

## Supporting Material referenced by Recommendation

1. This Annex contains some supporting material for each of the Recommendations. This is provided to give more background to the Recommendations and, particularly, to identify and credit the published material and sources that were particularly useful to the Commission. It does not form part of the Report.
2. No such high-level background can possibly do justice to the eight months of discussion and research. In particular, the considerations section, in relation to each Recommendation, is no more than illustrative of some of the points that were considered or proposed and does not represent the settled view of the Commission as a whole and should not be attributed to any individual Commissioner.
3. The Commission does not have the resources to undertake a proper cost/benefit analysis of each of the proposals. Accordingly, the comments on these aspects are also high level and indicative.

### **Recommendation 1: Ministerial Standards and the Ministerial Code**

4. Relationship with existing Code

The proposed streamlined and revised Ministerial Code will not cover all of the aspects of the operation of Government or arrangements for Ministers' Private Offices covered by the current version. It is expected, therefore, that there should be separate (published) guidance that would include more detail on these aspects including:

- a. the operation of Cabinet and Cabinet Committees including expectations around the management of collective responsibility;
- b. conduct that upholds Ministers' accountability to Parliament (e.g., important announcements of Government policy should be made in Parliament first (if it is in session);
- c. the distinction between Ministers' duties as members of the Government and constituency MPs (if applicable);
- d. confidentiality of Government business;
- e. consideration of, and due weight to, advice from Civil Servants;
- f. consultation of Law Officers on decisions involving important legal considerations;
- g. the role of special advisers;
- h. the role of Parliamentary Private Secretaries; and
- i. official travel arrangements.

As described in more detail in Recommendation 10 (relating to special advisers), this guidance should clarify the specific 'strands' of the special adviser roles that currently exist in government, with the remit of each 'strand' of special adviser being clearly demarcated. Further, the accountability chains for each strand should also be clarified so the relevant appointing Minister would be accountable in considering the compliance by that Minister with the Ministerial Code in relation to SpAd actions.

## 5. Benefits sought

- Separate out and clarify those parts of the current Ministerial Code which relate to standards of integrity and conduct.
- Provide for clear and credible independent enforcement of Ministerial integrity and conduct obligations through the independent Code Commissioner. There would be a clear reporting and enforcement mechanism when conduct may fall short of the expected standards.
- Provide for proper funding/resourcing of the Code Commissioner with a mixture of permanent staff and a budget to use specialist investigatory/legal/analytical resource where needed for particular investigations.
- Provide greater guidance to Ministers and those with whom they work closely (especially those who work directly for them) about how they should operate (whether on Ministerial, constituency, personal matters). This guidance should be public so that those interacting with Ministers know what to expect.
- These benefits are intended to make a substantive improvement to standards of governance in Government, and to the ethical and control environment for Government, and therefore to reduce the risk of abuse of power and improve public confidence.
- Preserve the constitutional position that the PM takes the final decision on Ministerial resignations.
- Use primary legislation which has both symbolic value and a measure of permanence.

## 6. Costs or risks

- Primary legislation needs Government/Civil Service resource and Parliamentary time. Much of the above could be achieved without legislation, but not formal legal powers for the Code Commissioner; and the resulting commitment and opportunity to provide a basis for public confidence would be lost.
- Costs of resourcing a fully independent Code Commissioner's office. This is likely to be incremental relative to existing costs of the Independent Adviser on Ministers' Interests and support already provided by the Cabinet Office.

## 7. Inter-dependencies and points for discussion

- The separate Recommendation relating to Conflicts of Interest, which envisages that the Code Commissioner will play a key role in receiving confidential disclosures from Ministers and special advisers and in then determining which of the interests so disclosed give rise to a need for conflict resolution.

- The separate Recommendation relating to special advisers, which envisages that changes will be made to the Special Adviser Code to conform to the approach described in this Recommendation.

8. This Recommendation is one of six which propose reforms around integrity and standards.

The other five are:

- Recommendation 2 on the Conflicts of Interest;
- Recommendation 3 on the House of Lords Appointments Committee;
- Recommendation 4 on the Advisory Committee on Business Appointments;
- Recommendation 5 on the Honours system; and
- Recommendation 6 on Professional development for those in public life.

These Recommendations are not inter-dependent. A Government might choose to implement any combination of them.

9. Acknowledgment of sources and gratitude

The Commission is grateful for the following sources which were extremely helpful in the formulation of this Recommendation:

- The Ministerial Code and the Independent Adviser on Ministers' Interests: <https://commonslibrary.parliament.uk/research-briefings/sn03750/>
- Committee on Standards in Public Life: [Upholding Standards in Public Life - A report of the Standards Matter 2 review \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/444444/standards-matter-2-review-report.pdf)
- Institute for Government: [updating-ministerial-code.pdf \(instituteforgovernment.org.uk\)](https://www.instituteforgovernment.org.uk/sites/default/files/2017/06/20170620-updating-ministerial-code.pdf)

This Recommendation reflects the Institute for Government proposals, and echoes the thrust of Labour's public statements so far in this area.

10. Brief summary of considerations that have prompted this Recommendation

The aim of this Recommendation is to strengthen the mechanisms for upholding standards of Ministerial conduct by providing greater clarity around those standards, along with stronger independent oversight and enforcement. A recent survey by the UCL Constitution Unit (details of which can be found in Annex 7 to the Report) found that if an independent authority was given the ability to initiate investigations and determine breaches of the Code, public trust in politicians and their ethical standards would significantly improve.

The following considerations have therefore been central in prompting the formulation of this Recommendation.

- Insufficient status -- the “Independent Adviser on Ministerial Interests” has the wrong title and insufficient independence, power and authority.
- Lack of clarity -- Ministers can argue that the expectations of them are not clear. The aim is to have one clear articulation of the obligations on Ministers which also guards against perceptions of poor behaviour.
- Cumbersome -- the current Ministerial Code is muddled, unwieldy to operate and has become more, not less, useful in practice as it has grown. New elements have been added to the Code to address gaps that have been shown up by particular incidents. (Nearly half of the current Ministerial Code is now comprised of a private office operations manual.). A clearer operations manual with common standards for all of those who work closely with a Minister would be a positive step.

## **Recommendation 2: Conflicts of Interest**

### 11. Benefits sought

- Primarily, a better structure so that the public can have greater confidence that their legislators and those governing them are operating in the public or national interest, not influenced by private interests. Essentially, this is about public confidence rather than responding to evidence that private interests have, in fact, affected public decisions.
- Greater transparency, harmonisation and consistency in the standards of financial behaviour to which legislators, Ministers and Relevant Officials are held.
- A slight relaxation of the requirements for legislators, with some protection from misuse of disclosures, leading to a fairer arrangement for those subject to the obligations and a more sensitive conflicts management system.
- A clear set of higher standards for those with executive (or related advisory) roles.
- The ability for some conflicts to be disclosed but not made public (where appropriate, not least to protect the interests of third parties) with those conflicts being managed internally but by an independent authority.
- Clear code responsibilities for Ministers and Relevant Officials.

### 12. Costs or Risks

- Limited administrative cost to the extent that: (a) there is an extension of the specific responsibilities of the Code Commissioner/CSC; (b) the existing systems require development to host the disclosure exercises for Ministers and Relevant Officials (with appropriate confidentiality and information barriers); and (c) the volume of disclosures increases.
- The wider disclosure regime being a deterrent to Relevant Officials (although their disclosures would not be public and such limited internal disclosure can clearly be justified).

- Publicity around the conflicts regime being a deterrent to people seeking to become MPs or entering the House of Lords. However, the proposals are intended to reduce those concerns and offer an improved system to such individuals with a lower risk of abuse or being placed in a difficult position of conflict.

