



Guide for Parliaments

Independent Oversight Institutions

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The federal Parliament of Belgium © Kamer van Volksvertegenwoordigers

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Introduction

Independent Oversight Institutions are bodies that provide independent scrutiny of government functioning (see the text box). They have existed for many centuries, at first mainly keeping an eye on the use of public finances, and in more recent years exercising scrutiny in a whole range of areas from human rights, to the environment, to corruption. In most countries, the number and importance of independent institutions both continue to grow.

Oversight, along with legislating and representing citizens, is one of Parliament's traditional roles. The relationship between parliaments and independent oversight institutions is therefore crucial. Working effectively together, they can reinforce the transparency and effectiveness of governance, and thus improve the quality of citizens' lives.

This guide is an introduction to independent oversight institutions and their relationship with parliament. It addresses institutions' mandates, leadership, reporting, and budgeting, from the perspective of parliaments with their role to establish, oversee, and collaborate with independent institutions in order to strengthen democratic governance.

The guide will be useful to parliamentary staff and parliamentarians working with independent oversight institutions, and will also be helpful to government officials interacting with parliaments and independent institutions, and to civil society activists and citizens who wish to understand and interact with the governance process in order to make change.

What is an independent oversight institution?

Independent oversight institutions vary widely in their formal structures and mandates. The wide range of independent oversight institutions that have been established around the world in recent years, function in different governance systems and can have widely different responsibilities even within the same country.

Some basic common characteristics can be defined. De Vrieze (2019: 5) states that, "[i]ndependent oversight institutions exercise oversight over the democratic functioning and integrity of the executive and state administration". He draws a distinction between 'independent oversight institutions' and regulatory bodies. Although regulatory bodies may have some operating independence, they are primarily charged with managing the regulation of an economic sector rather than having a broader mandate related to good governance and rights protection.

An independent oversight body should typically have the right to determine its own subjects for enquiry within its mandate area, as well as responding to the requests of state bodies and citizens.

Independence of oversight institutions must be combined with accountability including responsibility (both for good management of resources and for acting within the law), relevance, and impact. A body that is independent, but whose findings are ignored by the bodies it oversees, is not effective.

Oversight institutions need to be able to transmit their findings to legislative or judicial bodies to ensure follow-up, whether through enforcement action or through legislative changes. Oversight institutions as existing in an ecosystem in which institutions both act autonomously but within legally defined boundaries, and also feed into the work of other institutions in order to effect change.

1. Why independent oversight institutions?

In most constitutional systems, parliament is the main state institution responsible for oversight of the executive. There are good reasons for this. In parliamentary systems, the make-up of parliament is the choice of citizens. Normally in democratic countries, parliament reflects the diversity of a country in all its various geographical, social, and ideological dimensions. Government is created in order to carry out governance – to execute decisions – and frequently government will be made up mainly of representative of one political party or coalition. Because of their diversity, parliamentarians provide a guarantee that governance will be carried out transparently, issues will not be swept under the carpet, and that government will be expected to report back to ensure that problems have been resolved.¹

However, with the increasing complexity of governance, it is very difficult for parliaments to effectively follow all issues that arise. Even in large parliaments with several hundred MPs, committees often have to deal with a heavy load of proposed legislation and multiple emerging issues. Further, some issues are highly technical, and neither MPs, nor a small staff team supporting committees, can be expected to understand aspects such as detailed scientific specifications; for example, the potential impact of release of a particular chemical on marine biology.

Further, there can also be limits to the diligence with which parliaments address certain oversight issues. Government majorities can be used to place embarrassing topics at the bottom of parliamentary committee and plenary agendas. Further, in-depth oversight may not be the most popular activity for MPs seeking to build profile and assure re-election. While being seen to address a scandal can generate considerable publicity, carefully analysing technical issues rarely makes the media, and electors will often be completely unaware (and even uninterested) in such work. While parliamentary committee and research staff can support the work of MPs, the ultimate decision on what to scrutinize rests, as it should, with MPs.

Thus, independent oversight institutions have been established in order to provide an external eye on government actions. By far the most common of the independent oversight institutions are those dealing with financial audit; this function has been known for several millennia (see text box below). While independent audit institutions are structured differently according to the political system (they are typically parliamentary institutions in Westminster-model parliaments, and part of the court system in Napoleonic systems such as France), they perform similar functions and exist in almost every country.

