IPSA. The Compliance Officer has powers to impose civil penalties and repayment duties, with appeals to a tribunal: cases may still be referred to the Committee on Standards and Privileges if a parliamentary sanction is felt appropriate. Shortly after his appointment the Chair of IPSA (Sir Ian Kennedy) indicated that he would consider a regime under which MPs would be required to repay any profit they made on the sale of their second homes.²² That scheme might also incorporate the recommendations of the Committee on Standards in Public Life, which conducted its own review of the matter. Or it might not: the relationship between IPSA's statutory code of practice and the non-statutory code on standards in public life (the seven 'Nolan principles') endorsed by that Committee was unclear and the legislative provision for a statutory code was repealed by s. 32 of the Constitutional Reform and Governance Act 2010.²³

²¹ Responsibility for Members' salaries and pensions was added by Chapter 2, Part 3 of the Constitutional Reform and Governance Act 2010.

²² *The Times*, 15 February 2010. The government was keen to ensure that IPSA would be up and running before the general election in May 2010. The timescale was therefore very compressed, with inevitable teething problems. See IPSA, *Annual Report and Accounts 2009/10* (November 2010, HC 620), Chairman's Introduction, and its *Annual Review of the MPs' Scheme of Business Costs and Expenses 2012* (5 March 2012, HC 1868, Foreword by the Board of IPSA).

²³ The Committee on Standards in Public Life (CSPL) published its report in November 2009. Its recommendations were based on principles which are 'derived from an elaboration of what we believe the Seven Principles of Public Life require in this context' (*MPs' expenses and allowances: Supporting Parliament, safeguarding the taxpayer* (Cm 7724), para. 15). There followed a sequence of exchanges between IPSA and the Committee that became increasingly

Besides these important operational matters, more profound issues were raised by the Bill. Deeply embedded in the United Kingdom's constitutional history is the proposition that it is for Parliament, and not the government of the day or the courts, to regulate its members' conduct. This jealously maintained proposition derives from the constitutional struggle between Parliament (effectively the Commons) and the Crown in the seventeenth century. The Bill of Rights 1689 contains the principles that emerged from that struggle; for example that there should be 'no taxation without representation' and 'no fixing of excessive bail'. (These will be familiar from the later written constitution of the United States of America.) Another principle is Art. IX. This provides that 'the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament'.²⁴

A Member of Parliament is not immune from the criminal law; in this respect s. 10 of the 2009 Act does little more than create a specific offence that might otherwise be caught by the Fraud Act 2006.²⁵ Aside from crimes, the long-standing mechanism for regulating the conduct of Members of Parliament is the House of Commons Committee on Standards and Privileges. The provisions of the Parliamentary Standards Bill were regarded by many as objectionable precisely because they sought to subject MPs' conduct, and the words they spoke in parliamentary proceedings, to the scrutiny of the courts and of an external body that was itself not directly answerable to the House of Commons. Section 1 of the Act aimed to mollify such objectors: 'Nothing in this Act shall be construed by any court in the United Kingdom as affecting Article IX of the Bill of Rights 1689.' Clause 10 of the Bill, as introduced, would if enacted have enabled IPSA to carry out its functions, and have allowed parliamentary proceedings to be

fraught. Commenting on IPSA's first review of the new scheme, the Committee was not wholly convinced either that it had operated as effectively as it might or that it was serving what the Committee saw as its main function, 'to support Members of Parliament effectively in carrying out their important and difficult jobs' (*Response to IPSA Annual Review of the MPs' Expenses Scheme* (February 2010), para. 5). IPSA was unimpressed by these criticisms. On the matter of its function, IPSA commented, 'We also note the CSPL's view that IPSA's fundamental purpose is to support MPs. Actually, IPSA's fundamental purpose, as an independent regulator, is to serve the public interest' (see www.parliamentarystandards.org.uk, 'Latest News', 15 September 2011).

²⁴ The Commons Justice Committee conducted an enquiry; *Constitutional Reform and Renewal: The Parliamentary Standards Bill* (Seventh Report of Session 2008–9, HC 791). See the memorandum prepared by the Clerk of the House of Commons, 'Privilege Aspects of the Parliamentary Standards Bill' (www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/memos/constref/ucm102.htm).