### 13. Inter-dependencies and points for discussion

This Recommendation is one of the six which propose reforms around integrity and standards - see the discussion at paragraph 8.

- The creation of the Code Commissioner pursuant to Recommendation 1 on the Ministerial Code.
- The development of effective enforcement powers and capabilities within the CSC, as recommended in Recommendation 9 on the Civil Service.
- Ensuring that appropriate amendments are made to Ministerial, SpAd and Civil Service Codes (as proposed in the applicable Recommendations).

### 14. Brief summary of considerations that prompted this Recommendation

This Recommendation draws less on existing work and reports and more on the usual principles of governance and management of conflicts together with the comments received from those who were interviewed and who commented on our draft proposals.

- A history of adverse comment about both the effectiveness of the current system and its leading to unfair consequences for people trying in good faith to work with in it.
- A lack of rigour, or clarity, in relation to the position for Ministers and Relevant Officials.
- The fundamental importance of public trust in the system as regards the incentives on those governing the country to be such that they act in the public or national interest rather than their own private interest: there must be an emphasis on avoiding even the perception of a possible conflict (to ensure public confidence). This is so even if the actual evidence of decisions being take for private, rather public, benefit is limited.

## **Recommendation 3: House of Lords Appointments Commission**

### 15. Benefits sought

- Ensure that HOLAC is an exclusive process for approval to become a peer.
- Provide for proper funding/resourcing of HOLAC - a mixture of permanent staff and a budget to buy in specialist investigatory/legal/analytical resource where needed for particular investigations.
- Provide greater public awareness of the basis on which HOLAC determinations are made.
- Preserve the constitutional position that the Prime Minister makes the recommendations to the Monarch for appointments to the House of Lords, and the current position that the

Prime Minister has the ability to nominate any individual, and any number of individuals, to HOLAC. (What is removed is the discretion of the Prime Minister to recommend any individual who has not been the subject of a positive HOLAC determination.)

- To make a substantive improvement in the nature of the assessment applied by HOLAC and in the transparency of appointments, preventing abuse of the appointment system and reducing the risk of inappropriate practices.
- To deliver a substantive improvement in the functioning of the House of Lords as one of our central institutions, by improving its calibre and reputation, thereby enhancing public confidence.

#### 16. Costs or risks

- Primary legislation needs some Government/Civil Service resource and Parliamentary time.
- There would be some additional marginal cost since this Recommendation involves enhancing existing arrangements and an expansion of the criteria to be applied by HOLAC.
- There is a risk of a perception of power to approve or veto nominations being handed to unelected persons. This concern is mitigated by the ultimate oversight of HOLAC by Parliament and the ability of Parliament to change the rules if needed. In addition, the Prime Minister would retain a discretion not to recommend an individual, even if he or she had been the subject of a positive HOLAC determination. The Commission considers that there are sufficient checks and balances.
- In relation to those Ministerial appointments which involve an appointment as a life peer, it will be necessary for HOLAC and the Executive to work carefully together to ensure that the timing of the Ministerial appointment can be coordinated with the granting of the life peerage. The Commission believes this should be manageable.

#### 17. Inter-dependencies and points for discussion

This Recommendation is one of the six which propose reforms around integrity and standards - see the discussion at paragraph 8.

#### 18. Other material; acknowledgment of sources and gratitude

The Commission is grateful for the following sources which were helpful in the formulation of this Recommendation:

- House of Lords Library - Vetting appointments to the House of Lords: <https://lordslibrary.parliament.uk/vetting-appointments-to-the-house-of-lords/>
- House of Lords Library - Appointments to the House of Lords: Should the Process be Reviewed? <https://lordslibrary.parliament.uk/house-of-lords-appointments-should-the-process-be-reviewed/>

- House of Lords Library - Reforming the House of Lords Appointments Commission: <https://lordslibrary.parliament.uk/reforming-the-house-of-lords-appointments-commission/>
- Draft Bill introduced by Lord Norton in the 2020/21 session: <https://bills.parliament.uk/bills/3028/stages>
- The Constitution Society - House of Lords Appointment Commission (HOLAC) - Chronicle of a Death Foretold?: <https://consoc.org.uk/house-of-lords-appointment-commission/>
- House of Lords debate in September 2021: <https://hansard.parliament.uk/lords/2021-09-06/debates/38A32E33-059F-46D0-A6FF-C1AD7D413834/HouseOfLordsAppointmentsCommission>
- House of Lords Library - list of all life peers created since 1958: <https://lordslibrary.parliament.uk/research-briefings/lln-2021-0002/>
- [October 2022 Letter from Lord Bew as HOLAC Chairman to political party leaders indicating inter alia that HOLAC members are “increasingly uncomfortable about the limits of its role”](https://lordsappointments.independent.gov.uk/wp-content/uploads/2022/10/2022-10-11-HOLAC-Letter-to-party-leaders-.pdf): <https://lordsappointments.independent.gov.uk/wp-content/uploads/2022/10/2022-10-11-HOLAC-Letter-to-party-leaders-.pdf>
- [UCL Constitution Unit Blog - The Problems of House of Lords Appointments](https://constitution-unit.com/2022/11/17/the-problems-of-house-of-lords-appointments/): <https://constitution-unit.com/2022/11/17/the-problems-of-house-of-lords-appointments/>
- March 2023 report by Professor Meg Russell - [House of Lords reform: navigating the obstacles \(Meg Russell, March 2023\)](#) assessing the evolution of the House of Lords and its role, and various proposals to reform the institution over time.

19. Brief summary of considerations that prompted this Recommendation:

Excellent background summaries are contained in the three House of Lords papers cited above.

HOLAC is an independent, advisory, non-departmental public body, established by the then Prime Minister in May 2000. HOLAC currently makes non-binding, advisory assessments as to the propriety of individuals nominated to become Peers, and has published the following definition of what ‘propriety’ constitutes in the context of House of Lords appointments, as follows:

- a) the individual should be in good standing in the community in general and with the public regulatory authorities in particular; and
- b) the past conduct of the nominee would not reasonably be regarded as bringing the House of Lords into disrepute.

HOLAC has indicated that a check on a nominee’s propriety will include checking with relevant government departments and agencies and other organisations, including the Electoral Commission. It also conducts media searches. Once all the evidence has been

considered, HOLAC will either advise the Prime Minister that it has no concerns about the appointment or will draw its concerns to the Prime Minister's attention. It does not have the power to veto the appointment of members of the House of Lords.

HOLAC states on its website that, in relation to non-party political appointees, it will be seeking to recommend nominees:

- with the ability to make an effective and significant contribution to the work of the House of Lords, not only in their areas of particular interest and special expertise, but the wide range of other issues coming before the House;
- with a record of significant achievement within their chosen way of life that demonstrates a range of experience, skills and competencies;
- who are willing to commit the time necessary to make an effective contribution to the work of the House of Lords. The Commission recognises that many active members continue with their professional and other working interests and this can help maintain expertise and experience;
- with some understanding of the constitutional framework, including the place of the House of Lords, and the skills and qualities needed to be an effective member of the House – for example, nominees should be able to speak with independence and authority;
- who are able to demonstrate outstanding personal qualities, in particular, integrity and independence;
- with a strong and personal commitment to the principles and highest standards of public life;
- who are and intend to remain independent of any political party (as to which, guidance is stated on the website); and
- who are resident in the UK for tax purposes and accept the requirement to remain so.

Since its creation, HOLAC has recommended a total of 74 individuals for appointment to the House of Lords as non-party members. Most of these were during its first ten years. Since 2012, HOLAC has been limited to making two recommendations per year.