Numerous other types of independent oversight bodies have been established more recently. Many countries, for example, have independent electoral commission to ensure that elections are carried out fairly and transparently. Human rights bodies and parliamentary ombuds offices exist in well over one hundred countries. Access to information and protection of privacy bodies are in place in a growing number of jurisdictions. Climate change has led a number of countries to establish oversight institutions to assure proper focus on long-term preventive measures. The list goes on.

Independent audit institutions have existed for several millennia

Independent auditing processes took place in Babylon over four thousand years ago. Auditing is recorded also in ancient China and Egypt. Subsequently in ancient Greece, Aristotle argued for accounting to be conducted independent of the accountee; in other words, as a means for external accountability of state finances (Landau & Bilchitz, 2018). This early introduction of concepts of transparency and accountability defines auditing as a democratic practice.

In modern governance, the principle of independent institutions derives particularly from the concept of the separation of powers. The logic underpinning the separation of powers is that power should not be too closely concentrated, and that separate institutions, each responsible for one aspect of governance, would balance each other's power and help assure governance in the interests of the community. As Montesquieu put it:

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."

2. How are independent oversight institutions created?

Independent oversight institutions are typically created either through a country's constitution, or by legislation. Where a constitution provides for independent oversight institutions, it is normal for specific legislation to also be enacted to define the role, mandate, and functioning of each individual institution.

In recent years, several countries developing new constitutions have devoted a specific chapter of their constitution to outline the independent oversight institutions. In South Africa, for example, Chapter Nine of the 1996 Constitution entitled "State institutions supporting constitutional democracy", establishes seven constitutional bodies:

- the Public Protector
- the South African Human Rights Commission
- the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission)
- the Commission for Gender Equality
- the Auditor-General
- the Independent Electoral Commission
- an Independent Authority to Regulate Broadcasting

Similarly, Chapter Six of Tunisia's 2014 Constitution titled Independent Constitutional Bodies, established The Elections Commission; Audio-Visual Communication Commission; Human Rights Commission; the Commission for Sustainable Development and the Rights of Future Generations; and, The Good Governance and Anti-Corruption Commission

3. Mandates of independent oversight institutions

Just as the areas of oversight responsibility diverge greatly from country to country and from institution to institution, so the mandates and powers of independent oversight institutions are also very diverse.

Some of the mandates that are frequently assigned to oversight institutions include

- Conducting investigations on individual cases
- Assessing systemic issues in the institution's responsibility area, and recommending reforms to policies and practices
- Maintaining data on complaints and their resolution;
- Monitoring policy and practices
- Recommending policy changes to address systemic issues
- Regularly reporting (normally annually) on government and agency compliance with relevant legislation and good practice

4. Independent oversight institutions' reporting relationships

Typically, Independent Oversight Institutions' first reporting line is to Parliament, although this is by no means universal, and is dependent on constitutional system and the specific type of oversight body (see text box).

A direct relationship between independent oversight institutions and parliaments establishes an accountability chain that serves to strengthen the authority and legitimacy of independent oversight institutions on one hand, and on the other hand, enhances the ability of parliament to carry out its role effectively, especially in oversight, reinforcing the democratic substance of governance.

Except in specific circumstances, for example where an oversight institution is responsible for monitoring MPs (such as in the declaration of assets), it is generally considered best practice for independent oversight institutions to have their main reporting relationship with parliament, though it is also important that institutions engage with government and with citizens and civil society in order to carry out and communicate their work. This reporting relationship normally encompasses the selection of members, the voting of the institution's budget, and the receiving and processing of independent institution reports and findings.