²⁵ The question whether Article IX precludes any prosecution for offences in relation to falsely made expenses claims was considered by the Supreme Court in *R v. Chaytor and others* [2010] UKSC 52. During 2010 three MPs were prosecuted for the offence of false accounting in respect of their expenses claims. On their first appearance, at Southwark Crown Court, they argued that the proceedings could not be brought because they infringed parliamentary privilege. The trial judge dismissed this argument, as did the Court of Appeal and the Supreme Court, which also considered the argument's application to a member of the House of Lords who was facing similar charges. Having reviewed the history and present understanding of the scope and enforcement of the privilege within Parliament, Lord Phillips P. held that whereas decisions as to its scope were matters of privilege, their administration was not; accordingly the prosecution could proceed.

admissible in court in proceedings against an MP for alleged offences under the Act; it was defeated in the Commons by 247 votes to 250.

One final point is worthy of note. Some sections of the Act were of temporary effect: they were to expire two years after s. 8 came into force. This is not a sunset clause that applies to the whole Act. Instead the Act makes provision for its partial renewal, to be effected by an Order made by a Minister of the Crown. Here the House of Lords, to which the Act otherwise does not apply, has a role to play in approving the draft Order, which is subject to the affirmative resolution procedure.

2.5 Additional Costs Allowance Review

In July 2009 the Members Estimate Committee (a formation of the House of Commons Commission) asked Sir Thomas Legg (a former senior civil servant) to review every claim made by MPs under the ACA during the years 2004–5 to 2007–8. His remit was to:

conduct an independent review of all claims made by Members of Parliament (except those who have since died) for the Additional Costs Allowance during the financial years 2004/05 to 2007/08;²⁶ to examine all payments made on [ACA] claims, against the rules and standards in force at the time, and identify any which should not have been made, and any claims which otherwise call for comment; to allow Members who received such payments or made such claims a fair opportunity to make representations about them; Subject to any such representations, to recommend where necessary any repayments which Members should make and otherwise to comment as seems appropriate; and to report as soon as possible to the Members Estimate Committee.

On 13 October 2009, as Parliament returned from its summer adjournment, all MPs received letters informing them of Legg's provisional findings.²⁷ Those MPs in respect of whose expenses claims the Legg review had identified anomalies received letters inviting them either to provide further and better particulars or to repay named amounts. Their reactions ranged from the resigned to the furious.²⁸ Many of the identified MPs objected to what they perceived to be the retrospective imposition of arbitrary financial limits on the particular matters in respect of which they were being asked to pay on house (£2,000) and gardening (£1,000) expenses. They also objected that Legg had exceeded his remit. Noting that his letters to them only 'recommended' payments based on his 'provisional conclusions' and repeating their insistence that the Commons Fees Office had approved their claims, a number urged that the Members

²⁶ The initial remit announced on 1 July 2009 was extended on 21 July session 2008–9.

²⁷ His provisional findings did not deal with any payments that were under separate investigation by the Parliamentary Commissioner for Standards, the police or HMRC.

²⁸ *The Times*, 14 October 2009.

Estimate Committee, which had commissioned the review, should simply reject his findings.²⁹ Some went further. When they were reported in February 2010 to be the possible subjects of a criminal prosecution, three Labour MPs argued strenuously that their conduct was subject only to the rules on parliamentary privilege administered by House of Commons Committee on Standards and Privileges.³⁰ The objections were given credence when a retired High Court judge, Sir Paul Kennedy, later allowed a number of MPs' appeals, reducing or dismissing altogether the sums for which the Legg enquiry had sought repayment. Earlier *The Times* had commented, 'The saga of the Additional Costs Allowances is now descending into farce. The credibility and authority of the Parliament are falling with it.'³¹

By contrast, in a display of party unity, the Prime Minister, the Leader of the Opposition and the Leader of the Liberal Democrats all urged their MPs to pay up. They accepted that the 'caps' on expenses appeared to be retrospective in that this was the first occasion on which precise and quantitative criteria had been applied to the vague requirement that an expense be 'wholly and necessarily' incurred. However, it appeared that in their view too much damage had already been done to the credibility of those MPs whom the Legg review had identified as making excessive claims, and more broadly to the credibility of the House of Commons. When he published his final report, Sir Thomas Legg's review condemned MPs for instilling and exploiting a 'culture of deference' in the Fees Office, which in turn had led to the approval of claims that should never have been made.³²

2.6 House of Commons Committee on Standards and Privileges

Established by Standing Order No. 149, the functions of this Committee are to consider any specific matter concerning parliamentary privilege in the Commons, the conduct of Members, and to oversee the work of the Parliamentary Commissioner for Standards. The Committee recommends to the House what disciplinary measure may be imposed on a Member whom the Commissioner has found to be in breach of the Code of Conduct for Members. Such measures range from the requirement of an apology on the floor of the House to a recommendation to the House for suspension for one or more days or even expulsion.³³

²⁹ *The Times*, 12 October 2009.