In January 2000, the Royal Commission on Reform of the House of Lords recommended that HOLAC should be created by statute, arguing that establishing a commission on a non-statutory basis would mean that its role could be altered, or it could be abolished, without reference to Parliament and that HOLAC needed a proper level of political independence. In 2001, the then Government proposed that a new statutory appointments commission should be established. However, these proposals were not implemented.

The role and powers of the commission were also considered as part of the Coalition Government's proposals for reform of the House of Lords. In 2012, the Joint Committee on the Draft House of Lords Reform Bill agreed with proposals from the then Government that HOLAC should be placed on a statutory basis. However, the subsequent House of Lords Reform Bill was not passed, and these proposals were not implemented.



There have also been several previous attempts by members of the House of Lords to introduce private member's bills establishing a statutory appointments commission.

The question of whether HOLAC should be put on a statutory basis was debated (in a one-hour debate) by the House of Lords on 6 September, 2021, which included a consideration of a draft Bill for this purpose submitted by Lord Norton.

There is evidence that the public are frustrated by the current situation. Relatively few polls are conducted about the Lords, and those that are often ask fairly simplistic questions. As part of the Constitution Unit's Democracy in the UK after Brexit project, over 2000 people were polled about their attitudes to Lords appointments. These were deliberately 'forced choice' questions, asking respondents to indicate support for one proposition over another, rather than simply selecting 'agree' or 'disagree'. The result was a wholehearted rejection of key aspects of the current appointments process.

The first question asked respondents whether they preferred that the Prime Minister should appoint new members of the Lords, or whether this should be done by an independent body. Only 6% supported the existing system of prime ministerial appointments, and 58% preferred appointment by an independent body (17% agreed with both equally, and 19% responded 'do not know').

The following considerations have been central in prompting the formulation of this Recommendation:

- Not binding -- at present it is open to the Prime Minister, in making recommendations to the Crown, to disregard HOLAC's view because it is purely guidance and has no statutory basis.
- Criteria too narrow -- the grounds on which HOLAC is able to determine that a candidate is not suited to joining the House of Lords, are too narrow.

#### **Recommendation 4: Advisory Committee on Business Appointments**

##### **20. Benefits sought**

There have been growing and authoritative calls for reform of ACoBA, including, but not limited to, the PACAC and CSPL reports cited below. Nearly all of these recent reports envisage ACoBA being given full independence by way of primary legislation.

The Commission agrees that providing a statutory basis for ACoBA is the optimal next step. This is notwithstanding that this approach was rejected in the response by the Government, on 20 July 2023 (in the Cabinet Office paper (the "July 2023 Paper") entitled "Upholding Standards in Public Life") to the PACAC and CSPL reports, and to the Boardman Reports. The July 2023 Paper commits HMG to take several steps to strengthen ACoBA's position.

- This Recommendation aims to strengthen the independence, investigatory and enforcement powers of ACoBA and give it the resources to act independently.

➤ It is intended to make a substantive improvement to the transparency and effectiveness of decision-making in relation to transfers between public and private sectors, recognising the benefits that that offers to both sectors and to the individuals concerned.

#### 21. Costs or risks

➤ Minimal new cost since this is essentially putting existing arrangements on a stronger footing.

#### 22. Inter-dependencies and points for discussion

This Recommendation is one of the six which propose reforms around integrity and standards - see the discussion at paragraph 9.

#### 23. Other material; acknowledgment of sources and gratitude

The Commission is grateful for the following sources which were very helpful in the formulation of this Recommendation:

- House of Commons Library - The Business Appointment Rules: <https://researchbriefings.files.parliament.uk/documents/SN03745/SN03745.pdf>
- PACAC report (December 2022) - Propriety of Governance in light of Greensill: <https://committees.parliament.uk/work/1192/propriety-of-governance-in-light-of-greensill/publications/>
- CSPL report (1 November, 2021) - Upholding Standards in Public Life: <https://www.gov.uk/government/publications/upholding-standards-in-public-life-published-report>
- Cabinet Office - Strengthening Ethics and Integrity in Government: <https://www.gov.uk/government/publications/strengthening-ethics-and-integrity-in-central-government>
- IfG note on the July 2023 Paper, identifying what has and hasn't been accepted from PACAC, CSPL and Boardman: <https://www.instituteforgovernment.org.uk/explainer/government-response-standards-public-life>
- IfG background briefing on ACoBA: <https://www.instituteforgovernment.org.uk/explainer/jobs-after-government-rules>
- ACoBA website: <https://www.gov.uk/government/organisations/advisory-committee-on-business-appointments>
- Spotlight on Corruption - commentary on the July 2023 Paper: <https://www.spotlightcorruption.org/integrity-lite-standards-reforms-stack/>

- In relation to our Recommendation on Special Advisers, we note the Commission's belief that rigorous application of the BARs to SpAds is important. Recent research by individuals at the University of Essex ([https://news-archive.exeter.ac.uk/homepage/title\\_955270\\_en.html](https://news-archive.exeter.ac.uk/homepage/title_955270_en.html)) found that SpAds very often go on to corporate lobbying and policy advocacy roles, but they generally do not register with either the official lobbying register, or the voluntary one, with a small minority becoming politicians. The numbers going on to careers in public service has declined markedly.

#### 24. Brief summary of considerations that prompted this Recommendation

The first item cited above is a high-quality House of Commons Library Research Briefing, published on 27th July, which pulls together the background to this issue and highlighting important details. We will not restate that background here, nor as to recent calls for reform.

In relation to ACoBA, the July 2023 Paper includes three major positive steps from HMG:

- a) ACoBA rulings binding -- first, the Government agreed that ACoBA rulings, and adherence to the BARs, should be legally enforceable and binding. It proposed to do this contractually via (a) strengthened clauses in civil service contracts; and (b) for Ministers (who do not have employment contracts) a "Deed of Undertaking" as had been proposed by Sir Nigel Boardman in his 2021 reports which would legally commit ministers to adherence to the rules.
- b) MoU -- both CSPL and Boardman recommended that ACoBA and the Cabinet Office should agree how they can work better together and promote best practice awareness of the BARs across government. This has been accepted by the Government, who in the July 2023 Paper (a) agreed to develop a "MoU or Framework Document" to set out how it will work with ACoBA, and the timescales in which ACoBA should respond to applications; and (b) indicated that "a new departmental training programme is already underway, and this will be supplemented as needed with other support".
- c) Rule changes -- the July 2023 paper states that "The Government is introducing a set of fundamental reforms to the Business Appointment Rules to modernise the system, improve its usability for applicants and - most importantly - ensure that the integrity of Government is protected." The detail of these changes is not set out clearly, and the Government commits to a process of consultation so there will be a delay before there is clarity and implementation.

The Government also accepted the CSPL recommendation that government departments should publish anonymous data on their ACoBA rulings.

In addition, the Government says that it has responded positively to two other CSPL recommendations, although there is no independent verification. The first relates to ACoBA resources, where CSPL had recommended that ACoBA be granted additional resources. The Government responded that "the government has recently provided more resources to ACoBA". The second relates to ACoBA investigations, where CSPL had recommended that ACoBA should have the power to undertake investigations into potential breach of the BARs. The Government responded that ACoBA "is already empowered to make inquiries". However, the Government paper goes on to say that "Where they believe a breach has occurred, they write to the Cabinet Office setting out the facts, and it is then for Cabinet Office ministers to determine what action to take." It has been rightly observed that this is much less independent than would be appropriate for a properly independent regulator.

The Commission considered two questions.

- What had been proposed but not accepted in, or was possibly otherwise missing from, the current proposals?
- Are the Government's proposals enough: in particular does the contractual route fall short relative to the statutory route, as regards creating a binding regime, with adequate enforcement, for the Business Advisory Rules?