The main reasons that this is the preferable model are as follows:

- As the senior oversight institution, parliament is ultimately the responsible body to ensure governance accountability. Therefore, it is important that the work of the independent institution feeds into the parliamentary oversight process, to ensure that issues are addressed and that government is required to provide a response and where appropriate, strategies to resolve the specific complaint. Independent institutions themselves do not normally have a mandate to 'enforce' compliance by a government institution, whereas governments typically must retain the confidence of parliament.
- Parliaments represent the population in its diversity, and are well-placed to ensure that different backgrounds and perspectives are included on the boards.
- Ultimately, parliaments are directly accountable to citizens, as parliamentarians have to be elected, normally every four to five years. Thus, it is in parliamentarians' interests to ensure that oversight institutions are seen by citizens to be doing their job and holding government to account.
- It is essential that independent bodies should themselves be accountable. Although some have argued that bodies should be 'absolutely' independent, this is neither desirable or practicable. Someone has to appoint the members of independent bodies; someone has to allocate them resources. In most cases, parliamentary selection is the best way to ensure balanced membership of the independent body, although it is again important that institution board members should not be selected on the basis of majority rule, but rather allocated proportionately by political grouping. Criteria for membership are a useful means to ensure that qualified candidates are selected rather than on the basis of political affiliation. Some independent governing bodies are chosen by their peers, for example through professional associations. Even here, it is important for some members to be selected from the lay population, to ensure that decisions are made in the common good rather than that of a specific economic community.
- Budget allocation and financial oversight for independent institutions is normally the ultimate responsibility of parliament; in most countries, parliament is the only institution that can vote for expenditure of public finances. Although independent institutions' proposed budgets are normally drawn up in consultation with the Ministry of Finance, ultimately accountability for that expenditure is the role of parliament, both in voting that line of the budget, and in auditing its expenditure.

Some typical reporting relationships

- The Supreme Audit Institutions, in most Westminster governance model countries, tend to have their main reporting relationship with parliament, with their top official appointed by parliament, reports formally submitted to parliament (although often simultaneously to the government and elected president, if there is one).
- In countries with Audit Court systems, the SAI is a member of the judiciary, although again parliament plays a necessary role of passing the *Loi de Règlement* (budgetary discharge bill), which closes the annual accounts, and occurs following study of the SAI report that is annexed to the *Loi*.
- The Ombudsperson institutions tend to be appointed by parliament and with a reporting line mainly to parliament, following the models set by the Scandinavian parliaments that originally established these institutions.

5. Ensuring independence of oversight institutions

The legislative framework for oversight institutions is a crucial factor in determining their neutrality, impartiality, and effectiveness, and in avoiding risks of interference by government, parliament, or other actors in the institutions' work.

When creating independent institutions, parliaments should ensure that draft legislation addresses key aspects including mandate, budget, member selection, and reporting. The following criteria should be met:

1. The mandate for oversight institutions should be clear, and institutions free to operate within that mandate without requesting permission from parliament or government;
2. The budget for oversight institutions should be discussed and approved by parliament;
3. Clear criteria should be established for membership of the governing body of the institution;
4. Selection of members should be on the basis of a transparent process;
5. Membership should be for a multiyear period and may be non-renewable;
6. Institutions should be required to report annually to parliament on their work with contents and format as prescribed by law;
7. Institutions should have the right and obligation to present that report both in committee and in plenary session;
8. Parliaments should have the right to request institutions to carry out special enquiries within the institution's mandate area.

6. Leadership of Independent Oversight Institutions

Various processes can be used for the selection of Independent Oversight Institution members. Normally, parliament should have input into selection of Institution leadership. The Westminster Foundation for Democracy publication *Independent Oversight Institutions and Regulatory Agencies, and their Relationship to Parliament: Outline of assessment framework*² contains a series of best practices to follow within its Assessment Framework.

- Often, particularly for specialised bodies such as Supreme Audit Institutions, there are specific eligibility qualifications in law for institutional membership. This might include membership of a relevant professional body, and/or a certain combination of education and professional experience;
- Even where the qualifications are not laid out in law, it is important for the selection process to be carried out in a transparent manner.
- Sometimes, responsibility for selecting leaders of independent bodies is shared between the government and parliament. For example, the government may propose a number of candidates and parliament interviews and selects one, or vice versa. Sometimes, the nomination process is open to relevant professional groups to propose candidates and even participate in the selection process. All of these approaches can be appropriate depending on the characteristics of the independent institution, and providing that processes are clearly spelled out and followed.
- Where parliament is responsible for making appointments, a Terms of Reference is developed by the responsible parliamentary committee in conjunction with the institution staff, and where appropriate, the relevant government ministry;
- Increasingly, parliaments hold public interviews for the top positions in oversight institutions, giving government and opposition members the chance to directly question potential leaders;
- A balance needs to be struck between assuring that the leadership of the independent institution has the independence and authority to lead the institution, while protecting against possible misconduct or abuse of power; exceptional and tightly drawn provision for removing a board member or institution president should be included in the legislation and/or regulation governing the organization.