³⁰ *The Times*, 13 October 2009; and see n. 25 above. ³¹ *The Times*, 4 and 5 February 2010.

³² *The Times*, 17 October 2009. The Members Estimate Committee has continued its review of ACA claims; see its *Review of past ACA payments: third supplementary report* (Second Report of Session 2010–12, HC 1496).

³³ www.parliament.uk/parliamentary_committees/standards_and_privileges.cfm. It must be remembered that the nuclear option of expulsion, on which the whole House must decide, means that until a new MP is elected, the constituency has no representation in Parliament. See its recent review, Committee on Standards and Privileges, *Review of the Code of Conduct* (Nineteenth Report of Session 2010–12, HC 1579).

2.7 Parliamentary Commissioner for Standards

The Parliamentary Commissioner for Standards is an Officer established by the House of Commons and answerable to it.³⁴ Broadly speaking, the Commissioner's function is to maintain a register of MPs' financial interests, to monitor their compliance with the Code of Conduct for Members and to investigate possible breaches of the Code.³⁵ The Commissioner reports to the House of Commons Committee on Standards and Privileges. In an inquiry separate from the ACA review, the Commissioner ruled that Jacqui Smith MP had, in view of the available facts concerning her use of her family home in Redditch, wrongly nominated that home as her second home while treating her sister's London property as her main home. The question of whether she would be required to repay any claims was a matter on which the Standards and Privileges Committee would rule and report to the House for a determination.³⁶

2.8 Committee on Standards in Public Life

This is an independent body established in 1994 initially to deal with concerns about unethical conduct amongst MPs and others in public life, including accepting financial incentives for tabling Parliamentary questions, and issues over procedures for appointment to public bodies. It has responsibility for the seven principles of public life: selflessness, integrity, objectivity, accountability, openness, honesty and leadership. These are sometimes called 'the Nolan principles'.³⁷ In addition to the Legg inquiry into MPs' past expense claims, in April 2009 Sir Christopher Kelly, the Chairman of the Committee, commenced a consideration of how such claims might be managed in the future. The Committee issued its report in November 2009. Its principal recommendations were expected to be that MPs' entitlement to claim a range of expenses in respect of second homes, including mortgage interest, and expenses for the employment of family members should be phased out.³⁸

2.9 House of Lords

The party leaders' concern about the extent of public disquiet about the MPs' expenses scandal was reinforced by a concern about similar abuses in the House of Lords. These included allegations of abuse of the daily attendance allowance, claiming expenses on a main house which was seldom used, and accepting

³⁴ www.parliament.uk/about_commons/pcfs.cfm.

³⁵ See Parliamentary Commissioner for Standards, *Review of the Guide to the Rules relating to the Conduct of Members, Consultation Paper* (19 January 2012).

³⁶ Standards and Privileges Committee, Jacqui Smith (Ninth Report of Session 2008–9, HC 294).

³⁷ www.public-standards.gov.uk.

³⁸ See its Report, *MPs' expenses and allowances: Supporting Parliament, safeguarding the taxpayer* (2009, Cm 7724).

payments to influence the content of a Bill. The Parliamentary Standards Act 2009 originally contained a clause that would have extended its regulatory remit to the House of Lords. But this was strongly opposed in the Lords, and the clause was dropped. The Lords' objections were so strong that s. 2 was added: 'Nothing in this Act shall affect the House of Lords.'³⁹

3 Themes and issues

3.1 Problem-solving

The Parliamentary Standards Act 2009 is an example of legislation enacted in haste in order for the government to be seen to be 'doing something' in response to a matter of intense public disquiet. And that 'something' had to be done before the summer adjournment. Had MPs 'gone on their holidays' for twelve weeks (the length of the summer adjournment) that disquiet would have deepened and the disaffection with the political system would arguably have become yet greater (see also Public disengagement with Parliament, section 3.4 below).

Chapters 2, p. 74; and 7, p. 204.⁴⁰

3.2 Attitudes to rules

Much of the criticism centred on what were seen as MPs' 'legalistic' responses to the disclosures. They might have been obeying the rules (they were in crucial ways vague) but they appeared to be unaware of or oblivious to their spirit. In the circumstances in which the MPs made their claims they sought their entitlements but failed to exercise their judgement about the ethical dimension of those claims. Those MPs who were 'flipping' the designation of their second homes might have been regarded as bending, twisting or, in cases of serial redesignation, flouting the rules.