As to what may be missing from pre-existing proposals, there are three substantive elements. The first of these relates to rule changes, where the Government has rejected two substantive changes to the BARs:

- a) CSPL and PACAC recommended that the ACoBA rules be amended to prohibit appointments for two years where the applicant had direct responsibility for policy relevant to the employing company, and five years where the applicant is lobbying government. The Government rejected this, on the basis that the approach is "overly broad" and could constrain movement into and out of the public sector, and that a five-year ban "would be deemed as an unreasonable restraint on trade".
- b) CSPL recommended that the existing ban on lobbying should include a ban on any work for lobbying firms. The Government rejected this, arguing that it would be "disproportionate given a role as an 'in-house' lobbyist is functionally the same" arguing that lobbying bans will remain part of the BARs system, "applied proportionally".

The second point relates to consistency: each of PACAC, CSPL and Boardman identified a lack of consistency across the different ethics rules, including the Ministerial Code and ACoBA, which could be achieved by having a joined-up and statute-based system of regulation.

Finally, and most obviously, the July 2023 Paper rejects the basic element of statutory backing. CSPL and PACAC had recommended that ACoBA (along with the Ministerial Code and the CPA) should be given a statutory basis via primary legislation. This was rejected; the Cabinet Office paper explains this position by saying that "placing scrutiny bodies into primary legislation risks drawing the courts into political matters that are the sole purview of the Government".

Against this background, the Commission considered the second question, as to whether what the Government has already agreed to amounts to a sufficient level of ACoBA reform, which should be allowed a chance to bed in and for ACoBA to make it work. Or do the three missing items, noted above, require a rejection of this partial reform, with only a statutory basis for ACoBA being sufficient to provide it with the needed independence and, in particular, an independent power of enforcement?

The Commission has found this a difficult question to answer with certainty, but on balance, came down in favour of a move, as soon as possible, to a full statutory basis for ACoBA, but with a suggestion that immediately prior to the relevant legislation being introduced there should be a further 'last check' as to whether the partial reforms, outlined in the July 2023 Paper, have had sufficient effect that the legislation is no longer needed.

On the one hand, that there is cogency to the Government's concerns about creating a "one size fits all" approach, to be applied to such a wide range of situations; setting that in statute,

could be potentially unhelpful. As the Government says in the 20th July paper, this could “act as a fetter on porosity between the public and private sectors” (which is, of course, valuable). Similarly, with the ban on lobbying, the Government’s point seems valid that working in-house for a company which is lobbying can be functionally the same as lobbying. However, we think that this concern can be addressed by empowering ACoBA to develop the BARs over time. We think that a well-resourced ACoBBOCA, with enforceable rules and rulings, can determine the right course in terms of breadth of prohibitions, whilst applying the prohibitions sensibly and sensitively from case to case.

The main argument against the approach, of letting the HMG initiative have time to work, or not, is that, without a statute, ACoBA remains without a legal basis, despite being referred to in contractual arrangements, with the rules that can be changed at any time, and whose rulings can be left unenforced by the Cabinet Office. As CSPL stressed in its most recent report, this is a red flag in any assessment of the independence of a “regulator” such as ACOBA. The fix for this issue is to create a statutory basis for ACOBA, which only Parliament can change.

Similarly, the PACAC recommendation for a statutory basis for ACOBA was explicitly in addition to its recommendation for the rules, and for ACOBA’s decisions, to be binding in law. CSPL recommended that ACoBA should take on a formal regulatory function in order that its rulings should be directly binding on applicants in place of the current system whereby its recommendations are made to the Prime Minister.

In the July 2023 Paper, the Government has suggested that while the outcome will remain the same (that the BARs will be binding on all who are subject to them) it will be the contractual clauses - rather than ACoBA advice - that will be binding on individuals. The government doesn’t, however, expressly specify responsibilities for monitoring or enforcing any potential breaches.

In this regard, it is notable that Lord Pickles, the current ACoBA Chair, has called for financial penalties for breaches of rules, and warned that any non-statutory approach, to be taken seriously, will need a meaningful sanctions regime including the ability to impose financial penalties “in the most egregious cases.” The Government response suggests it will “explore” this “if needed,”.

This gap in the July 2023 Paper meant that the right answer was to recommend statutory independence for ACoBA.

## **Recommendation 5: Political Honours**

### 25. Benefits sought

- By addressing the concerns with the current system, this Recommendation would reduce the risk of abuse of power and improve the ethical and control environment.

### 26. Costs or risks

- Minimal incremental costs since this Recommendation largely builds on the existing system of the Independent Committees supported by the Honours and Appointments Secretariat (HAS).
- Implementation of these proposals could be achieved simply and quickly without legislation. A Policy Statement would be an appropriate mechanism and should provide an appropriate level of entrenchment for the proposed changes.

## 27. Inter-dependencies and points for discussion

This Recommendation is one of the six which propose reforms around integrity and standards - see the discussion at paragraph 8. Otherwise, there are no interdependencies.

## 28. Other material; acknowledgment of sources and gratitude

The Commission had the benefit of the 2017 House of Commons Library Briefing Paper "Honours: History and Reviews" (<https://researchbriefings.files.parliament.uk/documents/SN02832/SN02832.pdf>), which it found helpful in the formulation of this Recommendation.

## 29. Brief summary of considerations that prompted this Recommendation

The Briefing Paper cited above provides a good overview of how the honours system works and of recent reforms and proposals.

The current honours system is the product of reforms made following a review by the Public Administration Committee in 2004/05. At its centre is the HAS, located in the Cabinet Office, supporting the ten subject-specific honours committees (the Independent Committees) which consider nominations and which are staffed by independent members who are experts in their respective fields and are appointed via a process similar to those for public appointments. Prime Ministers' resignation or dissolution honours do not go via this process - with the outgoing Prime Minister instead submitting a list of recommendations which (by convention) is sent by their successor to the Monarch for approval.

The following criticisms are traditionally made which the Commission considers are not without some substance.

*Politicisation:* There is a widespread perception that honours have sometimes been used by Prime Ministers as a way of rewarding political allies (and opponents), donors, and party grandees. This potentially undermines the basis of the honours system, which is that honours are awarded on merit.

*The Prime Minister's office:* There is too close an operational tie, in practice, between the Prime Minister's office and the operation of the independent system. This risks political pressure on the process itself.

These risks are reduced by the following changes.

*Exclusivity of Independent Committees:* This change would take away the power of the PM to make personal recommendations outside the system via resignation or dissolution honours lists.

*Merger of the State and Political Committees:* This is as described in the Recommendation.

*Abolish the Parliamentary and Political Honours Committee:* This reflects and responds to concerns about the rigour of the process for awards of political honours.

## **Recommendation 6: Standards and Professional Development**

### 30. Benefits sought

- Making it explicit that those in public office have a duty to maintain appropriate standards of governance and conduct will help to reinforce the importance and value of such standards and make those in public life more aware of their responsibilities.
- Current professional development and induction processes for those in public bodies in Whitehall and Westminster often focus squarely on the logistics of parliamentary procedure and policymaking but contain little on adherence to standards in public life, nor about how and why the various parts of the UK's constitution relate to one another, and the important roles that holders of public office perform as part of this settlement. This recommendation aims to close this gap.
- The recommendations would help address public concerns about those in public life failing to observe the highest ethical standards.

### 31. Costs or risks

Administrative costs of training and guidance would be relatively modest. Annex 7 contains a summary of the significant evidence which we believe supports a view that there is a deep public support for material action in this area.

### 32. Inter-dependencies and points for discussion

This Recommendation is one of the six which propose reforms around integrity and standards - see the discussion at paragraph 8.