Public Accounts Committees and Supreme Audit Institutions - a crucial relationship

In the Westminster system, parliament's financial responsibilities are often divided between a Finance Committee that scrutinizes the budget and overall fiscal planning, and a Public Accounts Committee (PAC) that specializes in following public expenditures and investigating possible waste and misuse of resources. Frequently, the PAC is headed by an opposition member to provide assurance of independence from government.

The PAC relies upon the Auditor General (AG) - normally an 'Officer of Parliament' in the Westminster tradition, to conduct detailed analysis of government accounts and to highlight problem areas in an Auditor General's Report. Increasingly, especially in the larger Westminster model parliaments, as well as regular annual reporting, the AG produces special reports focusing on specific areas.

The PAC may also conduct its own inquiries, and request support from the Auditor General's Office if required.

An effective PAC not only identifies issues but ensures effective government follow-up on PAC and AG reports.

Many parliaments have established Parliamentary Budget Offices to support parliamentarians in their budget oversight work; a model drawing from the US Congressional Budget Office. These are also independent oversight institutions headed by an official appointed by Parliament.

7. Are independent oversight institutions always beneficial?

The trend in recent years has been to expand the number and the scope of Independent Oversight Institutions. At the same time, some experts have questioned whether the proliferation of Independent Institutions is always a good thing, and whether in some circumstances independent institutions may hamper parliament's work and effectiveness in providing oversight.

- There have been cases where 'independent institutions' have been established that are completely separate from and unaccountable to parliament. This has occurred particularly with anti-corruption agencies. The argument is sometimes made that MPs are themselves part of the corruption nexus, and it is necessary therefore to concentrate leadership of the battle against corruption in the hands of the Prime Minister or the President.

This approach risks politicising anti-corruption activities; in many less democratic countries, anti-corruption is used as a justification to repress political opponents. Thus, establishing independent institutions that are not democratically accountable is a risky and generally undesirable approach;

Citizens

Benefit from improved services and rights protections; report new and continuing issues to oversight institution directly or via civil society

Independent Oversight Institution

Gather citizen input, assesses government performance and issues, submits report to parliament

Government

Receives report, assesses, issues, identifies solutions, reforms processes, reports back to parliament and oversight institution

Parliament

Studies oversight institution report, audits institution, adopts report and recommendations, submits to government



- In some countries emerging from many years of dictatorship, there is an understandable desire to erect barriers against future abuse of power by the executive. In these circumstances, setting up numerous independent bodies to monitor government actions can be appealing. Often, international development partners encourage establishment of new independent oversight institutions modelled on examples in their own countries; there are even cases where a developing country has established two overlapping independent bodies on the recommendation of two different sponsoring development partners!

Too many bodies can be difficult for emerging democracies to support, and they may find it difficult to have impact. There has been a trend in several advanced democracies to consolidate independent oversight bodies to ensure they have the resources necessary to have real impact; for example, bringing together equality bodies with human rights commissions;

- An independent oversight institution cannot be effective if the basic democratic freedoms are not present. Often, non-democratic regimes will establish supposedly independent human rights commissions, anti-corruption commissions, etc. Here, the objective is not to enhance governance, but rather to create the impression of action on human rights and corruption concerns without altering the core conditions of authoritarian rule.

In fact, by establishing bodies that are outside parliament, which even in hybrid systems may have vocal MPs unafraid to speak out, issues may be side-tracked into effectively non-independent bodies and then buried. International development partners in particular need to be careful not to encourage the establishment of ineffective parallel accountability structures.