Chapter 4, pp. 136, 140; and 143–5.

3.3 Rule density

Following the commencement of the Parliamentary Standards Act 2009, MPs are, in respect of their financial affairs and their conduct, governed by a range of

³⁹ The current Code for the Conduct for Members of the House of Lords was adopted in 2009; it is administered by the Lords Committee for Privileges and Conduct. For examples of its response to peers who had falsely claimed expenses, see its Eighth and Ninth Reports of Session 2010–12, *The Conduct of Lord Taylor of Warwick* (HL 210) and *The Conduct of Lord Hanningfield* (HL 211) respectively. Lord Hanningfield was one of the unsuccessful appellants in *Chaytor* (see n. 25 above).

⁴⁰ See N. Parpworth, 'The Parliamentary Standards Act 2009: A Constitutional Dangerous Dogs Measure?', *Modern Law Review*, 73 (2010), 262.

rules managed and enforced by a range of authorities established within and outside the House of Commons:

- 1 the Members Estimate and the Members' Expenses Committees of the House of Commons;
- 2 the Parliamentary Commissioner for Standards;
- 3 the Commons Standards and Privileges Committee;
- 4 the Independent Parliamentary Standards Authority (IPSA), overseen by a Speaker's Committee, a member of which is to answer questions in the Commons on IPSA's activities;
- 5 the Compliance Officer for IPSA, who reports to the Commons Committee on Standards and Privileges;
- 6 the Committee on Standards in Public Life;
- 7 the ordinary law of the land concerning theft and fraud, including the new criminal offence in section 10 of the Act.

Chapters 3, pp. 101–2; and 7, p. 213.

3.4 Public disengagement with Parliament

At a time when the popular turnout at general elections in the United Kingdom has been in steady decline over the years, the MPs' expenses scandal has reinforced the popular view that many politicians are either self-serving or irrelevant to citizens' everyday concerns.

Chapter 7, pp. 193–4.

3.5 Vagueness, rules and precedents

The *Green Book* rule that expenses must be 'necessarily' incurred is a phrase that is long established in tax law. This is a deliberate use of vagueness where it would be impossible to determine in advance exactly what claims would be permissible and what excessive. In tax law there is a substantial jurisprudence of reported cases that indicate where some of the boundaries lie. There is no public record of the Fees Office's decisions, but it is highly likely that within the office there were precedents to which officials might refer to give the guidance that the *Green Book* recommends.⁴¹ Vague rules allow the exercise of discretion in difficult or hard cases, permit flexible responses to unforeseen facts and otherwise can ease interpretive life for officials. But they also carry the possibility of the arbitrary, inconsistent and improper exercise of discretion. And where a body subsequently introduces criteria that circumscribe that discretion and render decisions made under it unlawful in its terms, those detrimentally affected may cry foul.

Chapters 5, pp. 167, 171–2; 6, pp. 186–7; 7, pp. 219–21; and 9, p. 276.

⁴¹ Paragraph 1.2 of the *Green Book* (July 2009) refers to the publication of 'Practice Notes' to be used by the Department of Resources.

3.6 Retrospective legislation

There was a widespread belief among many of the MPs provisionally identified in the ACA review as having made excessive claims that they were victims of 'retrospective legislation'. Their argument was that as the Fees Office had approved and paid their claims any later imposition of fixed limits was unfair. The ACA review sought to penalise those who had, at the time, sought advice from the relevant authority on the admissibility of their claims and had acted accordingly (see the rule of law, section 3.7 below). But they may have misunderstood what retrospective legislation means. Legislation is retrospective when it attaches new consequences to behaviour that was at the time not specifically catered for. This may be to an individual's benefit, as in retrospective compensation payments or immunities, or disadvantage as where previously lawful behaviour becomes illegal.

In this case the behaviour contemplated was specifically catered for, through the rules and principles in the *Green Book* and the Code of Conduct for Members. It is true that a key test was vague ('necessary') but this is no different from hundreds of legislative rules. The question was not what 'law' should apply to MPs' expenses, but how the law that existed should be interpreted. Again, this is no different from the routine judicial interpretation of vague statutory rules.