It is important to define which individuals should be covered by this Recommendation. The Commission's view is that, at a minimum the approach contained in this Recommendation, should apply to all members of both Houses of Parliament, Ministers (as regards their additional duties), SpAds and senior officials. Once established, it should be progressively rolled out to others in the public sector.

### 33. Acknowledgement of sources and gratitude

The Commission is grateful for the following sources which were extremely helpful in the formulation of this Recommendation:

- Apolitical Foundation (2023). *Better Leaders, Better Democracies* – Apolitical Foundation. [online] Apolitical Foundation. Available at: <https://apolitical.foundation/resources-research>
- Brown, T. (n.d.). *Leadership training for ministers and senior civil servants*. [online] House of Lords Library. Available at: <https://lordslibrary.parliament.uk/leadership-training-for-ministers-and-senior-civil-servants/>.
- Mulgan, G. (2023). *Can democracies afford incompetent leaders? The case for training politicians*. [online] geoffmulgan. Available at: <https://www.geoffmulgan.com/post/can-democracies-afford-incompetent-leaders-the-case-for-training-politicians>

#### 34. Brief summary of considerations that prompted this Recommendation

None beyond those are outlined in the ‘benefits’ section above.

### **Recommendation 7: House of Commons**

#### 35. Benefits sought

- The ability of the House of Commons to have a greater degree of control over its own affairs will introduce greater democratic accountability for the Executive and create greater accountability for MPs themselves for the way they discharge their functions.
- It is appropriate, as a constitutional principle in a Parliamentary democracy, that the agenda of the House of Commons should belong to the parliamentary majority by default.
- Governments will no longer be able to restrict the time available to the majority of the House by refusing/controlling the allocation of Opposition Days, Backbench Business days etc.
- The safeguards around the use of Humble Addresses will help to improve relations between MPs and Ministers. There will be no scope for time-wasting and mischievous motions.
- The changes in the Standing Orders have a practical value and will be used to establish a measure of permanence (though, of course, they can always be amended/repealed by the House of Commons later). They will enhance, to a reasonable degree, the role of Select Committees with the specialist and more intense scrutiny of important issues.
- The restrictions on the use of prorogation and dissolution will offer protection to Parliament against the misuse of these powers.

#### 36. Costs or risks



- The proposed changes to the Standing Orders will require a report (following an inquiry) from the Procedure Select Committee.
- MPs may well be required to sit for longer periods of time to ensure that Government business can be secured (e.g. longer sitting hours and the possibility of meaningful business conducted on a Thursday).
- Primary legislation to restrict the use of prorogation and dissolution needs Governmental/Civil Service resources and Parliamentary time in both Houses (although the legislation should be very straightforward).
- Otherwise, minimal new cost since this Recommendation is essentially reorganising the resources and structures already available.

### 37. Inter-dependencies with other Recommendations

This Recommendation should be read in conjunction with the Recommendation on Secondary Legislation. Under those proposals, MPs will be able to force a debate, and if necessary, a vote on the disapplication of negative Statutory Instruments. This Recommendation facilitates that by making the necessary time and procedures available.

The Ministerial, SpAd and Civil Service Codes need to contain obligations to comply with a summons to attend a Select Committee or produce certain documents.

### 38. Acknowledgment of sources and a statement of gratitude

The Commission is grateful for the following sources which were extremely helpful in the formulation of this Recommendation:

*Reform of the House of Commons Select Committee - First Report: Rebuilding the House* (The Wright Committee Report): Available at:

<https://publications.parliament.uk/pa/cm200809/cmselect/cmrefhoc/1117/111702.htm>

*Taking back control: why the House of Commons should govern its own time.* Meg Russell and Daniel Gover, The Constitution Unit, University College London. Available at:

[https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/190\\_taking\\_back\\_control\\_-\\_why\\_the\\_house\\_of\\_commons\\_should\\_govern\\_its\\_own\\_time\\_final\\_report\\_110121.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/190_taking_back_control_-_why_the_house_of_commons_should_govern_its_own_time_final_report_110121.pdf)

*Who should control the parliamentary timetable?* Dr Alice Lilly – Institute for Government.

Available at: <https://www.instituteforgovernment.org.uk/article/comment/who-should-control-parliamentary-timetable>

*Endangering Constitutional Government: the risks of the House of Commons taking control.* Sir Stephen Laws and Professor Richard Ekins – Policy Exchange. Available at:

<https://policyexchange.org.uk/wp-content/uploads/2019/03/Endangering-Constitutional-Government.pdf>

*Demands to recall the House of Commons over this summer's exams fiasco reinforce the case for taking the process out of government hands.* Ruth Fox – Hansard Society. Available at: <https://www.hansardsociety.org.uk/blog/demands-to-recall-the-house-of-commons-over-this-summer-exams-fiasco>

*Select Committee development and reform: turning points over 40 years.* Lucinda Maer – Hansard Society. Available at: <https://www.hansardsociety.org.uk/blog/select-committee-development-and-reform-turning-points-over-40-years>

*Joint Committee on the Fixed-Term Parliaments Act (Report).* Available at: <https://committees.parliament.uk/publications/5190/documents/52402/default/>

*Dissolution of Parliament.* Richard Kelly – House of Commons Library. Available at: <https://commonslibrary.parliament.uk/research-briefings/sn05085/>

*Prorogation of Parliament.* Graeme Cowie – House of Commons Library. Available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-8589/>

39. Brief summary of considerations that prompted this Recommendation

The structural changes to the way the House of Commons operates require political consensus.

A lot of research has been produced on this topic by highly respected institutions (as acknowledged above). The Commission sought to repackage different ideas to permit rapid implementation. The heart of these proposals is that the Government should respect the role of MPs as the elective representatives from whom the Government derives its legitimacy.

The changes to Standing Order No.14 will be central to unlocking many of the current problems at Westminster which result from tensions about where power ultimately resides. Presenting the weekly agenda as an amendable motion, rather than a *fait accompli* decided by the Government, will allow MPs to provide input (and oversight) while allowing the necessary freedom for the Executive to pursue its plans.

The Commission considered the idea of establishing a Business of the House Committee. However, many of the experts we interviewed suggested that the experience in other Westminster model parliaments indicates that this model is flawed. No meaningful business seems to take place at these meetings, with arrangements being negotiated privately beforehand. In our view, it is more desirable to allow the 'Usual Channels' to continue to operate as they currently do, with any potential issues resolved on the floor of the House (although we do not expect this to happen as a matter of routine).

The question of the Commons controlling its agenda and sitting programme engages fundamental principles that require careful thought and consideration. It is ultimately a

matter for the House to decide whether it wishes to reassert its control over these aspects of its operations. The level of dissatisfaction expressed by MPs in recent years (whether on the handling of COVID-19 pandemic arrangements or the consideration of Select Committee reports) indicates that the time has come for the balance between the Government and the House of Commons to be adjusted not least so that the Commons can hold the Executive to account.

### **Recommendation 8: Secondary Legislation**

#### 40. Benefits sought

- Creating a common view between Government and the House of Commons on the appropriate use of Secondary Legislation in the light of changes in practice that have become increasingly prevalent. This would change the culture around the use of delegated powers, accepting that, sometimes, primary legislation will be the more appropriate vehicle for law-making even if the area is covered by delegated powers.
- Better legislation.
- Introducing greater democratic accountability to the development and execution of secondary legislation. Currently, Parliament can only, technically, give a 'yes' or 'no' response. In practice, its role is extremely limited. This Recommendation will bring more scope for nuanced legislative contributions.
- Equipping the House of Lords with slightly stronger powers with a reflection of those in relation to primary legislation.
- Drawing better on the (often underutilised) technical expertise of MPs and Peers.
- Limiting the opportunities for abuses such as skeleton clauses, Henry VIII powers or sub-delegation structures.