8. Options for parliamentary action to enhance oversight through ensuring effective Independent Institutions

1. Legislative framework

- Parliaments should ensure enacting legislation provides a suitable mandate and operating framework for independent oversight institutions;
- Parliaments shall carry out post-legislative scrutiny of legislation establishing independent oversight institutions, to ensure that they have been established and are functioning according to the intention of the legislators, and that all necessary regulatory and budgetary provisions have been put in place;

2. Selection of leaders and members of Independent Oversight Institutions

- The parliament should typically be responsible for electing members of independent oversight institutions, except where the independent institution is responsible for overseeing parliament itself (for example, a parliamentary ethics commission);
- Clear and enforceable eligibility criteria including minimum qualifications should be established in law or regulation;
- Parliament shall seek to select members by consensus or by a qualified majority of members – a process shall be established for choosing members where a qualified majority cannot be secured, to avoid blockage of the independent institution;
- Parliamentarians shall declare a conflict of interest and not participate in the selection process where they have personal or financial ties with a candidate for membership of the independent institution;
- Parliamentarians shall not be eligible for election to independent oversight institutions;
- Where the mandate of an independent oversight institution includes the oversight of members of parliament, an alternative body such as members of the judiciary shall be responsible for choosing members of the oversight institution.

3. Reporting

- Parliament shall receive all reports from independent oversight institution, distribute them to all MPs, and promptly post such reports on the parliamentary website;
- Substantive reports should be published at least annually. Reports should include comprehensive data and descriptions of work conducted in the previous period, as well as budget expended, personnel and organogram;
- A parliamentary committee shall be charged with responsibility for oversight, liaison and reporting for each independent oversight body;
- The responsible committee is responsible for analysing each independent oversight institution report, and for recommending adoption and follow-up to parliament;
- The responsible parliamentary committee shall regularly audition the chief of each independent oversight institution(s) within its mandate - parliamentary committees shall have the right to request appearance of the chiefs of independent oversight institutions to give testimony as required;
- Reports of independent oversight institutions should be submitted to parliament as well as other relevant bodies; they should be simultaneously published online;
- Parliament and where appropriate, other defined state bodies should be empowered to request independent oversight institution support in carrying out their oversight functions;
- Independent oversight institutions shall have the right and requirement to appear before parliament and present and discuss their annual reports and special reports;
- The responsible committee is required to follow-up on adopted independent oversight institution recommendations, to ensure that government reports on its actions to implement the recommendations;
- Where government without reasonable explanation fails to implement the adopted recommendations of independent oversight institutions, the committee shall report the relevant minister to the applicable privileges or disciplinary body of parliament;
- Except under exceptional circumstance including the protection of vulnerable individuals or legitimate national security concerns, all appearances of independent oversight institutions at parliament shall be held in public session.

4. Non-interference in the work of independent institutions

- Although parliament may request independent oversight institutions to carry out specific enquiries, it may not request institutions to not investigate any matters, or to limit the scope of its investigations;
- Parliament may not seek to remove any member of an independent oversight institution except in accordance with the established procedures in the case of misconduct;
- Parliament shall ensure that independent institutions are provided with an adequate budget to carry out their work, and that appropriate additional resources are provided in the case that institutions are requested to carry out work in addition to their original mandate and responsibilities.

5. Functioning

- The operating budget of independent institutions should be defined in disaggregated budget lines within the national budget;
- The budget of independent institutions should be audited according to national public sector auditing principles;
- The staff of independent institutions should be selected by the institution, on the basis of public service norms and criteria;
- The subjects of investigation and oversight shall be determined on the basis of predetermined and publicly available criteria;
- If members of the national civil service, staff of independent institutions should be protected from formal or informal career retaliation for their work at the independent institution;
- The obligation of government bodies to cooperate with and facilitate the work of independent oversight institutions should be defined in the legislation or regulation establishing the institution.

6. Citizen engagement

- Independent institutions should have an approved and measurable strategy for citizen engagement;
- Independent institutions should ensure the regular effective input and participation of civil society, including for example through a civil society advisory forum
- All reports except of a legitimately personal and confidential nature should be available online as soon as completed and adopted;
- Special accommodations should be made to enable access to the institution and its work to those with disabilities;

Endnotes

1. Murphy, J. and De Vrieze, F. (2020), Parliaments and Independent Oversight Institutions - Global and country-specific analysis of parliaments' relationships with Supreme Audit, Anti-Corruption and Human Rights Institutions, Westminster Foundation for Democracy, London, 70 p.
2. De Vrieze, F. (2019), Independent Oversight Institutions and Regulatory Agencies, and their Relationship to Parliament: Outline of assessment framework, Westminster Foundation for Democracy, London, 40 p. Available at: https://www.wfd.org/wp-content/uploads/2019/02/WEB_INDEPENDENT-OVERSIGHT-INS.pdf.

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