A better analogy is to view the ACA review as a form of appellate court, in the same way that the High Court is called upon to determine whether a taxpayer's claimed expenses were 'wholly, necessarily and exclusively' incurred in connection with his employment. When the ACA review found that an MP's expense claim was not 'necessary' its provisional conclusions were, in essence, either that:

- 1 the expense was of a kind that could not (reasonably) be regarded as necessary for the performance of the MP's parliamentary duties (a floating duck island);
- 2 the expense was of a kind that could be regarded as necessary for the performance of the MP's parliamentary duties (cleaning and gardening) but the sums claimed were as a matter of degree disproportionate.

This is not legislating retrospectively but interpreting the pre-existing rule.

Chapter 8, p. 233.

3.7 The rule of law

An important theme that ran through the public debate on MPs' expenses concerned the apparent willingness of the Prime Minister and the Leader of the Opposition to encourage or otherwise bring pressure to bear on the named MPs to stand down voluntarily. In the case of the Labour Party a 'Star Chamber' enquiry was conducted by its National Executive Committee; the

Conservative Party established a scrutiny panel which examined claims and recommended repayments where appropriate. These responses, made almost immediately following the public disclosures, raised questions of due process for the affected MPs whose claims, at the time that the calls were made and to rehearse the point, had been approved and paid by the relevant Commons authority.

Chapters 1, section 7.1; 3, p. 118; and 4, pp. 136 and 143.

3.8 Legislative technique

The Parliamentary Standards Act 2009 displays one or two technical points of interest. Because it needs none it had no section on its extent; four of its sections came into force on the day it was passed, and it contains a partial sunset section.

Chapter 7, pp. 233–4.

4 EXERCISES AND QUESTIONS

- 1 Using the parliamentary website and legislation.gov.uk:
 - (a) Find out and list the effect of the amendments that the Constitutional Reform and Governance Act 2010 made to the Parliamentary Standards Act 2009.
 - (b) Find out whether any rules have been published under the authority of the Parliamentary Standards Act 2009.
 - (c) Summarise the scope and effect of those rules and compare them with the Additional Costs Allowance rules: in what ways do they differ?
 - (d) Find out whether the Additional Costs Allowance rules have in any event been replaced by similar rules approved by the House of Commons.
 - (e) Compare the rules published by IPSA with the rules published by the Committee on Standards in Public Life: in what ways do they differ?
 - (f) Locate the Members Estimate Committee and the Members' Expenses Committee of the House of Commons. What are their roles, and in what ways do they differ from one another?
- 2 Using the parliamentary website find the latest version of the expenses rules and the Guidance that has been published with it, and then imagine that you are responsible for their implementation and for their application to MPs' expense claims.
 - (a) How would you decide the legitimacy of a claim for (i) expenditure at an MP's second home incurred in refilling a moat, building a rockery, purchasing a floating 'duck island' in a garden pond, redecorating the kitchen and building a new small outhouse in which the MP undertakes constituency work; and (ii) purchase of new 'white goods' (washing machine, etc.) for the redecorated kitchen?

- (b) Would your task be more or less difficult if you were required, as the revised edition of the *Green Book* provides, to apply 'a clear test of reasonableness'?⁴²
 - (c) Read Jeffrey Barnes, 'When "Plain Language" Legislation Is Ambiguous: Sources of Doubt and Lessons for the Plain Language Movement', *Melbourne University Law Review*, 34 (2010), 671–707, and using the diagnostic model set out in Chapter 6 of the book, analyse the conditions of doubt to which the Commons' expenses rules gave, or continue to give rise.
- 3 Read the report of the case *R v. Chaytor and others* [2010] UKSC 52.
 - (a) Using the template recommended in Chapter 9, section 1, write a case note of the Supreme Court's decision.
 - (b) Does the Supreme Court's decision have a *ratio decidendi* (see Chapter 9, section 6)? What might it be?
 - (c) What was the status of the three members of the Court of Appeal who dismissed the appeal, and how many Justices of the Supreme Court heard and dismissed the appeal? Do your answers suggest that their decisions might attract greater authority than is conferred simply by their being unanimous?
 - (d) Lord Phillips refers to *Pepper v. Hart* [1993] AC 593 (see Chapter 8, section 4.3(b)). What is the relevance of that case to the appeal in *Chaytor*?
 - 4 Read the Report of the Reform of the House of Commons Committee, *Rebuilding the House* (2008–9, HC 1117). How many of its recommendations have been acted upon?
 - 5 Using the parliamentary website, what steps have been taken in the House of Lords to address the question of the abuse of its expense and daily allowance rules?

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⁴² Ibid.