#### 41. Costs or risks

- Many of these changes are not under the direct influence of Government. There will need to be a significant amount of dialogue between Ministers, House of Commons, and House of Lords. The moment, after the coming election and at the beginning of a new parliament, seems auspicious in this regard and the right opportunity to negotiate the right direction.
- The adoption of added scrutiny systems will have a positive impact on the availability of parliamentary time for other business.

#### 42. Inter-dependencies with other Recommendations

This Recommendation must be read in conjunction with the House of Commons Recommendation. Under those proposals, MPs will be able to force a debate, and if necessary, a vote on the disapplication of negative Statutory Instruments. Similarly, the scrutiny of the policy underlying SIs by relevant Select Committees will allow the House of Commons to better coordinate its methods to hold the executive to account (whether in the Chamber or on Committee Corridor).

#### 42. Acknowledgment of sources and statement of gratitude

The Commission is grateful for the following sources which were extremely helpful in the formulation of this Recommendation:

- Proposals for a New System for Delegated Legislation: a Working Paper of the Hansard Society Delegated Legislation Review. Available at: [hansard-society-delegated-legislation-review-working-paper-2023.02.06.pdf \(ctfassets.net\)](https://ctfassets.net/hansard-society-delegated-legislation-review-working-paper-2023.02.06.pdf)
- Secondary Legislation Scrutiny Committee 20th Report of Session 2021–22 HL Paper 105 Government by Diktat: A call to return power to Parliament. Available at: <https://committees.parliament.uk/publications/7941/documents/82225/default/>
- Delegated Powers and Regulatory Reform Committee Report: Democracy Denied? The urgent need to rebalance power between Parliament and the Executive. Available at: <https://publications.parliament.uk/pa/ld5802/ldselect/lddelreg/106/10602.html>.
- Professor Meg Russell’s Lords Secondary Legislation Scrutiny Committee evidence: Strathclyde review & the Lords. Available at: <https://www.ucl.ac.uk/constitution-unit/news/2016/feb/meg-russells-lords-secondary-legislation-scrutiny-committee-evidencestrathclyde-review>.

#### 43. Brief summary of considerations that prompted this Recommendation

The present system can be argued to operate advantageously for the Government with no incentive for the Opposition to change it - as they aspire to be the Government one day. However, this analysis fails to accept the overriding importance for Government and Parliament, good governance and for all citizens, of achieving better quality legislation by way of appropriate scrutiny. This need not, and should not, impact negatively the ability of the Government to achieve rapid legislation where there is substantive need for this and the requisite majority. Ultimately, Parliament and the Government must confront the fact that the operation of the secondary legislation arrangements, and the quality of legislation, will only improve if the Executive stops demanding wide powers during the passage of primary legislation as a shortcut to proper legislative planning.

There was also a need to focus on “quasi-legislation”. These are instances where the Government blurs the distinction between the law and guidance; and/or purports to use guidance to amplify legislation. This phenomenon was seen during the COVID-19 pandemic but was not limited to those circumstances.

The Commission considered proposals to reform the different systems of delegated legislation committees, taking inspiration from the way in which EU legislation used to be scrutinised in the House of Lords. This envisaged a committee supported by a number of sub-committees allocated to deal with specific policy areas. This mechanism would ensure that Parliament can adopt a targeted – and more effective – approach to scrutinise secondary legislation; while the Government could benefit from experienced lawmakers reviewing its use of delegated powers. However, after discussing this proposal with expert witnesses, and deliberating internally, the Commission concluded that this idea would be unworkable given the sheer volume of domestic secondary legislation. In addition, there was the difficulty of the House

of Lords being particularly busy in recent times, and MPs under the pressures of constituency matters as part of their role as elective representatives.

### **Recommendation 9: The Civil Service and its relationship with Ministers**

#### 44. Benefits sought

- The Civil Service performs a central and critical function in the UK. However, in the light of all the changes in its operating environment, and stresses that it has come under, it is now time for a proper deep, party neutral review, by means of a Royal Commission, of how it is best structured to serve the UK's current and, particularly, prospective needs.
- Our other proposals in this Recommendation should provide stronger governance in advance of the report of the Royal Commission, including supporting better and clearer working relationships between Ministers and Civil Servants.
- They should contribute to greater accuracy in public statements and in record keeping, with careful increases in certain aspects of transparency, all supporting enhanced accountability.
- The role of the CSC is underlined in supporting the development of, and appointments within, the Civil Service.

#### 45. Costs or risks

- Postponing some of the changes which are believed to be desirable, for consideration by a Royal Commission, delays strengthening of some of the governance controls around the central relationships between the Civil Service and the Government. However, this means that those changes can be considered in the context of the wider review of the role of the Civil Service, with more evidence, wider contributions and greater time, and hence with less risk of error.
- There would be some greater administrative and salary costs arising from the enhanced role of the CSC but they are not expected to be material.

#### 46. Inter-dependencies with other Recommendations

We do not believe that there are any significant dependencies with other individual Recommendations. As noted, our proposal in this Recommendation in relation to Ministerial training is in addition to and should be complementary with our Recommendation relating to training in ethics and conduct for those in public life more broadly and for the development of the role of SpAds and clarity on the responsibilities of Ministers.

#### 47. Acknowledgment of sources and statement of gratitude

The Commission is grateful for the following sources, among many, which were helpful in the formulation of this Recommendation:

- from March 2022, an IfG piece envisaging a full statutory reset of the role, powers and accountability of the Civil Service:

<https://www.instituteforgovernment.org.uk/sites/default/files/publications/new-statutory-role-civil-service.pdf>);

- from December 2022, an article by Jill Rutter focussed on relations between Ministers and senior Civil Servants, calling for a “reset”: <https://www.instituteforgovernment.org.uk/publication/civil-service-ministerial-relations>); and
- From October 2023, Francis Maude’s Independent Review of Governance and Accountability in the Civil Service: <https://www.gov.uk/government/publications/review-of-governance-and-accountability/independent-review-of-governance-and-accountability-in-the-civil-service-the-rt-hon-lord-maude-of-horsham-html>).

#### 48. Brief summary of considerations that prompted this Recommendation

The proposal of a Royal Commission reflects the recognition, as noted above, of the need for a comprehensive ‘reset’ of the Civil Service, but also the Commission’s concerns as to the dangers and difficulties of piecemeal reform in this area. This section therefore consists of a short commentary on a sub-set of the detailed proposals which the Commission has made, alongside that of the Royal Commission.

In relation to the contractual position for Permanent Secretaries, there is a difficult balancing process between creating a degree of continuity for these important posts in line with the basic principles (including merit and impartiality) on which the Civil Service operates, but at the same time enforcing their accountability, and maintaining rigorous performance management for senior civil servants. Any performance management system should take account of the long-term consequences of performance in previous departments: individuals should be held to account for poor outcomes, and rewarded for positive outcomes, over this longer period. This is part of the background to the proposal that the five-year terms for Permanent Secretaries should cease, but coupled with proposals in relation to clear accountability. The former element is felt likely to strengthen their ability to “hold the line” in debates with their Ministers and it is hoped to reduce the risk of politicisation of those relationships.

In relation to ministerial directions, there are arguments on both sides of the debate as to whether the current framework should be strengthened or their use should be reduced. The Commission decided not to make a specific proposal on either side of that debate, but has focused on enhancing the existing requirement that Ministerial Directions should always be made public and available for scrutiny by Select Committees.

The Commission felt that there needs to be a refocus on the importance of retaining consistently a record of papers – including digital communications – which directly relate to the taking of any ministerial decision. It is thought that full compliance with the Public Records Act should be sufficient. This will require effective processes for the keeping of that record (which have slipped).

Given the importance of public confidence in official government communications and the perception that this has declined recently, the Commission considered whether Permanent Secretaries should be required to certify the accuracy of statements published by their Departments, and concluded that the annual report for each Department should

include a verification that all communications issued by the Department have been accurate and truthful.

### **Recommendation 10: Role and Appointment of Special Advisors**

#### 49. Benefits sought

This Recommendation is aimed at improving public understanding of, and confidence in, the role of special advisors in government, the valuable contribution they make, and the way they are deployed and managed.

- We have sought to ensure that a clear understanding of the role of SpAds should be reflected in the Ministerial and Special Adviser codes.
- To be able usefully to advise and support Ministers, all SpAds should have a sufficient level of background knowledge and training about the legislative process and the work of the departmental civil service (and their interaction with it).
- There needs to be clear accountability and chains of command for SpAds.
- Providing more explicit information about the roles and responsibilities of SpAds will help to clarify what they do and how they work with Ministers. Disclosure to the relevant Select Committee will assist with improving and monitoring the calibre and quality of appointees.
- The Recommendation provides for greater clarity on the roles and responsibilities of SpAds and their interaction with the Civil Service. They also provide for the professionalisation of the support for SpAds around HR, complaints processes and the management responsibilities of, and for, SpAds.
- Ministers will be accountable for the acts of the SpAds for which they are responsible.
- Providing more flexibility in the operation of the cap on the number of advisers working for Ministers will reflect the reality of the situation without sanctioning a further increase in SpAd numbers.
- Removing permission for SpAds also to hold political positions will ensure that public money is not being used to subsidise administrative or political support for a governing party.

The implementation of training and support for advisers has been a repeated concern of numerous reports by external and House of Commons bodies. Introducing some elements of support, training and formalisation of the line management will begin to address these concerns, and improve working life for those in government.

#### 50. Costs or risks

- The proposals should be neutral as to the aggregate salary costs of SpAds.

- Introducing training or formal line management processes may marginally extend the recruitment period for advisers. It is always helpful for advisers to be in post as soon as possible. This should be manageable and that any inconvenience will be justified relative to the improvements sought.

## 51. Inter-dependencies

- The Commission has, in Recommendation 1, recommended the statutory appointment of a Code Commissioner who would administer Conflict of Interest arrangements for SpAds and enforce Ministerial responsibilities for SpAd actions.
- Recommendation 2 on Conflict of Interests makes it clear that the enhanced disclosure obligations should apply to SpAds as Relevant Officials.
- The Commission's Recommendation 4 relating to the ACoBA makes it clear that the BARs should apply to SpAds.

## 52. Acknowledgement of sources and gratitude

The Commission is grateful for the following sources which were extremely helpful in the formulation of this Recommendation:

- Gruhn, Z. (2012). *Not so special? Why we need a more thought out approach to special advisers.* [online] Institute for Government. Available at: <https://www.instituteforgovernment.org.uk/article/comment/not-so-special-why-we-need-more-thought-out-approach-special-advisers> [Accessed Jul. 2023].
- Institute for Government (2020). *Johnson's reforms to role of special advisers disempowering ministers.* [online] Institute for Government. Available at: <https://www.instituteforgovernment.org.uk/article/press-release/special-advisers> [Accessed Jul. 2023].
- King, S. (2003). *Regulating the Behaviour of Ministers, Special Advisers and Civil Servants.* The Constitution Unit. Available at: [https://www.ucl.ac.uk/constitution-unit/sites/constitution\\_unit/files/102.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/102.pdf) [Accessed Jul. 2023].
- Maer, L. and McCaffrey, R. (2018). *Special Advisers.* [online] House of Commons Library. Available at: <https://commonslibrary.parliament.uk/research-briefings/sn03813/>.
- Public Administration Committee (2012). *Sixth report: Special advisers in the thick of it.* [online] *Public Administration Committee - Sixth Report Special advisers in the thick of it.* London: House of Commons. Available at: <https://publications.parliament.uk/pa/cm201213/cmselect/cmpubadm/134/13402.html>.
- Russell, M., White, H. and James, L. (2023). *Rebuilding and renewing the constitution: Options for reform.* [online] London: University College London. Available at: [https://www.ucl.ac.uk/constitution-unit/sites/constitution\\_unit/files/rebuilding-and-renewing-the-constitution\\_1.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/rebuilding-and-renewing-the-constitution_1.pdf).



- T, D. (2020). *Special advisers with greater powers also require greater scrutiny*. Institute for Government. Available at: <https://www.instituteforgovernment.org.uk/article/comment/special-advisers-greater-powers-also-require-greater-scrutiny>.

### 53. Brief summary of considerations that prompted this Recommendation

Concerns about the training and support in place for, and the management and supervision of, SpAds has been a central theme of reports by both external and internal (House of Commons) bodies. In this, and other ways, the UK's management of and support for SpAds is at odds with, and below the standards achieved in, other comparable countries.

There are also concerns about the impact on the permanent Civil Service of a growing cohort of SpAds and that it should not be within the remit of a SpAd to give directions to a member of the permanent Civil Service.

There are straightforward changes which can be made without material cost, disruption or risk and which could improve this position.

SpAds perform very valuable roles. Any steps which improve the quality of advice and support being given to Ministers, are worth investigating seriously and implementing where practicable. The proposals which we have adopted and formulated fall within these parameters.

## **Recommendation 11: The Electoral Commission (EC)**

### 54. Benefits sought

This Recommendation seeks to give independence and authority to the EC as the agency responsible for maintaining the quality of democracy in the UK. It also gives greater rigour and coherence to the regulation of UK elections and (to a self-limited extent as noted below) of the financing of political activities. It thereby strengthens the foundational structure of our democracy.

In particular:

- The complexity of electoral law, and the wealth of primary and secondary legislation around it, has been noted by previous reports into the EC including those by the EC itself and by the Law Commission as specified below. The existing legal sources are often outdated or overly complex. The electoral process would be better governed by a more straightforward legislative framework. This goes well beyond mere administrative convenience and is at a stage now which undermines the legitimacy of the electoral system, as well as its credibility for the electorate. As noted in the 2020 Law Commission Report (see below), the existing regime is often impenetrable to the non-expert: this does not need to be the case. The view of the EC is noted in that Report, that "potential voters may find that important aspects of registering, voting and campaign transparency are so old-

fashioned or opaque that they do not have enough trust in politicians or elections to cast their vote". The Report cites the view of PACAC that "the updating and simplification of electoral law must be seen as a pressing priority for the Government". The proposed unification and codification would take some thought and planning – with which the Commission would be willing to help – but would for the most part be an essentially mechanical task.

- Giving the EC increased sanctioning powers would help change its image as a purely financial regulator and, instead, give it a more explicit role in protecting the democratic and electoral process.
- Our one proposal in relation to party finance relates to increasing the transparency attaching to donations by unincorporated associations. As indicated by the Committee for Standards in Public Life (and well summarised in this article by The Electoral Reform Society: <https://www.electoral-reform.org.uk/there-is-a-dangerous-loophole-in-our-political-financing-rules/>) the current exception for donations of less than £25,000 is dangerous and unjustified and should be removed.
- Giving the EC prosecution powers would also mean it is no longer dependent on cooperation with the National Crime Agency, which is often pressed for time and resources and has (rightly and understandably) other priorities with the result that electoral crimes are not sanctioned. The analysis is the same for the current lack of investigatory powers of the EC; other agencies which might take on investigations are simply too distracted on other urgent fronts and so investigations simply do not happen. Electoral law breaches are not investigated and go unpunished, undermining a critical control.
- Granting investigatory powers to the EC, coupled with the power to make anti-avoidance rules, will allow it to take action in relation to coordinated conduct in order to circumvent the relevant electoral rules. As an example, there is currently little effective control over donations through an agency: this can often be a front for a funder who is not eligible. Similarly in relation to micro-donations, the EC now would be able to investigate circumstances of multiple donations, each below the declarable limit, being made from what is, in effect, the same source.
- Removing political influence from the appointment process for the EC Chair, and appointing an individual with a track record of robust autonomy, would solidify the body's reputation for independence.

## 55. Costs or risks

- The Speaker's Committee's report into the EC for 2022-23 expressed understanding for calls for the EC to have increased sanctioning powers, but noted concerns about the impact this would have on the ability of campaigns and political parties to organise. This is because the risk of increased sanctions would arguably be met with more bureaucracy and administration on the side of campaigns to prevent any wrongdoing. This could lead to increased cost to campaigns and dissuade the voluntary workforce which often supports these bodies from taking part in campaigning. We understand this argument but in substance it amounts to a concern that individuals may be put off if they believe that laws and rules will be upheld. This does not seem to us to be a good reason to continue with a

structure which systematically does not actively uphold its own rules. Moreover, the proposals in relation to clarity would reduce this risk.

- A large portion of the above recommendations require primary legislation, or amendment to existing law, with related costs including in Parliamentary time. We have tried to identify ways of achieving the same outcomes, without using primary legislation, but have not been able to do so given the statutory basis of the EC and, self-evidently, electoral law.
- Our proposals, if implemented, would be relatively neutral in relation to overall cost. The proposed increase in investigatory and prosecutorial powers would require a degree greater EC resources in their exercise. However, the total number of cases is relatively small and it would be possible to support a small team with access to expert resources elsewhere for investigation and prosecution.
- On the other hand, the proposed changes to Electoral Law and to voter registration, whilst aimed at fixing governance and systemic failings, should result in greater efficiency and therefore cost savings.

#### 56. Inter-dependencies and points for discussion

There are no inter-dependencies between this Recommendation and any of the other Recommendations in this Report.

#### 57. Acknowledgement of sources and gratitude

The Commission is grateful for the following sources which were extremely helpful in the formulation of this Recommendation:

- House of Commons Public Administration and Constitutional Affairs Committee. "The Work of the Electoral Commission." House of Commons, Oct. 2022.
- Sergeant, J. "Electoral Reform and the Constitution." *Institute for Government*, 12 July 2023, [www.instituteforgovernment.org.uk/publication/electoral-reform-and-constitution](http://www.instituteforgovernment.org.uk/publication/electoral-reform-and-constitution).
- The Electoral Commission. "Changing Electoral Law." *Www.electoralcommission.org.uk*, The Electoral Commission, [www.electoralcommission.org.uk/who-we-are-and-what-we-do/changing-electoral-law](http://www.electoralcommission.org.uk/who-we-are-and-what-we-do/changing-electoral-law). Accessed Aug. 2023.
- "Modernising Electoral Registration: Feasibility Studies." *Www.electoralcommission.org.uk*, The Electoral Commission, [www.electoralcommission.org.uk/who-we-are-and-what-we-do/changing-electoral-law/a-modern-electoral-register/modernising-electoral-registration-feasibility-studies](http://www.electoralcommission.org.uk/who-we-are-and-what-we-do/changing-electoral-law/a-modern-electoral-register/modernising-electoral-registration-feasibility-studies).
- "Reforming Electoral Law." *Www.electoralcommission.org.uk*, The Electoral Commission, [www.electoralcommission.org.uk/who-we-are-and-what-we-do/changing-electoral-law/reforming-electoral-law](http://www.electoralcommission.org.uk/who-we-are-and-what-we-do/changing-electoral-law/reforming-electoral-law). Accessed Aug. 2023. The Law Commission. "Electoral Law: A Joint Final Report." The Law Commission, March 2020.

#### 58. Brief summary of considerations that prompted this Recommendation

The principal considerations are those set out above under “Benefits sought”.

The deliberation process included whether or not to include additional elements relating to (a) funding of political parties and of elections; and (b) transparency as to the assets of political parties. In particular, there are cogent and important arguments in favour of the introduction of the following reforms:

- Limits on single donations to political parties should be introduced, with the condition that all donations must be from UK-based individuals and not incorporated or unincorporated bodies.
- As a minimum, campaigns and political parties should not be permitted to accept donations from companies or individuals that have not made enough money in the UK to fund the amount of their donation or loan.
- The costs of directly employed party staff working on elections or other campaigns should also be included in the rules regarding spending limits.
- Political Parties should be required to submit a declaration of their assets and liabilities above £500 when registering for a campaign.
- The period during which spending and funding restrictions apply before a referendum or election should also be reviewed, and potentially extended beyond the life of the short campaign.
- The absence of any controls on election-related spending by newspapers, which currently allow unlimited electoral spending by any newspaper proprietor, should be changed.

Unless these kinds of reforms are made to political funding are made, concerns will remain. However, it is understood that these reforms would constitute a significant political and practical challenge to a Government of any political complexion. To cite one aspect of this, the changes described above would, in isolation, very likely lead to a shortfall in party funding relative to current levels of donations. This would raise the question of how this shortfall would be made good or otherwise managed. Clearly one option would be to increase public funding, including possibly the use of so-called ‘[democracy vouchers](#)’. However, that public funding will raise its own political debate. These proposals went well beyond our self-imposed limitations on scope (to make proposals which could reasonably be expected to be implemented in relatively short order.). The Commission did not come to a collective view on these issues.

There are some other items that are worthy of consideration but which were not considered in detail for the main Recommendation and on which the Commission did not form a concluded view.

- Should there be greater transparency as to funding sources for political Think Tanks. This might provided for by a category of entities within the Charity sector, where sources of funding needed to be disclosed.

- Courts currently have power to disqualify candidates, thereby requiring an election to be rerun, if breaches of electoral law are sufficiently egregious, but not for any breach of the political finance rules. That anomaly should be considered.
- Candidate returns of expenditure are often now simply a one-line bill from the relevant political party or referendum campaign group, which provides no detail. Should the party be required to detail what has been provided?
- Decriminalising the minor offences under the Representation of the People Act would allow proportionate civil penalties to be imposed instead of a criminal prosecution.
- In relation to campaigning, there is an increased trend to shut down campaigning by third parties, often non-political groups including charities. This would be lobbying outside an electoral context, but campaigning during an election. Warnings about cutting across charitable status have had a “chilling effect” and risk cutting out an important democratic voice. The relevant rules are very difficult to understand. On the other hand, some anti-avoidance provisions are needed, to cut out “fronting” organisations. Should this area be subject to clearer rules?
- The boundary between national and constituency campaigning presents problems and there is an issue as to whether the latter should be brought within the EC’s remit (although this would have resource implications). A reform which would bring benefits without adding to cost would be to remove exemptions to controlled national spending which differentiate it from constituency spending, and which provide opportunities for higher spending; an example is the exemption of staff costs from national spending but not from constituency spending.
- There have been recent and significant increases in various thresholds including the national campaign spending threshold in general elections. These have been effected by way of negative procedure Statutory Instruments. The power to set thresholds might be with the EC and not with Ministers (or at least subject to proper Parliamentary consideration).
- The referendum rules are currently difficult to follow and contain the substantive anomaly that there is (unlike with elections) no possibility for annulment of the result if the winning side breaks the spending limits.
- There are cost-saving and other benefits associated with the introduction of automated voter registration, provided that this can be implemented neutrally. (For example the linkage with motor vehicles is likely to discriminate against the young, the poor and the disabled.)
- Lack of basic information about elections is a continuing problem, including more efforts to foster a better understanding of their fundamental purposes.